IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONESTOGA WOOD SPECIALTIES CORPORATION, et al.,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services, et al.,

Defendants-Appellees

No. 13-1144

OPPOSITION TO PLAINTIFFS' EXPEDITED MOTION FOR AN INJUNCTION PENDING APPEAL

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INTRODUCTION AND SUMMARY

The federal government respectfully submits this opposition to plaintiffs' motion for an injunction pending appeal. Plaintiff Conestoga Wood Specialties Corporation is a for-profit corporation that manufactures wood cabinets. Conestoga Wood has 950 full-time employees. The corporation does not hire employees on the basis of their religion, and the employees do not necessarily share the religious beliefs of the corporation's controlling shareholders, the Hahns, who allege that they regard certain forms of contraception as immoral.

People employed by Conestoga Wood obtain health coverage for themselves and their family members through the Conestoga Wood group health plan, as an employee benefit that is part of their compensation packages. Conestoga Wood and the Hahns contend that, under the Religious Freedom Restoration Act ("RFRA") and the First Amendment, the Conestoga Wood plan is entitled to an exemption from the federal regulatory requirement that the plan to cover all forms of Food and Drug Administration ("FDA")-approved contraceptives, as prescribed by a health care provider. The district court denied a preliminary injunction, finding that Conestoga Wood and the Hahns failed to establish a reasonable likelihood of success on the merits of their claims. *See* R.49.

Conestoga Wood and the Hahns now ask this Court to issue an injunction pending appeal that would exempt the Conestoga Wood plan from the contraceptive-coverage requirement. The motion should be denied. The First Amendment is not implicated because the challenged regulations establish neutral rules of general applicability. And RFRA is not implicated because the contraceptive-coverage requirement does not impose a substantial burden on any exercise of religion by Conestoga Wood or the Hahns.

Health coverage under a group health plan is a form of employee compensation that, like salary, is for the benefit of employees and their family members. The participants in the Conestoga Wood plan are not required to share

the personal religious beliefs of the Hahns, and they have the right to decide for themselves how to use their health coverage, just as they are entitled to decide how to use their salaries. Congress has granted religious organizations alone the prerogative to deny employee benefits on the basis of religion, and Conestoga Wood is not a religious organization. *See* R.49 at 14. The corporation therefore must provide the employee benefits that are required by federal law.

Plaintiffs cannot circumvent the distinction between religious and secular employers by declaring that the contraceptive-coverage requirement imposes a substantial burden on the personal free exercise rights of the Hahns. The contraceptive-coverage requirement applies to the Conestoga Wood group health plan, which, like the corporation itself, is a legal entity that is separate and distinct from the corporation's controlling shareholders. The Hahns benefit personally from the separation inherent in the corporate form, and 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." *Id*. at 16.

"Whatever burden the Hahns may feel from being involved with a for-profit corporation that provides health insurance that could possibly be used to pay for contraceptives, that burden is simply too indirect to be considered substantial under the RFRA." *Id*. at 28. "RFRA does not protect against the slight burden on

religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *O'Brien v. HHS*, __F. Supp. 2d __, 2012 WL 4481208, *6 (E.D. Mo. Sept. 28, 2012), *appeal pending*, No. 12-3357 (8th Cir.). *See also Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 12/20/12 (10th Cir.) (12/20/12 order) (denying motion to enjoin the contraceptive-coverage requirement pending appeal); *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir.) (12/28/12 & 12/31/12 orders) (same).[1]

STATEMENT

A. Statutory and Regulatory Background

Congress has long regulated certain terms of group health plans, and the Patient Protection and Affordable Care Act establishes additional minimum standards for such plans. As a component of the Act's emphasis on cost-saving preventive care, Congress provided that a non-grandfathered plan must cover certain preventive health services without requiring plan participants to make co-payments or pay deductibles. These preventive health services include immunizations recommended by the Advisory Committee on Immunization

[1] Plaintiffs rely on the stay pending appeal issued in *O'Brien v. HHS*, No. 12-3357 (8th Cir.) (11/28/12 order), and on the injunction pending appeal issued in *Korte v. Sebelius*, No. 12-3841 (7th Cir.) (12/28/12 order). But the one-sentence stay order in *O'Brien* did not provide any rationale, and the *Korte* order did not address the concerns that underlie the district court's decision in this case.

