IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPEAL CASE NO. 13-1144

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

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;

Appellees.

APPELLANTS' EXPEDITED
MOTION FOR INJUNCTION PENDING APPEAL

DISCLOSURE STATEMENT

Pursuant to 3d Cir. R. 26.1.1, the undersigned makes the following disclosures:

Conestoga Wood Specialties Corporation is a closely-held family owned corporation owned by members of the Hahn family. No parents, trusts, subsidiaries, and/or affiliates of this company have issued shares or debt securities to the public, and there is no publicly held company that owns any part of the company.

January 22, 2013

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Conestoga Wood Specialties Corporation and the Hahns hereby request an emergency injunction of the District Court's January 11, 2013 Order denying Plaintiff's Motion for Preliminary Injunction pursuant to Federal Rule of Appellate Procedure 8(a)(2). In support of this Motion, the Appellants state as follows:

1. On January 11, 2013 the District Court entered an Order and Opinion denying Plaintiffs' request for a Preliminary Injunction preventing the application of a portion of the Preventative Services Mandate issued by the Department of Health and Human Services pursuant to the Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), requiring Appellants to immediately provide, at their sole cost, as part of their employee health plan certain forms of contraception, all of which are against the Appellants' strongly held religious beliefs.

2. On January 14, 2013 Conestoga filed a Notice of Appeal with the District Court exercising its right to immediately Appeal the Court's order.

3. A party must ordinarily move first in the District Court for an injunction pending appeal. Fed. R. App. P. 8(a)(1). Due to the District Court's decision to deny Conestoga's Motion for Preliminary Injunction on the same issues presented here, Conestoga files the present Motion pursuant to Fed. R. App. P. 8(a)(2)(A)(ii).

4. The District Court determined that Conestoga was unable to demonstrate a likelihood of success on their First Amendment and RFRA claims.

5. Pursuant to Third Circuit Local Appellate Rule 8.2 and 27.7, Appellants respectfully requests that this Motion be considered for expedited consideration by this Court.

6. Conestoga believes that there is a substantial likelihood of obtaining a reversal of the District Court's Order of January 11, 2013.

7. Conestoga and the Hahns will suffer a substantial burden on their religious freedom and irreparable harm in the absence of an injunction.

8. Conestoga believes that the government will not suffer any substantial harm if the injunction is granted.

9. An injunction of the District Court's Order is not contrary to the public interest.

10. Attached to this Motion are the relevant parts of the District Court Record as required by Federal Rules of Appellate Procedure 8(a)(2)(B)(iii) and Third Circuit Local Appellate Rule 8.1.

11. In deciding a motion for an injunction pending appeal pursuant to Fed. R. App. P. 8, this court looks to the following criteria: "1. the likelihood that the petitioner will prevail on the merits of the appeal; 2. whether there will be irreparable injury to the petitioner unless a stay is granted; 3. whether there will be substantial harm to other interested parties; and 4. the public interest." *United States v. Fiumara*, 605 F.2d 116, 117 (3d Cir. 1979).

12. Conestoga and the Hahns are likely to prevail on the merits, are likely to suffer irreparable injury in the absence of an injunction, and the public interest and balance of harms weigh greatly in favor of Conestoga. Thus this court should issue injunctive relief pending appeal preventing Appellees from enforcing the Mandate against Conestoga.

13. The members of the Hahn Family own and operate Conestoga, a privately held, for profit business manufacturing components for the cabinet industry, headquartered in East Earl, Pennsylvania. Amended Compl. ¶ 2. Conestoga currently has approximately 950 full-time employees in the United States. *Id.* ¶ 37. Failure to comply with the Mandate could result in fines of $95,000.00 per day for Conestoga.

14. The Hahn family, who are Mennonite, seek to run Conestoga in a manner that reflects their sincerely held religious beliefs. *Id.* ¶ 2. Their faith teaches them that taking life, which includes anything that could terminate a fertilized embryo or prevent its implantation in a women's uterus, is sin for which they are accountable to God. *Id.* ¶ 30. Therefore, they believe that contraception that may bring about the death of an embryo is wrong and that it would likewise be wrong to facilitate such a wrong by providing insurance coverage for such contraception in their insurance policy. *Id.* ¶ 30, 32. The Hahn family and Conestoga have previously provided health care insurance which omits coverage for contraception. *Id.* ¶ 3.

