IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-00285-WYD

STEPHEN W. BRISCOE;
CONTINUUM HEALTH PARTNERSHIPS, INC;
CONTINUUM HEALTH MANAGEMENT, LLC; and
MOUNTAIN STATES HEALTH PROPERTIES, LLC,

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; NEAL WOLIN, in his official capacity as Acting 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.

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Plaintiffs ask this Court to enter a temporary restraining order to enjoin regulations that are intended to help ensure that women have access to health coverage, without cost-sharing, for certain preventive services that medical experts deem necessary for women's health and well-being. The preventive services coverage regulations that plaintiffs challenge 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 (and group coverage sold in connection with those plans), 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.

The plaintiffs in this case are Continuum Health Partnership, Inc.; Continuum Health Management, LLC; and Mountain States Health Properties, LLC (collectively "Continuum"), three for-profit companies based in Colorado that provide assisted living services and supplies, and the companies' owner, Stephen Briscoe.[1] Plaintiffs claim their sincerely held religious beliefs prohibit them from providing health coverage for certain contraceptive services. Plaintiffs' challenge rests largely on the theory that a for-profit, secular company engaged in providing assisted living services can exercise religion and thereby avoid the reach of laws designed to regulate commercial activity. This cannot be. Indeed, 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 owner of a for-profit, secular corporation

[1] For the sake of simplicity, defendants generally will refer to the three companies as a single entity, "Continuum."

eliminate the legal separation provided by the corporate form, which the owner has chosen because it benefits him, to impose his 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.

For these reasons and others, plaintiffs' motion for temporary restraining order should be denied because plaintiffs have not established a substantial likelihood of success on the merits. Indeed, in a case that plaintiffs do not cite, 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 for a temporary restraining order.

With respect to plaintiffs' Religious Freedom Restoration Act ("RFRA") claim, none of the plaintiffs can show, as each must, that the regulations impose a substantial burden on their religious exercise. Continuum is a for-profit, secular employer, and a secular entity—by definition—does not exercise religion. Indeed, every court to have directly addressed this question in cases similar to this one has held that "secular, for-profit corporations . . . do not have free exercise rights." *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1296 (W.D. Okla. 2012), *appeal docketed*, No. 12-6294 (10th Cir. Nov. 19, 2012); *see also, e.g., Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, Order at 6 (3d Cir. Jan. 29, 2013) (Garth, J.,

concurring) ("As the District Court properly recognized, . . . *for-profit corporate entities*, unlike religious *non-profit corporations or organizations*, do not—and cannot—legally claim a right to exercise or establish a "corporate" religion under the First Amendment or the RFRA."); *Korte v. U.S. Dep't of Health & Human Servs.*, No. 3:12-CV-01072-MJR, 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).[2]

Mr. Briscoe's allegations of a substantial burden on his own individual religious exercise fare no better, as the regulations that purportedly impose such a burden apply only to certain group health plans and health insurance issuers. It is well established that a corporation and its owners/shareholders are wholly separate entities, and the Court should not permit Mr. Briscoe to eliminate that legal separation to impose his personal religious beliefs on Continuum's group health plans or its employees. Only the company is subject to the challenged regulations, and thus the company's owners have not shown a substantial burden on their individual religious exercise. *See, e.g.*, *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Conestoga Wood Specialties Corp. v. Sebelius*, Civil Action No. 12-6744, 2013 WL 140110, at *7-8 (E.D. Pa. Jan. 11, 2013); *Conestoga*, slip op. at 7 (Garth, J., concurring) (adopting the district court's reasoning); *Autocam Corp. v. Sebelius*, No. 1:12-cv-1096, 2012 WL 6845677, at *7 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.). Mr. Briscoe cannot use the corporate form alternatively as a shield and a sword, depending on what suits him in any given circumstance.

Furthermore, even if a secular entity could exercise religion, the regulations do not substantially burden Continuum's or Mr. Briscoe's exercise of religion because any burden caused by the regulations is simply too attenuated to qualify as a *substantial* burden. *See Hobby Lobby*, 2012 WL 6930302, at *3; *Hobby Lobby*, 870 F. Supp. 2d at 1294; *Conestoga*, 2013 WL

[2] 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*, Civil Action No. 12-1635 (RBW), 2012 WL 5817323, at *5 (D.D.C. Nov. 16, 2012) ("This Court, like others before it, declines to address the unresolved question of whether for-profit corporations can exercise religion within the meaning of the RFRA and the Free Exercise Clause.").

140110, at *12-14; *Autocam*, 2012 WL 6845677, at *6-7; *Grote v. Sebelius*, No. 13-1077, 2013 WL 362725, at *9, *13-14 (7th Cir. Jan. 30, 2013) (Rovner, J., dissenting); *Grote Industries, LLC v. Sebelius*, No. 4:12-cv-00134-SEB-DML, 2012 WL 6725905, at *5-7 (S.D. Ind. Dec. 27, 2012), *motion for reconsideration denied*, 2013 WL 53736 (S.D. Ind. Jan. 3, 2013), *appeal pending*, No. 13-1077 (7th Cir.); *Korte*, 2012 WL 6553996, at *10; *Annex Medical, Inc. v. Sebelius*, No. 12-cv-2804, 2013 WL 101927, at *4-5 (D. Minn. Jan. 8, 2013); *O'Brien v. U.S. Dep't of Health & Human Servs.*, Case No. 4:12-CV-476 (CEJ), 2012 WL 4481208, at *5-7 (E.D. Mo. Sept. 28, 2012), *appeal docketed*, No. 12-3357 (8th Cir. Oct. 4, 2012). Just as Continuum's employees have always retained the ability to choose whether to procure contraceptive services by using the salaries the corporation pays them, under the current regulations those employees retain the ability to choose what health services they wish to obtain according to their own beliefs and preferences. Plaintiffs remain free to advocate against their employees' use of contraceptive services (or any other services). Ultimately, an employee's health care choices remain those of the employee, not Continuum or Mr. Briscoe.