Practices, *see* 42 U.S.C. § 300gg-13(a)(2); items or services that have an "A" or "B" rating from the U.S. Preventive Services Task Force, *see id*. § 300gg-13(a)(1); preventive care and screenings for infants, children, and adolescents as provided in guidelines of the Health Resources and Services Administration ("HSRA"), a component of the Department of Health and Human Services ("HHS"), *see id*. § 300gg-13(a)(3); and certain additional preventive services for women as provided in HRSA guidelines, *see id*. § 300gg-13(a)(4).

Collectively, these preventive health services provisions require coverage of an array of recommended services including immunizations, blood pressure screening, mammograms, cervical cancer screening, and cholesterol screening.[2] HRSA commissioned a study by the Institute of Medicine to help it develop the statutorily required preventive services guidelines for women. Consistent with the Institute's recommendations, the regulations require coverage for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity, as prescribed by a provider." 77 Fed. Reg. 8725 (Feb. 15, 2012) (internal quotation marks omitted). FDA-approved contraceptive methods include

[2] *See, e.g.*, U.S. Preventive Services Task Force "A" and "B" Recommendations, *available at* http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm.

diaphragms, oral contraceptive pills, injections and implants, emergency contraceptive drugs, and intrauterine devices.[3]

The regulations that implement the contraceptive-coverage requirement authorize an exemption from that requirement for the group health plan of any organization that qualifies as a religious employer. The regulations define a religious employer as an organization that has as its purpose the inculcation of religious values, that primarily hires and serves persons who share the religious tenets of the organization, and that is a non-profit organization as described in Internal Revenue Code provisions applicable to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B). In addition, the agencies charged with enforcing the contraceptive-coverage requirement established a temporary enforcement safe harbor for plans sponsored by certain non-profit organizations that have religious objections to providing contraceptive coverage. *See* 77 Fed. Reg. at 8727; HHS, Guidance on the Temporary Enforcement Safe Harbor (Aug. 15, 2012).[4]

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[3] *See* Birth Control Guide, FDA Office of Women's Health, *available at* http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf (last updated Jan. 2013).

[4] *Available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf.

B. Factual Background and District Court Proceedings

Plaintiff Conestoga Wood Specialties Corporation is a for-profit Pennsylvania corporation that manufactures wood cabinets. *See* R.48 ¶ 11. Conestoga Wood has 950 full-time employees throughout its various locations in the United States. *See id*. ¶ 37. The corporation does not hire employees on the basis of their religion, and the employees do not necessarily share the religious beliefs of the corporation's controlling shareholders, the Hahns, who allege that they regard certain forms of contraception as immoral. *Id*. ¶¶ 45-46.[5]

People employed by Conestoga Wood obtain health coverage for themselves and their family members through the Conestoga Wood group health plan. *See id*. ¶ 36. Conestoga Wood and the Hahns contend that the plan should be exempted from the federal regulatory requirement that the plan cover all forms of FDA-approved contraceptive services, as prescribed by a health care provider. They allege that an exemption for the Conestoga Wood plan is required under RFRA and the First Amendment. The district court denied plaintiffs' motion for a preliminary

[5] Although plaintiffs refer to the drugs Plan B and Ella as abortifacients, *see* R.48 ¶¶ 3, 45-48, these drugs are not abortifacients within the meaning of federal law because they have no effect if a woman is pregnant. *See* 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997) ("Emergency contraceptive pills are not effective if the woman is pregnant; they act by delaying or inhibiting ovulation, and/or altering tubal transport of sperm and/or ova (thereby inhibiting fertilization), and/or altering the endometrium (thereby inhibiting implantation)."); 45 C.F.R. § 46.202(f) ("[P]regnancy encompasses the time period from implantation to delivery.").

injunction, finding that Conestoga Wood and the Hahns failed to establish a reasonable likelihood of success on the merits of their claims. *See* R.49.

ARGUMENT

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id*. at 20; *see also Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012). The district court correctly held that Conestoga Wood and the Hahns failed to establish a reasonable likelihood of success on the merits of their claims.

A. The Contraceptive-Coverage Requirement Does Not Impose a Substantial Burden on Any Exercise of Religion by Plaintiffs.

1. RFRA is not implicated here because the contraceptive-coverage requirement does not impose a substantial burden on any exercise of religion by Conestoga Wood or the Hahns. *See* 42 U.S.C. § 2000bb-1(a). It is common ground that corporations are legal persons that enjoy certain First Amendment rights. *See Citizens United v. FEC*, 130 S. Ct. 876 (2010) (freedom of speech). But, whereas 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).

