No. 13-1144

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONESTOGA WOOD SPECIALITIES CORPORATION, a PA Corporation; NORMAN HAHN; ELIZABETH HAHN; NORMAN LEMAR HAHN; ANTHONY H. HAHN; and KEVIN HAHN

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; HILDA SOLIS, in her official capacity as Secretary of the United States Department of Labor; TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY;

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (No. 5:12-cv-06744)
(Hon. Mitchell S. Goldberg)

REPLY BRIEF OF APPELLANTS

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Conestoga Wood Specialties Corporation, hereinafter "Conestoga", and Norman Hahn, Norman Lemar Hahn, Anthony H. Hahn, Elizabeth Hahn, and Kevin Hahn, hereinafter "Hahns", ask this Court to adjudicate the merits of their argument including several concepts fundamental to all Americans. First, Conestoga and the Hahns are likely to prevail on the merits. Second, Conestoga as a for-profit corporation is not precluded from exercising religious beliefs. Third, Conestoga, and thus the Hahns, are harmed by the coercive action of the Government in forcing them to comply with the mandate issued by Health and Human Services or otherwise suffer irreparable financial harm. Defendants, Kathleen Sebelius, Secretary of the Department of health and Human Services, Hilda Solis, Secretary of the United States Department of Labor and Timothy Geitner, Secretary of the United States Department of Treasury, hereinafter collectively referred to as the "Government", would have the Court erroneously believe that, among other things, Conestoga cannot exercise religion, that the Hahns have not been irreparably harmed, and that the Mandate, which is the subject matter of this case, is the least restrictive means of furthering a governmental interest. All of these arguments are contrary to statutory law and fundamental Constitutional principles which guide our legislators and our courts.

I. THE RELIGIOUS FREEDOM RESTORATION ACT (RFRA) PROTECTS THE EXERCISE OF RELIGION WITHOUT A GOVERNMENT IMPOSED DISTINCTION AS TO HOW THAT EXERISE IS EXPRESSED

Interestingly, the Government starts their argument by severely misquoting the position of Conestoga and the Hahns regarding the application of RFRA. Brief of Appellees 14, 15. Rather, Conestoga and the Hahns specifically state "RFRA does NOT give businesses an unbounded right to ignore antidiscrimination laws…." Brief of Appellants 37 (emphasis added). The Governments mischaracterization of the Appellant's premise merely exposes the weakness of the government's argument. However, Conestoga and the Hahns concur with the government that RFRA provides that the Federal Government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further compelling governmental interests. 42 U.S.C. § 2000(b)(b)-1(a)(b). Further Conestoga and the Hahns agree with the Government that burdening religious freedom is a matter of strict scrutiny which "is the most demanding test known to constitutional law". *City of Boerne v. Flores* 521 U.S. 507, 534 (1997).

It is well stated law Firth Amendment rights extend to a corporation as well as an individual. This is agreed to by the Government. Brief of Appellee 16. Where Congress has not specified a distinction, 1 U.S.C. § 1 defines the word person to "include corporations, companies, associations, firms, partnerships,

societies and joint stock companies as well as individuals". Further, Pennsylvania law states that a corporation "shall have legal capacity of nature persons to act." 15 PA. CONSOL. STAT. § 1501. RFRA contains no corporate or business exception to the Free Exercise Clause and does not preclude a corporation from enjoying First Amendment rights. The Supreme Court has stated that "First Amendment protection extends to corporations" and a First Amendment right "does not lose protection simply because its source is a corporation." *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010). The Supreme Court held that "corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." The distinction between the Free Speech Clause and the Establishment Clause in the Constitution is separated only by a semi-colon. A semi-colon is indicative of the application of the continuing thought as a whole not as two separate and distinct concepts or arguments. No court has distinguished Free Exercise from Freedom of Speech as two concepts independent of each other.

Is Conestoga Wood to be treated differently simply because it has a corporate charter as opposed to a birth certificate? Does Conestoga exist without a creator and sustainer, the Hahn Family? Conestoga which is owned, managed, and directed solely by the Hahn Family can only exist and provide health insurance for its employees at the Hahn's direction. "A corporation cannot act except through the human beings who may act for it." *Robertson v. Cheney*, 876 F.2d 152, 159

(D.C. Circuit 1989). Thus, a business can only take corporate action as the result of direction and the expressed intention of their owners, in this case the Hahns. And if the Hahns are prevented from exercising their religious conscience through Conestoga, then they have suffered a vast frustration of their religious rights. In addition to the employees covered by the Conestoga health plan, so are the Hahns themselves thus making the affront on their religious conscience that more unbearable. The Government has violated that most sacred tenet of the First Amendment by imposing their beliefs and their religious standards on the creators and owners of Conestoga contrary to their firmly held religious beliefs and conscience as expressed by the Hahn Family by their coercion to comply with the Mandate.