And even if the challenged regulations were deemed to substantially burden any plaintiff's religious exercise, the regulations would not violate RFRA because they are narrowly tailored to serve two compelling governmental interests: improving the health of women and children, and equalizing the provision of preventive care for women and men so that women who choose to can be a part of the workforce on an equal playing field with men.

Plaintiffs' First Amendment claims are equally meritless. The Free Exercise Clause does not prohibit a law that is neutral and generally applicable, even if the law prescribes conduct that an individual's religion proscribes. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). The preventive services coverage regulations fall within this rubric because they do not target, or selectively burden, religiously motivated conduct. The regulations apply to all non-exempt, non-grandfathered plans, not just those of employers with a religious affiliation. Indeed, all but one court to have addressed Free Exercise challenges to these regulations have concluded that the regulations are neutral and generally applicable. *See Hobby Lobby*, 870 F.

Supp. 2d at 1287-90; *Conestoga*, 2013 WL 140110, at *6-9; *Autocam*, 2012 WL 6845677, at *4-5; *Grote*, 2012 WL 6725905, at *7-8; *Korte*, 2012 WL 6553996, at *6-8; *O'Brien*, 2012 WL 4481208, at *7-9. *But see Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-CV-92-DDN, 2012 WL 6738489, at *6 (E.D. Mo. Dec. 31, 2012). Plaintiffs' Establishment Clause claim is similarly flawed. The religious employer exemption distinguishes between *organizations* based on their purpose and composition; it does not favor one *religion*, *denomination*, or *sect* over another. The distinctions drawn by the exemption, therefore, simply do not violate the constitutional prohibition against denominational preferences. Nor do the regulations violate plaintiffs' free speech rights. The regulations compel conduct, not speech. They do not require plaintiffs to say anything; nor do they prohibit plaintiffs from expressing to company employees or the public their views in opposition to the use of contraceptive services. For these reasons, the *Hobby Lobby*, *Conestoga*, *Autocam*, *Grote*, *Korte*, and *O'Brien* courts rejected free exercise, Establishment Clause, and/or free speech challenges identical to those raised here, and the highest courts of both New York and California have upheld similar state laws against similar First Amendment challenges. *See Hobby Lobby*, 870 F. Supp. 2d at 1287-88; *Conestoga*, 2013 WL 140110, at *6-9, *15-17; *Grote*, 2012 WL 6725905, at *7-10; *Korte*, 2012 WL 6553996, at *6-8; *O'Brien*, 2012 WL 4481208, at *7-13; *see also Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 461 (N.Y. 2006); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 74 n.3 (Cal. 2004).

Plaintiffs also cannot establish the remaining requirements for obtaining a temporary restraining order. Even if plaintiffs could show a likelihood of success on the merits—which they cannot—the Court should not grant their request for injunctive relief, because, in light of a delay of almost a year and a half between the enactment of the challenged regulations and the initiation of this suit, plaintiffs cannot establish irreparable harm. The purported urgency of plaintiffs' current request for emergency injunctive relief is belied by the tardiness of that request. Plaintiffs should not be rewarded for creating their own alleged emergency, especially given that Continuum's health plan has apparently covered the contraceptive services to which Mr. Briscoe

objects for some time. *See* Compl. ¶ 9. Furthermore, the balance of equities tips toward the government. Enjoining application of the regulations as to plaintiffs would prevent the government from achieving Congress's goals of improving the health of women and children and equalizing the playing field for women and men. It would also harm the public, given Continuum's employees—as well as any covered spouses and other dependents—who could suffer the negative health and other consequences that the regulations are intended to prevent.

In support of their motion, plaintiffs rely heavily on Judge Kane's decision in *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012). This reliance is misplaced for two reasons. First, in evaluating the plaintiffs' likelihood of success on the merits, Judge Kane applied a relaxed preliminary injunction standard, by which he did not require the plaintiffs to show a likelihood of success on the merits, but only recognized that the case presented "difficult questions of first impression." *Id.* at 1297. Because the court did not find a substantial likelihood of success on the merits before granting preliminary injunctive relief, its decision was in error. *See Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009). Moreover, the *Newland* decision did not address defendants' argument that a for-profit, secular company cannot exercise religion within the meaning of RFRA, concluding that the question needed "more deliberate investigation." 881 F. Supp. 2d at 1296. For the reasons explained below, however, defendants respectfully submit that this Court cannot enter a temporary restraining order without addressing that issue. It is also worth noting that the *Newland* decision predated the Tenth Circuit's denial of preliminary injunctive relief in *Hobby Lobby*, which further calls into question the validity of the *Newland* decision's reasoning.

For these reasons, and the reasons explained below, defendants respectfully ask the Court to deny plaintiffs' motion for a temporary restraining order.

BACKGROUND

I. STATUTORY AND REGULATORY 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://books.nap.edu/openbook.php?record_id= 13181 (last visited Nov. 13, 2012). 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).

The government issued interim final regulations implementing the preventive services coverage provision on July 19, 2010. 75 Fed. Reg. 41,726. Those regulations provide, among other things, that a group health plan or health insurance issuer offering non-grandfathered health coverage must provide coverage for newly recommended preventive services, without cost-sharing, for plan years that begin on or after the date that is one year after the date on which the new recommendation is issued. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R. § 147.130(b)(1). 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.[3] After 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,

[3] IOM was established in 1970 by the National Academy of Sciences and is funded by Congress. IOM REP. at iv. It secures the services of eminent members of appropriate professions to examine policy matters pertaining to the health of the public and provides expert advice to the federal government. *Id.*

oral contraceptive pills, emergency contraceptives (such as Plan B and Ella), and intrauterine devices (IUDs). FDA, Birth Control Guide, *available at* http://www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm (last visited Nov. 13, 2012). 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 regulations. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Nov. 13, 2012). 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. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A).[4] The religious employer exemption was modeled after the religious accommodation used in multiple states that already required health insurance issuers to cover contraception. 76 Fed. Reg. at 46,623.

