IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUTOCAM CORPORATION, *et al.*	)	
Plaintiffs,	)	
v.	)	Case No. 1:12-cv-01096-RJJ
KATHLEEN SEBELIUS, *et al.*	)	
Defendants.	)	

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Relying largely on claims this Court has already deemed unlikely to succeed, plaintiffs – two manufacturing companies and their shareholders – seek to strike down regulations that are intended to ensure that women have access to health coverage, without cost-sharing, for certain preventive services that medical experts have deemed necessary for women's health and well-being. Plaintiffs' challenge rests largely on the theory that a for-profit, secular corporation established to engage in manufacturing can claim to exercise a religion and thereby avoid the reach of laws designed to regulate commercial activity. This cannot be. Indeed, the Supreme Court and this Court have 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.'" *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012) ("*Opinion Denying Prelim. Inj.*") (quoting *United States v. Lee*, 455 U.S. 252, 261 (1982)), *motion for injunction pending appeal denied*, No. 12-2673 (6th Cir. Dec. 28, 2012), *reconsideration denied*, No. 12-2673 (6th Cir. Dec. 31, 2012). Nor can such a company's owners or officers eliminate the legal separation provided by the corporate form to impose their personal religious beliefs on the corporation's employees. To hold otherwise, this Court has emphasized, would permit for-profit, secular companies and their shareholders and officers to become laws unto themselves, claiming countless exemptions from an untold number of general laws designed to improve the health and well-being of individual employees based on an infinite variety of alleged religious beliefs. 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. *Id.* This Court, therefore, should once again reject plaintiffs' effort to bring about an unprecedented expansion of constitutional and statutory free exercise rights.

Indeed, all of plaintiffs' claims are subject to dismissal for failure to state a claim upon which relief may be granted. With respect to plaintiffs' Religious Freedom Restoration Act ("RFRA") claim, none of the plaintiffs can show, as each must, that the preventive services coverage regulations impose a substantial burden on their religious exercise. This Court has already articulated the reasons why. *Id.* at *6-8. Autocam is a for-profit, secular employer, and a secular entity - by definition – does not exercise religion within the meaning of the Free Exercise Clause or RFRA. Indeed, this Court expressed grave doubts about Autocam's claim, *id.* at *4, and the only courts to address the question in this context have 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. Nov. 19, 2012), *motion for injunction pending appeal denied*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012) ("*Hobby Lobby Tenth Circuit Order*"), *application for injunction pending appellate review denied*, 133 S. Ct. 641 (Dec. 26, 2012) (Sotomayor, J., in chambers); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110, *8 (E.D. Pa. Jan. 11, 2013) (same), *motion for stay pending appeal denied*, No. 13-1144 (3d Cir. Feb. 7, 2013) ("*Conestoga Third Circuit Order*") (Ex. 1). The Kennedys' allegations of a substantial burden on their own personal 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. The Kennedys are neither. It is well established that a corporation and its shareholders and officers are wholly separate entities, and the Court should not permit the Kennedys to eliminate that legal separation to impose their personal religious beliefs on the corporate entity's group health plan or its employees. Autocam's owners and shareholders

cannot use the corporate form alternatively as a shield and a sword, depending on what suits them in any given circumstance.

Furthermore, even if a secular entity could exercise religion, the regulations still do not substantially burden the company's or its owners' exercise of religion for an independent reason: Any burden caused by the regulations is simply too attenuated to qualify as a substantial burden. *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *7. Just as employees of Autocam have always retained the ability to choose whether to procure contraceptive services by using the salaries the company pays them or by using some combination of their salaries and other benefits provided by Autocam, 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. Autocam and its shareholders remain free to advocate against employees' use of contraceptive services (or any other services). Ultimately, an employee's health care choices remain those of the employee, not Autocam's or Autocam's shareholders. Finally, even if the preventive services coverage regulations were deemed to impose a substantial burden on either 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 do so 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). As this Court correctly concluded, 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. *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *4-5. Nor do the regulations violate the Establishment Clause by selectively burdening plaintiffs. Plaintiffs did not rely on this claim in seeking preliminary injunctive relief, and it is meritless. Furthermore, the regulations do not violate plaintiffs' free speech rights. This Court has already held that the regulations compel conduct, not speech, and that conduct is not inherently expressive so as to warrant First Amendment protection. *Id.* at *8.

For these reasons, and those set out below, the Court should grant defendants' motion to dismiss this case in its entirety.

BACKGROUND

Defendants have already set out, and the Court is well aware of, the statutory, regulatory, and factual background related to this case. *See* Defs.' Br. in Opp'n to Pls.' Mot. for Prelim. Inj. 4-7, Nov. 9, 2012, ECF No. 17 ("Defs.' PI Opp'n"); *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, *1-4. Defendants will not repeat it here, except to summarize the proceedings thus far.[1]

Plaintiffs brought this action to challenge the lawfulness of the preventive services coverage regulations to the extent that they require the health coverage Autocam makes available to its employees to cover certain recommended contraceptive services. Plaintiffs filed suit on October 8, 2012. *See* Compl., ECF No. 1. They moved for a preliminary injunction on October 10, 2012, relying on their RFRA, Free Exercise Clause, and Free Speech Clause claims. *See* Pls.' Br. Supporting Mot. for Prelim. Inj. 3-4, Oct. 10, 2012, ECF No. 9.

This Court denied plaintiffs' motion for a preliminary injunction. The Court held, in relevant part, that plaintiffs were unlikely to succeed on the merits of their RFRA, Free Exercise,

[1] Defendants generally will refer to the two company plaintiffs as a single entity, "Autocam," and to the individual plaintiffs collectively as "the Kennedys."

and Free Speech claims. *Opinion Denying Prelim. Inj.*, 2012 WL 6845677 at *4-9. Plaintiffs have appealed the Court's ruling as to their RFRA claim.[2] They also moved the Sixth Circuit Court of Appeals for an injunction pending appeal, which the Sixth Circuit denied. *Autocam Corp. v. Sebelius*, No. 12-2673, Order (6th Cir. Dec. 28, 2012) ("*Autocam Sixth Circuit Order*").[3] Shortly thereafter, plaintiffs moved for reconsideration of the Sixth Circuit's denial of an injunction pending appeal, which was also denied. *Autocam Corp. v. Sebelius*, No. 12-2673, Order (6th Cir. Dec. 31, 2012).

On February 5, 2013, plaintiffs dismissed their First Amendment Expressive Association claim (Count VI) and all their Administrative Procedure Act claims (Counts IX through XII). Notice of Dismissal of Pls.' Counts VI and IX – XII, ECF No. 48. In their remaining claims, plaintiffs contend that the preventive services coverage regulations violate RFRA and the First Amendment's Free Exercise, Establishment, and Free Speech Clauses.

STANDARD OF REVIEW

Defendants move to dismiss the Complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Under this Rule, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Bell*

[2] Plaintiffs' opening brief before the Sixth Circuit appears to address this Court's denial of preliminary relief as to RFRA only. *See* Appellants' Principal Br., Feb. 11, 2013, *Autocam Corp. v. Sebelius*, No. 12-2673.

[3] The Sixth Circuit did, however, grant expedition of the appeal. *See Sixth Circuit Order*.

Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)); *U.S. Citizens Ass'n v. Sebelius*, -- F.3d --, Nos. 11-3327 & 11-3798, 2013 WL 380342, *5 (6th Cir. Feb. 1, 2013).

ARGUMENT

I. THE COURT SHOULD DISMISS PLAINTIFFS' RELIGIOUS FREEDOM RESTORATION ACT CLAIM

A. The Preventive Services Coverage Regulations Do Not Substantially Burden Any Exercise Of Religion By For-Profit, Secular Companies And Their Owners

This Court has already held that plaintiffs are unlikely to establish a substantial burden on any exercise of religion. *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *4, 6-8. A Sixth Circuit motions panel agreed, citing this Court's "reasoned opinion" as well as the Supreme Court's denial of an injunction pending appeal in *Hobby Lobby Stores, Inc.*, 133 S. Ct. 641. *Sixth Circuit Order* at 2. This Court's reasons for denying preliminary injunctive relief warrant dismissal of plaintiffs' RFRA claim.

i. There is no substantial burden on Autocam because secular, for-profit corporations do not exercise rights under RFRA

Under RFRA, 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, as this Court has recognized, plaintiffs have not shown that the regulations substantially burden any religious exercise. *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *4, 6-8; *see also* Defs.' PI Opp'n at 9-18. Any suggestion that Autocam "exercise[s] . . . religion" with the meaning of RFRA cannot be reconciled with Autocam's self-described status

as a "for-profit, secular employer[]." Compl. ¶ 155. 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 Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 83 (D.D.C. 2002), *aff'd on other grounds*, 333 F.3d 156 (rejecting an organization's RFRA claim because "nowhere in Plaintiff's Complaint does it contend that it is a religious organization. Instead, [Plaintiff] defines itself as a 'non-profit charitable corporation,' without any reference to its religious character or purpose.").