15. The Conestoga insurance plan renewed on January 1, 2013. *Id.* Conestoga and the Hahn family sought injunctive relief to protect them and their insurance carrier from severe penalties so that they could continue offering insurance without the objectionable coverage. *Id.* ¶ 147.

16. Therefore, Conestoga and the Hahn's seek immediate injunctive relief pending appeal to prevent enforcement by the Appellees of the objectionable provisions of the Mandate against them, their insurance plan, and their insurance carrier pending appeal.

Appellants Are Likely to Succeed on Their RFRA and Free Exercise Claims

17. The Hahns and Conestoga present a likelihood of success on the merits of their claims.

18. The purpose of RFRA was "to restore 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 a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). Under RFRA, the federal government may only substantially burden a person's exercise of religion if "it demonstrates that application of the burden to the person (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). Thus, under RFRA, the government must satisfy the test of strict scrutiny. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418,

430 (2006). Claims brought under the Free Exercise Clause rather than RFRA require the government to satisfy strict scrutiny if the challenged law is or not generally applicable or is not neutral. *See Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004).

19. The Hahns and Conestoga satisfy all the elements of both claims. All Plaintiff's can exercise religion. The government cannot satisfy either prong of strict scrutiny. Strict scrutiny is applicable under RFRA because the Mandate is a substantial burden on the beliefs of the Hahns and Conestoga. Strict scrutiny is also required under the Free Exercise Clause because the Mandate is not generally applicable.

20. Both the Seventh Circuit and Eighth Circuit granted injunctions pending appeal in favor of appellants challenging this Mandate. *Korte v. Sebelius*, No. 12-3841 (7th Cir. Dec. 28, 2012); *O'Brien v. U.S. Dep't of Health and Human Servs.*, No. 12-3357 (8th Cir. Nov. 28, 2012).

Conestoga Can Exercise Religion

21. The District Court incorrectly concluded that Conestoga, as a for profit, corporation does not possess rights under RFRA or the Free Exercise Clause. *See* Opinion at 12, 20. RFRA encompasses "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2; 42 U.S.C. § 2000cc-5. The Free Exercise Clause likewise

encompasses "the free exercise" of religion, without qualification. There is no corporate or business exception to RFRA or the Free Exercise Clause.

22. Conestoga is organized, owned, and operated entirely by the Hahns. Pennsylvania law states that a corporation "shall have the legal capacity of natural persons to act." 15 Pa. Consol. Stat. § 1501. The Hahns define and exercise the company's financial and personnel policy and exercise thereof, they define and exercise its religious mission. Conestoga exercises the Hahn's beliefs.

23. Denying that Conestoga can exercise religion assumes two untenable premises: that (1) the corporate form, and/or (2) a for profit purpose, exclude the exercise of religion. Corporate form cannot prevent Conestoga's exercise of religion because the United States Supreme Court has affirmed religious freedom claims for many incorporated plaintiffs. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Likewise, RFRA applies to "persons," 42 U.S.C. § 2000bb(b), and persons as defined by 1 U.S.C. § 1 includes corporations.[1] These statutes suggest that corporations can exercise religion. Concluding otherwise would mean that churches, religious hospitals, and religious non-profits cannot bring claims either under RFRA or the Free Exercise Clause.

[1] Likewise under Pennsylvania law, a corporation shall have the legal capacity of a natural person to act . 15 Pa.Consol.Stat. §1501.

24. Citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978), the District Court asserted that religious exercise is purely "personal" in such a way that it cannot be exercised by corporations. This viewpoint cannot be reconciled with the Supreme Court's allowance of religious exercise by corporations in *Lukumi* and *O Centro*. On the contrary, *Bellotti* states that the First Amendment's scope cannot be resolved on formalities such as whether the plaintiff is a corporation, but instead depends on whether the law in question "abridges [rights] that the First Amendment was meant to protect." *Id.* at 776.