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 (and any associated

[4] To qualify, an employer must meet all of 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). However, a recently published Notice of Proposed Rulemaking would eliminate the first three criteria and modify the fourth criterion, thereby ensuring "that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths." 78 Fed. Reg. 8456, 8459, 8474 (Feb. 6, 2013).

group health insurance coverage). 77 Fed. Reg. 8725, 8726-27 (Feb. 15, 2012). During the safe harbor, the government intends to amend the preventive services coverage regulations to further accommodate non-exempt, non-grandfathered religious organizations' religious objections to covering contraceptive services. *Id.* at 8728. The government began the process of further amending the regulations on March 21, 2012, when it published an Advance Notice of Proposed Rulemaking ("ANPRM") in the Federal Register, 77 Fed. Reg. 16,501 (Mar. 21, 2012), and took the next step in that process with the recent publication of a Notice of Proposed Rulemaking ("NPRM"), 78 Fed. Reg. 8456 (Feb. 6, 2013).

II. CURRENT PROCEEDINGS

Plaintiffs challenge the regulations to the extent they require the health coverage Continuum makes available to its employees to cover recommended contraceptive services. Nearly a year and a half after the contraceptive coverage requirement was established, plaintiffs filed suit and moved for a preliminary injunction and a temporary restraining order, claiming they will suffer irreparable harm if the regulations are not enjoined as to them. *See* Compl., ECF No. 1; Pls.' Br. in Supp. of Mot. for Prelim. Inj., ("Pls.' Br."), ECF No. 15-1; Pls.' Mot. for Forthwith Issuance of TRO, ECF No. 16.

STANDARD OF REVIEW

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.

ARGUMENT

I. PLAINTIFFS HAVE NOT SHOWN A SUBSTANTIAL 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

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

Under the Religious Freedom Restoration Act, 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).

Here, plaintiffs have not shown that the regulations substantially burden any religious exercise. Plaintiffs' suggestion that Continuum "exercise[s] . . . religion" within the meaning of RFRA, 42 U.S.C. § 2000bb-1(b), cannot be reconciled with Continuum'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) ("[T]he practice[] at issue must be of a religious nature."); *see also Hobby Lobby*, 870 F. Supp. 2d at 1291-92; *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). Continuum is plainly secular. The company's pursuits and products are not religious; it is a for-profit company that owns and operates assisted living facilities. The company was not organized for carrying out a religious purpose. Rather, it was established in order to insulate Mr. Briscoe from liability. *See* Compl. ¶ 25. Although defendants do not question the sincerity of Mr. Briscoe's religious beliefs, the sincere religious beliefs of a company's owner do not make the company religious. Otherwise, every company with a religious owner—no matter how secular the company's purpose—would be considered religious, which would dramatically expand the scope of RFRA and the Free

Exercise Clause. *See Grote*, 2013 WL 362725, at *14 (Rovner, J., dissenting) (describing some of the potential consequences of such an expansion).

The government is aware of no case in which a secular, for-profit employer like Continuum prevailed on a RFRA claim. Because Continuum 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 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); *Werft v. Desert Sw. Annual Conference of the United Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004) ("The Free Exercise Clause protects . . . *religious* organizations . . . .") (emphasis added); *Anselmo v. Cnty. of Shasta*, No. CIV. 2:12-361 WBS EFB, 2012 WL 2090437, at *12 (E.D. Cal. 2012) ("Although corporations and limited partnerships have broad rights, the court has been unable to find a single [Religious Land Use and Institutionalized Persons Act] case protecting the religious exercise rights of a non-religious organization such as Seven Hills."); *see also Hobby Lobby*, 870 F. Supp. 2d at 1288; *Conestoga*, 2013 WL 140110, at *6-7; *Korte*, 2012 WL 6553996, at *6, *9-10. 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 Continuum 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 Continuum does not qualify as a "religious corporation"; it is for-profit, it is not affiliated with a formally religious entity such as a church or synagogue, and it makes secular products. *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 Continuum 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).[5] Such a conclusion would allow a secular company 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. *See Autocam*, 2012 WL 686845677, at *7. Moreover, any secular company 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]

[5] Indeed, such a conclusion would undermine Congress's decision to limit the exemption in Title VII to religious organizations; any company that does not qualify for Title VII's exemption could simply sue under RFRA for an exemption from Title VII's prohibition against discrimination in employment. *See, e.g.*, *Franklin v. United States*, 992 F.2d 1492, 1502 (10th Cir. 1993) ("[E]ven where two statutes are not entirely harmonious, courts must, if possible, give effect to both, unless Congress clearly intended to repeal the earlier statute.") (citation omitted). As the district court recognized in *Autocam*, "this theory would mean that every government regulation could be subject to the compelling interest and narrowest possible means test of RFRA based simply on an asserted religious basis for objections," which would "paralyze the normal process of governing." 2012 WL 6845677, at *7.

[6] For this reason, plaintiffs' reliance on *Sherbert v. Verner*, 374 U.S. 398 (1963), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Thomas v. Review Board*, 450 U.S. 707 (1981), Pls.' Br. at 8-10, is misplaced. Those cases involved individual plaintiffs, not a for-profit, secular company.

It is significant that Mr. Briscoe elected to organize Continuum 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. Having chosen this path, the company may not impose its owner's personal religious beliefs on its employees (many of whom may not share the owners' beliefs) by refusing to cover certain contraceptive services. *Lee*, 455 U.S. at 261 ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."); *Hobby Lobby*, 870 F. Supp. 2d at 1295-96; *Conestoga*, 2013 WL 140110, at *10. In this respect, "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity." *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (interpreting the Free Exercise Clause of the Alaska Constitution).[7]

b. The regulations do not substantially burden Mr. Briscoe's religious exercise because the regulations apply only to Continuum, a separate and distinct legal entity