That special solicitude is reflected in Acts of Congress that give religious organizations alone the latitude to deny their employees certain benefits and protections of federal law. Although Title VII of the Civil Rights Act of 1964 generally prohibits an employer from discriminating on the basis of religion in the terms or conditions of employment, it exempts a "religious corporation, association, educational institution, or society" from this prohibition. 42 U.S.C. § 2000e-1(a). Because the line between a religious organization's religious and secular activities may be difficult to discern, the Title VII exemption applies regardless of whether the activities are religious in nature. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335-36 & n.14 (1987). Thus, in *Amos*, the Supreme Court held that a non-profit gymnasium run by the Mormon Church was free to fire a janitor who failed to observe the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco. *See id*. at 330 & n.4.

Similarly, a church-operated educational institution is exempt from the jurisdiction of the National Labor Relations Board, and even lay faculty members of such an institution cannot invoke the collective bargaining and other federal

rights that the National Labor Relations Act grants to employees. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

Conestoga Wood is not a religious organization. By plaintiffs' own account, Conestoga Wood is a for-profit corporation that manufactures wood cabinets. Because Conestoga Wood is not a religious organization, it cannot invoke the special statutory provisions that allow religious employers to deny employee benefits for religious reasons. Indeed, plaintiffs do not claim that Conestoga Wood qualifies for the Title VII exemption. Federal law thus does not allow Conestoga Wood to take religion into account in establishing the terms or conditions of employment.

No court has ever found a for-profit corporation to be a religious organization for purposes of federal law. The Supreme Court stressed that the activities under review in *Amos* were not conducted on a for-profit basis, *see Amos*, 483 U.S. at 339, and the D.C. Circuit has explained that for-profit status provides an objective way to distinguish a secular company from a potentially religious organization. *See University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). "As the *Amos* Court noted, it is hard to draw a line between the secular and religious activities of a religious organization." *Id*. at 1344. By contrast, "it is relatively straight-forward to distinguish between a non-profit and a for-profit entity." *Ibid*.; *see also Spencer v. World Vision, Inc.*, 633 F.3d 723, 734 (9th Cir.

2011) (O'Scannlain, J., concurring) (urging that analysis of the Title VII exemption should "center[] on neutral factors (i.e., whether an entity is a nonprofit and whether it holds itself out as religious)," "[r]ather than forcing courts to 'troll[] through the beliefs of [an organization], making determinations about its religious mission'") (quoting *Great Falls*, 278 F.3d at 1342).

RFRA cannot be interpreted in a way that disregards the established dichotomy between religious and secular employers. As discussed above, this dichotomy is rooted in the Free Exercise Clause, *see Hosanna-Tabor*, 132 S. Ct. at 706, and embodied in other federal statutes. When Congress enacted RFRA in 1993, it did so 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. Conestoga Wood is a for-profit, secular employer, and it must provide the employee benefits that federal law requires.

2. Conestoga Wood cannot circumvent the distinction between religious and secular employers by declaring that the contraceptive-coverage requirement imposes a substantial burden on the personal free exercise rights of the Hahns. The obligation to cover recommended preventive health services is imposed on group health plans and issuers of health insurance coverage, *see* 42 U.S.C. § 300gg-13(a), and the Hahns are neither.

A group health plan is a legally separate entity from the company that sponsors it. *See* 29 U.S.C. § 1132(d). And Conestoga Wood "is a distinct and separate entity, irrespective of the persons who own all its stock." *Barium Steel Corp. v. Wiley*, 108 A.2d 336, 341 (Pa. 1954); *see* Pa. Cons. Stat. §§ 1501-02. Although plaintiffs seek to collapse these distinctions, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). As a Pennsylvania corporation with a "perpetual" existence, Conestoga has broad powers to conduct business, hold and transact property, and enter into contracts. *See* Pa. Cons. Stat. § 1502.

Significantly, by engaging in commerce through a corporation, the Hahns protect themselves from personal liability for the actions of Conestoga Wood. *See Lumax Indus., Inc. v. Aultman*, 669 A.2d 893, 895, (Pa. 1995). "Even when a corporation is owned by one person or a family, the corporate form shields the individual members of the corporation from personal liability." *Kelleytown Co. v. Williams*, 426 A.2d 663, 668 (Pa. Super. Ct. 1981). The controlling shareholders of a corporation "quite properly enjoy the protections and benefits of the corporate form." *Autocam Corp. v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6845677, *7 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.). "[T]his

separation between a corporation and its owners 'at a minimum [ ] means the corporation is not the *alter ego* of its owners for purposes of religious belief and exercise.'" R.49 at 16 (quoting *Autocam Corp.*, __ F. Supp. 2d __, 2012 WL 6845677, *7). "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." *Ibid*.