25. The District Court incorrectly opined that an entity cannot exercise religion if it operates for profit. No Supreme Court or Court of Appeals precedent takes this position. The Supreme Court recognized that an Amish business exercised religion in *United States v. Lee*, 455 U.S. 252, 257 (1982). Other cases likewise show that a for profit company can exercise religion and bring free exercise claims on behalf of itself or its owners.[2] In each of those cases the court subjected each claim to the applicable level of scrutiny rather than declaring that the for profit business and its owners were not capable of exercising religion.

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[2] *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985) (finding that a health club and its owners could assert free exercise of religion claims). The Ninth Circuit allowed two for-profit corporations to assert free exercise claims on behalf of their owners. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 & n.9 (9th Cir. 2009) (pharmacy and its religious owners); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988) (manufacturer on behalf of its religious owners). In *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194 (2d Cir. 2012), the Court allowed a kosher deli and butcher ("Inc."), and its owners, officers, and shareholders, to bring Free Exercise and Establishment Clause claims. *See also Tyndale House Publishers*, 2012 WL 5817323 at *5–9 (finding owner-standing in a for-profit company).

26. The Supreme Court also emphasized that "First Amendment protection extends to corporations," and a First Amendment right "does not lose First Amendment protection simply because its source is a corporation." *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 899 (2010); *see also Monell v. Dept. of Social Services*, 436 U.S. 658, 687 (1978) (the Court held that "corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis").

27. The District Court misconstrued *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), when it declared that only religious organizations can exercise religion. No Supreme Court case, including *Hosanna-Tabor*, makes that assertion. The citation that the District Court gave for the idea of limiting religious exercise to religious corporations was *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n,* 503 F.3d 217 (3d Cir. 2007). However, *LeBoon* is not a First Amendment case. It interpreted Title VII of the Civil Rights Act, which, unlike RFRA and the Free Exercise Clause, explicitly applies its exemptions to religious corporations. *Id.* at 226.

28. Corporations are no more purely secular or purely religious than are the people that run them. Americans live out their religion in their everyday lives, including in the way they run their family businesses. Judicial precedent does not declare that religious families can only exercise religion in their business if they do so as sole proprietors instead of through a corporation.

The Mandate Imposes a Substantial Burden on Appellants' Religious Exercise

29. The Mandate is a substantial burden because it "make[s] unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Conestoga and the Hahns have exercised their religious beliefs by not providing coverage for contraceptive items in their employee health insurance plan. The Mandate directly outlaws that exercise of their religious beliefs.

30. In order to prevail under RFRA, a claimant must show a religious exercise that is "substantially burdened" by the government. § 2000bb(b). It was Congress' intent "to create a broad definition of substantial burden." *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007) (finding a substantial burden on a prisoner's belief to read four religious books a day by limiting the prisoner's access to 10 books per week). A substantial burden is imposed "where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available...; or 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Id.*

31. A burden occurs even in indirect instances. *Sherbert*, 374 U.S. at 404. *Sherbert* held that it was clear that denying unemployment benefits to an employee was a substantial burden, even though the law did not directly command her to violate her beliefs against working on Saturdays. *Id.* at 403–04. Also, in *Wisconsin vs. Yoder*, 406 U.S. 205 (1972), the Court held that a state compulsory

school attendance law substantially burdened the religious exercise of Amish parents who refused to send their children to high school. The parents "were fined the sum of $5 each." 406 U.S. at 208. The Court found the burden "not only severe, but inescapable," requiring the parents "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Id.* at 218.

32. Contrary to the District Court's view, the coercion here is even more direct than in *Sherbert* since the Mandate requires Conestoga and the Hahn family to purchase coverage through a health plan that can bring about the death of an embryo. Not only is their religious belief clear, i.e., that they cannot in good conscience facilitate such coverage, but the substantial burden is also clear, i.e., penalties of $100 per employee per day, totaling more than $95,000 per day.