Because Autocam 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); *see also, e.g.*, *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (stating that 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 . . . .") (citations and quotation marks omitted) (emphasis added).

RFRA was intended only to reinstate the pre-*Smith* compelling interest test, 42 U.S.C. § 2000bb-1(b), *not* to *expand* the scope of that test. The Sixth Circuit has explained, in the parallel RLUIPA context:

> The U.S. Supreme Court has not yet defined "substantial burden" as it applies to RLUIPA. Neither does the statute itself contain any definition of the term. The statute's legislative history, however, indicates that the "term 'substantial burden' as used in this Act is *not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise*." 146 Cong. Rec. S7774–01, 7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy).

Living Water Church of God v. Charter Twp. of Meridian, 258 Fed. App'x 729, 733-34 (6th Cir. 2007) (emphasis added). In other words, Supreme Court precedent should guide judicial interpretation of the phrase "exercise of religion" contained in RLUIPA and RFRA.[4] *Id.*; *see also Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003) ("Congress defined the term 'exercise of religion' only as meaning 'the exercise of religion under the First Amendment to the Constitution.'"). There is no authority – much less from the Supreme Court – to support plaintiffs' assertion "that a secular, for-profit corporation has a First Amendment right of free exercise of religion." *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *4; *see also, e.g.*, *Anselmo v. Cnty. of Shasta*, 873 F. Supp. 2d 1247, 1264 (E.D. Cal. 2012) ("Although corporations and limited partnerships have broad rights, the court has been unable to find a single RLUIPA case protecting the religious exercise rights of a n on-religious organization such as Seven Hills."). This is powerful evidence that Congress did not intend that a secular, for-profit corporation could engage in any "exercise of religion" under RFRA. Accordingly, the two other district courts and one other circuit court motions panel to have reached the issue in cases like

[4] RFRA expressly incorporates the definition of "exercise of religion" contained in RLUIPA. 42 U.S.C. § 2000bb-2(4) ("[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title."); *id.* § 2000cc-5(7)(A) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.").

this one have rejected claims nearly identical to Autocam's. *See Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d at 1291-92; *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *8 (E.D. Pa. Jan. 11, 2013); *Conestoga Third Circuit Order*, Ex. 1 at 3. This Court should continue to do the same.

Furthermore, 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 cannot permissibly discriminate on the basis of religion in hiring or firing their employees or otherwise establishing the terms and conditions of their 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 . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [a corporation] of its activities." *Id.* § 2000 e-1(a). It is clear that Autocam does not qualify as a "religious corporation"; it is for-profit, it engages in manufacturing, and it alleges no religious purpose or affiliation. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007).

It would be extraordinary to conclude that Autocam is not a "religious corporation" under Title VII (and it clearly is not) and thus cannot discriminate on the basis of religion in hiring or firing or otherwise establishing the terms and conditions of employment, 42 U.S.C. § 2000e-1(a), but nonetheless "exercise[s] . . . r eligion" under 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

[5] Indeed, such a conclusion would not only expand the scope of RFRA in an unprecedented way, but would also 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 to obtain 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).

well-being (including Title VII). A host of laws and regulations would be subject to attack. *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *7. Moreover, any secular company would have 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.

It is significant that Autocam elected to organize itself 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.'" *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *7 (quoting *Lee*, 455 U.S. at 261); *see also McClure v. Sports & Health Club*, 370 N.W.2d 844, 853 (Minn. 1985) ("By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs."). Having chosen this path, the corporation may not impose its owners' personal religious beliefs on its employees (many of whom may not share, or even know of, the owners' beliefs). 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). Any burden is therefore caused by the company's "choice to enter into a

commercial activity." *Id.*; *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 635-36 (1984) (O'Connor, J., concurring in part and concurring in judgment).[6]

ii. The regulations do not substantially burden the Kennedys' religious exercise because the regulations apply only to Autocam, a separate legal entity

The preventive services coverage regulations also do not substantially burden the Kennedys' religious exercise, for reasons this Court recognized in its prior ruling. 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. The Kennedys are neither. The Kennedys nonetheless claim that the regulations substantially burden their religious exercise because the regulations require the group health plans sponsored by their for-profit secular companies to provide health insurance that includes contraceptive coverage.

But 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 must be imposed on the plaintiff himself. "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

[6] A for-profit, secular employer like Autocam 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.").

governmental action." *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring); *see also Living Water Church of God*, 258 Fed. App'x at *734 ("In the 'Free Exercise' context, the Supreme Court has made clear that the 'substantial burden' hurdle is high . . . ."). Here, any burden on the Kennedys' religious exercise results from obligations that the regulations impose on a legally separate, secular entity.[7]

The Kennedys' theory boils down to the claim that what's done to the company (or group health plans sponsored by the company) is also done to its owners. But, as a legal matter, that is simply not so, as the very purpose of incorporation "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). "Standing between the Kennedy Plaintiffs and the decisions some Autocam employees make to procure contraceptive services are not only the independent decisions of an employee and the employee's health care provider, but also the corporate form itself." *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *7. The Kennedys should not be permitted to eliminate that legal separation only when it suits them to impose their personal religious beliefs on Autocam's group health plans or its large number of employees. *Id.* ("The law protects th[e] separation between the corporation and its owners for many worthwhile purposes. Neither the law nor equity can ignore the separation when assessing claimed burdens on the individual owners' free exercise of religion caused by requirements imposed on the corporate entities they own.").

Although the preventive services coverage regulations do not require the Kennedys to provide contraceptive services directly, their complaint appears to be that, through *Autocam*'s

[7] 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, Autocam is a legally separate entity from the Kennedys.

group health plans and the benefits *Autocam* provides to employees, the Kennedys will facilitate conduct (the use of contraceptives) that they find objectionable. But this complaint has no limits, and its necessary implications are "troubling." *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *7. A company provides numerous benefits to its employees, including a salary, and by doing so in some sense facilitates whatever use its employees make of those benefits. But the Kennedys have no right to control the choices of their company's employees, many of whom (having been hired, presumably, without regard to their religious views) may not share the Kennedys' religious beliefs, when making use of their benefits. These employees have a legitimate interest in access to the preventive services coverage made available under the challenged regulations. More generally, if an owner's or shareholder's religious beliefs were automatically imputed to the company, any secular company with a religious owner or shareholder would be permitted to discriminate against the company's employees on the basis of religion in establishing the terms and conditions of employment. 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 hiring or firing its employees or otherwise establishing the terms and conditions of their employment, 42 U.S.C. § 2000e-1(a).

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

Even assuming that Autocam exercises religion within the meaning of RFRA and that the legal separation created by the corporate form can be pierced when the corporation or its owners want it to be, the regulations still do not substantially burden plaintiffs' religious exercise. For reasons this Court has recognized, any burden imposed by the regulations is too attenuated to satisfy RFRA's substantial burden requirement. Indeed,

> [T]he [regulatory] requirement differs little in substance from Autocam's current practice of providing undesignated cash that employees are free to apply to uncovered health expenses – including contraception – of their choosing. In particular, the Autocam Plaintiffs already give each employee up to $1500 for a health savings account . . . .
>
> Implementing the challenged [regulations] will keep the locus of decision-making in exactly the same place: namely, with each employee, and not the Autocam plaintiffs. It will also involve the same economic exchange at the corporate level: employees will earn a wage or benefit with their labor, and money originating from the Autocam Plaintiffs will pay for it . . . . [I]n both situations, the Autocam Plaintiffs are responsible to pay wages or benefits that their employees earn; and in neither situation do the wages and benefits earned pay – directly or indirectly – for contraception products and services unless an employee makes an entirely independent decision to purchase them.

Opinion Denying Prelim. Inj., 2012 WL 6845677, at *6; *see also, e.g.*, *Hobby Lobby Tenth Circuit Order*, 2012 WL 6930302, at *3 (deeming it unlikely that the Tenth Circuit "will extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship"); *Conestoga Third Circuit Order*, Ex. 1 at 3 (agreeing with the district court that any burden on the corporation's owners' religious exercise would be "indirect" and "too attenuated" to be considered "substantial").

The Sixth Circuit has emphasized that "a 'substantial burden' is a difficult threshold to cross." *Living Water Church of God*, 258 Fed. App'x at 736, and this Court soundly concluded that "[p]laintiffs are unlikely to cross it," *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *6. Because the regulations do not substantially burden any religious exercise by plaintiffs, the regulations do not violate RFRA, and Count VIII should be dismissed.

B. Even If There Were A Substantial Burden, The Preventive Services Coverage Regulations Serve Compelling Governmental Interests And Are The Least Restrictive Means To Achieve Those Interests

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

Even if plaintiffs could demonstrate a substantial burden on their religious exercise, they

would not prevail because the regulations are justified by two compelling governmental interests, and are the least restrictive means to achieve those interests. *See also* Defs.' PI Opp'n at 18-29. First, "the 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 Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998) (concluding that "public health is a compelling government 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.") (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992)).