The challenged regulations do not "compel the [Hahns] as individuals to do anything." *Autocam Corp.*, __ F. Supp. 2d __, 2012 WL 6845677, *7. "They do not have to use or buy contraceptives for themselves or anyone else." *Ibid*. "It is only the legally separate entities they currently own that have any obligation under the mandate." *Ibid*. "The law protects that separation between the corporation and its owners for many worthwhile purposes." *Ibid*. "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." *Ibid*.

None of the Supreme Court cases on which plaintiffs rely supports their position here. When Justice Sotomayor denied another for-profit corporation's motion to enjoin the contraceptive-coverage requirement, she explained that the Supreme Court has never "addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders alleging

that the mandatory provision of certain employee benefits substantially burdens their exercise of religion." *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers). In the one case that involved employee benefits, the Court rejected the "free exercise claim brought by [an] individual Amish employer who argued that paying Social Security taxes for his employees interfered with his exercise of religion." *Ibid*. (citing *United States v. Lee*, 455 U.S. 252 (1982)). Even with respect to that individual employer, the Court stressed that, "[w]hen followers of a particular sect enter into commercial activities as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. The Court explained that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees." *Id.* at 260.

"Whatever burden the Hahns may feel from being involved with a for-profit corporation that provides health insurance that could possibly be used to pay for contraceptives, that burden is simply too indirect to be considered substantial under the RFRA." R.49 at 28. Health coverage under a group health plan is a form of employee compensation that, like salary, is provided for the benefit of employees and their families. The participants in a group health plan are not required to share the personal religious beliefs of a for-profit, secular company's officers or

controlling shareholders, and they have the right to decide for themselves how to use their health coverage, just as they are entitled to decide for themselves how to use their salaries. "RFRA is a shield, not a sword." *O'Brien v. HHS*, __F. Supp. 2d __, 2012 WL 4481208, *6 (E.D. Mo. Sept. 28, 2012), *appeal pending*, No. 12-3357 (8th Cir.). "[I]t is not a means to force one's religious practices upon others." *Ibid*. "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *Ibid*.; *accord Korte v. HHS*, __ F. Supp. 2d __, 2012 WL 6553996 (S.D. Ill. Dec. 14, 2012), *appeal pending*, No. 12-3841 (7th Cir.); *Grote Industries, LLC v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012), *appeal pending*, No. 13-1077 (7th Cir.).[6]

3. Contrary to plaintiffs' assertion, a plaintiff does not "show[] a burden to be substantial simply by claiming that it is." R.49 at 24. Although "'courts are not

[6] The cases on which plaintiffs rely (Pl. Mot. 13) are inapposite. In *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 850-51 & n.10 (Minn. 1985), a state hearing examiner "pierced the 'corporate veil'" to hold the individual owners of the stock and assets of a corporation "liable for the illegal actions of" the corporation. In *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988), and *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), the courts held that corporations had standing to raise the free exercise rights of their owners, but did not address whether those rights had been substantially burdened. And, in *Tyndale House Publishers, Inc. v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5817323, *6-7 & n.10 (D.D.C. Nov. 16, 2012), the court relied on the "unique corporate structure" of the plaintiff, which was 96.5% owned by a non-profit, religious organization.

the arbiters of scriptural interpretation,' *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981), the RFRA still requires the court to determine whether the burden a law imposes on a plaintiff's stated religious belief is 'substantial.'" *Ibid*. "If every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed that it was the case, then the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." *Id*. at 25. "This would subject virtually every government action to a potential private veto based on a person's ability to articulate a sincerely held objection tied in some rational way to a particular religious belief." *Autocam Corp.*, __ F. Supp. 2d __, 2012 WL 6845677, *7.

The implications of plaintiffs' position are untenable. "If the financial support for health care coverage of which Plaintiffs complain constitutes a substantial burden," then a for-profit, secular company "could seek exemptions from employer-provided health care coverage for a myriad of health care needs, or for that matter, for any health care at all to its employees." *Grote Industries*, __ F. Supp. 2d __, 2012 WL 6725905, *6. The controlling shareholder of a for-profit, secular corporation may, for example, have a personal religious objection to receiving immunizations, and he may on that basis be entitled to a state-law exemption from the requirement that his children be vaccinated as a condition of

attending school. *See, e.g.*, N.Y. Pub. Health Law § 2164(9) (McKinney 2002) (authorization such an exemption). It does not follow, however, that the same individual could demand that the group health plan of the corporation he controls be exempted from the federal requirement to cover immunizations recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention. *See* 42 U.S.C. § 300gg-13(a)(2). Neither RFRA nor any other federal statute gives a for-profit, secular corporation the right to require employees and their families to pay out of pocket for recommended preventive health services that do not accord with the personal religious beliefs of the corporation's controlling shareholder.

B. The Contraceptive-Coverage Requirement Is Narrowly Tailored To Advance Compelling Governmental Interests.

1. The contraceptive-coverage requirement is also narrowly tailored to advance compelling governmental interests: promoting the health of women and children and promoting gender equality. Plaintiffs cannot deny the importance of ensuring that employees and their family members have access to recommended preventive health services, including FDA-approved contraceptive services prescribed by a health care provider. That "the employees' rights being affected are of constitutional dimension" because they relate to matters of procreation and marriage, *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla.

2012), *appeal pending*, No. 12-6294 (10th Cir.), only confirms that the interests served by the contraceptive-coverage requirement are compelling.

Plaintiffs nonetheless contend that these interests cannot be compelling because certain plans that collectively cover millions of employees are not subject to the preventive health services coverage requirement. *See* Pl. Mot. 17. This argument reflects a misunderstanding of the Affordable Care Act's grandfathering provision, 42 U.S.C. § 18011. Although grandfathered plans are not subject to certain Affordable Care Act requirements, including the requirement to cover recommended preventive health services, the grandfathering provision is transitional in effect, and it was projected a majority of plans would lose their grandfathered status by 2013. *See* 75 Fed. Reg. 34,538, 34,552 (June 17, 2010).

Moreover, plaintiffs cite no evidence to show that grandfathered plans exclude coverage of FDA-approved contraceptives, as prescribed by a health care provider. By the *O'Brien* plaintiffs' account, "a whopping 90% of employer-based insurance plans already covered a full range of prescription contraceptives" before the contraceptive-coverage requirement was established. *O'Brien v. HHS*, No. 12-3357 (8th Cir.), Pl. Br. 32-33 (filed 11/13/12).

2. Plaintiffs alternatively contend that, instead of regulating the terms of group health plans, the federal government could give all citizens access to free contraceptives. *See* Pl. Mot. 18. This argument reflects a fundamental

misunderstanding of the "least restrictive means" test, which has never been held to require the government to "subsidize private religious practices." *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 94 (Cal. 2004) (rejecting challenge to a state-law requirement that certain health insurance plans cover prescription contraceptives).

C. The First Amendment Claim Is Also Meritless.

The First Amendment's Free Exercise Clause is not implicated when the government burdens a person's religious exercise through laws that are neutral and generally applicable. *See Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879 (1990). Even assuming *arguendo* that plaintiffs' free exercise rights are burdened by the contraceptive-coverage regulations, there is no Free Exercise Clause violation because the regulations are neutral and generally applicable. *See* R.49 at 17-19.

Plaintiffs assert that the requirement to cover recommended preventive health services (including contraceptives) is not generally applicable because it does not apply to grandfathered plans. *See* Pl. Mot. 15. But, as discussed above, the effect of the Affordable Care Act's grandfathering provision is not to give a plan the type of permanent exemption from requirements that plaintiffs demand here. The grandfathering provision is transitional in effect, and it is "a reasonable plan for instituting an incredibly complex health care law while balancing

competing interests." *Legatus v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5359630, *9 (Oct. 31, 2012), *appeals pending*, Nos. 13-1092 & 13-1093 (6th Cir.).

Plaintiffs also note that certain non-profit, religious institutions such as churches and their integrated auxiliaries are exempt from the contraceptive-coverage requirement. Pl. Mot. 15. "The fact that exemptions were made for religious employers does not indicate that the regulations seek to burden religion." R.49 at 18. "Instead, it shows that the government made efforts to accommodate religious beliefs, which counsels in favor of the regulations' neutrality." *Ibid*. Clearly, the government may provide an exemption for non-profit, religious institutions, without also extending that measure to for-profit, secular employers like Conestoga Wood. Indeed, the federal government has long afforded favorable tax treatment to non-profit organizations that are organized and operated exclusively for religious purposes. *See* 26 U.S.C. § 501(c)(3); *see also Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 666 (1970) (upholding property tax exemptions for real property owned by non-profit, religious organizations and used exclusively for religious worship).

CONCLUSION

Plaintiffs' motion for an injunction pending appeal should be denied.

Respectfully submitted,

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January 28, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2013, I filed and served the foregoing opposition on counsel of record through this Court's CM/ECF system.

/s Alisa B. Klein

Alisa B. Klein