The preventive services coverage regulations also do not substantially burden Mr. Briscoe's religious exercise. By their terms, the regulations apply to group health plans and health insurance issuers. 42 U.S.C. § 300gg-91(a)(1); 26 C.F.R. § 54.9815-2713T; 29 C.F.R. § 2590.715-2713; 45 C.F.R. § 147.130. Mr. Briscoe is neither. Nonetheless, Mr. Briscoe claims that the regulations substantially burden *his* religious exercise because the regulations require the group health plan sponsored by his for-profit secular *company* to provide health insurance that includes certain contraceptive coverage. As several courts have explained in some detail, a plaintiff cannot establish a substantial burden on his religious exercise by invoking this type of trickle-down theory; to constitute a substantial burden within the meaning of RFRA, the burden

[7] A for-profit, secular employer like Continuum therefore stands in a fundamentally different position from a church or a religiously affiliated non-profit organization. *Cf. Amos*, 483 U.S. at 344 (Brennan, J., concurring in the judgment) ("The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation . . . . but that [its] activities themselves are infused with a religious purpose."); *see also Hobby Lobby*, 870 F. Supp. 2d at 1288.

must be imposed on the plaintiff himself. *See Hobby Lobby*, 870 F. Supp. 2d at 1293-96; *Conestoga*, 2013 WL 140110, at *8, *14; *Korte*, 2012 WL 6553996, *9-11; *Autocam*, 2012 WL 6845677, at *7; *see also Grote*, 2012 WL 6725905, at *5 (explaining that for a burden to be substantial, it must apply directly to the plaintiff). "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Indeed, "[i]n our modern regulatory state, virtually all legislation (including neutral laws of general applicability) imposes an incidental burden at some level by placing indirect costs on an individual's activity. Recognizing this . . . [t]he federal government . . . ha[s] identified a substantiality threshold as the tipping point for requiring heightened justifications for governmental action." *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("[a]pplication of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise . . . would render meaningless the word 'substantial'"); *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 734 (6th Cir. 2007) ("In the 'Free Exercise' context, the Supreme Court has made clear that the 'substantial burden' hurdle is high.").

Here, any burden on Mr. Briscoe's religious exercise results from obligations the regulations impose on a legally separate, secular corporation's group health plan.[8] This type of attenuated burden is not cognizable under RFRA. Indeed, cases that find a substantial burden uniformly involve a direct burden on the plaintiff rather than a burden imposed on another entity. *See, e.g.*, *Lukumi*, 508 U.S. at 524; *Potter v. Dist. of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009); *see also Grote*, 2012 WL 6725905, at *5; *Conestoga*, 2013 WL 140110, at *14. Not so

[8] The attenuation is in fact twice removed. A group health plan is a legally separate entity from the company that sponsors it. 29 U.S.C. § 1132(d). And, as explained below, Continuum is a legally separate entity from Mr. Briscoe.

here, where the regulations apply to the group health plan sponsored by Continuum, not to Mr. Briscoe himself. *See Hobby Lobby*, 870 F. Supp. 2d at 1294; *Korte*, 2012 WL 6553996, at *9 ("[T]he RFRA 'substantial burden' inquiry makes clear that business forms and so-called 'legal fictions' cannot be entirely ignored—in this situation, they are dispositive"); *Autocam*, 2012 WL 6845677, at *7; *Conestoga*, 2013 WL 140110, at *8; *Conestoga*, No. 13-1144, slip op. at 7 (Garth, J., concurring); *Grote*, 2013 WL 362725, at *6 (Rovner, J., dissenting).

Mr. Briscoe's theory boils down to the claim that what's done to the corporation (or group health plan sponsored by the company) is also done to its owners. But, as a legal matter, that is simply not so. Mr. Briscoe has chosen to enter into commerce and elected to do so by establishing a for-profit, secular corporation, which "is a distinct and separate entity, unique from its officers, directors, and shareholders." *In re Phillips*, 139 P.3d 639, 643 (Colo. 2006); *see* Colo. Rev. Stat. §§ 7-106-203, 7-108-401. 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, Continuum 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 owner, Mr. Briscoe, is generally not liable for the corporation's debts. *In re Phillips*, 139 P.3d at 643.[9] 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 Promotions*, 533 U.S. at 163. Mr. Briscoe should not be permitted to eliminate that legal separation only when it suits them to impose his personal religious beliefs on the corporate entity's group health plan or its employees.

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

[9] The same goes for Continuum Health Management, LLC and Mountain States Health Properties, LLC. *See* Colo. Rev. Stat. § 7-80-107(1) (indicating that the case law regarding the conditions and circumstances under which the corporate veil of a corporation may be pierced applies equally to limited liability partnerships).

corporation is also the obligation of the owner or that the owner's and corporation's rights and responsibilities are coextensive. *See, e.g.*, *In re Phillips*, 139 P.3d at 643; *Hobby Lobby*, 870 F. Supp. 2d at 1294-95; *Conestoga*, 2013 WL 140110, at *8; *Conestoga*, No. 13-1144, slip op. at 7 (Garth, J., concurring); *Autocam*, 2012 WL 6845677, at *7; *Grote*, 2013 WL 362725, at *6 (Rovner, J., dissenting). If that were the rule, any of the millions of shareholders of publicly traded companies could assert RFRA claims on behalf of those companies. Moreover, if an owner's religious beliefs were automatically imputed to the company, any secular company with a religious owner or shareholder (or with one or more, but not all, religious owners or shareholders) could impose its owner's or shareholder's beliefs on the company's employees in a way that deprives those employees of legal rights they would otherwise have, *see Autocam*, 2012 WL 6845677, at *7; *Grote*, 2012 WL 6725905, at *6; *Grote*, 2013 WL 362725, at *14 (Rovner, J., dissenting), 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).[10]

The courts to have granted preliminary injunctive relief in cases similar to this one have