There can be no question that this compelling interest in the promotion of public health is furthered by the regulations at issue here. As explained in the interim final regulations, 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 . . . a nd 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*, 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." 468 U .S. at 626. 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 C ong. Rec. S12265-02, S12274. Accordingly, this disproportionate burden on women creates "financial barriers . . . that prevent women from achieving health and well-being for themselves and their families." IOM REP. at 20. Thus, Congress intended to equalize health care for women and men in the area of preventive care, including the provision of family planning services for women. *See, e.g.*, 155 C ong. Rec. S12265-02, S12271; *see also* 77 Fed. Reg. at 8728. 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 v. Superior Court*, 85 P.3d 67, 92-93 (Cal. 2004).

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

The regulations, moreover, are the least restrictive means of furthering the government's dual 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 S. Ridge Baptist Church v. Indus. Comm'n*, 911 F.2d 1203, 1206 (6th Cir. 1990) (describing the least restrictive means test as "the extent to which accommodation of the defendant would impede the state's objectives"); *United States v. Schmucker*, 815 F.2d 413, 417 (6th Cir. 1987) (same); *see also, 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.).

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 Autocam and similarly-situated companies from the obligation to make available to its employees a health plan that covers contraceptive services would remove these employees from the very protections that were intended to further the compelling interests recognized by the government. *See, e.g., Graham v. Comm'r of Internal Revenue Serv.*, 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."). Each woman who wishes to

use contraceptives and who works for Autocam or a similarly-situated employer (and each woman who is a covered spouse or dependent of an employee) – or, for that matter, any woman in such a position in the future – is significantly disadvantaged when her employer chooses to provide a plan that fails to cover such services. As revealed by the IOM Report, those female employees (and covered spouses and dependents) 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 the women themselves and their potential 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.[8] These harms would befall female employees (and covered spouses and dependents) who do not share their employer's religious beliefs and might not have been aware of those beliefs when they joined the ostensibly secular company. Autocam's desire not to make available a health plan that permits such individuals to exercise their own choice as to contraceptive use must yield to the Government's compelling interest in avoiding the adverse and unfair consequences that would be suffered by such individuals as a result of the company's decision. *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"); *S. Ridge Baptist Church*, 911 F.2d at 1209, 1211 n.6.

[8] Plaintiffs' allegations regarding the pre- and postnatal care available to Autocam employees, *see* Compl. ¶ 38, do not advance plaintiffs' RFRA claim. As explained in the IOM Report, unwanted or unplanned pregnancies are associated with adverse health outcomes for a variety of reasons unrelated to a lack of access to pre- and post-natal care. IOM REP. at 103. Thus, access to such care, while certainly desirable, does not fully address the compelling interest in women's and infants' health underlying the preventive services coverage regulations. And access to pre- and postnatal care does little to advance the government's compelling interest in gender equality. Nor does the care available to Autocam's employees reveal anything about care provided for employees of similarly-situated employers.

Should plaintiffs be permitted to extend the protections of RFRA to any employer whose owners or shareholders object to the operation of 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; *see also S. Ridge Baptist Church*, 911 F.2d at 1211, 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 preventive services coverage 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. Indeed, women who receive their health coverage through corporations like Autocam would be subject to negative health and employment outcomes because they had obtained employment with a company that imposes its owners' religious beliefs on their health care needs. *See* 77 Fed. Reg. at 8728.

Thus, even if there were a substantial burden, the regulations serve compelling governmental interests and are the least restrictive means of achieving those interests, and Count VIII should accordingly be dismissed.

II. THE COURT SHOULD DISMISS PLAINTIFFS' FIRST AMENDMENT CLAIMS

A. The Regulations Do Not Violate The Free Exercise Clause

As explained above, a for-profit, secular employer like Autocam does not engage in any exercise of religion protected by the First Amendment. But even if it did, the preventive services

coverage regulations do not violate the Free Exercise Clause because – as this Court and numerous others have held – the regulations are neutral laws of general applicability. *Opinion Denying Prelim. Inj.*, 2012 WL 6845677 at *5; *see also* Defs.' PI Opp'n at 29-32.

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; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The challenged regulations are neutral and generally applicable because they "do[] not target a particular religion or religious practice or have as [their] objective the interference with a particular religion or religious practice." *Opinion Denying Prelim. Inj.*, 2012 WL 6845677 at *5. Rather, the regulations "appl[y] to all non-exempt, non-grandfathered plans," and, to the extent the regulations burden on plaintiffs' religious exercise, they do so only "incidentally." *Id.*

The Complaint suggests two ways in which the regulations are not neutral and generally applicable, neither of which has merit. First, plaintiffs aver that the regulations contain "categorical exemptions." Compl. ¶ 111. But as this Court and numerous others have recognized, the existence of categorical exemptions "does not mean that the law does not apply generally." *Opinion Denying Prelim. Inj.*, 2012 WL 6845677 at *5 (citing *United States v. Lee*, 455 U.S. 252, 261 (1982)); *see Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991). The regulations "appl[y] to all non-grandfathered, non-exempt plans, regardless of employers' religious persuasions, and this is enough to create a neutral law of general application." *Opinion Denying Prelim. Inj.*, 2012 WL 6845677 at *5.

Second, plaintiffs claim that defendants have created a system of individualized exemptions. Compl. ¶ 111. To warrant strict scrutiny, however, a system of individualized exemptions must be one that enables the government to make a subjective, case-by-case inquiry of the reasons for the relevant conduct, and the government must utilize that system to grant exemptions for secular reasons but not for religious reasons. *Smith*, 494 U.S. at 884. Plaintiffs point to no such system with respect to the challenged regulations, and there is none. Plaintiffs incorrectly suggest that HHS' purported authority to grant "waivers," Compl. ¶ 57, 101, permits individualized exemptions from the challenged regulations. Plaintiffs appear to reference the annual limits waiver program. *See* 42 U.S.C. § 300gg-11; 45 C.F.R. § 147.126. The ACA's annual limits provision restricts annual dollar limits on essential health benefits provided by health insurance issuers and group health plans. *See id.* The Secretary of HHS had the authority to waive these restrictions for plans if compliance "would result in a significant decrease in access to benefits under the plan or health insurance coverage or would significantly increase premiums for the plan or health insurance coverage." 45 C.F.R. § 147.126(d)(3). These waivers are *not* related to the challenged regulations, however, and those non-exempt, non-grandfathered plans that received such a waiver must provide the required preventive services coverage.

Virtually every court to consider similar claims has agreed with this Court's conclusions. *See Conestoga Third Circuit Order*, Ex. 1 at 3; *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-CV-476 (CEJ), 2012 WL 4481208, *7-9 (E.D. Mo. Sept. 28, 2012), *stay pending appeal granted on other grounds*, No. 12-3357 (8th Cir. Nov. 28, 2012); *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *6-9, *18; *Grote Indus., LLC v. Sebelius*, No. 4:12-cv-00134-SEB-DML, 2012 WL 6725905, *7-8 (S.D. Ind. Dec. 27, 2012), *injunction pending appeal granted on other grounds*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013); *Hobby Lobby*

Stores, Inc., 870 F. Supp. 2d at 1287-91; *see also Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 468-69 (N.Y. 2006); *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67, 81-87 (Cal. 2004); Defs.' PI Opp'n at 29-32.

Because the regulations are neutral and generally applicable, and therefore do not violate the Free Exercise Clause, Counts I, II, III, and VII should be dismissed.

B. The Regulations Do Not Violate The Establishment Clause

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). A law that discriminates among religions by "aid[ing] one religion" or "prefer[ring] one religion over another" is subject to strict scrutiny. *Id*. at 246 (quotations omitted); *see also Olsen v. DEA*, 878 F.2d 1458, 1461 (D.C. Cir. 1989). Although plaintiffs' theory is difficult to discern, they appear to claim that the preventive services coverage regulations violate the Establishment Clause by allegedly imposing a "selective burden on Plaintiffs" and "vest[ing] HRSA with unbridled discretion" as regards the "religious employer" exemption. Compl. ¶¶ 135-37. These contentions lack merit.

Plaintiffs' allegation that they are selectively burdened by the regulations mirrors their Free Exercise argument that the regulations are not generally applicable. *See Lukumi*, 508 U.S. at 543 (explaining that a generally applicable law does not "in a selective manner impose burdens only on conduct motivated by religious belief"); *see, e.g.*, *O'Brien*, 2012 WL 4481208, at *8. That argument fails, for reasons explained already. *See supra* at 19-22; *Opinion Denying Prelim. Inj.*, 2012 WL 6845677 at *5.

