IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-00563-RBJ-BNB

W.L. (BILL) ARMSTRONG;
JEFFREY S. MAY;
WILLIAM L. (WIL) ARMSTRONG III;
JOHN A. MAY;
DOROTHY A. SHANAHAN; and
CHERRY CREEK MORTGAGE CO., INC., a Colorado corporation;

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services;
SETH D. HARRIS, in his official capacity as Acting Secretary of the United States Department of Labor;
JACOB LEW, in his official capacity as Secretary of the United States Department of the Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF THE TREASURY;

Defendants.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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MISCELLANEOUS

Plaintiffs ask this Court to preliminarily enjoin regulations that are intended to help ensure that women have access to health coverage, without cost-sharing, for preventive services that medical experts deem necessary for women's health and well-being. The regulations require all group health plans and health insurance issuers offering non-grandfathered group or individual health coverage to provide coverage for certain recommended preventive services without cost-sharing (such as a copayment, coinsurance, or a deductible). As relevant here, except as to group health plans of certain non-profit religious employers, the preventive services that must be covered include all Food and Drug Administration ("FDA")-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider.

Plaintiffs, a for-profit residential mortgage banking corporation and its five owners, claim that their sincerely held religious beliefs prohibit them from providing health coverage for certain contraceptive services. Plaintiffs' motion for preliminary injunction should be denied at the outset because plaintiffs' inexplicable delay in bringing this action negates any claim of irreparable harm. Plaintiffs discovered in December 2012 that Cherry Creek's health plan covers the contraceptive services to which they object. Yet plaintiffs waited more than three months – while continuing to provide such coverage – to file suit and seek preliminary injunctive relief. This Court should not grant an injunction that would alter the status quo when plaintiffs have sat on their purported rights. *See e.g.*, *Autocam v. Sebelius*, 2012 WL 6845677, at *9 (W.D. Mich. Dec. 24, 2012) ("Equity does not favor the dilatory.").

In any event, plaintiffs have not shown a likelihood of success on the merits. Plaintiffs' challenge rests largely on the theory that a for-profit, secular corporation can exercise religion and thereby avoid the reach of laws designed to regulate commercial activity. This cannot be. The Supreme Court has recognized that, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982). Nor can the owners of

a for-profit, secular corporation eliminate the legal separation provided by the corporate form, which the owners have chosen because it benefits them, to impose their personal religious beliefs on the corporate entity's employees. To hold otherwise would permit for-profit, secular companies and their owners to become laws unto themselves. Because there are an infinite variety of alleged religious beliefs, such companies and their owners could claim countless exemptions from an untold number of general commercial laws designed to protect against unfair discrimination in the workplace and to protect the health and well-being of individual employees and their families. Such a system would not only be unworkable, it would also cripple the government's ability to solve national problems through laws of general application. This Court, therefore, should reject plaintiffs' effort to bring about an unprecedented expansion of free exercise rights.

Indeed, a motions panel for the Tenth Circuit recently denied an analogous motion for preliminary injunctive relief pending appeal. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012), *app. for inj. pending appellate review denied*, No. 12A644, 2012 WL 6698888 (Sotomayor, J., in chambers). Although not binding on this Court, the Tenth Circuit's analysis is persuasive, as was the district court's reasoning in that case, and therefore counsels strongly against granting plaintiffs' motion.[1]

BACKGROUND

Before the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), many Americans did not receive the preventive health care they needed to stay healthy, avoid or delay the onset of disease, lead productive lives, and reduce health care costs. Due largely to cost, Americans used preventive services at about half the recommended rate. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 19-20, 109 (2011) ("IOM REP."), *available at* http://www.nap.edu/catalog.php?record_id=13181.

[1] The Tenth Circuit granted plaintiffs' motion for initial *en banc* review in *Hobby Lobby* and scheduled argument for May 23, 2013. The court also ordered supplemental briefing on several jurisdictional issues.

Section 1001 of the ACA, which includes the preventive services coverage provision relevant here, seeks to cure this problem by making preventive care affordable and accessible for many more Americans. Specifically, the provision requires all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]." 42 U.S.C. § 300gg-13(a)(4).

Because there were no existing HRSA guidelines relating to preventive care and screening for women, HHS tasked the Institute of Medicine (IOM) with developing recommendations to implement the requirement to provide preventive services for women. IOM REP. at 2.[2] After conducting an extensive science-based review, IOM recommended that HRSA guidelines include, as relevant here, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 10-12. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices (IUDs).[3] FDA, Birth Control Guide, *available at* http://www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm. IOM determined that coverage, without cost-sharing, for these services is necessary to increase access, and thereby reduce unintended pregnancies (and the negative health outcomes that disproportionately accompany unintended pregnancies) and promote healthy birth spacing. IOM REP. at 102-03; *see infra* at 23.

On August 1, 2011, HRSA adopted IOM's recommendations, subject to an exemption relating to certain religious employers authorized by an amendment to the interim final

[2] IOM, which was established by the National Academy of Sciences in 1970, is funded by Congress to provide expert advice to the federal government on matters of public health. IOM REP. at iv.

[3] Although plaintiffs describe IUDs, Plan B, and Ella as abortion-causing devices and drugs, Compl. ¶ 53, these devices and drugs are not abortifacients within the meaning of federal law. *See, e.g.*, 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997) ("Emergency contraceptive pills are not effective if the woman is pregnant[.]"); 45 C.F.R. § 46.202(f).

regulations. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/. The amendment, issued the same day, authorized HRSA to exempt group health plans established or maintained by certain religious employers (and associated group health insurance coverage) from any requirement to cover contraceptive services under HRSA's guidelines. 76 Fed. Reg. 46,603, 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A).[4]

In February 2012, the government adopted in final regulations the definition of "religious employer" contained in the amended interim final regulations while also creating a temporary enforcement safe harbor for non-grandfathered group health plans sponsored by certain non-profit organizations with religious objections to contraceptive coverage. 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). The government intends to amend the preventive services coverage regulations during the safe harbor period to further accommodate non-profit religious organizations' religious objections to covering contraceptive services. *Id.* at 8728. To this end, the government issued a NPRM on February 6, 2013. 78 Fed. Reg. 8456.

ARGUMENT

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id*. at 20.