[10] Defendants anticipate that plaintiffs may rely, in their reply brief, on *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), and *EEOC v. Townley Engineering and Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988), to argue that the regulations impose a substantial burden on plaintiffs' religious exercise. Both cases, however, expressly declined to decide whether "a for-profit corporation can assert its own rights under the Free Exercise Clause." *Stormans*, 586 F.3d at 1119; *see also Townley*, 859 F.2d at 619, 620. Instead, *Stormans* held that a particular corporation had standing to raise the rights of its owner (who was not a party). 586 F.3d at 1119-22. But this case does not present that standing question, as Mr. Briscoe is also plaintiffs here. As for the question that this case *does* present—whether a burden on a corporation is also a burden on its owners—*Stormans* had absolutely nothing to say. Indeed, while the case discussed whether the challenged rules were neutral and generally applicable, *see id.* at 1130-37, it did not address the substantial burden prong at all. Similarly, nothing in *Townley* suggests that a burden on a corporation is also a burden on its owners. Although the court allowed Townley (the company) to assert the rights of its owners (who were not parties), *see Townley*, 859 F.2d at 619-20 & n.15, it did not find that Title VII imposed a substantial burden on the owners' religious exercise. Rather, *Townley* acknowledged that the challenged statute "to some extent would adversely affect [plaintiffs'] religious practices," and then proceeded to uphold Title VII on compelling interest grounds. In short, neither case supports the proposition that the preventive services coverage regulations impose a substantial burden on Continuum or Mr. Briscoe. 859 F.2d at 620.

uniformly ignored or disregarded the legal separation between corporations and their owners. *See, e.g., Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012) (stating, without analysis, "[t]hat the Kortes operate their business in the corporate form is not dispositive of their claim"); *Grote v. Sebelius*, 2013 WL 362725, at *3 (7th Cir. Jan. 30, 2013) (same); *Sharpe Holdings*, 2012 WL 6738489, at *5 (ignoring the issue entirely). Moreover, a company and its owners 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*, 2013 WL 362725, at *6 (Rovner, J., dissenting) ("To suggest, for purposes of the RFRA, that monies used to fund the Grote Industries health plan—including, in particular, any monies spent paying for employee contraceptive care—ought to be treated as monies from the Grotes' own pockets would be to make an argument for piercing the corporate veil. I do not understand the Grotes to be making such an argument.").

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

Although the regulations do not require Continuum or Mr. Briscoe to provide contraceptive services directly, plaintiffs' complaint appears to be that, through Continuum'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.* Moreover, the court held that this was so as to both the corporate plaintiffs and the individual owner plaintiffs, finding that "their common failure to demonstrate a substantial likelihood of success on the RFRA prima facie case suffices to dispose of the motion." *Id.* at *2 n.4.

The Tenth Circuit's reasoning is similar to other courts that have rejected similar challenges to the preventive services coverage regulations. *See Conestoga*, 2013 WL 140110, at *12-14; *Autocam*, 2012 WL 6845677, at *6-7; *Grote*, 2013 WL 362725, at *9, *13-14 (Rovner, J., dissenting); *Grote*, 2012 WL 6725905, at *5-7; *Korte*, 2012 WL 6553996, at *10; *Annex Medical*, 2013 WL 101927, at *4-5; *O'Brien*, 2012 WL 4481208, at *5-7. For example, assuming but not deciding, that the for-profit company in *O'Brien* could exercise religion, the court nevertheless determined that any burden on that exercise (as well as the owner's exercise of religion) is too attenuated to state a claim for relief. 2012 WL 4481208, at *5-7. The court explained that "the plain meaning of 'substantial,'" as used in RFRA, "suggests that the burden on religious exercise must be more than insignificant or remote." *Id*. at *5; *see also Hobby Lobby*, 870 F. Supp. 2d at 1294; *Conestoga*, 2013 WL 140110, at *12-14; *Korte*, 2012 WL 6553996, at *10-11; *Grote*, 2012 WL 6725905, at *5; *Autocam*, 2012 WL 6845677, at *6-7. The

court noted that the regulations have no more of an impact on the plaintiffs' beliefs than the company's payment of salaries to its employees, which those employees can also use to purchase contraceptives. *O'Brien*, 2012 WL 4481208, at *7. Indeed, the court observed, "if the financial support of which plaintiffs complain was in fact substantially burdensome, secular companies owned by individuals objecting on religious grounds to all modern medical care could no longer be required to provide health care to employees." *Id.* at *6. Because the preventive services coverage regulations "are several degrees removed from imposing a substantial burden on [Continuum], and one further degree removed from imposing a substantial burden on [Mr. Briscoe]," *id.* at *7, plaintiffs cannot show a likelihood of success on the merits, even assuming a for-profit secular company like Continuum can exercise religion.

Finally, it is irrelevant that Continuum's group health plan is self insured. *See* Compl. ¶ 30. It is still the case that "[t]he burden of which plaintiffs complain" rests on "a series of independent decisions by health care providers and patients covered by [Continuum's plan]." *O'Brien*, 2012 WL 4481208, at *6; *see also Grote*, 2013 WL 362725, at *6 (Rovner, J., dissenting) (rejecting the reasoning of *Tyndale*); *id.* at *9 (noting that whether a plan is self-insured or fully-insured, "the employee is making wholly independent decisions about how to use an element of her compensation"); *Grote*, 2012 WL 6725905, at *6-*7 (same). Furthermore, a group health plan is a separate legal entity from the sponsoring employer even if the plan is self-insured. *See* 29 U.S.C. § 1132(d); *Grote*, 2012 WL 6725905, at *7. Finally, "[i]f the Plaintiffs are more comfortable religiously and morally with more layers of insulation between the wages and benefits earned, on the one hand, and an employee's decision to acquire contraceptives with them, Plaintiffs have the option of restructuring from a self-insured plan to an insured plan." *Autocam*, 2012 WL 6845677, at *6 n.1; *see also Grote*, 2013 WL 362725, at *11 (Rovner, J., dissenting).

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

Even if plaintiffs could demonstrate a substantial burden on any religious exercise, they would not prevail because the regulations are justified by two compelling governmental interests. "[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.*, *United States v. Stevens*, 533 F.3d 218, 241 (3d Cir. 2008) (recognizing public health as a compelling interest); *Dickerson v. Stuart*, 877 F. Supp. 1556, 1559 (M.D. Fla. 1995) ("The State . . . has a compelling interest in the health of expectant mothers and the safe delivery of newborn babies."). 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. at 41,733; *see also* 77 Fed. Reg. at 8728. 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. In fact, "pregnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension . . . and cyanotic heart disease, and for women with the Marfan Syndrome." *Id.* at 103-04.