Likewise, plaintiffs miss the mark with their conclusory assertions about HRSA and the "religious employer" exemption. Indeed, plaintiffs misunderstand the regulations when they

assert – throughout the Complaint – that the regulations provide HRSA "unbridled discretion in deciding whether to allow exemptions to some, all, or no organizations meeting the definition of 'religious employers'" or to individuals. Compl. ¶¶ 93, 125, 130-31, 136-37, 154-55. That is incorrect. The plan of any employer that meets the criteria for the "religious employer" exemption is not required to cover contraceptive services. *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Feb. 6, 2013); *see, e.g.*, *Grote*, 2012 WL 6725905, at *8. To be sure, secular, for-profit corporations such as Autocam do not meet these criteria, and therefore do not benefit from the "religious employer" exemption, Compl. ¶ 53, but that is not itself a violation of the Establishment Clause:

> Accommodations of religion are possible because the legislative line-drawing to which the plaintiffs object, between the religious and the secular, is constitutionally permissible. The religious employer exemption, by necessity, distinguishes between religious and secular employers, and HHS has selected a logical bright line between the two . . . . I f the Constitution required Congress to provide exemptions for such employers whenever an exemption was also allowed for churches organized specifically for the purpose of promoting a religion, the accommodation would swallow the rule.

O'Brien, 2012 WL 4481208, at *10; *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *15 ("A statute does not violate the Establishment Clause merely because it distinguishes between secular and religious organizations."); *see also Catholic Charities of Diocese of Albany*, 859 N.E.2d at 459; *Catholic Charities of Sacramento*, 85 P.3d at 67.[9]

Because plaintiffs fail to state a plausible claim under the Establishment Clause, Count VI of the Complaint should be dismissed.

[9] 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* at 14-19.

C. The Regulations Do Not Violate The Free Speech Clause

The right to freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights* ("FAIR"), 547 U.S. 47, 61 (2006). Plaintiffs have already advanced their Free Speech theory in this case; this Court soundly rejected it as "not persuasive." *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *8; *see also* Defs.' PI Opp'n at 35-37. Every court to rule on similar claims has agreed. *See O'Brien*, 2012 WL 4481208, at *11-13 (dismissing identical Free Speech claim); *Conestoga Third Circuit Order*, Ex. 1 at 3 (agreeing with the district court's finding that plaintiffs' Free Speech claim had "little likelihood of success" because the regulations affect conduct, not speech); *Grote*, 2012 WL 6725905, at *8-10 (same).

The preventive services coverage regulations do not require plaintiffs – or any other person, employer, or other entity – to say anything. Like the statute at issue in *FAIR*, "the contraceptive coverage requirement 'regulates conduct, not speech. It affects what [employers] must *do* . . . not what they may or may not say.'" *Opinion Denying Prelim. Inj.*, 2012 WL 6845677, at *8 (quoting *FAIR*, 547 U.S. at 60). And, as in *FAIR*, "the contraceptive coverage requirement differs from cases concerning compelled-speech violations, in which the violations 'resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate.'" *Id.* (quoting *FAIR*, 547, U.S. at 63). The conduct required by the regulations is not "inherently expressive," such that it is entitled to First Amendment protection. *Id.*; *see FAIR*, 547 U.S. at 66; *see also O'Brien*, 2012 WL 4481208, at *12; *Conestoga Third Circuit Order*, Ex. 1 at 3-4. Thus, plaintiffs' Free Speech clause claim fails, and Counts VI and VII of the Complaint should be dismissed.[10]

[10] To the extent Count VII invokes the Free Exercise Clause, it fails for reasons explained earlier. *Supra* at 19-22.

CONCLUSION

For the forgoing reasons, this Court should grant defendants' motion to dismiss this case in its entirety.

Respectfully submitted this 15th day of February, 2013,

STUART F. DELERY
Principal Deputy Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

PATRICK A. MILES, JR.
United States Attorney

JENNIFER RICKETTS
Director, Federal Programs Branch

SHEILA M. LIEBER
Deputy Director

/s/ Jacek Pruski
JACEK PRUSKI (CA Bar. No. 277211)
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W.
Washington, D.C. 20001
Tel: (202) 616-2035; Fax: (202) 616-8470
Email: jacek.pruski@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Jacek Pruski
JACEK PRUSKI

Exhibit 1

Conestoga Third Circuit Order

January 29, 2013
CCO-046-E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13-1144

CONESTOGA WOOD SPECIALITIES CORPORATION;
NORMAN HAHN; NORMAN LEMAR HAHN;
ANTHONY H. HAHN; ELIZABETH HAHN; KEVIN HAHN,
Appellants

v.

SECRETARY OF THE UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES
DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF
THE TREASURY;UNITED STATES DEPARTMENT OF HEALTH AND HUMAN
SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES
DEPARTMENTOF THE TREASURY
(E.D. Pa. No. 5-12-cv-06744)

Before: RENDELL, JORDAN and GARTH, Circuit Judges

OPINION/ORDER RE EXPEDITED MOTION FOR INJUNCTION

Before us is a motion for a stay pending appeal, which, in our Court, is an extraordinary remedy. *See United States v. Cianfrani*, 573 F.2d 835, 846 (3d Cir. 1978). This case involves a challenge to the enforcement provisions of the Patient Protection and Affordable Care Act (the "ACA") and related regulations that require Conestoga to include coverage for contraception – including abortifacients and sterilization – in its employee health insurance plan. *See* 42 U.S.C. § 300gg-13(a)(4); 77 Fed. Reg. 8725 (Feb. 15, 2012). In essence, Plaintiffs Conestoga Wood Specialties Corporation, a secular, for-profit corporation, and five of its shareholders, the Hahns, claim that providing the mandated coverage would violate their religious beliefs. Plaintiffs brought suit in the Eastern District of Pennsylvania and filed a motion for a preliminary injunction to enjoin enforcement of the regulations. After holding an evidentiary hearing, the District Court issued a 34-page opinion on January 11, 2013, detailing its reasons for denying injunctive relief to Plaintiffs. *See Conestoga Wood Specialties Corp. v. Sebelius*, --- F. Supp. 2d ---, No. 12-6744, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013). Plaintiffs subsequently filed a motion for a stay pending appeal in this Court.

As Judge Jordan notes, the standard for obtaining a stay pending appeal is essentially the same as that for obtaining a preliminary injunction. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). To qualify for preliminary injunctive relief, a party must demonstrate "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). Therefore, in assessing the present motion for a stay pending appeal, we must consider the same four factors that the District Court considered after an evidentiary hearing, ultimately concluding that preliminary relief was not warranted.

Such stays are rarely granted, because in our Court the bar is set particularly high. Indeed, we have said that an "injunction shall issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief." *N.J. Hosp. Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995) (citation omitted). In other words, "[a] plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." *NutraSweet Co. v. Vit-Mar Enter., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999). This standard distinguishes the present case from most of the cases cited by Judge Jordan in his dissent, in which those courts applied a "sliding scale" standard, whereby preliminary injunctive relief may be granted upon particularly strong showing of one factor. In those cases, "[t]he more the balance of harms tips in favor of an injunction, the lighter the burden on the party seeking the injunction to demonstrate that it will ultimately prevail." *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *2 (7th Cir. Dec. 28, 2012).[1]

[1] *See also Grote v. Sebelius*, --- F.3d ---, 13-1077, 2013 WL 362725, at *3 (7th Cir. Jan. 30, 2013) (adopting the reasoning of *Korte* and applying the same "sliding scale" standard); *Monaghan v. Sebelius*, --- F. Supp. 2d ---, No. 12-15488, 2012 WL 6738476, at *3 (E.D. Mich. Dec. 30, 2012) (applying a standard that "[c]ourts . . . may grant a preliminary injunction even where the plaintiff fails to show a strong or substantial probability of success on the merits, but where he at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued"); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459, slip op. at 8 (W.D. Mo. Dec. 20, 2012) (applying a sliding scale standard and finding that "the balance of equities tip strongly in favor of injunctive relief in this case and Plaintiffs have raised questions concerning their likelihood of success on the merits that are so serious and difficult as to call for more deliberate investigation"); *Tyndale House Publishers, Inc. v. Sebelius*, --- F. Supp. 2d ---, No. 12-1635, 2012 WL 5817323, at *4 (D.D.C. Nov. 16, 2012) (applying a sliding scale standard by which "if the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor").

To be sure, the law requires us to balance the factors against each other; however Judge Jordan overstates the significance of *Constructors Association of Western Pennsylvania v. Kreps*, 573 F.2d 811 (3d Cir. 1978), in favor of applying a less stringent standard. The fact of the matter is that this Court has not sanctioned the "sliding scale" standard employed in other courts of appeals. Accordingly, we must examine each factor and determine whether Plaintiffs have met their burden as to each element.

We agree with the District Court's ruling that Plaintiffs have not met their burden in demonstrating likelihood of success on the merits. We find the District Court's reasoning persuasive and we incorporate it by reference herein. In short, it determined that Plaintiffs had not demonstrated their likelihood of success on the merits of their claims under either the First Amendment or the Religious Freedom Restoration Act ("RFRA"). *Conestoga Wood Specialties Corp.*, 2013 WL 140110 at *18. The District Court determined that, as a secular, for-profit corporation, Conestoga has no free exercise rights under the First Amendment, *id.* at *6-8, and is not a "person" under the RFRA, *id.* at *10.