[4] To qualify, an employer must meet the following criteria: (1) The inculcation of religious values is the purpose of the organization; (2) the organization primarily employs persons who share the religious tenets of the organization; (3) the organization serves primarily persons who share the religious tenets of the organization, and (4) the organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended. 45 C.F.R. § 147.130(a)(1)(iv)(B). A recently published Notice of Proposed Rulemaking ("NPRM") would eliminate the first three criteria and modify the fourth criterion. 78 Fed. Reg. 8456, 8459, 8474 (Feb. 6, 2013).

I. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM

The Court should deny plaintiffs' motion at the outset because plaintiffs' inexplicable delay in bringing this action and plaintiffs' failure to monitor the health coverage provided by Cherry Creek belies any claim of irreparable harm. The contraceptive coverage requirement was issued on August 1, 2011. Yet plaintiffs waited almost two years to file suit and seek preliminary injunctive relief. Plaintiffs allege that they did not "discover" that Cherry Creek's health plan covers the contraceptive services to which they object until December 2012. Compl. ¶ 53. But plaintiffs' failure to monitor the corporation's health plan to ensure that it does not include such coverage undermines plaintiffs' claim that providing the coverage while this case is resolved will cause irreparable harm. Moreover, plaintiffs did not file suit immediately after their discovery; instead, they waited another three months, and, during that time, continued to provide the contraceptive coverage to which they object. "Equity does not favor the dilatory," *Autocam*, 2012 WL 6845677, at *9, and thus, these reasons alone provide a sufficient basis for the Court to deny plaintiffs' motion. *See, e.g.*, *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (noting, in denying preliminary injunction, that delay of forty-four days after final regulations were issued was "inexcusable"). In any event, plaintiffs cannot show irreparable harm because, as explained below, they have not shown a likelihood of success on the merits. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012) (explaining that, in free exercise context, a plaintiff cannot show irreparable harm without likelihood of success on the merits).

II. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

A. Plaintiffs' Religious Freedom Restoration Act Claim Is Without Merit

1. The regulations do not substantially burden any exercise of religion by a for-profit, secular company and its owners

Under the Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-1), the federal government generally may not

"substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb-1(a)). But the government may substantially burden the exercise of religion if the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

For several reasons, plaintiffs cannot show that the challenged regulations substantially burden any exercise of religion, and thus cannot succeed on their RFRA claim. First, Cherry Creek is not an individual or a "religious organization," and thus cannot "exercise religion," under RFRA. Second, because the regulations apply only to the company, and not to its owners, the religious exercise of the owners is not substantially burdened. And third, any burden imposed by the regulations is attenuated and thus cannot be substantial.

a. There is no substantial burden on Cherry Creek because a for-profit, secular company does not exercise religion

Plaintiffs' claim that Cherry Creek "exercise[s] . . . religion" within the meaning of RFRA, 42 U.S.C. § 2000bb-1(b), cannot be reconciled with Cherry Creek's status as a secular company. The terms "religious" and "secular" are antonyms; a "secular" entity is defined as "not overtly or specifically religious." *See Merriam-Webster's Collegiate Dictionary* 1123 (11th ed. 2003). Thus, by definition, a secular company does not engage in any "exercise of religion," 42 U.S.C. § 2000bb-1(a), as required by RFRA. *See Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 83 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003). Numerous courts, including one in this District, have rejected RFRA challenges nearly identical to Cherry Creek's on this basis. *See Korte v. HHS*, 2012 WL 6553996, at *6 (S.D. Ill. Dec. 14, 2012) ("[T]he exercise of religion [i]s a purely personal guarantee that cannot be extended to corporations." (quotation omitted)), *appeal docketed*, No. 12-3841 (7th Cir. Dec. 18, 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F.

Supp. 2d 1278, 1287, 1296 (W.D. Okla. Nov. 19, 2012) ("secular, for-profit corporations . . . do not have free exercise rights"), *appeal docketed*, No. 12-6294 (10th Cir. Nov. 19, 2012).[5]

Cherry Creek is plainly secular. The company's pursuits and products are not religious; it is a for-profit residential mortgage banking corporation. Compl. ¶ 3. The corporation was not organized for carrying out a religious purpose; its Articles of Incorporation make no reference at all to any religious purpose. *Id*. ¶31. Nor does the corporation assert that it employs persons of a particular faith. *Id*. ¶83. Although defendants do not question the sincerity of the individual owners' religious beliefs, the sincere religious beliefs of a corporation's owners do not make the corporation religious. Otherwise, every corporation with a religious owner – no matter how secular the corporation's purpose – would be considered religious, which would dramatically expand the scope of RFRA and the Free Exercise Clause. *See Grote v. Sebelius*, 708 F.3d 850, 856-58 (7th Cir. 2013) (Rovner, J., dissenting) (describing the potential consequences of such an expansion); *see also Autocam*, 2012 WL 6845677, at *7-8.

The government is aware of no case in which a secular, for-profit employer like Cherry Creek prevailed on a RFRA claim. Because Cherry Creek is a secular employer, it is not entitled to the protections of the Free Exercise Clause or RFRA. This is because, although the First Amendment freedoms of speech and association are "right[s] enjoyed by religious and secular groups alike," the Free Exercise Clause "gives special solicitude to the rights of *religious* organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (emphasis added). The cases are replete with statements like this. *See, e.g.*, *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (the

[5] *See also Conestoga Wood Specialities Corp. v. HHS*, 2013 WL 1277419, at *2 (3d Cir. Feb. 8, 2013); *Eden Foods, Inc. v. Sebelius*, 2013 WL 1190001, at *4 (E.D. Mich. Mar. 22, 2013); *Gilardi v. Sebelius*, 2013 WL 781150, at *6-8 (D.D.C. Mar. 3, 2013), *appeal docketed sub nom. Gilardi v. HHS*, No. 13-5069 (D.C. Cir. Mar. 3, 2013); *Briscoe v. Sebelius*, 2013 WL 755413, at *4-5 (D. Colo. Feb. 27, 2013); *Conestoga Wood Specialities Corp. v. Sebelius*, 2013 WL 140110, at *6-7, 10 (E.D. Pa. Jan. 11, 2013), *appeal docketed*, No. 13-1144 (3d Cir. Jan. 17, 2013).