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

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*, 85 P.3d at 92-93.

Of course, the government's interest in ensuring access to contraceptive services is *particularly* compelling for women employed by companies not currently offering such coverage, like Continuum. 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 Continuum 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."), *overruled*

in part on other grounds by Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1033 (9th Cir. 2007) (en banc). Women who work for Continuum 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 Mr. Briscoe's 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 owner's 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' primary argument is that the interests underlying the regulations cannot be considered compelling when millions of people are not protected by the regulations at the

[11] Plaintiffs assert that defendants must show a compelling interest as to Continuum specifically, *see* Pls.' Br. at 11-14, as though the government must separately analyze the impact of and 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 that is challenged due to religious objections—completely unworkable. *See Lee*, 455 U.S. at 259-60. 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.*, *id*. at 260 (considering the impact on the tax system if all religious adherents—not just the plaintiff—could opt out); *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001) (per curiam) ("Oliver has argued a one-man exemption should be made," but "[t]here are no safeguards to prevent similarly situated individuals from asserting the same privilege and leading to uncontrolled eagle harvesting."); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990) ("There is no principled way of exempting the school without exempting all other sectarian schools."). *O Centro* is not to the contrary. To be sure, the Court rejected "slippery-slope" arguments for refusing to accommodate a particular claimant. *See* 546 U.S. at 435-36. But it construed the scope of the requested exemption as encompassing *all* members of the plaintiff religious sect. *See id.* at 433. Similarly, the exemption in *Yoder*, 406 U.S. 205, encompassed *all* Amish children; and the exemption in *Sherbert*, 374 U.S. 398, encompassed *all* individuals who had a religious objection to working on Saturdays. *See O Centro*, 546 U.S. at 431. The Court's warning in *O Centro* 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.

moment. Pls.' Br. at 15-18. But this is not a case where underinclusive enforcement of a law suggests that the government's "supposedly vital interest" is not really compelling. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546-47 (1993). First, the grandfathering of certain health plans with respect to certain provisions of the ACA is not specifically limited to the preventive services coverage regulations. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. In fact, the effect of grandfathering is not really a permanent "exemption," but rather, over the long term, a transition 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, including those provided by the preventive services coverage provision, 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).

The incremental transition of the marketplace into the ACA administrative scheme 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. 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. To find the Government's interests other than compelling only because of the grandfathering rule would perversely encourage Congress in the

future to require immediate and draconian enforcement of all provisions of similar laws, without regard to pragmatic considerations, simply in order to preserve 'compelling interest' status.").

Second, 26 U.S.C. § 4980H9(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 and certain other criteria are met. *See* 26 U.S.C. § 4980H(c)(2). Employees of these small businesses can get their health insurance 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. And there is reason to believe that many small employers will continue to offer health coverage to their employees, because the ACA, among other things, provides for tax incentives for small businesses to encourage the purchase of health insurance. *See id*. § 45R.

Third, although 26 U.S.C. § 5000A(d)(2) exempts from the minimum coverage provision of the ACA "member[s] of a recognized religious sect or division thereof" who, on the basis of their religion, are opposed to the concept of health insurance, this provision is entirely unrelated to the preventive services coverage regulations. *See also id.* § 1402(g)(1). It provides no exemption from the preventive services coverage regulations, as it only excludes certain *individuals* from the requirement to obtain health coverage and says nothing about the requirement that non-grandfathered group health plans provide preventive services coverage to their participants. It is also clearly an attempt by Congress to *accommodate* religion and, unlike the broad exemption sought by plaintiffs, is sufficiently narrow so as not to undermine the larger administrative scheme. *See Lee*, 455 U.S. at 260-61. By definition, a woman who is "conscientiously opposed to acceptance of the benefits of any private or public insurance which

. . . makes payments toward the cost of, or provides services for, medical care," 26 U.S.C. § 1402(g)(1), would not utilize health coverage—including contraceptive coverage—even if it were offered.

The only true exemption from the preventive services coverage 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. It anticipates that the impact on employees of exempted organizations will be minimal, 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 Continuum, which cannot discriminate based upon religious beliefs in hiring, and therefore almost certainly employs many individuals who do not share Mr. Briscoe's 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) (recognizing that granting plaintiff's RFRA claim "would lead to significant administrative problems for the [government] and open the door to a . . . proliferation of claims").

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

The preventive services coverage regulations, moreover, are the least restrictive means of furthering the government's 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); *New Life Baptist Church Acad. v. Town of E. Longmeadow*, 885 F.2d 940, 946 (1st Cir. 1989) (Breyer, J.); *Israel*, 317 F.3d at 772. The government is not required "to do the impossible—refute each and every conceivable alternative regulation scheme." *Wilgus*, 638 F.3d at 1289. Instead, the government need only "refute the alternative schemes offered by the challenger." *Id.*

Instead of explaining how Continuum 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 regulatory schemes they claim would be less restrictive. *See* Pls.' Br. at 10-11. 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) (explaining why Congress chose to build on the employer-based system), plaintiffs would have the system turned upside-down to accommodate Mr. Briscoe's 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 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*, 885 F.2d at 947 (considering "in a practical way" whether proffered alternative would "threaten potential administrative difficulties, including those costs and complexities which . . . may significantly interfere with the state's ability to achieve its . . . objectives"); *Graham*, 822 F.2d at 852 (rejecting alternative as "not feasible"). 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) (rejecting proffered alternative because it "would place an unreasonable burden" on the government); *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.[12]

Nor would the proposed alternatives be equally effective in advancing the government's compelling interests. *See, e.g.*, *Kaemmerling v. Lappin*, 553 F.3d 669, 684 (D.C. Cir. 2008) (finding that means was least restrictive where no alternative means would achieve compelling interests); *Murphy v. State of Ark.*, 852 F.2d 1039, 1042-43 (8th Cir. 1988) (same). 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

[12] The costs and administrative burdens that plaintiffs' alternative schemes would impose on the government are not the only reason they are infeasible. 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.