Concerning the Hahns' rights under the Free Exercise Clause of the First Amendment, the District Court concluded that the ACA regulations are generally applicable because they are not specifically targeted at conduct motivated by religious belief, and are neutral because the purpose of the regulations is to promote public health and gender equality instead of targeting religion. *Id.* at *8-9. Because a neutral law of generally applicability need only be "rationally related to a legitimate government objective" to be upheld – and the government demonstrated that the regulations are just that – the District Court concluded that the Hahns' challenge to the regulations under the Free Exercise Clause were not likely to succeed. *Id.* (citing *Combs v. Home-Ctr. Sch. Dist.*, 540 F.3d 231, 243 (3d Cir. 2008)). Likewise, the District Court found that the Hahns' claims under the RFRA were not likely to succeed because the burden imposed by the regulations does not constitute a "substantial burden" under the RFRA. While this question presents a close call, *id.* at *12, the District Court ultimately concluded that any burden imposed by the regulations would be too attenuated to be considered substantial and that any burden on the Hahns' ability to exercise their religion would be indirect, *id.* at *14.

Furthermore, regarding Plaintiffs' claim under the Establishment Clause of the First Amendment, the District Court found that the "religious employer exemption" of the ACA does not violate the Establishment Clause because it applies equally to organizations of every faith and does not favor one denomination over another, and does not create excessive government entanglement with religion. *Id.* at *15-16. Finally, the District Court found that Plaintiffs' Free Speech claim had little likelihood of success because the ACA regulations "affect[] what [Plaintiffs] must *do* . . . not what they may or may not say," *id.* at *17 (quoting *Rumsfeld v. Forum for Academic and Institutional*

Rights, 547 U.S. 47, 60 (2006)), and the regulations do not interfere with Plaintiffs' expression of their opinions regarding contraceptives.

While we note that the issues in this case have not been definitively settled by this Court or the Supreme Court, we nonetheless find that Plaintiffs failed to prove a "reasonable likelihood of success on the merits," as required by law. *See Assoc. N.J. Rifle and Pistol Clubs v. Governor of the State of New Jersey*, --- F.3d ---, No. 12-1624, 2013 WL 336680, at *2 (3d Cir. Jan. 30, 2013). Judge Goldberg's reasoning comports with that of other courts who analyzed the issue of whether a stay should be granted pending appeal in the same situation based on the same factors, and the same standard, that we do. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012) (concluding that the reach of the RFRA does not "encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship"). Plaintiffs and Judge Jordan take issue with certain aspects of Judge Goldberg's analysis and view of the case law; however, we conclude that his reasoning is sound and is not likely to be overturned on appeal.

While we recognize that, as Judge Jordan urges, the rights at stake are important, we do not, unlike other courts, relax our standard depending on the nature of the right asserted. Given our standard, because Plaintiffs failed to prove their likelihood of success on the merits, we DENY their request for extraordinary relief. Judge Garth is filing a concurrence and Judge Jordan is filing a dissent.

By the Court,

/s/Marjorie O. Rendell
Circuit Judge

Dated: 2/7/13
MB/cc: Charles W. Proctor, III, Esq.
Randall L. Wenger, Esq.
Michelle Renee Bennett, Esq.
Alisa B. Klein, Esq.
Mark B. Stern, Esq.
Michelle Renee Bennett, Esq.

Conestoga Wood v. Sect'y Dept. HHS
No. 13-1144

January 29, 2013
CCO-046-E

GARTH, *Circuit Judge*, concurring.

I concur wholeheartedly in Judge Rendell's majority opinion, which correctly outlines this Court's standard of review in motions seeking an injunction pending appeal and which denies the plaintiffs'[1] motion to enjoin the Affordable Care Act's furnishing of contraceptives to women. I also agree with Judge Rendell that Conestoga has failed to carry its burden of demonstrating that it is likely to be successful in any of its claims under the First Amendment or the RFRA. In reaching this conclusion, as Judge Rendell points out, the District Court convincingly disposed of Conestoga's arguments.

I write separately in order to highlight what I have found to be particularly persuasive reasoning advanced both by District Court Judge Goldberg's thorough and comprehensive opinion in this case[2] and by our sister Circuits, most notably the Tenth Circuit in Hobby Lobby Stores, Inc. v. Sebelius, 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012).[3] I have also found the opinion of Judge Judge Ilana Rovner of the Seventh Circuit, writing in dissent in Grote v. Sebelius, 13-1077, 2013 WL 362725 at *4-15 (7th Cir. Jan. 30, 2013), to dispositively answer all of the arguments of Conestoga and Judge Jordan. I conclude, as Judge Rovner's opinion does, that Conestoga's complaint is flawed and without the likelihood of success necessary to warrant an injunction.

I begin by noting that Conestoga moved for an injunction pending appeal before the District Court. That motion was denied; Conestoga Wood Specialities Corp. v. Sebelius, No. 12-6744, 2013 WL 140110 at *18 (E.D. Pa. Jan. 11, 2013); and Conestoga renewed the motion before us. See F. R. App. P. 8 (a). As Judge Rendell has discussed

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[1] For purposes of identification, except as otherwise specified I will refer to the plaintiffs as "Conestoga," inasmuch as the for-profit corporation Conestoga is the only entity that has any direct obligations under the ACA.

[2] Conestoga Wood Specialties Corp. v. Sebelius, No. 12-6744, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013).

[3] See also *Autocam Corp. v. Sebelius*, No. 12-2673, slip op. (6th Cir. Dec. 28, 2012). I also note, as an aside, that Justice Sotomayor, sitting as a single Circuit Justice for the Tenth Circuit, denied the plaintiffs in Hobby Lobby an injunction pending review, reasoning that "Applicants do not satisfy the demanding standard for the extraordinary relief they seek." Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (Sotomayor, Circuit Justice Dec. 26, 2012).

(Maj. Op. at 2), the analytic framework governing such requests is well established: "In ruling on a motion for a preliminary injunction, the district court must consider: (1) the likelihood that the plaintiff will prevail on the merits at final hearing; (2) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which the defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest. The injunction should issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief." Merch. & Evans, Inc. v. Roosevelt Bldg. Products Co., Inc., 963 F.2d 628, 632-33 (3d Cir. 1992) (citations omitted).

I focus my attention in this concurrence on the first factor; i.e, whether Conestoga has shown a likelihood of success on the merits. Because this Court requires that all four factors be satisfied, Conestoga must demonstrate first that it is "likely to prevail on the merits." Constructors Ass'n of W. Pennsylvania v. Kreps, 573 F.2d 811, 814 (3d Cir. 1978). See also Delaware River Port Auth. v. Transamerican Trailer Transp., Inc., 501 F.2d 917, 919-20 (3d Cir. 1974) ("[A]s a prerequisite to the issuance of a preliminary injunction the moving party must generally show: (1) a reasonable probability of eventual success in the litigation . . . ."). I conclude that Conestoga has demonstrated no such likelihood of success.

Conestoga seeks to demonstrate that it, Conestoga Wood Specialties Corporation—the *for-profit corporate entity* that would be required under the ACA to participate in an insurance plan for its employees that includes coverage of various contraceptives—has religious views that are entitled to legal protection and that these religious views are identical with those of its owners, the Hahns.

As the District Court properly recognized, this argument fails to account for the fact that *for-profit corporate entities*, unlike religious *non-profit organizations*, do not—and cannot—legally claim a right to exercise or establish a "corporate" religion under the First Amendment or the RFRA. As the District Court noted, "[g]eneral business corporations … do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." Contestoga 2013 WL 140110 at *7 (quoting *Hobby Lobby Stores, Inc. v. Sebelius,* 870 F.Supp.2d 1278, 1291 (W.D. Okla. 2012)). Unlike religious *non-profit corporations or organizations*, the religious liberty relevant in the context of for-profit corporations is the liberty of its individuals, not of a *profit-seeking* corporate entity.[4]

[4] I also note in this connection that President Obama has recently proposed permitting a broad range of *religious nonprofit organizations* who object to providing contraception coverage to decline to do so. Coverage of Certain Preventive Services Under the Affordable Care Act, http://www.ofr.gov/OFRUpload/OFRData/2013-02420_PI.pdf (proposed Jan. 30, 2013).

Conestoga further claims that it should be construed as holding the religious beliefs of its owners. This claim is belied by the fact that, as the District Court correctly noted, "[i]ncorporation'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' . . . . It would be entirely inconsistent to allow the Hahns to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations." Contestoga, 2013 WL 140110 at *8 (quoting Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001)). As Judge Rovner put it in Grote, "the mission of Grote Industries, like that of any other for-profit, secular business, is to make money in the commercial sphere. In short, the only religious freedoms at issue in this appeal are those of the Grotes, not the companies they own." Grote, 13-1077, 2013 WL 362725 at *5. Similarly, the purpose—and only purpose—of the plaintiff Conestoga is to make money! Despite Judge Jordan's objection to this statement (see Diss. Op. at n. 8), the record clearly reveals that Conestoga Wood Specialties Corporation is no more than a for-profit corporation designed for commercial success and is without membership in any church, synagogue, or mosque and without religious convictions.