By contrast, those courts that have ruled against defendants in similar cases have unanimously bypassed the question of whether a for-profit, secular corporation can exercise religion under RFRA. *See, e.g., Tyndale House Publishers, Inc. v. Sebelius*, 2012 WL 5817323, at *5 (D.D.C. Nov. 16, 2012).

Supreme Court's precedent "radiates . . . a spirit of freedom for *religious* organizations, an independence from secular control or manipulation") (emphasis added); *Hosanna-Tabor*, 132 S. Ct. at 706 (Free Exercise Clause "protects a *religious* group's right to shape its own faith and mission") (emphasis added); *Anselmo v. Cnty. of Shasta*, 2012 WL 2090437, at *12 (E.D. Cal. 2012). Because RFRA incorporates Free Exercise jurisprudence, the same logic applies. *See Holy Land Found.*, 333 F.3d at 167. In short, only a religious organization can "exercise religion" under RFRA.

Indeed, no court has ever held that a for-profit, secular corporation is a "religious corporation" for purposes of federal law. For this reason, secular companies such as Cherry Creek cannot permissibly discriminate on the basis of religion in hiring or firing employees or otherwise establishing the terms and conditions of employment. Title VII of the Civil Rights Act generally prohibits religious discrimination in the workplace. *See* 42 U.S.C. § 2000e-2(a). But that bar does not apply to "a religious corporation." *Id.* § 2000e-1(a). It is clear that Cherry Creek does not qualify as a "religious corporation." *See, e.g.*, *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 734, 748 (9th Cir. 2011).

It would be extraordinary to conclude that Cherry Creek is not a "religious corporation" under Title VII (and it clearly is not) and thus cannot discriminate in employment on the basis of religion, 42 U.S.C. § 2000e-1(a), but nonetheless "exercise[s] . . . religion" within the meaning of RFRA, *id.* § 2000bb-1(b). Such a conclusion would allow a secular corporation to impose its owner's religious beliefs on its employees in a way that denies those employees the protection of general laws designed to protect their health and well-being. A host of laws and regulations would be subject to attack. Moreover, any secular corporation would have precisely the same right as a religious organization to, for example, require that its employees "observe the [company owner's] standards in such matters as regular church attendance, tithing, and

abstinence from coffee, tea, alcohol, and tobacco." *Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 n.4 (1987). These consequences underscore why the Free Exercise Clause, RFRA, and Title VII distinguish between secular and religious organizations, with only the latter receiving special protection.[6]

It is significant that the individual plaintiffs elected to organize Cherry Creek as a secular, for-profit entity and to enter commercial activity. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261; *see also McClure v. Sports & Health Club*, 370 N.W.2d 844, 853 (Minn. 1985) ("By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs."). Having chosen this path, the corporation may not impose its owners' personal religious beliefs on its employees by refusing to cover certain contraceptive services. *Lee*, 455 U.S. at 261.

b. The regulations do not substantially burden the individual plaintiffs' religious exercise because the regulations apply only to Cherry Creek, a separate and distinct legal entity

The regulations also do not substantially burden the individual plaintiffs' religious exercise. By their terms, the regulations apply to group health plans and health insurance issuers. *See, e.g.*, 45 C.F.R. § 147.130. The individual plaintiffs are neither. Nonetheless, the individual plaintiffs claims that the regulations substantially burden *their* religious exercise because the

[6] None of the cases plaintiffs cite held that a for-profit, secular corporation may exercise religion, and the government is not aware of any such case, *see Hobby Lobby*, 870 F. Supp. 2d at 1288. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), involved *individual* plaintiffs, not corporations. The plaintiff in *Lee*, 455 U.S. 252, was an Amish individual who employed several other people on his farm, not a secular company, much less a corporation with layers of legal separation from its owner. In *McClure*, 370 N.W.2d at 854, a state hearing examiner "pierced the 'corporate veil'" to make the individual owners of the stock and assets of a corporation "liable for the illegal actions of" the corporation. *Braunfeld v. Brown*, 366 U.S. 599 (1961), and *Commack Self-Service Kosher Meats, Inc.*, 680 F.3d 194 (2d Cir. 2012), rejected free exercise challenges to state laws that regulated retail store hours and kosher food labels. And both *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009), and *EEOC v. Townley Engineering and Manufacturing Co.*, 859 F.2d 610, 619-20 (9th Cir. 1988), declined to decide whether "a for-profit corporation can assert its own rights under the Free Exercise Clause."

regulations require the group health plan sponsored by their for-profit secular *company* to provide health insurance that includes certain contraceptive coverage. But a plaintiff cannot establish a substantial burden on his religious exercise by invoking this type of trickle-down theory. Indeed, cases that find a substantial burden uniformly involve a direct burden on the plaintiff rather than a burden imposed on another, legally separate, entity. *See, e.g.*, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524 (1993); *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009).

The individual plaintiffs' theory boils down to the claim that what's done to the corporation (or group health plan sponsored by the corporation)[7] is also done to its owners. But, as a legal matter, that is simply not so. The individual plaintiffs have chosen to enter into commerce and elected to do so by establishing a for-profit, secular corporation, which is "a separate legal entity, unique from its officers, directors, and shareholders." *In re Phillips*, 139 P.3d 639, 643 (Colo. 2006). Indeed, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). As a Colorado corporation, Cherry Creek has broad powers to conduct business, hold and transact property, and enter into contracts, among others. *See* Colo. Rev. Stat. § 7-103-102. The company's owners in turn are generally not liable for the corporation's debts. *In re Phillips*, 139 P.3d at 643. In short, "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Cedric Kushner*, 533 U.S. at 163.

"Generally, if a harm has been directed toward the corporation, then only the corporation has standing to assert a claim," and this "shareholder standing rule applies even if the plaintiff is the sole shareholder of the corporation." *Potthoff v. Morin*, 245 F.3d 710, 716 (8th Cir. 2001)

[7] The attenuation here is in fact twice removed, as a group health plan is a legally separate entity from the company that sponsors it. 29 U.S.C. § 1132(d).