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—an attribute that some of plaintiffs' alternatives admittedly share—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 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—in addition to raising myriad administrative and logistical difficulties and being unauthorized by statute and not funded by appropriation—are less likely to achieve the compelling interests furthered by the regulations, and therefore do not represent reasonable less restrictive means.

C. 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, *see supra* pp. 9-13, a for-profit, secular employer like Continuum 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. That was precisely the holding in *Hobby Lobby*, as well as all but one other court to have addressed the issue, including the highest courts of two states that addressed nearly identical free exercise challenges to similar state laws. *See Hobby Lobby*, 870 F. Supp. 2d at 1287-90; *Conestoga*, 2013 WL 140110, at *6-9; *Autocam*, 2012 WL 6845677, at *4-5; *Grote*, 2012 WL 6725905, at *7-8; *Korte*, 2012 WL 6553996, at *6-8; *O'Brien*, 2012 WL 4481208, at *7-9; *see also Diocese of*

Albany, 859 N.E.2d at 468-69; *Catholic Charities of Sacramento*, 85 P.3d at 81-87. *But see Sharpe Holdings*, 2012 WL 6738489, at *6.

A neutral and generally applicable law does not violate the Free Exercise Clause even if it prescribes conduct that an individual's religion proscribes or has the incidental effect of burdening a particular religious practice. *Smith*, 494 U.S. at 879. A law is neutral if it does not target religiously motivated conduct but rather has as its purpose something other than the disapproval of a particular religion, or of religion in general. *Lukumi*, 508 U.S. at 533, 545. A law is generally applicable if it does not selectively impose burdens only on conduct motivated by religious belief. *Id*. at 535-37, 545.

Unlike such selective laws, the preventive services coverage regulations are neutral and generally applicable. They do not target religiously motivated conduct; their purpose is to promote public health and gender equality by increasing access to and utilization of recommended preventive services, including those for women. *See, e.g.*, *Hobby Lobby*, 870 F. Supp. 2d at 1289-90. The regulations reflect expert recommendations about the medical need for the services, without regard to any religious motivations for or against such services. As the IOM Report shows, this purpose is entirely secular in nature. IOM REP. at 2-4, 7-8; *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007) (concluding law was neutral where there was no evidence "it was developed with the aim of infringing on religious practices").

Plaintiffs' characterization of the regulations as an intentional attempt to target non-insularly focused religious objectors, *see* Pls.' Br. at 21-22, 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 in ways that will not undermine the goal of ensuring that women have access to coverage for recommended preventive services without cost-sharing. *See supra* pp. 24-25. This case, therefore, is a far cry from *Lukumi*, 508 U.S. 520, on which plaintiffs rely. In

Lukumi, 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. There is no evidence of a similar targeting of religious practice here. *See Korte*, 2012 WL 6553996, at *8.

The regulations also are generally applicable because they do not pursue their purpose "only against conduct motivated by religious belief." *Lukumi*, 508 U.S. 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 ("The regulations in this case apply to all employers not falling under an exemption, regardless of those employers' personal religious inclinations."). 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) (concluding law that "punishe[d] conduct within its reach without regard to whether the conduct was religiously motivated" was generally applicable).

Plaintiffs maintain that the regulations are not generally applicable because they contain certain categorical exceptions.[13] *See* Pls.' Br. at 19-20. But the existence of "express exceptions for objectively defined categories of [entities]," like the ones plaintiffs reference, 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.[14]

[13] Contrary to plaintiffs' assertion, *see* Pls.' Br. at 24, the religious employer exemption is not discretionary. Any employer that meets the four criteria for the religious employer exemption is not required to cover contraceptive services. *See* HRSA Guidelines, *supra*; *Nebraska v. U.S. Dep't of Health & Human Servs.*, 877 F. Supp. 2d 777, 782 *4 n.1 (D. Neb. 2012).

[14] Plaintiffs' reliance on *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), *see* Pls.' Br. at 20, is misplaced. Those cases addressed policies that created a secular exemption but refused all religious exemptions. *See Blackhawk*, 381 F.3d at 212; *Fraternal Order of Police*, 170 F.3d at 365. The preventive services coverage regulations, in contrast, contain a

The regulations are no different from other neutral and generally applicable laws governing employers that have been upheld against free exercise challenges. *See United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000) (upholding federal employment tax laws because they were "not restricted to [the church] or even religion-related employers generally, and there [was] no indication that they were enacted for the purpose of burdening religious practices"); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991) (upholding law that required employers to verify the immigration status of their employees); *Intercommunity Ctr. for Justice & Peace v. INS*, 910 F.2d 42, 44 (2d Cir. 1990) (same). Because the regulations are neutral laws of general applicability, plaintiffs' free exercise claim is without merit.[15]

2. The regulations do not violate the Establishment Clause

Plaintiffs claim that the regulations violate the Establishment Clause because the religious employer exemption amounts to a denominational preference forbidden by *Larson v. Valente*, 456 U.S. 228 (1982). *See* Pls.' Br. at 23-24. Yet, plaintiffs' argument must fail, as recognized by every court to address a similar challenge to the preventive services coverage regulations. *See, e.g.*, *O'Brien*, 2012 WL 4481208, at *9-11; *see also Diocese of Albany*, 859 N.E.2d at 468-69; *Catholic Charities of Sacramento*, 85 P.3d at 83-87.

"The clearest command of the Establishment Clause is that one religious *denomination* cannot be officially preferred over another." *Larson*, 456 U.S. at 244 (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. 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

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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 Fraternal Order of Police*, 170 F.3d at 365; *see also Conestoga*, 2013 WL 140110, at *9.

[15] 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. 19-28.

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) (upholding RLUIPA because it does not "confer[] . . . privileged status on any particular religious sect" or "single[] out [any] bona fide faith for disadvantageous treatment").

