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;
JACK LEW, in his official capacity as Secretary of the
United States Department of the Treasury;
the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN
SERVICES;
the UNITED STATES DEPARTMENT OF LABOR; and
the UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

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

N.B. THIS AMENDED REPLY IS FILED IN LIEU OF THE REPLY FILED ELECTRONICALLY ON APRIL 22, 2013. THE UNDERSIGNED COUNSEL FOR PLAINTIFFS, MICHAEL J. NORTON, REALIZED TODAY, APRIL 23, 2013, THAT HE HAD NOT FOLLOWED THE COURT'S MARCH 18, 2013 ORDER WHICH LIMITED PLAINTIFFS' REPLY TO FIVE PAGES. COUNSEL FOR PLAINTIFFS APOLOGIZES TO THE COURT AND ASKS THE COURT'S FORGIVENESS.

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I. Introduction

The Religious Freedom Restoration Act, 42 U.S.C.§ 2000bb-1 ("RFRA") requires this Court to issue the requested Preliminary Injunction. The individual Plaintiffs, as owners and managers of Cherry Creek Mortgage, may not be forced to violate their religious beliefs simply because they own and operate a for-profit corporation.

II. Plaintiffs' Religious Beliefs Have Been Substantially Burdened

The HHS Mandate forces Plaintiffs to choose between violating their religious beliefs, refusing to comply and paying fines up to $25.5 million, or abandoning their business altogether. This is a quintessential substantial burden on their religious exercise. *Abdulhaseeb v. Calbone,* 600 F.3d 1301, 1315 (10th Cir. 2010) (quoting *Thomas v. Review Board,* 450 U.S. 707, 717-18 (1981)).

III. Plaintiffs' Burden Is Not Diluted Because Cherry Creek Mortgage is a Corporation

A corporation does not act in a vacuum. It consists of human beings acting together as one "person." *NLRB v. Greater Kansas City Roofing,* 2 F.3d 1047, 1051 (10th Cir. 1993) (corporations are state-law constructs designed "to create an incentive for investment by limiting exposure to personal liability"). This is particularly true of an S-corporation like Cherry Creek Mortgage as income or losses are treated by the government as "pass through" income or losses to the owners. *United States v. Rice,* 52 F.3d 843, 844 (10th Cir. 1995).

The government's contention that "only a religious organization can 'exercise religion'" (See Gov. Res. at 8) is "conclusory" and "unsupported." *McClure v. Sports and Health Club, Inc.,* 370 N.W. 2d 844, 850 (Minn. 1985). *See also Citizens United v. Federal Election Com'n.* 130 S.Ct. 876, 899 (2010) (regarding speech).

That Cherry Creek Mortgage's articles of incorporation "make no reference . . . to any religious purpose" (Gov. Res. at 7) is irrelevant. Colorado law provides that every corporation "has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs." C.R.S. § 7-103-102. Plaintiffs may operate Cherry Creek Mortgage in accord with their religious beliefs and pressure to comply with the HHS Mandate, even though the sanctions fall on their business, is a violation of the owners' religious exercise. *Cf. Wisconsin v. Yoder,* 406 U.S. 205, 218 (1972) (pressure from a five dollar fine was "severe" and "inescapable"). *See also Sherbert v. Verner,* 374 U.S. 398, 404 (1963).

IV. RFRA Applies to Corporations

The government contends that if only courts properly applied RFRA, courts would distinguish between the "religious" and the "secular." However, in twenty-four other cases in which federal courts have rendered "merits rulings," 18 for-profit businesses have secured injunctive relief; only six have not.[1]

RFRA asks a much simpler question, *i.e.,* does the government impose a substantial burden on the exercise of religion. The issue is "not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978); *see also Citizens United,* 130 S.Ct. 899-900 (explaining that "political speech does not lose First Amendment protection 'simply because its source is a corporation'") (quoting *Bellotti,* 435 U.S. at 784).

[1] //www.becketfund.org/hhsinformationcentral/ (last visited on April 22, 2013).

V. The HHS Mandate Cannot Survive Strict Scrutiny

As other courts have found and as is the case here, "the government has not made an effort to satisfy strict scrutiny." *See, e.g., Grote v. Sebelius,* 2013 U.S. App. LEXIS 2112 (7th Cir. Jan. 30, 2013).

A. The government cannot demonstrate a compelling government interest.

The government relates a multitude of conjectural harms it imagines will befall the Nation if Plaintiffs' few hundred employees are added by this Court to the millions of employees already exempt from the Mandate, *i.e.,* thousands of employees of presently "safe-harbored" religious non-profits, "grandfathered" plans of secular for-profits, the Amish, small employers[2], and churches. The government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these [real] harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 624, 664 (1994).

No law can "be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). *See also Geneva College v. Sebelius,* Case No. 2:12-cv-00207 (D.WD Penna. April 19, 2013), Findings of Fact and Conclusions of Law at 18 ("In light of the myriad exemptions to the mandate's requirements already granted and conceding that the requirement does not include small employers similarly situated to [the

[2] The Defendants allege that, since small employers "are not subject to assessable payments if they do not provide health coverage", they are not really exempt under the HHS Mandate. GOV. RES. at 17. This is disingenuous as such employers are simply not subject to the massive penalties that Plaintiffs face in this case.

for-profit plaintiffs], the requirement is 'woefully underincludive' and does not serve a compelling government interest").

B. The government has numerous less restrictive means available.

The government has made no effort in this or any other case to even suggest alternate means of furthering its supposed interest. That the government argues it would have to spend money to implement a viable alternative is irrelevant. "[T]he government must show something more compelling than saving money. . . . That is the compelling interest test of *Sherbert* and *Yoder* and, therefore, of RFRA." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV 209. 226 (1994); *see also Sherbert*, 374 U.S. at 407 (even if it was possible that "spurious claims threatened to dilute the [government unemployment compensation] fund . . . it would plainly be incumbent upon the [government] to demonstrate no alternative forms of regulation would combat such abuses without infringing First Amendment rights").

VI. Plaintiffs Are Not Imposing Their Faith On Others

What Plaintiffs' faith demands of them is that they refrain from providing access to or paying for abortion-inducing drugs and devices. What others choose to do with their funds is up to them. Indeed, the government is forcing its "faith" on Plaintiffs. *See Geneva College,* Findings of Fact and Conclusions of Law at 16 ("It is not, as defendants suggest, merely a question whether plaintiffs object to third parties' decisions with respect to using or purchasing the objected to services. Instead, plaintiffs' objection relates to whether the [for-profit plaintiffs] will be forced to provide coverage for the objected to services in the first place. This is a quintessential substantial burden, and plaintiffs demonstrated that they are likely to succeed on the merits with respect to the substantial burden issue.").

VII. Plaintiffs Have Not Delayed In Seeking Relief

Plaintiffs have, in fact, acted promptly upon learning their business was covering not just "contraceptives", but abortion-inducing drugs and devices as well. In any event, constitutional rights cannot be waived. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Glasser v. United States*, 315 U.S. 60, 70-71 (1942); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege'); *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972); *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937). Moreover, the government has shown no disadvantage to it that should deprive Plaintiffs of their requested relief. *Roda Drilling v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009). *See also Nilson v. JPMorgan Chase Bank*, 690 F.Supp.2d 1231 (D. Utah, Dec. 23, 2009) (any delay in seeking injunctive relief neither disadvantaged the other party nor altered the outcome of the proceeding); *Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Social & Rehabilitation Servs.*, 31 F.3d 1536, 1544 (10th Cir. 1994).

Respectfully submitted this 24th day of April, 2013.

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s/ Michael J. Norton

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CERTIFICATE OF SERVICE

I, Michael J. Norton, hereby certify that on the 24th day of April, 2013, I caused the foregoing motion to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record, to wit:

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