(citing cases); *see also Bartel v. Kemmerer City*, 482 Fed. App'x 323, 326 (10th Cir. 2012) (unpublished). The individual plaintiffs "'may not move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms.'" *Potthoff*, 245 F.3d at 716 (citation omitted). "So long as the business's liabilities are not [the individual plaintiffs'] liabilities – which is the primary and 'invaluable privilege' conferred by the corporate form, *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445, 1451 (N.D. Ill. 1991) (Posner, J., sitting by designation) – neither are the business's expenditures [the individual plaintiffs'] own expenditures." *Grote*, 708 F.3d at 858 (Rovner, J., dissenting). The money used to pay for health coverage under the Cherry Creek group health plan "belongs to the company, not to" the individual plaintiffs. *Id*. The individual plaintiffs should not be permitted to eliminate the legal separation between corporation and owners only when it suits them to impose their personal religious beliefs on the corporate entity's group health plan or its employees. For this reason, numerous courts, including one in this District, have rejected RFRA challenges nearly identical to the individual plaintiffs' claim.[8]

A contrary view would expand RFRA's scope in an extraordinary way. All corporations act through human agency; but that cannot mean that any legal obligation imposed on a corporation is also the obligation of the owners or that the owners' and corporation's rights and

[8] *See Eden Foods*, 2013 WL 1190001, at *4; *Gilardi*, 2013 WL 781150, at *4-5, 9-10; *Briscoe*, 2013 WL 755413, at *5-6; *Conestoga*, 2013 WL 140110, at *14; *Autocam*, 2012 WL 6845677, at *7; *Korte*, 2012 WL 6553996, at *9-11; *Hobby Lobby*, 870 F. Supp. 2d at 1293-96.

On the other hand, the courts to have granted preliminary injunctive relief in cases similar to this one have uniformly ignored or disregarded the legal separation between corporations and their owners. A company and its owners, however, cannot be treated as alter-egos for some purposes and not others; if the corporate veil is pierced, it is pierced for all purposes. *See, e.g.*, *Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 738 (7th Cir. 2008); *Korte*, 2012 WL 6553996, at *11; *Autocam*, 2012 WL 6845677, at *7 ("Whatever the ultimate limits of this principle may be, at a minimum it means the corporation is not the alter ego of its owners for purposes of religious belief and exercise."); *Conestoga*, 2013 WL 140110, at *8 ("It would be entirely inconsistent to allow the [corporation's owners] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations."); *Grote*, 708 F.3d 850, 856 (Rovner, J., dissenting).

The Court in *Newland v. Sebelius*, 2012 WL 3069154, at *6 (D. Colo. July 27, 2012), *appeal docketed*, No. 12-1380 (10th Cir. Sept. 26, 2012), did not decide whether a for-profit, secular company can exercise religion, or whether the regulations impose a substantial burden on the exercise of religion, but rather applied a relaxed preliminary injunction standard that a motions panel of the Tenth Circuit has since made clear does not apply here. *See Hobby Lobby*, 2012 WL 6930302, at *2.

responsibilities are coextensive. If that were the rule, any of the millions of shareholders of publicly traded companies could assert RFRA claims on behalf of those companies and thereby impose the owners' or shareholders' beliefs on the companies' employees in a way that deprives those employees of legal rights they would otherwise have, such as by discriminating against the company's employees on the basis of religion in establishing the terms and conditions of employment notwithstanding the limited religious exemption that Congress established under Title VII. This result would constitute a wholesale evasion of the rule that a company must be a "religious organization" to assert free exercise rights, *Hosanna-Tabor*, 132 S. Ct. at 706, or a "religious corporation" to permissibly discriminate on the basis of religion in employment, 42 U.S.C. § 2000e-1(a).

c. Alternatively, any burden imposed by the regulations is too attenuated to constitute a substantial burden

Although the regulations do not require Cherry Creek or the individual plaintiffs to provide contraceptive services directly, plaintiffs' complaint appears to be that, through Cherry Creek's health plan and the benefits it provides to employees, plaintiffs will facilitate conduct (the use of certain contraceptives) that they find objectionable. But this complaint has no limits. A company provides numerous benefits, including a salary, to its employees and by doing so in some sense facilitates whatever use its employees make of those benefits. But the owner has no right to control the choices of his company's employees, who may not share his religious beliefs, when making use of their benefits. Those employees have a legitimate interest in access to the preventive services coverage made available under the challenged regulations.

Indeed, in denying the plaintiffs' motion for emergency relief pending appeal, a motions panel of the Tenth Circuit concluded as much. *See Hobby Lobby*, 2012 WL 6930302, at *3. The Tenth Circuit agreed with the district court that "the particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients . . . subsidize *someone*

else's participation in an activity that is condemned by plaintiff[s'] religion." *Id*. (quoting *Hobby Lobby Stores*, 870 F. Supp. 2d at 1294). The court concluded that there was not a substantial likelihood that it would find such a burden to be "substantial," as to do so would "extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship." *Id.*

Other courts, too, have relied on similar reasoning to reject similar plaintiffs' RFRA claims. *See Autocam*, 2012 WL 6845677, at *6 (W.D. Mich.) ("The incremental difference between providing the benefit directly, rather than indirectly, is unlikely to qualify as a substantial burden on the Autocam Plaintiffs."), *mot. for inj. pending appeal denied*, No. 12-2673 (6th Cir. Dec. 28, 2012); *O'Brien v. HHS*, 2012 WL 4481208, at *5-7 (E.D. Mo. Sept. 28, 2012) ("[RFRA] is not a means to force one's religious practices upon others. RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own."), *appeal pending*, No. 12-3357 (8th Cir. Oct. 4, 2012).[9] Although "[c]ourts are not arbiters of scriptural interpretation," *Thomas*, 450 U.S. at 716, "RFRA still requires the court to determine whether the burden a law imposes on a plaintiff's stated religious belief is 'substantial.'" *Conestoga*, 2013 WL 140110, at *12. *See also Autocam*, 2012 WL 6845677, at *6 ("The Court does not doubt the sincerity of Plaintiff Kennedy's decision to draw the line he does, but the Court still has a duty to assess whether the claimed burden – no matter how sincerely felt – really amounts to a substantial burden on a person's exercise of religion."). For the reasons set forth above, any burden imposed by the challenged regulations is not substantial within the meaning of RFRA.[10]

[9] *See also Conestoga*, 2013 WL 1277419, at *2; *Grote*, 708 F.3d 850 (Rovner, J., dissenting); *Eden Foods*, 2013 WL 1190001, at *4; *Conestoga*, 2013 WL 140110, at *13-14; *Annex Med., Inc. v. Sebelius*, 2013 WL 101927, at *4-5 (D. Minn. Jan. 8, 2013), *appeal pending*, No. 13-1118 (8th Cir. Jan. 11, 2013); *Grote Industries, LLC v. Sebelius*, 2012 WL 6725905, at *4-7 (S.D. Ind. Dec. 27, 2012), *appeal pending*, No. 13-1077 (7th Cir. Jan. 9, 2013); *Hobby Lobby*, 870 F. Supp. 2d at 1293-96.