Like the statutes at issue in *Gillette* and *Cutter*, 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) (concluding religious exemption from self-employment Social Security taxes did not violate the Establishment Clause even though "some individuals receive exemptions, and other individuals with identical beliefs do not"); *Diocese of Albany*, 859 N.E.2d at 468-69 (rejecting challenge to similar religious employer exemption under New York law; "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) (upholding tax exemption for all realty owned by an association organized and used exclusively for religious purposes because statute did not "single[] out one particular church or religious group"). 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; *Conestoga*, 2013 WL 140110, at *15.[16] Thus, plaintiffs' Establishment Clause claim must fail.[17]

3. The regulations do not violate the Free Speech Clause

Plaintiffs' free speech claim fares no better. 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 preventive services coverage regulations do not require plaintiffs—or any other person, employer, or entity—to say anything. Plaintiffs' assertion that the regulations require Continuum to provide coverage of education and counseling

[16] 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. In *Weaver*, the court struck down a state law that provided scholarship funds for students to attend college, including religious colleges, but denied such funding to students attending colleges that were determined by the state on an ad hoc basis to be pervasively sectarian. *Id.* at 1250. The court's decision 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. Because the preventive services coverage regulations do not "facially regulate religious issues," *Weaver*, 534 F.3d at 1257, and because the religious employer exemption serves to accommodate—rather than disadvantage—religion, *Weaver* is inapposite. Plaintiffs' reliance on *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), *see* Pls.' Br. at 23, is also misplaced. The statute at issue in that case discriminated among religious denominations by favoring established denominations—i.e., "a bona fide religion, body, or sect"—over less established religions. *Wilson*, 920 F.2d at 1285, 1288. The regulations challenged here do no such thing.

[17] 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 19-28; *Larson*, 456 U.S. at 251-52.

"in favor" of certain contraceptive services, Pls.' Br. at 25-26, demonstrates a fundamental misunderstanding of the regulations' requirements. The regulations require that employers offer to their employees 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 provider. *See, e.g.*, *O'Brien*, 2012 WL 4481208, at *12 (observing that the regulations "do not require funding of one defined viewpoint"). Taken to its logical conclusion, plaintiffs' theory would preclude virtually all government efforts to regulate health coverage, as a medical visit almost invariably involves some communication between the patient and a health care provider, and there may be many instances in which the entity providing the health coverage disagrees with the content of this communication.

The regulations also do not limit what plaintiffs may say. Plaintiffs remain free under the regulations to express whatever views they may have on the use of contraceptive services (or any other health care services) as well as their views on the regulations' requirement that certain group health plans and health insurance issuers cover certain contraceptive services. Indeed, plaintiffs may encourage Continuum's employees not to use contraceptive services. The regulations, thus, regulate conduct, not speech. *See FAIR*, 547 U.S. at 60-62.

Moreover, the conduct required by the regulations is not "inherently expressive," such that it is entitled to First Amendment protection. *Id*. at 66. An employer that provides a health plan that covers contraceptive services, along with numerous other medical items and services, because it is required by law to do so is not engaged in the sort of conduct the Supreme Court has recognized as inherently expressive. *Compare id.* at 65-66 (making space for military recruiters on campus is not conduct that indicates colleges' support for, or sponsorship of, recruiters' message), *with Texas v. Johnson*, 491 U.S. 397, 406 (1989) (flag burning is expressive conduct); *see also Catholic Charities of Sacramento*, 85 P.3d at 89 ("a law regulating health care benefits is not speech"); *Diocese of Albany*, 859 N.E.2d at 465. As recognized by every court to address

the issue, because the regulations do not compel any speech or expressive conduct, they do not violate the Free Speech Clause. *See Conestoga*, 2013 WL 140110, at *16-17; *Autocam*, 2012 WL 6845677, at *8; *Grote*, 2012 WL 6725905, at *9-10; *O'Brien*, 2012 WL 4481208, at *11-13.

II. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM, AND ENTERING AN INJUNCTION WOULD INJURE THE GOVERNMENT AND THE PUBLIC

Although "[t]he loss of First Amendment freedoms," or a violation of RFRA, "for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), plaintiffs have not shown that the challenged regulations violate their First Amendment or RFRA rights, so there has been no "loss of First Amendment freedoms" for any period of time, *id.* In this respect, the merits and irreparable injury prongs of the preliminary injunction analysis merge together, and plaintiffs cannot show irreparable injury without also showing a likelihood of success on the merits, which they cannot do. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012).

Plaintiffs' inexplicable delay in filing this suit further counsels against a finding of irreparable harm. The contraceptive coverage requirement was issued on August 1, 2011. Yet plaintiffs waited more than eighteen months—until February 2013—to bring suit and seek preliminary injunctive relief. Such a substantial delay seriously undermines plaintiffs' claim of irreparable harm. *See, e.g.*, *Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Social & Rehabilitation Servs.*, 31 F.3d 1536, 1544-45 (10th Cir. 1994) (recognizing that delay undermines claim of irreparable harm); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (denying preliminary injunction and noting that delay of forty-four days after final regulations were issued was "inexcusable").

In contrast, 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 Continuum'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 Continuum is a for-profit, secular employer and thus cannot discriminate on the basis of religion in hiring, many of its employees may not share Mr. Briscoe's 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. The female employees of Continuum (and covered spouses and dependents) would have more difficulty accessing contraceptive services, placing them at greater risk of negative health consequences for themselves and their newborn children and putting them at a competitive disadvantage in the workforce. *See* IOM REP. at 20, 102-04; 77 Fed. Reg. at 8728; *see also Stormans*, 586 F.3d at 1139 (vacating preliminary injunction and noting that "[t]here is a general public interest in ensuring that all citizens have timely access to lawfully prescribed medications"). Any potential harm to plaintiffs resulting from plaintiffs' desire not to provide coverage for certain recommended contraceptive services is thus outweighed by the harm an injunction would cause to the public and the government.

CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' motion for a temporary restraining order.

Respectfully submitted this 21st day of February, 2013,

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on February 21, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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and I hereby certify that I have mailed or served the document or paper to the following non-CM/ECF participants in the manner (mail, hand-delivery, etc.) indicated by nonparticipant's name:

None.

/s/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS