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.

REPLY TO OPPOSITION TO APPELLANTS' EXPEDITED MOTION FOR AN INJUNCTION PENDING APPEAL

Conestoga and the Hahn Family file this Reply to Appellees Opposition to Appellants Expedited Motion for an Injunction Pending Appeal to address the ability of a corporate entity like Conestoga to exercise religion and the substantial nature of the burden on such an entity caused by the Mandate.

I. Neither corporations nor for-profit entities are excluded from exercising religion under RFRA or the First Amendment.

The Appellees mistakenly asserts that Conestoga cannot exercise religion, claiming that as a for-profit corporation, it is entirely devoid of any religious dimensions. This is incorrect as a factual matter in that many for-profit entities like Conestoga have a significant religious dimension, and it is incorrect as a legal matter as well. Both REFRA and the Free Exercise clause have generous concepts of what constitutes religious exercise.

Conestoga is organized, shaped, and run entirely by the Hahns as its owners. They shape the corporation's day to day business as well as its mission following their own religious beliefs. Their mission specifically involves serving their customers and employees in a Christian manner. The fact that the Hahns earn a profit and pay taxes on that profit does not decrease the extent to which the Hahns seek to live out their faith through the operation of this business.

Denying that a corporation is a direct reflection and a voice for the religious beliefs of the owners would be akin to denying what the Supreme Court has already explicitly recognized, specifically, that corporations can exercise various constitutional rights that are not purely personal. The expressive religious conduct which Conestoga wishes to engage in here is just the kind of constitutional right that a corporation can carry out. Recognizing some rights but denying others just has no basis in our constitutional heritage.

While Appellees claim that it would be unfair for the Hahns to benefit from the corporate form in the exercise of religion, the corporate form should not be applied in such a way to undermine justice and good public policy. See, e.g., *Wicks v. Milzoco Builders, Inc.*, 470 A. 2d 86, 503 Pa. 614, 620 (1983). Indeed, persons are allowed to benefit from the corporate form in order to exercise their speech rights. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Therefore, those exercising religion should not be uniquely barred from using the corporate form.

The Appelles are incorrect that the corporate form or for-profit purpose are a bar to religious exercise. Clearly the Supreme Court has protected the religious freedom of corporations. 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) (captioned as a "New Mexico corporation" in the lower courts' decisions). The fact that these corporations were churches or were not-for-profit is irrelevant to the conclusion that corporate form is not a bar to that exercise. Likewise, RFRA applies to "persons," 42 U.S.C. § 2000bb(b), and persons as defined by 1 U.S.C. § 1 includes corporations.

For-profit status is not a bar to religious exercise. See e.g. *United States v. Lee*, 455 U.S. 252, 257 (1982) (involving an Amish business). Although that employer lost on another element of the claim, the Court specifically said the business exercised religion. *Id.* Because a business is indisputably operated for profit, it cannot be true that operating a business for profit deprives it of the exercise of religion.

Since neither corporate status nor for-profit status are a bar to the exercise of religion, Appellees take a different approach and claim that Conestoga does not meet the definition of a religious corporation under either the Mandate or under the laws pertaining to employment discrimination. However this is a red herring as Conestoga is not claiming that it meets any existing regulatory definition under the Mandate or definition pertaining to other unrelated areas of the law. Appellees argue that entities are either completely religious or completely secular, when real life demonstrates something different. While Conestoga is not a church or a Bible publisher, it is beyond dispute that there is a significant religious element to Conestoga. The Hahn family has long operated their business according to their stated religious purposes.

Millions of Americans live out their religion in their everyday lives, including in the way they run their family businesses. In doing so, they infuse that business with religious ideals such as glorifying God in the way the business is run, serving the community charitably, respecting their workers and being good stewards of the environment. It would run contrary to caselaw as well as common sense and sound public policy to declare that business corporations may not pursue any of these religious concerns and can only seek profit. And it would constitute viewpoint discrimination to allow businesses to pursue employee safety and ethical concerns but not religious ones.