33. The government has expressly acknowledged the burden that the Mandate imposes upon religious exercise. Recognizing that providing the mandated insurance coverage would conflict with "the religious beliefs of certain religious employers," the government has granted them a wholesale exemption. 76 Fed. Reg. 46,621, 46,623; 77 Fed. Reg. 8,725. The government is also considering whether "for-profit religious employers with [religious] objections should be considered as well," 77 Fed. Reg. 16501, 16504, thus underscoring the government's acknowledgment that the Mandate burdens religious exercise.

34. The District Court determined that any burden on Conestoga or the Hahns' religious exercise was "too attenuated to be considered substantial"

because the employees' decision to use services objectionable to the Hahns insulated them from the impact on their religious beliefs. See Opinion at 21-29. However, Conestoga and the Hahns' religious faith does not merely object to their own use of such items, but also prohibits them from facilitating or providing health insurance coverage for such items. Verified Complaint ¶s 2,3,5 and 25-30.

35. This exact argument was rejected by the Court of Appeals for the Seventh Circuit:

> With respect, we think this 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 related services.
>
> *Korte*, Slip Op. at 5 (emphasis in original).

36. A substantial burden measures the government's penalties and pressures to violate one's religious beliefs. It does not engage in moral theologizing about attenuation and the Supreme Court has rejected such an approach. In *Thomas v. Review Board*, a plaintiff who objected to war was denied unemployment benefits after refusing to work in an armament factory. 450 U.S. 707, 714–16 (1981). The government argued that working in a tank factory was not a cognizable burden on the plaintiff's beliefs because it was "sufficiently insulated" from his objection to war. *Id.* at 715. The Court rejected not only this conclusion but also the underlying premise that it is the court's business to draw moral lines. "Thomas drew a line, and it is not for us to say that the line he drew

was an unreasonable one. Courts should not undertake to dissect religious beliefs . . . ." *Id.* Likewise here, the notion that direct penalties are somehow not substantial burdens on an explicit religious belief because the court deems that activity is insulated or attenuated from the use of contraceptives, is not proper legal analysis.[3]

37. Because Appellants' religious beliefs are substantially burdened, the government must satisfy strict scrutiny under RFRA.

The Mandate Burdens the Hahns' Religious Beliefs to the Same Extent as Conestoga

38. The substantial burden is imposed against Conestoga and the Hahn family. The District Court incorrectly claimed that the burden on the Hahns was attenuated because it is imposed on their company. The fact that the Hahns' beliefs are conducted through their operation of Conestoga in no way makes the burden on their beliefs attenuated or insubstantial.

39. Multiple cases recognize that a government burden on a family company is a burden on the beliefs of its owners. *McClure*, 370 N.W.2d at 850; *Stormans*, 586 F.3d at 1119–20; *Townley*, 859 F.2d at 620; *Tyndale House Publishers*, 2012 WL 5817323 at *5–9. The Hahns' sole ownership and decision making for Conestoga render their interests the same. Because Conestoga is the

[3] As the District Court in *Tyndale* correctly noted, "*Because it is the coverage, not just the use*, of the contraceptives at issue to which the plaintiffs object, it is irrelevant that the use of the contraceptives depends on the independent decisions of third parties. And even if this burden could be characterized as 'indirect,' the Supreme Court has indicated that indirectness is not a barrier to finding a substantial burden." *Tyndale*, 2012 WL 5817323 at *13 (citing *Thomas*, 450 U.S. at 718) (emphasis added).

Hahns' property, all the penalties assessed against Conestoga under the Mandate would have a direct impact on the Hahns themselves. Enforcing the mandate is giving religiously guided employers the option of selling their family companies rather than complying. That effectively bans religious believers from business. Hanging a "no believers allowed" sign on the American economy substantially burdens religion. By forcing religiously guided employees to abandon corporate status or sell their family companies altogether the Mandate coerces them to "forfeit [] benefits otherwise generally available." *Klem*, 497 F.3rd at 280.