Several recent cases involving the Health and Human Services Mandate, with an almost identical factual pattern, have supported the position of Conestoga and the Hahns. The Eastern District of Michigan recently stated that "a closely held corporation may assert its owner's free exercise and RFRA rights where the corporate entity is merely the instrument through and by which the owners express their religious beliefs." *Monaghan v. Sebelius,* No. 12-15488, 2013 WL 1014026 at *4 (E.D. Mich. March 14, 2013). There the Court granted a preliminary injunction against application of the Mandate stating that it "sees no reason why a

corporation cannot support a particular religious view point by using corporate funds to support that view point." *Id.* at * 5.

Previously, in a Ninth Circuit case, the Court held that the owners of a for profit business had standing to assert the free exercise rights of its owners despite its operation as a secular for profit company. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1116-20 (9th Cir. 2009). Similarly, the Court in *EEOC v. Townley Engineering Manufacturing Company*, found that a corporation owned primarily by a husband and wife who were members of the Catholic faith were permitted to exercise their free exercise rights as owners of the corporation in a Title VII case. *Townley*, 859 F.2d 610, 619-20 n.15 (9th Circuit 1988). All three of these cases have found that secular for profit corporations are capable of asserting the Free Exercise rights of their owners.

II. CONESTOGA AND THE HAHNS EQUALLY SHARE THE OBLIGATION TO PROVIDE THE COVERAGE REQUIRED BY THE HHS MANDATE

The Government misses a crucial point that without the Hahns there would be no Conestoga Wood and there would not be 950 gainfully employed individuals who rely on the corporation for their health insurance coverage. The Government cites *Barium Steel Crop. v. Wally* to suggest that a corporation "is a distinct and separate entity irrespective of the persons who owned all its stock." *Barium Steel Corp.*, 108 A.2d 336, 341 (Pa. 1954). However, that same Court said,

"nevertheless, we have repeatedly held that courts can go behind the corporate entity, 'whenever justice or public policy demand it and when the rights of parties are not prejudiced thereby nor the theory of corporate entity made useless.'" *Id.* (citing *Tucker v. Binenstock,* 310 Pa. 254, 263 (1933)).[1] In the *Edirose* case, the court went on to say that "in an appropriate case and where, as here, justice to all parties require it, this Court will not hesitate to treat as identical the corporation and the individual or individuals owning all its stock and assets…." *Edirose Silk Mfg. Co. v. First National Bank and Trust Co.,* 338 Pa. 139, 143 (1940). Justice and public policy cry out for equal treatment for all parties affected by the imposition of the Government's Mandate.

The Government also would have us believe that individuals forfeit their religious conscience and liberties because they utilize a corporate forum. To suggest that someone can assume that their religious exercise is conditioned on not availing themselves of a government benefit while others who have no religious objections can take advantage of is simply unequal treatment under the law. Thus, just the mere act of having to give up your corporate identity in order to protect your religious conscience in itself constitutes a substantial burden.

[1] Same principle is supported in *Wearing v. WDAS Broadcasting Station, Inc.,* 327 Pa. 433 (1937), *Commonwealth v. VanBuskirk,* 155 Pa. Super. 613 (Pa. Super. Ct. 1944), *Great Oak Building Alone Ass'n v. Rosenheim,* 341, Pa. 132 (1941), *Stoney Brock Lumber Co. v. Blackmen,* 286 Pa. 305 (1926).

The District Court below similarly missed the point when they said it would be inconsistent to allow the Hahns to enjoy the corporate identity for their business and yet allow them to pierce the corporate veil to exercise their religious conscience. *Conestoga Wood Specialties Corp. v. Sebelius,* 2012 U.S. Dist. Lexis 4449 (E.D. Pa. Jan. 11, 2013). Exercising your religious conscience is not a matter of piercing the corporate veil which is a term normally held for finding owners of closely held businesses liable for their grossly negligent and willful acts. Never has it been suggested that the exercise of any religious freedom is connected with piercing the corporate veil. It is supported by *McClure v. Sports and Health Club, Inc*, where the distinction is made that the corporate veil was pierced to make the owners of the corporation liable for their illegal actions. *McClure*, 370 N.W.2d 844 (1985). Conestoga and the Hahns have never suggested that illegal activity or ignoring other federal or state laws that do not burden their religious conscience was advocated in any manner.

III. THE HEALTH AND HUMAN SERVICES MANDATE DOES NOT ADVANCE A COMPELLING GOVERNMENTAL INTEREST

By the Government's own admission the contraception coverage requirement is narrowly tailored. Brief for the Appellee 34. The Government has admittedly exempted 190 million people from the Mandate while those in compliance include, among others, a specific group of small business owners whose religious conscience is offended by providing the required coverage.

In *Geneva College v. Seblius*, the court recently held "in light of the myriad exemptions to the mandate's requirements already granted and conceding that the requirement does not include small employers similarly situated to SHLC, the requirement is 'woefully underinclusive' and therefore does not serve a compelling government interest." *Geneva College v. Seblius*, No. 12-00207 (W.D. Pa. April 19, 2013) (order granting preliminary injunction and findings of fact and conclusions of law).

The Government argues, using language from *Griswold v. Connecticut,* that "if the right of privacy means anything, and is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Griswold v. Connecticut,* 381 U.S. 479 (1965). The Government misunderstands the interest and intent of Conestoga and the Hahns. They do not want to intrude on the privacy of their employees or attempt to dictate what they can or cannot do. Conestoga and the Hahns merely want to avoid involvement with the objectionable coverage. Why should Conestoga and the Hahns be forced by the Government to provide something that should be free from unwarranted governmental intrusion? That same rule of privacy should extend to Conestoga and the Hahns as well, freeing them from unwarranted governmental intrusion into a type of health insurance coverage that violates their religious conscience. It is interesting to note

that nowhere has the Government ever denied that the Hahns and Conestoga have a sincere religious belief. The Government goes on to argue that these services are necessary for women's health and gender equality rights while trampling on Conestoga and the Hahns religious freedom. There is no question that women are able to obtain the medical services including contraceptives and other medical treatment of their choosing. But should they do so at the cost of trampling on someone else's religious freedom as well as requiring an employer to pay for it by government coercion? The Government has many other ways of promoting and encouraging women's health through tax credits, tax deductions, and enhancing private and federally sponsored programs already in place for women's health. Recently in *Geneva College*, the court stated "that the scheme set forth in the proposed rules calls in to serious question whether the Mandate is the least restrictive means of achieving the governments alleged compelling interest." *Geneva College,* No. 12-00207 (W.D. Pa., April 19, 2013) (order Granting Preliminary Injunction and Findings of Fact and Conclusions of Law). If the government was so concerned about these issues why has it placed responsibility for paying for the coverage on business owners?

Further, if this is such a compelling governmental interest why would 190 million people be exempted? The government asserts that this only a temporary measure and that the number of people exempted will decrease over time but they

do not assert that the number will be eliminated. Thus we have two classes of people, those that the Government has exempted through their own definition of religion and those people like Conestoga and the Hahns who must pay the price for the governments unilateral decision on who is responsible for these services. RFRA unequivocally states that the Government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. § 2000(b)(b)-1(a)(b). Conestoga and the Hahns further concur with the Government that this is a matter of strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Floeres,* 521, U.S. 507, 534 (1979). However, the Government fails to show what is so compelling to their interest as to not only trample the religious conscience of the Hahns and Conestoga but to also financially cripple them should they fail to comply. Such coercion, a fine of $100.00 per employee, cannot be considered inconsequential. In *Blackhawk*, the fee for a permit was a mere $50.00 and the fine $200.00. *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004). Here, the Hahn's could be fined $95,000.00 per day for non-compliance which would put them out of business almost immediately. The Government's self conceived narrow definition of what constitutes a religious entity and their exemption of millions of people from this Mandate shows how it is not generally applicable or facially neutral. See, *Blackhawk,* 381 F.3d at 209.

IV. CONESTOGA AND THE HAHNS ARE BOTH DIRECTLY IMPACTED BY THE HHS MANDATE

The Government erroneously argued that an employee's decision to use certain health and medical services has no impact on employers. Further, the Government relies on other currently pending cases including the instant case as their authority for extending the argument of attenuation between the Hahns and the ultimate receiver of the medical services. Somehow, the argument is that the Hahns are "in both law and fact, separated by multiple steps in 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 would use." *Conestoga Wood Specialties Corp. v. Sebelius,* No 13-1144, (3d Cir. 2013) (Garth, J., concurring) ((quoting *Grote v. Sebelius*, 703 F.3d 850, 858) (Rovner, J., dissenting)). However, the court failed to define what those multiple steps are to separate the Hahns from the questioned coverage. In fact, the Hahns, through their corporation, pay for themselves that very health insurance policy with the religiously objectionable requirement to provide contraception and counseling for same. The Hahns research, negotiate and contract for the policy of health insurance and pay for it from company revenues. Coverage is identical to their employees. Whether an employee needs an appendectomy or is desirous of contraceptive services it does not attenuate the Hahns involvement with coercion of the Mandate. Additional dictum in *O'Brien v. HHS*, states that "RFRA does not

protect against the slight burden on religious exercise but arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from ones own." *O'Brien*, ___ F. Supp. 2d ___, 2012 W.L. 4481208 at *6 (E.D. Mo. Sept. 28, 2012, appeal pending No. 12-3357 (8th Cir.)) The serious flaw in this statement is that the money does not "circuitously" flow but comes directly from the money that Conestoga and Hahns earn through their efforts and is applied directly to the health insurance premiums that are at the core of this debate. Further, any burden no matter how slight is enough to burden someone's religious conscience. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). How an employee uses those health insurance benefits is not the issue but merely the end result. "It is not, as defendants suggest, merely a question whether plaintiffs object to third parties' decisions with respect to using or purchasing the objected to services. Instead, plaintiffs' objection relates to whether the [Hahns] and [Conestoga] will be forced to provide coverage for the objected to services in the first place. This is a quintessential substantial burden, and plaintiffs demonstrated that they are likely to succeed on the merits with respect to the substantial burden issue." *Geneva College*, No. 12-00207 (W.D. Pa. April 19, 2013) (order granting preliminary injunction and findings of fact and conclusions of law) at 16.

Finally, the Government contends that by the Hahns objecting to the contraceptive coverage they are forcing their personal beliefs on their employees. Brief for the Appellees 38. It also suggests, without documentation, that this would impose a wholly unwarranted burden on individual employees and their family members. Brief for the Appellees 38. Conestoga and the Hahns have been operating their business since 1965 without contraceptive and associated counseling coverage for their employees. They have provided health care coverage for their employees, have maintained a competitive wage base and benefits program that has enabled them to be successful in the market place. Can the Government show a compelling interest? Does the forced coercion of Conestoga and the Hahns to provide the objectionable coverage have a neutral and generally applicable affect on everyone impacted by it when it is so clearly tramples on the First Amendment Rights of our citizens?

Finally, the Government argues that the Supreme Court has stated that government "may encourage the Free Exercise of the Religion by granting religious accommodations, even if not required by the Free Exercise Clause, without running afoul of the Establishment clause." *O'Brien,* 2012 W.L. 4481208 at *10. The problem with this argument is that we are not talking about the Establishment clause but rather the Free Exercise of religion by our clients who object to any form of abortifacient contraception. Conestoga and the Hahns have

First Amendment Rights contrary to the Government's position. These distinctions created by the Government have been of their own making and are not rooted in fundamental principles of constitutional law. The Government argues that consistent with long standing federal law the department proposed to make certain accommodations for "non profit religious organizations but not to for profit secular organizations." Brief for the Appellee 44. Obviously, this is purely arbitrary and inconsistent policy that denies corporations and the people that own and manage them the ability to exercise their religion in their every day lives. Religious belief is not something to be confined to Saturday or Sunday morning or whatever other time you choose to exercise it, but rather something that people of faith enjoy 24 hours a day 7 days a week.

If in fact, under strict scrutiny, this Mandate was truly neutral in applicability and did not discriminate against and single out religiously minded owners of businesses, there would not be in excess of 40 law suits filed regarding the HHS Mandate. If the law were generally applicable there would not be 190 million exemptions. Even if that number is reduced in half it is still an especially egregious number. The Government attempts to argue that "Congress likewise has shown a special solicitude for religious organizations and federal statutes that regulate the relationship between their employers and their employees. At the same time, however, Congress has not permitted for-profit secular corporations to

invoke religion as a basis to defeat the requirements of federal employment law," without any citation to support their claim. Brief for the Appellee 17. By their own admission they acknowledge the special solicitude that Congress has for religious entities. If Congress has a special solicitude for religious entities it has to be proven that they do not have one for secular for-profit entities. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Court specifically indicated that the special solicitude of which the government speaks is rooted in the First Amendment. *Hasanna-Tabor*, 132 S. Ct. 694, 706 (2012). Saying that Conestoga and the Hahns have no right to Free Exercise of Religion under the First Amendment is essentially denying the very spirit of the Free Exercise Clause as purely and simply stated in the Constitution.

CONCLUSION

Thus, Conestoga Wood Specialties, Inc. and the Hahn Family request this Honorable Court to grant a Preliminary Injunction Pending Appeal.

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CERTIFICATION OF COMPLIANCE

I certify that the text of the electronic Brief the text of the hard copies filed or to be filed with the Court are identical. The electronic copy of the Brief has been scanned for viruses using Norton Internet Securities 2005 software.

I further certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 3,496 words as calculated by the word processing program used in the preparation of this brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. (32)(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 97-2003 in 14 point Times New Roman font.

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CERTIFICATION OF SERVICE

The undersigned counsel for Appellants, Charles W. Proctor, III, Esquire, hereby certifies that the foregoing brief has been electronically filed with the Clerk of this Court by using the appellate CM/ECF system and caused ten paper copies of the brief to be sent to the Court. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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