[10] Plaintiffs "misunderstand the principle asserted in *Thomas*, [450 U.S. 707]," when they claim that the case establishes that an indirect burden may nonetheless be substantial. *Conestoga*, 2013 WL

2. Even if there were a substantial burden on religious exercise, the regulations serve compelling governmental interests and are the least restrictive means to achieve those interests

a. The regulations significantly advance compelling governmental interests in public health and gender equality

"[T]he Government clearly has a compelling interest in safeguarding the public health by regulating the health care and insurance markets." *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011); *see also, e.g.*, *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998); *Dickerson v. Stuart*, 877 F. Supp. 1556, 1559 (M.D. Fla. 1995). And the challenged regulations further this compelling interest. The primary predicted benefit of the regulations is that "individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease." 75 Fed. Reg. 41,726, 41,733 (July 19, 2010); *see also* 77 Fed. Reg. at 8727. Indeed, "[b]y expanding coverage and eliminating cost sharing for recommended preventive services, these interim final regulations could be expected to increase access to and utilization of these services, which are not used at optimal levels today." 75 Fed. Reg. at 41,733. Increased access to FDA-approved contraceptive services is a key part of these predicted health outcomes, as a lack of contraceptive use has proven in many cases to have negative health consequences for both women and a developing fetus. As IOM concluded in identifying services recommended to "prevent conditions harmful to women's health and well-being," unintended pregnancy may delay "entry into prenatal care," prolong "behaviors that present risks for the developing fetus," and cause "depression, anxiety, or other conditions." IOM REP. at 20, 103. Contraceptive coverage also helps to avoid "the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103.

Closely tied to this interest is a related, but separate, compelling interest that is furthered by the regulations. As the Supreme Court explained in *Roberts v. United States Jaycees*, 468

140110, at *14 n.15. "While a *compulsion* may certainly be indirect and still constitute a substantial burden, such as the denial of a benefit found in *Thomas*, '[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion . . . would radically restrict the operating latitude of the legislature.'" *Id*. (quoting *Braunfeld*, 366 U.S. at 606).

U.S. 609, 626 (1984), there is a fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." Thus, "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Id.* By including in the ACA gender-specific preventive health services for women, Congress made clear that the goals and benefits of effective preventive health care apply equally to women, who might otherwise be excluded from such benefits if their unique health care needs were not taken into account in the ACA. As explained by members of Congress, "women have different health needs than men, and these needs often generate additional costs. Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009). These costs result in women often forgoing preventive care. *See, e.g.*, 155 Cong. Rec. S12265-02, S12274 (daily ed. Dec. 3, 2009); IOM REP. at 20. Congress's attempt to equalize the provision of preventive health care services, with the resulting benefit of women being able to contribute to the same degree as men as healthy and productive members of society, furthers a compelling governmental interest. *Cf. Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 92-93 (Cal. 2004).

Of course, the government's interest in ensuring access to contraceptive services is *particularly* compelling for women employed by companies that wish to eliminate such coverage, like Cherry Creek. Taking into account the "particular claimant whose sincere exercise of religion is [purportedly] being substantially burdened," *O Centro*, 546 U.S. at 430-31, exempting Cherry Creek and other similar companies from the obligation of their health plans to cover contraceptive services without cost-sharing would remove its employees (and their employees' families) from the very protections that were intended to further the compelling interests recognized by Congress. *See, e.g.*, *Graham v. Comm'r*, 822 F.2d 844, 853 (9th Cir. 1987) ("Where, as here, the purpose of granting the benefit is squarely at odds with the creation

of an exception, we think the government is entitled to point out that the creation of an exception does violence to the rationale on which the benefit is dispensed in the first instance."). Women who work for Cherry Creek or similarly situated companies would be, as a whole, less likely to use contraceptive services in light of the financial barriers to obtaining them and would then be at risk of unhealthier outcomes, both for themselves and their newborn children. IOM REP at 102-03. They also would have unequal access to preventive care and would be at a competitive disadvantage in the workforce due to their inability to decide for themselves if and when to bear children. These harms would befall female employees (and covered spouses and dependents) who do not necessarily share the individual plaintiffs' religious beliefs. Plaintiffs' desire not to provide a health plan that permits such individuals to exercise their own choice must yield to the government's compelling interest in avoiding the adverse and unfair consequences that such individuals would suffer as a result of the company's decision to impose the company's owners' religious beliefs on them. *See Lee*, 455 U.S. at 261 (noting that a religious exemption is improper where it "operates to impose the employer's religious faith on the employees").[11]

Plaintiffs argue that the interests underlying the regulations cannot be considered compelling when millions of people are not protected by the regulations at the moment. But this is not a case where underinclusive enforcement of a law suggests that the government's "supposedly vital interest" is not really compelling. *Lukumi*, 508 U.S. at 546-47. First, grandfathering is not really a permanent "exemption," but rather, over the long term, a transition

[11] Plaintiffs assert that defendants must show a compelling interest as to Cherry Creek specifically, as though the government must separately analyze the need for the regulations as to each and every employer and employee in America. But this level of specificity would be nearly impossible to establish and would render this regulatory scheme – and potentially any regulatory scheme challenged due to religious objections – completely unworkable. In practice, courts have not required the government to analyze the impact of a regulation on the single entity seeking an exemption, but have expanded the inquiry to all similarly situated individuals or organizations. *See, e.g.*, *Lee*, 455 U.S. at 260; *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (per curiam); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990). *O Centro* is not to the contrary, as the Court construed the scope of the requested exemption as encompassing *all* members of the plaintiff religious sect. *O Centro*, 546 U.S. at 433. The Court's warning against "slippery-slope" arguments was a rejection of arguments by analogy – that is, speculation that providing an exemption to one group will lead to exemptions for other non-similarly situated groups. It was not an invitation to ignore the reality that an exemption for a particular claimant might necessarily lead to an exemption for an entire category of similarly situated entities.

in the marketplace with respect to several provisions of the ACA, including the preventive services coverage provision. The grandfathering provision reflects Congress's attempts to balance competing interests – specifically, the interest in spreading the benefits of the ACA and the interest in maintaining existing coverage and easing the transition into the new regulatory regime established by the ACA—in the context of a complex statutory scheme. *See* 75 Fed. Reg. 34,538, 34,540, 34,546 (June 17, 2010). This incremental transition does nothing to call into question the compelling interests furthered by the regulations. Even under the grandfathering provision, it is projected that more group health plans will transition to the requirements under the regulations as time goes on. Defendants estimate that, as a practical matter, a majority of group health plans will lose their grandfather status by 2013. *See* 75 Fed. Reg. at 34,552. Thus, any purported damage to the compelling interests underlying the regulations will be quickly mitigated, which is in stark contrast to the *permanent* exemption from the regulations that plaintiffs seek.[12] Plaintiffs would have this Court believe that an interest cannot truly be "compelling" unless Congress is willing to impose it on everyone all at once despite competing interests, but offers no support for such an untenable proposition. *See Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *9 (E.D. Mich. Oct. 31, 2012) ("[T]he grandfathering rule seems to be a reasonable plan for instituting an incredibly complex health care law while balancing competing interests."), *appeal docketed*, No. 13-1092 (6th Cir. Jan. 24, 2013).

Second, 26 U.S.C. § 4980H(c)(2) does *not* exempt small employers from the preventive services coverage regulations. *See* 42 U.S.C. § 300gg-13(a); 76 Fed. Reg. at 46,622 n.1. Instead, it excludes employers with fewer than fifty full-time equivalent employees from the employer responsibility provision, meaning that, starting in 2014, such employers are not subject to assessable payments if they do not provide health coverage to their full-time employees. *See* 26 U.S.C. § 4980H(c)(2). Employees of these small businesses can get their health insurance

[12] The same is true of the temporary enforcement safe harbor for certain non-profit organizations with religious objections to contraceptive coverage.

through other ACA provisions, primarily premium tax credits and health insurance Exchanges, and the coverage they receive will include all preventive services, including contraception. In addition, small businesses that choose to offer non-grandfathered health coverage to their employees are required to provide coverage for recommended preventive services, including contraceptive services, without cost-sharing.

The only true exemption from the regulations is the exemption for "religious employer[s]," 45 C.F.R. § 147.130(a)(1)(iv)(B). But there is a rational distinction between this narrow exception and the expansion plaintiffs seek. A "religious employer" is an employer that, among other things, has the "inculcation of religious values" as its purpose and "primarily employs persons who share the religious tenets of the organization." *Id*. Thus, the exception does not undermine the government's compelling interests, given that any religious objections of the exempted organizations are presumably shared by most of the individuals actually making the choice of whether to use contraceptive services. *See* 77 Fed. Reg. at 8728.

The same is not true for Cherry Creek, which cannot discriminate based upon religious beliefs in hiring, and therefore almost certainly employs many individuals who do not share the individual plaintiffs' religious beliefs. If courts were to grant plaintiffs' request to extend the protections of RFRA to any employer whose owners or shareholders object to the regulations, it is difficult to see how the regulations could continue to function or be enforced in a rational manner. *See O Centro*, 546 U.S. at 435. Providing for voluntary participation among for-profit, secular employers would be "almost a contradiction in terms and difficult, if not impossible, to administer." *Lee*, 455 U.S. at 258. We are a "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S. at 606, and many people object to countless medical services. If any organization, no matter the high degree of attenuation between the mission of that organization and the exercise of religious belief, were able to seek an exemption from the operation of the regulations, it is difficult to see how defendants could

administer the regulations in a manner that would achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women. *See United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003).[13]

b. The regulations are the least restrictive means of advancing the government's compelling interests

When determining whether a particular regulatory scheme is "least restrictive," the appropriate inquiry is whether the individual or organization with religious objections, and those similarly situated, can be exempted from the scheme – or whether the scheme can otherwise be modified – without undermining the government's compelling interest. *See, e.g.*, *United States v. Wilgus*, 638 F.3d 1274, 1289-95 (10th Cir. 2011). The government is not required "to do the impossible – refute each and every conceivable alternative regulation scheme." *Id*. 1289. Instead, the government need only "refute the alternative schemes offered by the challenger." *Id.*

Instead of explaining how Cherry Creek and similarly situated secular companies could be exempted from the regulations without significant damage to the government's compelling interests, plaintiffs conjure up several new statutory and regulatory schemes they claim would be less restrictive. Rather than suggesting modifications to the current employer-based system that Congress enacted, *see generally* H.R. Rep. No. 111-443, pt. II, at 984-86 (2010), plaintiffs would have the system turned upside-down to accommodate the individual plaintiffs' beliefs at enormous administrative and financial cost to the government. But, just because plaintiffs can devise an entirely new legislative and administrative scheme does not make that scheme a feasible less restrictive means. *See Wilgus*, 638 F.3d at 1289; *Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 180 n.8 (3d Cir. 1999) ("A judge would be unimaginative indeed if he

[13] Plaintiffs miss the point when they attempt to minimize the magnitude of the government's interests by arguing that contraception is widely available and even subsidized for certain individuals at lower income levels. Although a majority of employers cover FDA-approved contraceptives, *see* IOM REP. at 109, many women forgo preventive services, including certain reproductive health care, because of cost-sharing imposed by their health plans, *see id.* at 19-20, 109. The challenged regulations eliminate that cost-sharing. 77 Fed. Reg. at 8728. And, of course, the government's interest in ensuring access to contraceptive services is *particularly* compelling for women employed by companies that do not provide or want to eliminate such coverage, like Cherry Creek.

could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down.'" (quotations omitted)).