40. In free exercise of religion contexts the question is not whether the company and its owners are identical, the question is whether government coercion on an owner's business is a violation of the owner's personal moral and religious beliefs. Many cases have recognized that the beliefs of a closely held corporation and its owners are inseparable. *See, e.g. Stormans* and *McClure, supra; Tyndale House Publishers*, 2012 WL 5817323 at *8 (*Townley* and *Stormans* recognize that a corporation should be deemed the alter-ego of its owners for religious purposes).

The Mandate is Not Generally Applicable

41. The Mandate also faces strict scrutiny under the First Amendment because it is not generally applicable. This Court has previously explained the standards of general applicability.

> A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not

> reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.

Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004). *Blackhawk* involved a Native American required to pay a permit fee to keep a bear he used for religious rituals. The law contained categorical exceptions to the annual fee while not making the same allowance for religious objections. Thus, the Court applied strict scrutiny. *Id.* at 212.

42. The District Court in the instant case incorrectly concluded that the Mandate was generally applicable because it did not specifically target religion. *See* Opinion at 18. This reasoning is inconsistent with the holding in *Blackhawk*. It is not necessary to show that religion is explicitly targeted. Instead, it is only necessary to show that the statutory scheme is underinclusive, allowing for exceptions for secular reasons but not for the religious reasons raised.

43. The Mandate is massively underinclusive. As many as 191 million employees are exempt from the contraceptive coverage Mandate due to the grandfathered plans alone. Mandate, 76 Fed. Reg. at 46623 & n.4; *Newland*, 2012 WL 3069154 at *1; *Tyndale House Publishers*, 2012 WL 5817323 at *18. The Mandate also does not apply to small employers who choose to drop insurance coverage for employees, to religious sects opposed to insurance, and to religious employers that the Mandate defines as exempt. The government has chosen of its

own accord to leave most women without the health and equality that they claim must be imposed through Conestoga and the Hahns.

44. In cases striking down religiously burdensome laws containing exemptions, Judge Alito explained for the Third Circuit that strict scrutiny applies when either discretionary *or* categorical exemptions exist but religious objections are denied. *Blackhawk*, 381 F.3d at 209; *Fraternal Order of Police*, 170 F.3d at 365. Appellees admit that they possess discretion over the exemption they created for religious employers. Mandate, 76 Fed. Reg. at 46623–24; 77 Fed. Reg. at 8726. Meanwhile, their scheme exempts millions for secular reasons. Because of its underinclusiveness and the government's discretionary power, the Mandate is not generally applicable and therefore must pass strict scrutiny.

The Mandate, as applied to Appellants, Does Dot Survive Strict Scrutiny

45. In order to survive strict scrutiny, the government must prove that the regulations are the least restrictive means to achieving a compelling governmental interest. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006). A compelling interest is an interest of "the highest order," *Lukumi*, 508 U.S. at 546, and is justified only by "the gravest abuses, endangering paramount interests," *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

The government lacks a compelling interest as to Conestoga and the Hahns

46. The government has proffered two compelling interests for the Mandate, health and gender equality. 77 Fed. Reg. 8,725, 8,729. What undermines the government's claim that the Mandate is needed to address a compelling interest is the massive number of employees and participants for whom the government has voluntarily decided to omit. "[A] law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547.

47. The Affordable Care Act imposes multiple requirements on grandfathered health plans, but the government has decided that this Mandate is not of a high enough interest to be included. The preventive services Mandate, listed at § 2713 of PPACA, is omitted from the provisions that grandfathered plans must observe: §§ 2704, 2708, 2711, 2712, 2714, 2715, and 2718. 75 Fed. Reg. 34,538, 34,542. These include requirements such as dependent coverage until age 26, restrictions on preexisting conditions and annual or lifetime limits. Thus, the government has deemed that this Mandate is not of the highest order.[4]

48. The government cannot satisfy the compelling interest prong by asserting its health and equality interests generally. *O Centro*, 546 U.S. at 431. Further, the government has not offered compelling evidence that grave harm will be caused by exempting Conestoga and the Hahn family. *See Brown v. Entm't*

[4] The statutory text of § 2713 does not even mention contraception.

Merchs. Ass'n, 131 S. Ct. 2729, 2738–39 (2011) (the government must "specifically identify an 'actual problem' in need of solving"). Generic evidence that contraception benefits women does not prove that providing these items for free is needed against religious objectors. For all these reasons, the Mandate does not advance a compelling interest.

The Mandate is Not the Least Restrictive Means of Achieving Any Interest

49. The Mandate is not the least restrictive means of furthering the alleged interests. If the government wishes to further the interests of health and equality by means of free access to contraceptive services, it could do so in a variety of ways without coercing Conestoga and the Hahn family. The government could offer tax deductions or credits for the purchase of contraceptives, reimburse citizens who pay to use contraceptives, provide these services to citizens itself, or provide incentives for pharmaceutical companies to provide such products free of charge. The government already subsidizes contraception extensively.[5] In *Riley v. National Federation of the Blind*, 487 U.S. 781, 799–800 (1988), the Court required the government to use alternatives rather than burden fundamental rights, even when the alternatives might be more costly or less directly effective to

[5] *See, e.g.*, Family Planning grants in 42 U.S.C. § 300, et seq.; the Teenage Pregnancy Prevention Program, Public Law 112-74; the Healthy Start Program, 42 U.S.C. § 254c-8; the Maternal, Infant, and Early Childhood Home Visiting Program, 42 U.S.C. § 711; Maternal and Child Health Block Grants, 42 U.S.C. § 703; Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.; the Indian Health Service, 25 U.S.C. § 13; Health center grants, 42 U.S.C. § 254b; the NIH Clinical Center, 42 U.S.C. § 248; the Personal Responsibility Education Program, 42 U.S.C. § 713; and the Unaccompanied Alien Children Program, 8 U.S.C. § 1232(b)(1).

achieve the goal. If the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties". *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983). *Thompson v. Western States Med. Ctr.*, 535, U.S. 357, 373 (2002) (restricting First Amendments rights "must be a last – not first – resort").

Appellants Satisfy the Remaining Injunction Factors

50. A preliminary injunction pending appeal should be granted because, in addition to their likelihood of success on the merits, Conestoga and the Hahns will suffer irreparable harm in the absence of an injunction. The loss of First Amendment rights for even a limited period of time constitutes irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Moreover, the government will not be subjected to harm since it already allows millions of Americans to be without this Mandate's coverage. The public interest is served by the injunction itself because "one of the goals of the preliminary injunction analysis is to maintain the status quo, defined as the last, peaceable, noncontested status of the parties." *Kos Pharm.*, 369 F.3d at 708 (quoting *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 197 (3d Cir. 1990)). Because the four factors of a preliminary injunction are met, relief should be granted. Enjoining application of the Mandate will impose no monetary requirements on the government, so no bond should be required of Appellants. *See* Fed. R. App. P. 8(a)(2)(E).

CONCLUSION

51. Appellants request that this Court grant this motion and enter an injunction pending appeal to prohibit Appellees, their officers, agents, servants, successors in office, employees, attorneys, and those acting in concert or participation with them, from applying and enforcing against Appellants, their health care plan, or insurance carrier any or any provision of the Preventative Services Mandate issued pursuant to the ACA that requires Appellants to include in their employee health plan coverage for FDA approved contraceptive methods, related patient education and counseling, including the substantive requirement imposed in 42 U.S.C. § 300gg-13, as well as any penalties and fines for non-compliance, including those found in 26 U.S.C. §§ 4980D, 4980H, and 29 U.S.C. § 1132, and from making any determination that the requirements apply to Appellants, their health care plan, or insurance carrier.

Respectfully submitted on this 22nd day of January, 2013,

Respectfully submitted,

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UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR; and
UNITED STATES DEPARTMENT OF THE TREASURY;
Appellees.

CERTIFICATION OF SERVICE

The undersigned counsel for Appellants, Charles W. Proctor, III, Esquire, hereby certifies that the following counsel for Appellees were served with Motion for Injunction Pending Appeal document by the Court's ECF filing system on January 22, 2013:

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