Appellees also misstate the holding of *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), when it suggests that only religious organizations can exercise religion. The *Hosanna-Tabor* court made clear

that religious corporations are protected by the First Amendment relating to their selection of ministers, but the Court in no way concluded that no company has protection unless it is a religious non-profit. For these reasons, Conestoga may exercise religion under RFRA and the Free Exercise clause.

II. The Mandate imposes a substantial burden on Appellants' religious exercise.

The Mandate is a quintessential substantial burden because it "make[s] unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Conestoga and the Hahns exercise their religious belief by refraining from covering drugs and devices that could result in the death of an embryo after conception. The Mandate directly prohibits this religious exercise.

Under both RFRA and the First Amendment, a claimant must show a "substantial burden." See 42 U.S.C. § 2000bb(b); *Sherbert v. Verner*, 374 U.S. 398 (1963). This can occur when "the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007). Here there is substantial pressure to modify their behavior due to the $100 per employee per day fine that is levied for non-compliance. This is far more substantial than the burdens found in other cases such as the fine of $5 in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (involving the substantial burden on Amish parents by the compulsory school-attendance laws) or the $50 fee in *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d

Cir. 2004) (involving the substantial burden on Native American religious rituals by being forced to pay a fee to keep a bear).

The Mandate explicitly makes unlawful Appellants' religious practice as it is against their religious beliefs to specifically facilitate what is contrary to their beliefs. The Mandate is a "fine imposed against appellant" for its religious practice, *Sherbert*, 374 U.S. at 404, and requires Conestoga and the Hahns "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Yoder*, 406 U.S. at 218. Thus the Mandate bears direct responsibility for placing substantial pressure on Conestoga and the Hahns to offer a health plan that violates their religious beliefs, rendering their constitutionally mandated religious exercise effectively impracticable.

To claim that the Hahns themselves are immune from this burden underestimates the dilemma that the Hahns are facing. The Mandate is not, as suggested by Appellees, akin to paying employees who can do what they want with their funds. Instead, Conestoga and the Hahns are being required to participate in and pay for coverage that they find abhorrent, creating a dilemma for the Hahns who own and operate the company according to their religious conscience. It is not for the Appellees to second guess what should be burdensome to the Hahns. It is enough that the Hahns object on religious grounds. To go any further would put the court in the position of determining what was a valid or reasonable religious belief, which is not the place of the courts.

A "substantial burden" analysis measures the government's penalties and the resulting pressure to violate ones religious beliefs. The analysis does *not* measure

moral beliefs or weigh how morally attenuated one's theological objection is in relation to other immoral activity. It analyzes a substantial burden not substantial beliefs. The Supreme Court has explicitly rejected this kind of moral theologizing. 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 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.* The proposition that direct penalties are somehow not substantial burdens on an explicit religious belief because the court deems that activity *morally* insulated or, is plain legal error.

The Hahns and Conestoga's exercise of their religious beliefs does not impose such religious beliefs on their employees. The Hahns and Conestoga have long excluded contraception coverage in their health plan for religious reasons. It was neither then nor is it now an imposition of religious beliefs on others. Conestoga employees are still able to purchase contraceptive or obtain same through existing government funded programs. For these reasons, this Court should find that there is a substantial burden to the Hahns' and Conestoga's religious beliefs.

CONCLUSION

Conestoga and the Hahn's wish to exercise their religious beliefs free of the penalties of the Mandate. Because their religious beliefs are substantially burdened by the Mandate, because RFRA and the First Amendment protects those interests, and because they are suffering injury to their religious beliefs every day that goes by, an injunction pending appeal should be granted.

Respectfully submitted on this 29th day of January, 2013,

Respectfully submitted,

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Appellees.

CERTIFICATION OF SERVICE

I hereby certify that on January 29, 2013, I filed and served the foregoing reply on counsel of record through this Court's CM/ECF system.

/s/ Charles W. Proctor, III
Charles W. Proctor, III, Esquire