I will not reiterate at length the defects in the claims brought by the individual plaintiffs as distinct from the corporate entity Contestoga, which as discussed above cannot claim its own "corporate" right to free exercise of religion. The flaw in this aspect of Conestoga's argument is more than sufficiently articulated in Judge Rovner's opinion in Grote, which is as completely applicable to Conestoga as it is to Grote: "it is the corporation, rather than its owners, which is obligated to provide the contraceptive coverage to which the owners are objecting. [Conestoga Wood Specialties Corporation] is a closely-held, family-owned firm, and I suspect there is a natural inclination for the owners of such companies to elide the distinction between themselves and the companies they own. . . . [Nevertheless the Hahns] are, in both law and fact, separated by multiple steps from both the coverage that the company health plan provides and from the decisions that individual employees make in consultation with their physicians as to what covered services they will use." Grote v. Sebelius, 13-1077, 2013 WL 362725 at *6-7 (7th Cir. Jan. 30, 2013) (citation omitted).

Suffice it to say that there is no argument advanced by Conestoga, or by Judge Jordan in dissent here, that convinces me that Conestoga's motion for an injunction should be granted. I am confident that Conestoga's appeal will not succeed, and I—as does Judge Rendell—therefore deny their expedited motion for an injunction pending appeal.

Conestoga Wood v. Sect'y Dept. HHS
No. 13-1144

January 29, 2013
CCO-046-E

JORDAN, *Circuit Judge*, dissenting.

Conestoga Wood Specialties Corporation ("Conestoga"), and five of its owners, Norman Hahn, Elizabeth Hahn, Norman Lemar Hahn, Anthony H. Hahn, and Kevin Hahn, appeal the denial of their motion for a preliminary injunction against the enforcement of provisions of the Patient Protection and Affordable Care Act (the "ACA") and related regulations that require Conestoga to purchase an employee health insurance plan that includes coverage for contraception, including abortifacients and sterilization services. *See* 42 U.S.C. § 300gg-13(a)(4); 77 Fed. Reg. 8725 (Feb. 15, 2012). They have moved for an injunction pending appeal.[1] *See* Fed. R. App. P. 8(a). Because I believe an injunction is warranted, I respectfully dissent from the order denying the motion.

Conestoga is a privately held, for-profit Pennsylvania corporation that manufactures wood cabinets and wood specialty products and employs approximately 950 full-time employees. (Am. Compl. ¶¶ 11-16, 37.) It is owned entirely by members of the Hahn family, who, the District Court acknowledges, "are practicing Mennonite Christians whose faith requires them to operate Conestoga in accordance with their religious beliefs and moral principles." *Conestoga Wood Specialties Corp. v. Sebelius*, No. 12-6744, 2013 WL 140110, at *3 (E.D. Pa. Jan. 11, 2013).

In the midst of the public debate about the propriety of the Obama Administration's decision to create regulations requiring (with possible exceptions not applicable here) all for-profit businesses to provide health insurance to their employees to pay for abortifacients and sterilization services, Conestoga's Board of Directors adopted, on October 31, 2012, a "Statement on the Sanctity of Human Life," which, among other things, proclaims that

> [t]he Hahn Family believes that human life begins at conception (at the point where an egg and sperm unite) and that it is a sacred gift from God and only God has the right to terminate human life. Therefore it is against our moral conviction to be involved in the termination of human life

[1] The procedural history is essentially as follows. On December 4, 2012, Appellants filed suit and requested a preliminary injunction prohibiting the government from applying the contraception mandate to Conestoga. On January 11, 2013, the District Court denied Appellants' request for a preliminary injunction. On January 14, 2013, Appellants filed their notice of appeal, *see* 28 U.S.C. § 1292(a)(1), and on January 22, 2013, they filed the present expedited motion for an injunction pending appeal.

> through abortion, suicide, euthanasia, murder, or any other acts that involve the deliberate taking of human life.

Id. at *3 n.5.

Accordingly, the Hahns believe that facilitating contraception, including particularly abortifacients, by providing insurance coverage will violate their religious beliefs. (Am. Compl. ¶¶ 30, 32.) Conestoga, at the Hahns' direction, previously provided health insurance that omitted coverage for contraception (Am. Compl. ¶ 3), but, as of January 1, 2013,[2] the company is required under the ACA either to provide health insurance plans that cover contraception or to face enforcement actions and substantial financial penalties.[3] *See* 29 U.S.C. § 1132(a); 26 U.S.C. § 4980D(a), (b) ($100 per day per employee for noncompliance with coverage provisions); 26 U.S.C. § 4980H (approximately $2,000 per employee annual tax assessment for noncompliance). The Hahns estimate that, if they do not comply with the mandate to provide coverage for contraception, Conestoga could be subject to daily fines of approximately $95,000.[4] (Expedited Mot. for Inj. Pending Appeal at 5.) They have therefore brought the present action against the Secretary of the U.S. Department of Health and Human Services, Kathleen Sebelius, seeking declaratory and injunctive relief against the enforcement of the contraception mandate. They allege that the mandate violates their rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1; the First Amendment's Free Exercise, Establishment, and Speech Clauses; the Fifth Amendment's Due Process Clause; and the Administrative Procedure Act, 5 U.S.C. §§ 553(b)-(c), 706(2)(A), (D).

Before turning to the government's arguments for why enforcement of its mandate cannot wait for a fair opportunity to review the merits of the constitutional and statutory claims asserted by the Hahns and Conestoga, it is perhaps well to note what is not contested in this case. The government does not dispute the sincerity of the Hahns' religious beliefs or the District Court's finding that the Hahns' faith requires them to operate their business in accordance with those beliefs. The government does not contend that the regulations at issue are anything less than anathema to the Hahns because of those deeply held religious beliefs. Nor does it take issue with the Hahns'

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[2] On December 28, 2012, the District Court granted a temporary stay, but on January 11, 2013, the Court denied Appellants' motion for a preliminary injunction.

[3] Conestoga's health insurance renewal date was January 1, 2013. It is unclear from the record whether Conestoga is now risking enforcement or paying for the offending coverage.

[4] The government offers no disagreement with the Hahns' assessment of the sanctions they face for noncompliance.

assertion that, unless they submit to the offending regulations, Conestoga will be fined on a scale that will rapidly destroy the business and the 950 jobs that go with it. Finally, the government does not argue that the choice being pressed upon Conestoga and the Hahns – namely, to pay for what those parties view as life-destroying drugs and procedures or to watch their business be destroyed by government fines – is somehow merely theoretical. It is uncontested that Conestoga's health insurance renewal date has arrived and that the Hahns and their company are thus faced with the immediate and highly consequential choice which is at the center of this lawsuit.

What the government does assert, and what the District Court decided, is that the Hahns and the business they own and operate lack a reasonable likelihood of succeeding in their challenge to the government's threatened actions against them because Conestoga is a for-profit corporation. In the District Court's words, "It would be entirely inconsistent to allow the Hahns to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations." *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *8. Despite the evident care invested by the District Court in its decision, that conclusion is highly questionable.

To qualify for preliminary injunctive relief, a litigant must demonstrate "(1) a likelihood of success on the merits; (2) that [they] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). "The injunction shall issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief." *N.J. Hosp. Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995). Importantly, however, although the four factors provide structure for the inquiry, "in a situation where factors of irreparable harm, interests of third parties and public considerations strongly favor the moving party, an injunction might be appropriate even though plaintiffs did not demonstrate as strong a likelihood of ultimate success as would generally be required." *Constructors Ass'n of W. Pa. v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978).[5]

[5] While we have not ruled on the matter definitively, the standard for obtaining an injunction pending appeal is essentially the same as that for obtaining a preliminary injunction. *See Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *2 (7th Cir. Dec. 28, 2012) (evaluating "a motion for an injunction pending appeal using the same factors and … approach that govern an application for a preliminary injunction"); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) ("In ruling on … a request [for a stay or an injunction pending appeal], this court makes the same inquiry as it would when reviewing a district court's grant or denial of a preliminary injunction."); *LaRouche v. Kezer*, 20 F.3d 68, 73 (2d Cir. 1994) ("The standard for preliminary injunctions, similar to the standard for injunctions pending appeal, dictates a weighing of the

likelihood of success on the merits, irreparable injury, the balance of equities and the public interest.").

The District Court disregarded the several precedents from other courts granting injunctions to companies and their owners like Conestoga and the Hahns because, it said, those courts "applied a less rigorous standard" for the granting of preliminary injunctive relief. *Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *4. In particular, the Court said that those other courts "applied a 'sliding scale approach,' whereby an unusually strong showing of one factor lessens a plaintiff's burden in demonstrating a different factor." *Id.* Then, citing *Pitt News v. Fisher*, 215 F.3d 354, 365-66 (3d Cir. 2000), it contrasted that approach with what it characterized as our Court's approach, saying, "the Third Circuit ... has no 'sliding scale' standard, and plaintiffs must show that all four factors favor preliminary relief." *Id.*

The District Court was mistaken on two fronts in that analysis. First, it ignored the import of cases like *Kreps*, in which we have indicated that "balancing" means just that, so that one can succeed in gaining injunctive relief if the threatened harm is particularly great, despite a showing on "likelihood of success" that is less than would usually be required. 573 F.2d at 815. Even if *Pitt News* stood for the proposition for which the District Court cites it, that case could not be controlling because it is a panel opinion and cannot overrule those earlier precedents. *See United States v. Rivera*, 365 F.3d 213, 213 (3d Cir. 2004) ("This Circuit has long held that if its cases conflict, the earlier is the controlling authority and the latter is ineffective as precedents."). But, and this is the second mistake, *Pitt News* does not say, as the District Court implied, that a balancing among factors is not permitted. It said, rather, that "all four factors [must] favor preliminary relief." 215 F.3d at 366. To say that one must make a positive showing on all four preliminary injunction factors is not to say that there cannot be a balancing among them that would allow greater or lesser strength, depending on the facts.

The majority disparages my reliance on *Kreps*, asserting that I have "overstate[d] the significance" of that case and am "applying a less stringent standard." (Maj. Op. at 4.) But, with all due respect, that criticism is not sound. *Kreps* has not been overturned and is, accordingly, the law of this Circuit. It speaks in terms of balancing, and plainly states that a stronger showing on one factor may allow for a less forceful showing on another. If there were any ambiguity about that, it was removed by our later holding in *Marxe v. Jackson*, 833 F.2d 1121, 1128 (3d Cir. 1987), in which we said that "a[] decision on an application for a preliminary injunction requires a delicate exercise of equitable discretion," and that "the strength of [a] plaintiff's showing with respect to one [preliminary injunction factor] may affect what will suffice with respect to another." My colleagues in the majority acknowledge that the central holding of *Kreps* is that "the law requires us to balance the [preliminary injunction] factors against each other" (Maj. Op. at 4), but they simply decline to do so, focusing their attention solely on the first factor. I am left to wonder what "balancing" means, if we are not to take into consideration the other factors, including the significance of the rights at stake, which the majority

The harm threatened here is great. "It is well-established that 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). If government action presents such a threat, it is no answer to cite, as the government does, a litany of laudatory things that the government may also be doing at the same time. The government is at pains to point out, for example, that the "preventive health services provisions [of the ACA] require coverage of an array of recommended services including immunizations, blood pressure screening, mamograms, cervical cancer screening, and cholesterol screening." (Gov't Opp. at 5.) The question posed by the Hahns and Conestoga, however, is not whether mamograms or screening for high cholesterol or cervical cancer are valuable health services. The question is not even whether the abortifacient drugs and sterilization procedures that they view as life-destroying and therefore impossible to support can rightly be viewed by other people as praiseworthy. The Hahns and Conestoga pose a very different and precise question: they turn to their government and ask, can you rightly make us pay for something poisonous to our religious beliefs or face the destruction of our business. It evidently matters not one whit to them how healthful the banquet they are told to buy may otherwise be, if the menu contains a toxic item too. "There's just one fatal dish," is non-responsive to their point, which is that their religious liberty is directly threatened by the government's edict. We are thus dealing with the prospect of grievous harm, and the threshold for showing a likelihood of success on the merits may be correspondingly relaxed.[6]

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concedes in this case are "important" (Maj. Op. at 6) and I would say are of absolutely fundamental importance. The threatened deprivation here is profound.

[6] I note the relaxed measure for likelihood of success only to emphasize that, in light of the threatened harm, this case seems clearly to meet the requirements for an injunction pending appeal. Even were the harm less severe and the threshold showing for likelihood of success accordingly higher, though, I would still think that the Hahns and Conestoga had made the necessary showing. To meet that threshold, a "plaintiff need only prove a prima facie case, not a certainty that he or she will win." *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 173 (3d Cir. 2001); *see also Punnett v. Carter*, 621 F.2d 578, 583 (3d Cir. 1980) ("It is not necessary that the moving party's right to a final decision after trial be wholly without doubt; rather the burden is on the party seeking relief to make a prima facie case showing a reasonable probability that it will prevail on the merits." (internal quotation marks omitted)). "'[L]ikelihood of success on the merits' means that a plaintiff has 'a reasonable chance, or probability, of winning.'" *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc). It "does not mean more likely than not." *Id.* In the sense pertinent here, the term "likelihood" embodies "'[t]he quality of offering a *prospect* of success' or 'promise.'" Oxford English Dictionary, Vol. I, at 1625 (compact ed., 1986) (emphasis added). The Plaintiffs in this case have that kind of chance, as the numerous courts that have granted injunctions

In addition to showing irreparable harm, the Hahns and Conestoga have adequately demonstrated that they meet the other requirements for an injunction pending appeal, including having a sufficient likelihood of success on the merits. Several courts, as noted by the District Court itself, have already looked at facts like the ones before us and held that at least some temporary injunctive relief is in order. *See Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *2 (7th Cir. Dec. 28, 2012) (granting motion for injunction pending appeal because appellants "have established both a reasonable likelihood of success on the merits and irreparable harm, and [because] the balance of harms tips in their favor"); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, slip op. at 1 (8th Cir. Nov. 28, 2012) (granting "[]ppellants' motion for stay pending appeal," without further comment); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-92, 2012 WL 6738489, at *7 (E.D. Mo. Dec. 31, 2012) (holding that "plaintiffs are entitled to injunctive relief that maintains the status quo until the important relevant issues have been more fully heard"); *Monaghan v. Sebelius*, No. 12-15488, 2012 WL 6738476, at *6 (E.D. Mich. Dec. 30, 2012) (granting preliminary injunction because "t[]he Government has failed to satisfy its burden of showing that its actions were narrowly tailored to serve a compelling interest," and plaintiffs therefore "established at least some likelihood of succeeding on the merits of their RFRA claim"); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459, slip op. at 8 (W.D. Mo. Dec. 20, 2012) (granting preliminary injunction because "the balance of equities tip strongly in favor of injunctive relief in this case and [because] Plaintiffs have raised questions concerning their likelihood of success on the merits that are so serious and difficult as to call for more deliberate investigation"); *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 WL 5817323, at *18 (D.D.C. Nov. 16, 2012) (granting preliminary injunction to publishing corporation and its president because they had "shown a strong likelihood of success on the merits of their RFRA claim," and because

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involving the ACA contraception mandate have necessarily found. *See* cases cited *infra*, in the text following this footnote.

Having said that, it bears repetition that the hardship the Plaintiffs allege is severe. The government has put the Hahns and Conestoga in a terrible position by insisting that, under threat of ruinous fines, they capitulate now, before their rights have been fully adjudicated through appeal. The equities favor granting a preliminary injunction when the owners of a company stand to lose their business unless the status quo is maintained. *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling, Co.*, 749 F.2d 124, 126 (2d Cir. 1984). And injunctive relief has been found appropriate in circumstances much less onerous than the ones here. *See Gen. Protecht Grp., Inc. v. Leviton Mfg. Co.*, 651 F.3d 1355, 1363-65 (Fed. Cir. 2011) (concluding that there was irreparable harm and that the equities favored granting an injunction when a company was required to litigate in two forums in violation of a contractual forum selection clause). Given the balance of hardships here – with, on one hand, the government being asked merely to wait until the case can be fully adjudicated, and, on the other, the Plaintiffs being told to forego their rights of religious conscience – and given the issues at stake, an injunction is warranted.

the other preliminary injunction factors favored granting the motion); *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *14 (E.D. Mich. Oct. 31, 2012) (granting preliminary injunction to for-profit, family-owned and operated corporation and holding that "[t]he harm in delaying the implementation of a statute that may later be deemed constitutional must yield to the risk presented here of substantially infringing the sincere exercise of religious beliefs"); *Newland v. Sebelius*, No. 12-1123, 2012 WL 3069154, at *8 (D. Colo. July 27, 2012) (granting preliminary injunction, holding that "[t]he balance of the equities tip strongly in favor of injunctive relief in this case"). *But see Autocam Corp. v. Sebelius*, No. 12-2673, slip op. at 3 (6th Cir. Dec. 28, 2012) (denying motion for injunction pending appeal); *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012) (denying motion for injunction pending appeal, stating, "We do not think there is a substantial likelihood that this court will extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship").

The two Courts of Appeals to view the issue the other way are the Sixth and Tenth Circuits. The Sixth Circuit issued an order acknowledging "conflicting decisions," but denying injunctive relief because the district court in that case issued a "reasoned opinion" and because "the Supreme Court [had] recent[ly] deni[ed] … an injunction pending appeal in *Hobby Lobby*." *Autocam Corp. v. Sebelius*, No. 12-2673, slip op. at 2 (6th Cir. Dec. 28, 2012). The Supreme Court opinion the *Autocam* court referred to was an in-chambers decision by Justice Sotomayor, acting alone, denying the plaintiffs' motion for an injunction pending appellate review. *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641 (Sotomayor, Circuit Justice Dec. 26, 2012). She denied the motion under the particular standard for issuance of an extraordinary writ by the Supreme Court, *id.* at 643, which differs significantly from our standard for evaluating a motion for a preliminary injunction. Under that more demanding standard, the entitlement to relief must be "indisputably clear.'" *Id.* (quoting *Lux v. Rodrigues*, 131 S. Ct. 5, 6 (2010) (Roberts, C.J., in chambers)). The *Autocom* court's reliance on her opinion is therefore misplaced, and its decision is otherwise devoid of explanation. Its conclusion may also be viewed as disregarding the point of RFRA, which is to put the onus on the government when the government seeks to restrict fundamental rights.[7]

[7] Congress enacted RFRA to overturn the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court rejected a challenge to an Oregon statute that denied unemployment benefits to drug users, including Native Americans engaged in the sacramental use of peyote, holding that "the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (citing *Smith*, 494 U.S. at 890). In so doing, the Court rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner*, 374 U.S. 398 (1963), and returned to the doctrine of earlier cases that held that "the Constitution does not require judges to

The Tenth Circuit provided more explanation. It found the position of the plaintiffs in that case wanting because "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 covered by [the corporate] plan, subsidize *someone else's* participation in an activity condemned by plaintiff[s'] religion.'" *Hobby Lobby Stores, Inc.*, 2012 WL 6930302, at *3 (alteration in original) (quoting *Hobby Lobby Stores, Inc. v. Sebelius,* 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012)). As the Seventh Circuit rightly pointed out, though, that description "misunderstands the substance of the claim. The religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not* – or perhaps more precisely, *not only* – in the later purchase or use of contraception or related services." *Korte*, 2012 WL 6757353, at *3.

The government brushes that aside by saying that the "dichotomy between religious and secular employers" (Gov't Opp. at 11) is case dispositive. Because Conestoga is a business, the government's argument, to which the District Court subscribed, is that there is nothing that can be done to Conestoga, or through it to its owners, that implicates religious liberty. That conclusion seems to rest on two premises which are at the very least open to such serious question that it is unjust to deny an injunction while the matter is more fully considered.

One is that the corporate form itself, whether the enterprise involved is for-profit or not, places an enterprise outside the realm of First Amendment rights. *See Conestoga Wood Specialties Corp.*, 2013 WL 140110, at *8 (reasoning that a business owner cannot enjoy the protection of the corporate veil while also asking that the owner's religious interests be considered for First Amendment purposes). An entity's incorporated status does not, however, alter the underlying reality that corporations can and often do reflect the particular viewpoints held by their flesh and blood owners – a fact that has been recognized in the great many cases holding that corporations can indeed assert First Amendment rights. Religious bodies frequently operate through corporations. *See, e.g.,*

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engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws." *Gonzales*, 546 U.S. at 424 (citing *Smith*, 494 U.S. at 883-90).

"Congress responded by enacting [RFRA], ... which adopts a statutory rule comparable to the constitutional rule rejected in *Smith*." *Id.* RFRA provides that the government may not substantially burden a person's exercise of religion, "even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), unless it can demonstrate that the government regulation "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b). RFRA thus "restore[s] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and "provide[s] a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.* § 2000bb(b).

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423, 439 (2006) (affirming the grant of a preliminary injunction to a religious sect, which was also a corporation, enjoining the enforcement of federal drug laws against the sect for its importation of a drug used in religious rituals); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525-26 (1993) (recognizing that the petitioner was a corporation whose congregants practiced the Santeria religion and concluding that city ordinances violated the corporation's, and its members', free exercise of their religion); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987) (recognizing the petitioner as a corporation in a case concerning First Amendment free exercise rights). And corporations have been held to have free speech rights, *see generally Citizens United v. Fed. Election Comm'n,* 558 U.S. 310 (2010), including the right to frame their own message where abortion is concerned. *See Greater Balt. Ctr for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 683 F.3d 539, 554 (4th Cir. 2012) (holding that the plaintiff "pregnancy centers are not engaged in commercial speech and that their speech cannot be denied the full protection of strict scrutiny"). Ironically (given the character of the constitutional and statutory claims being made here), many an abortion rights case has been brought by corporations like Planned Parenthood and has resulted in the granting of preliminary injunctive relief. *See Planned Parenthood of Ind., Inc. v. Comm'r of Ind. Dept. of Health*, 699 F.3d 962, 968 (7th Cir. 2012) (affirming grant of preliminary injunction to prevent enforcement of a state statute prohibiting a medical provider (a corporation) that also performed abortions from receiving any state-administered funding, because the state law required the provider to choose between providing abortion services and receiving public money for other services besides abortions); *Planned Parenthood of S.E. Pa. v. Casey*, 686 F. Supp. 1089, 1137-38 (E.D. Pa. 1988) (granting preliminary injunction to several corporations, both for-profit and not-for-profit, and an individual to enjoin state law requiring, *inter alia*, unduly burdensome record keeping and reporting requirements that were determined to be likely to result in an unconstitutional impediment to a woman's right to have an abortion). There is thus ample precedent indicating that the corporate form itself does not prevent a corporation from asserting constitutional rights, including First Amendment rights.

The other questionable premise pressed by the government and adopted by the District Court is that the distinction between for-profit and not-for-profit corporations justifies holding the Hahns' and Conestoga's claims to be untenable. Asserting that RFRA was "enacted … against the backdrop of the federal statutes that grant religious employers alone the prerogative to rely on religion in setting the terms and conditions of employment" (Gov't Opp. at 11), the government says Conestoga, as a for-profit enterprise, "must provide the employee benefits that federal law requires." (*Id.*) Leaving aside that the government's demand that employers provide insurance coverage for abortifacients and other contraceptives is unprecedented and hence cannot have formed the backdrop for RFRA or anything else, the distinction that the government points to has been rejected by other courts, *see, e.g., Stormans Inc. v. Selecky*, 586 F.3d 1109, 1120

(9th Cir. 2009) (―We have held that a corporation has standing to assert the free exercise right of its owners.‖); *Tyndale House Publishers, Inc. v. Sebelius*, 2012 WL 5817323, at *7 (D.D.C. Nov. 16, 2012) (―[T]he beliefs of Tyndale and its owners are indistinguishable.‖); *Legatus v. Sebelius*, 2012 WL 5359630, at *5 (E.D. Mich. Oct. 31, 2012) (―For the purposes of the pending motion, however, Weingartz Supply Co. may exercise standing in order to assert the free exercise rights of its president, Daniel Weingartz, being identified as ‗his company.'‖), and in other First Amendment contexts, *cf. Citizens United*, 558 U.S. at __, 130 S.Ct. at 907 (―By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.‖); *Transp. Alts., Inc. v. City of New York*, 218 F. Supp. 2d 423, 444 (S.D.N.Y. 2002) (―[D]rawing distinctions between organizations based on for-profit or non-profit sponsorship in determining how much to charge to hold an event [in a public park] runs afoul of the First Amendment.‖). It is therefore only reasonable to hold in place the status quo in this case while the parties' arguments can be fully considered, rather than to make a hasty decision that risks denying fundamental rights.[8]

In short, while the District Court's opinion and the government's response to the motion for injunctive relief provide some answers to the important questions raised by the Hahns' and Conestoga's motion for preliminary injunctive relief, they are not nearly persuasive enough, in my judgment, to warrant cutting off all debate before those questions can be given a full airing and a decision on the merits. The simple fact is that, if the Hahns and Conestoga are forced to kneel before the government's regulation now, they have already lost. The government's view of what is and is not a valid exercise of religion will have prevailed before appellate rights have been vindicated. I am convinced that the threatened harm we are dealing with here is particularly grievous, that the appropriate threshold for showing a likelihood of success on the merits has been met, along with the remaining requirements for relief, and that preserving the status quo with an injunction is the appropriate course. I therefore respectfully dissent from the order denying the expedited motion for an injunction pending appeal.

[8] Judge Garth asserts that ―the purpose – and only purpose – of the plaintiff Conestoga is to make money!‖ (Concurrence at 4.) That assumes the answer to the question the Hahns have posed. As a factual matter, it is unrebutted that Conestoga does not exist solely to make money. This is a closely held corporation which is operated to accomplish the specific vision of its deeply religious owners, and, while making money is part of that, it has been effectively conceded that they have a great deal more than profit on their minds. To say that religiously inclined people will have to forego their rights of conscience and focus solely on profit, if they choose to adopt a corporate form to conduct their business, is a controversial position and certainly not one already established in law.