In effect, plaintiffs want the government "to subsidize private religious practices," *Catholic Charities of Sacramento*, 85 P.3d at 94, by expending significant resources to adopt an entirely new legislative or administrative scheme. But a proposed alternative scheme is not an adequate alternative – and thus not a viable less restrictive means to achieve the compelling interest – if it is not feasible or plausible. *See, e.g.*, *New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 947 (1st Cir. 1989) (Breyer, J.); *Graham*, 822 F.2d at 852. In determining whether a proposed alternative scheme is feasible, courts often consider the additional administrative and fiscal costs of the scheme. *See, e.g.*, *United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011); *New Life Baptist*, 885 F.2d at 947. Plaintiffs' alternatives would impose considerable new costs and other burdens on the government and would otherwise be impractical. *See Lafley*, 656 F.3d at 942; *New Life Baptist*, 885 F.2d at 947.[14]

Nor would the proposed alternatives be equally effective in advancing the government's compelling interests. As discussed above, Congress determined that the best way to achieve the goals of the ACA, including expanding preventive services coverage, was to utilize the existing employer-based system. The anticipated benefits of the challenged regulations are attributable not only to the fact that recommended contraceptive services will be available to women with no cost sharing, but also to the fact that these services will be available through the existing employer-based system of health coverage through which women will face minimal logistical and administrative obstacles to receiving coverage of their care. Plaintiffs' alternatives, on the other hand, have none of these advantages. They would require establishing entirely new government programs and infrastructures, and would almost certainly require women to take

[14] Furthermore, the ACA requires that recommended preventive services be covered without cost-sharing through the existing employer-based system. *See* H.R. Rep. No. 111-443, pt. II, at 984-86. Thus, even if defendants wanted to adopt one of plaintiffs' non-employer-based alternatives, they would be constrained by the statute from doing so.

steps to find out about the availability of and sign up for the new benefit, thereby ensuring that fewer women would take advantage of it. Nor does plaintiff offer any suggestion as to how these programs could be integrated with the employer-based system or how women would obtain government-provided preventive services in practice. Thus, plaintiffs' proposals are less likely to achieve the compelling interests furthered by the regulations, and therefore do not represent reasonable less restrictive means.

B. Plaintiffs' First Amendment Claims Are Without Merit

1. The regulations do not violate the Free Exercise Clause

Plaintiffs' Free Exercise claim fails at the outset because, as explained above, a for-profit, secular employer like Cherry Creek does not engage in any exercise of religion protected by the First Amendment. But even if it did, the regulations are neutral laws of general applicability and therefore do not violate the Free Exercise Clause. *See Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990). That was precisely the holding of every court but one that has addressed this claim.[15]

The regulations are neutral because they do not target religiously motivated conduct. *See Lukumi*, 508 U.S. at 533, 545. Their purpose is to promote public health and gender equality by increasing access to and utilization of recommended preventive services, including those for women. The regulations reflect expert recommendations about the medical need for the services, without regard to any religious motivations for or against such services.[16]

[15] *See Conestoga*, 2013 WL 1277419, at *2; *Eden Foods*, 2013 WL 1190001, at *5; *Briscoe*, 2013 WL 755413, at *6-7; *Conestoga*, 2013 WL 140110, at *8-9; *Grote*, 2012 WL 6725905, at *7-8; *Autocam*, 2012 WL 6845677, at *5 (W.D. Mich.); *Korte*, 2012 WL 6553996, at *7-8; *Hobby Lobby*, 870 F. Supp. 2d at 1289-90; *O'Brien*, 2012 WL 4481208, at *7-9; *see also Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006); *Catholic Charities of Sacramento*, 85 P.3d at 81-87. *But see Sharpe Holdings, Inc. v. HHS*, 2012 WL 6738489, at *5 (E.D. Mo. Dec. 31, 2012).

[16] Plaintiffs' characterization of the regulations as an attempt to target non-insularly focused religious objectors is mere rhetorical bluster. Plaintiffs provide no evidence to show that the regulations were designed as an assault on some religious objectors, as opposed to an effort to increase women's access to and utilization of recommended preventive services. And plaintiffs cannot dispute that defendants have made efforts to accommodate religion (i.e., the religious employer exemption and the NPRM) in ways that will not undermine the goal of ensuring that women have access to coverage for recommended preventive services without cost-sharing. This case, therefore, is a far cry from *Lukumi*, 508 U.S. 520, where the legislature specifically targeted the religious exercise of members of a single church (Santeria) by enacting ordinances that used terms such as "sacrifice" and "ritual," *id*. at 533-34, and prohibited few, if any, animal killings other than Santeria sacrifices, *id*. at 535-36.

The regulations also are generally applicable because they do not pursue their purpose "only against conduct motivated by religious belief." *Id*. at 545. They apply to all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage and do not qualify for the religious employer exemption. *See O'Brien*, 2012 WL 4481208, at *8. Thus, "it is just not true . . . that the burdens of the [regulations] fall on religious organizations 'but almost no others.'" *Am. Family Ass'n v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) (quoting *Lukumi*, 508 U.S. at 536); *see also United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997). Plaintiffs maintain that the regulations are not generally applicable because they contain certain categorical exceptions. But the existence of "express exceptions for objectively defined categories of [entities]" does not negate a law's general applicability. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004). The exception for grandfathered plans is available on equal terms to all employers, whether religious or secular. And the religious employer exemption serves to accommodate religion, not to disfavor it. Such categorical exceptions do not trigger strict scrutiny.[17] Therefore, plaintiffs' free exercise claim fails.[18]

2. The regulations do not violate the Establishment Clause

Plaintiffs' Establishment Clause claim has been rejected by every court to consider it,[19] and this Court should do the same. "The clearest command of the Establishment Clause is that one religious *denomination* cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982) (emphasis added). A law that discriminates among religions by "aid[ing] one religion" or "prefer[ing] one religion over another" is subject to strict scrutiny. *Id*. at 246.

[17] *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), and *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), addressed policies that created a secular exemption but refused all religious exemptions. The preventive services coverage regulations, in contrast, contain a religious exemption that specifically seeks to accommodate religion. Thus, there is simply no basis in this case to infer discriminatory intent on the part of the government. *See Conestoga*, 2013 WL 140110, at *9.

[18] Even if the regulations were not neutral and generally applicable, they would not violate the Free Exercise Clause because they satisfy strict scrutiny. *See supra* pp. 14-21.

[19] *See Conestoga*, 2013 WL 1277419, at *2; *Briscoe*, 2013 WL 755413, at *7-8; *Conestoga*, 2013 WL 140110, at *15; *Grote*, 2012 WL 6725905, at *8-9; *O'Brien*, 2012 WL 4481208, at *9-10; *see also Diocese of Albany*, 859 N.E.2d at 468-69; *Catholic Charities of Sacramento*, 85 P.3d at 83-87.

Thus, for example, the Supreme Court has struck down on Establishment Clause grounds a state statute that was "drafted with the explicit intention" of requiring "particular religious denominations" to comply with registration and reporting requirements while excluding other religious denominations. *Id*. at 254; *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703-07 (1994) (striking down statute that "single[d] out a particular religious sect for special treatment"). The Court, on the other hand, has upheld a statute that provided an exemption from military service for persons who had a conscientious objection to all wars, but not those who objected to only a particular war. *Gillette v. United States*, 401 U.S. 437 (1971). The Court explained that the statute did not discriminate among religions because "no particular sectarian affiliation" was required to qualify for conscientious objector status. *Id*. at 450-51. "[C]onscientious objector status was available on an equal basis to both the Quaker and the Roman Catholic." *Larson*, 456 U.S. at 247 n.23; *see also Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005).

Like the statute at issue in *Gillette*, the preventive services coverage regulations do not grant any denominational preference or otherwise discriminate among religions. It is of no moment that the religious employer exemption applies to some religious employers but not others. *See Droz v. Comm'r of IRS*, 48 F.3d 1120, 1124 (9th Cir. 1995); *Diocese of Albany*, 859 N.E.2d at 468-69 ("this kind of distinction – not between denominations, but between religious organizations based on the nature of their activities – is not what *Larson* condemns"). The relevant inquiry is whether the distinction drawn by the regulations between exempt and non-exempt entities is based on religious affiliation. Here, it is not.

The regulations' definition of "religious employer" does not refer to any particular denomination. The criteria for the exemption focus on the purpose and composition of the organization, not on its sectarian affiliation. The exemption is available on an equal basis to organizations affiliated with any and all religions. The regulations, therefore, do not promote

some religions over others. Indeed, the Supreme Court upheld a similar statutory exemption for houses of worship in *Walz v. Tax Commission of New York*, 397 U.S. 664, 672-73 (1970). The same result should obtain here. Nothing in the Establishment Clause, or the cases interpreting it, requires the government to create an exemption for for-profit, secular companies whenever it creates an exemption for religious organizations. *See, e.g.*, *Amos*, 483 U.S. at 334.[20] Thus, plaintiffs' Establishment Clause claim fails.[21]

3. The regulations do not violate the Free Speech Clause

Plaintiffs' free speech claim fares no better, as every court to address this claim has rejected it.[22] The right to freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 61 (2006). But the challenged regulations do not require plaintiffs – or any other person, employer, or entity – to say anything. They do not, as plaintiffs claim (Pls.' Br. at 49), require Cherry Creek to provide coverage of education and counseling "in favor" of certain contraceptive services. The regulations require that employers offer a health plan that includes coverage for "patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider. *See* HRSA Guidelines, *supra*. The regulations do not purport to regulate the content of the education or counseling provided – that is between the patient and her health care

[20] Plaintiffs stretch *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), well beyond its facts in asserting that the case stands for the proposition that the Establishment Clause prohibits the government from distinguishing between different types of organizations that adhere to the same religion. The court's decision in *Weaver* was limited to "laws that facially regulate religious issues," *id*. at 1257, and, particularly, those that do so in a way that denies certain religious institutions public benefits that are afforded to all other institutions, whether secular or religious. The court in *Weaver* said nothing about the constitutionality of exemptions from generally applicable laws that are designed to accommodate religion, as opposed to discriminate against religion. Requiring that such exemptions apply to all organizations – no matter their purpose, composition, or religious character – would severely hamper the government's ability to accommodate religion. *See Amos*, 483 U.S. at 334 ("There is ample room under the Establishment Clause for 'benevolent' neutrality which will permit religious exercise to exist without sponsorship and without interference."); *Catholic Charities of Sacramento*, 85 P.3d at 79.

[21] Even if the regulations discriminate among religions (and they do not), they are valid under the Establishment Clause because they satisfy strict scrutiny. *See supra* at 14-21; *Larson*, 456 U.S. at 251-52.

[22] *See Conestoga*, 2013 WL 1277419, at *2; *Briscoe*, 2013 WL 755413, at *8; *Conestoga*, 2013 WL 140110, at *16-17; *Grote*, 2012 WL 6725905, at *9-10; *Autocam*, 2012 WL 6845677, at *8; *O'Brien*, 2012 WL 4481208, at *11-13; *see also Catholic Charities of Sacramento*, 85 P.3d at 89; *Diocese of Albany*, 859 N.E.2d at 465.

provider. Because the regulations "do not require funding of one defined viewpoint," this case is not like the unconstitutional speech subsidy cases plaintiffs cite. *O'Brien*, 2012 WL 4481208, at *12. Taken to its logical conclusion, "plaintiffs' theory would mean that an employer's disagreement with the subject of a discussion between an employee and her physician would be a basis for precluding all government efforts to regulate health coverage." *Id*. The regulations govern conduct, not speech, and thus, plaintiffs' free speech claim fails.

III. PLAINTIFFS CANNOT SATISFY THE REMAINING TWO PRELIMINARY INJUNCTION FACTORS

"The primary function of a preliminary injunction is to preserve the status quo pending a final determination of the rights of the parties." *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992) (quotation omitted). The status quo is that Cherry Creek makes available to its employees a health plan that covers contraceptive services. *See Hobby Lobby*, 2012 WL 6930302, at *1 ("[T]he status quo is reflected in the coverage provided in [plaintiff's] current health plans[.]"). Altering the status quo by granting plaintiffs' request for a preliminary injunction would harm both the government and the public. "[T]here is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008). Enjoining the regulations as to for-profit, secular companies would undermine the government's ability to achieve Congress's goals of improving the health of women and children and equalizing the coverage of preventive services for women and men. It would also be contrary to the public interest to deny Cherry Creek's employees (and their families) the benefits of the preventive services coverage regulations. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Because Cherry Creek is a for-profit, secular employer and thus cannot discriminate on the basis of religion in hiring, many of its employees may not share the owners' religious beliefs. Those employees should not be deprived of the benefits of obtaining a health plan through their employer that covers the full range of recommended contraceptive services.

Respectfully submitted this 10th day of April, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Michelle R. Bennett
MICHELLE R. BENNETT
Trial Attorney