UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 13-1144

CONESTOGA WOOD SPECIALTIES CORPORATION, a PA Corporation; NORMAN HAHN; ELIZABETH HAHN; NORMAN LEMAR HAHN; ANTHONY H. HAHN; 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

BRIEF OF APPELLANTS

APPEAL FROM THE ORDER DATED JANUARY 11, 2012 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA AT DOCKET NO. 5:12-CV-06744-MSG DENYING APPELLANTS' MOTION FOR PRELIMINARY INJUNCTION

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JURISDICTIONAL STATEMENT

I. JURISDICTION OF THE DISTRICT COURT

The Eastern District Court of Pennsylvania had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it is a civil action against agencies and officials of the United States based on claims arising under the United States Constitution, particularly the First Amendment, and under the statutes of the United States, particularly the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.* ("RFRA") and the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.* The District Court also had subject matter jurisdiction pursuant to 28 U.S.C. § 1343(a)(4) because this is a civil action to secure equitable or other relief under an Act of Congress providing for the protection of civil rights (RFRA), and pursuant to 28 U.S.C. § 1346(a)(2) because it is a civil action against the United States based on the Constitution, Acts of Congress, and regulations enacted by various executive departments. Lastly, the District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1361 because the District Court may compel officers and agencies of the United States to perform a duty owed to Conestoga and the Hahn Family.

II. JURISDICTION OF THE THIRD CIRCUIT COURT OF APPEALS

This Court has jurisdiction over this appeal because the order of the District Court, from which this appeal is taken, denied Plaintiffs' Motion for Preliminary Injunction. 28 U.S.C. § 1292(a)(1); App. 3.[1]

This appeal was timely filed. Fed. R. App. P. 4. The District Court entered its order denying Plaintiffs' Motion for Preliminary Injunction on January 11, 2013, App. 3, and Plaintiffs filed their Notice of Appeal from that order on January 14, 2013. App. 1.

The District Court's Order denying Plaintiffs' Motion for a Preliminary Injunction dealt with the following claims raised in Plaintiffs' complaint: Count I (Violation of the Religious Freedom Restoration Act) and Count II (Violation of the Free Exercise Clause of the U.S. Constitution). App. 54-56; DCT Doc. 48. Still pending in the District Court are the remaining claims raised in Plaintiffs' complaint: Count III (Violation of the Establishment Clause of the United States Constitution), Count IV (Violation of the Free Speech Clause of the United States Constitution), and Count V (Violation of the Due Process Clause of the United States Constitution). App. 56-60; DCT Doc. 48.

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[1] References in this brief to "App.," "DCT Doc.," and "CTA Doc.," are to the Appendix to this brief, the district court's docket entries, and this Court's docket entries respectively.

Although three claims remain pending in the District Court, the Order denying Plaintiffs' Motion for a Preliminary Injunction based on their RFRA and Free Exercise Clause claims was immediately appealable by Plaintiffs pursuant to 28 U.S.C. § 1292(a)(1). The District Court below has stayed all proceedings, as of January 16, 2013, pending the resolution of this appeal. DCT Doc. 55.

STATEMENT OF THE ISSUES

Regulations designed by the Department of Health and Human Services (hereinafter "HHS") pursuant to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (March 23, 2010) (hereinafter "the Affordable Care Act") require many employers, under severe financial penalty, to include in their employee health benefit plans coverage for contraceptives, including abortion-inducing drugs, sterilization, and related patient education and counseling (hereinafter "the Mandate"). The Mandate, although authored by HHS, requires the collective participation of all Defendants (hereinafter referred to as the "Government"). Plaintiffs Norman Hahn, Elizabeth Hahn, Norman Lemar Hahn, Anthony H. Hahn, and Kevin Hahn own one hundred percent (100%) of Plaintiff Conestoga Wood Specialties, Inc. (hereinafter "Conestoga") are members of the Board of Directors and are or have been actively involved in the day to day management of the company. The Hahns' Mennonite religious beliefs specifically forbid them from paying for or providing the products and services, directly or

indirectly, as the Mandate requires them to do. The District Court denied Conestoga's Motion for a Preliminary Injunction, and a motions panel of this Court thereafter denied Conestoga's Expedited Motion for Injunction Pending Appeal. App. 3; CTA Doc. 16. The issues presented are:

1. Whether a business or a family doing business can exercise religion under RFRA and the Free Exercise Clause?

Yes. A business's exercise of religion is protected by RFRA and the Free Exercise Clause.

The issue was raised in the Amended Verified Complaint at App. 54-55. The issue was addressed in Judge Goldberg's District Court Opinion at App. 15-20.

2. Whether the Mandate substantially burdens Conestoga and the Hahns' religious exercise by requiring them to choose between taking actions that violate the tenets of their religion or suffering ruinous penalties for refusing to take those actions?

Yes. The Mandate substantially burdens Conestoga and the Hahns' religious exercise and must therefore pass strict scrutiny.

The issue was raised in the Amended Verified Complaint at App. 54. The issue was addressed in Judge Goldberg's District Court Opinion at App. 24-32.

3. Whether the Mandate is a neutral law of general applicability, subject only to rational basis scrutiny, when the Government has exempted millions of Americans from the Mandate's requirements?

No. The mandate is not a neutral law of general applicability and should, therefore, be subject to strict scrutiny.

The issue was raised in the Amended Verified Complaint at App. 55. The issue was addressed by Judge Goldberg's District Court Opinion at App. 20-22.

4. Whether the Government can meet their high burden under RFRA and the First Amendment of demonstrating that the Mandate is the least restrictive means to implement a compelling governmental interest even when the Government has exempted millions of Americans from the Mandate's requirements and several alternative means exist that would not substantially burden Conestoga and the Hahns' religious exercise?

No. The Government can not meet their burden of showing either that the Mandate furthers a compelling governmental interest or that it is the least restrictive means.

The issue raised in the Amended Verified Complaint at App. 55-56. This issue was not addressed by Judge Goldberg as his analysis did not call for the application of strict scrutiny to the Mandate. *See* App. 22, 32.

5. Whether the District Court erred by denying Conestoga's Motion for Preliminary Injunction?

Yes. Conestoga has have satisfied all four elements of the preliminary injunction analysis.

The issue was raised in the Motion for Preliminary Injunction at DCT Doc. 7. The issue was addressed by Judge Goldberg's District Court Opinion at App. 37.

STATEMENT OF THE CASE

The preceding issues arise from the Mandate issued by HHS, which requires Conestoga to provide and pay for an employee health plan that includes coverage, without cost-sharing, for all Food and Drug Administration-approved contraceptive methods, including abortion-inducing drugs, sterilization procedures, and related education and counseling. The Hahns' Mennonite religious beliefs and ethical guidelines dictate that it is immoral to use, provide, or facilitate the use of such goods and services. App. 44.

On December 4, 2012, Conestoga and the Hahns filed a Complaint with the District Court for the Eastern District of Pennsylvania alleging that the Mandate violates their rights under RFRA and under the Free Exercise, Free Speech, and Establishment Clauses of the First Amendment. Conestoga and the Hahns also alleged that the Mandate violates the Due Process Clause of the Fifth Amendment.

DCT Doc. 1. On December 7, 2012, Conestoga and the Hahns filed a Motion for a Preliminary Injunction. DCT Docs. 7, 15.

The District Court heard argument on the Motion on January 4, 2013, and subsequently denied the Motion. App. 3; DCT Doc. 35. The Court held that Conestoga had not established a likelihood of success on the merits of their RFRA claim because Conestoga as a corporation cannot exercise religion within the meaning of RFRA and that the Mandate does not substantially burden the religious exercise of the Hahns. App. 20, 32. The District Court also determined that Conestoga had not established a reasonable likelihood of success on the merits of their Free Exercise Clause claim because the Mandate is a neutral law of general applicability that does not impermissibly burden Conestoga's religious exercise. App. 20-22.

Conestoga and the Hahns filed their Notice of Appeal on January 14, 2013, DCT Doc. 52, and on January 22, 2013, Conestoga filed an Expedited Motion for an Injunction Pending Appeal with this Court. CTA Doc. 5.

On February 7, 2013, a motions panel of this Court, in a 2-to-1 decision, denied Plaintiffs' Motion, concluding that Conestoga had not established a reasonable likelihood of success on the merits. CTA Doc. 16.

STATEMENT OF THE FACTS

The Affordable Care Act requires non-exempt group health plans to provide coverage for preventative care and screening for women without cost sharing in accordance with guidelines created by the Health Resources and Services Administration. 42 U.S.C. § 300gg-13(a)(4); DCT Doc. 15 at 5. These guidelines include, among other things, "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."[2] FDA approved contraceptive methods include emergency contraception (such as "Plan B" and "Ella"), diaphragms, oral contraceptive pills, and intrauterine devices.[3]

In February 2012, HHS finalized an interim rule requiring certain group health plans to provide coverage for all FDA approved contraceptive methods and sterilization procedures as well as patient education and counseling about those services. 45 C.F.R. § 147.130; DCT Doc. 15 at 5. This Mandate applies to all non-exempt employers whose group health plans renew on or after August 1, 2012. As

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[2] Health Res. & Servs. Admin., *Women's Preventive Services: Required Health Plan Coverage Guidelines,* http://www.hrsa.gov/womensguidelines/ (last visited Jan. 24, 2013).

[3] Office of Women's Health, Federal Drug Administration, *Birth Control Guide* 6-19 (Oct. 19, 2012), http://www.fda.gov/downloads/forconsumers/byaudience/forwomen/freepublications/ucm282014.pdf. (last visited Jan. 24, 2013).

discussed herein, non-compliance will lead to significant fines and penalties. 45 C.F.R. § 147.130(a)(1)(iv); 77 Fed. Reg. 8725, 8726-28; DCT Doc. 15 at 6.

The Mandate does not apply to all employers because many have been exempted, for example, grandfathered health plans. Grandfathered health plans are plans in existence on March 23, 2010, that have not undergone any of a defined set of changes. *See* 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140; DCT Doc. 15 at 21-22. The government describes the rules for grandfathered health plans as preserving a "right to maintain existing coverage." 42 U.S.C. § 18011; 45 C.F.R. § 147.140; 75 Fed. Reg. 34538, 34562, 34566; DCT Doc. 15 at 21-22.[4] HHS estimates that "98 million individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. 41732. Although grandfathered plans are exempt from the Mandate and are therefore not required to provide the objectionable coverage, they are subject to many related provisions of the Affordable Care Act.[5]

Nonprofit "religious employers," as defined at 45 C.F.R. § 147.130(a)(1)(iv)(B), are also exempt from the Mandate. DCT Doc. 15 at 22. In

[4] "Existing plans may continue to offer coverage as grandfathered plans in the individual and group markets. . . . Enrollees could continue and renew enrollment in a grandfathered plan *indefinitely*." Cong. Research Serv., RL 7-5700, *Private Health Insurance Provisions in PPACA* (May 4, 2012) (emphasis added).

[5] 75 Fed. Reg. 34538, 34542; *Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans*, http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited Jan. 24, 2013).

addition, employers with fewer than fifty full-time employees have no obligation to provide an employee health plan under the Affordable Care Act and can bypass the Mandate by not providing health insurance coverage. 26 U.S.C. § 4980H(c)(2)(A); App. 46.

A non-exempt employer that provides a health insurance plan that does not comply with the Mandate will be subject to penalties of $100 per day for each employee who is offered non-compliant insurance, 26 U.S.C. § 4980D, as well as potential enforcement lawsuits, 29 U.S.C. §§ 1132, 1185d; DCT Doc. 15 at 6. In addition, non-exempt employers that have fifty or more full-time employees who fail to provide any employee health plan are subject to annual penalties of $2,000 for each full-time employee. 26 U.S.C. § 4980H; DCT Doc. 15 at 6, 22.

Plaintiffs Norman Hahn, Norman Lemar Hahn, Anthony H. Hahn, Elizabeth Hahn, and Kevin Hahn are practicing and believing Mennonite Christians. App. 39. They own and operate Conestoga Wood Specialties Corporation. *Id.* The Hahns seek to operate Conestoga in a manner that reflects their sincerely held religious beliefs. *Id.* The Hahns, based upon these sincerely held religious beliefs as formed by the moral teachings of their Mennonite Christian denomination, believe that God requires immutable respect for the sanctity of human life. *Id.*

Applying their religious faith and the moral teachings of the Mennonite faith, the Hahns believe that it would be sinful and immoral for them to

intentionally participate in, pay for, facilitate, or otherwise support any contraception with an abortifacient effect through health insurance coverage they offer at Conestoga. The Hahns had previously provided health insurance benefits to their employees that omitted such coverage of abortifacient drugs.

Conestoga has approximately nine hundred and fifty full-time employees. App. 45. Like other employee benefits provided by Conestoga, the Hahns consider the provision of employee health insurance to be an integral component of furthering the company's mission and values. App. 44-45.

Conestoga is subject to the Mandate as of January 1, 2013, when their group health plan came up for renewal. They filed this action in December of 2012 and requested a preliminary injunction that would allow them to offer a health plan that would not cause them to violate their religious beliefs and that would be consistent with the company's ethical guidelines. DCT Docs. 1, 7, 15. Without permanent injunctive relief, the Mandate will require Conestoga to provide coverage, without cost-sharing, for contraceptives, including abortion-inducing drugs, sterilization, and related patient education and counseling, in violation of Conestoga's religious beliefs and ethical guidelines. App. 39. If Conestoga fails to comply with the Mandate, they will incur over $34 million in penalties every year, an amount that would bankrupt Conestoga as well as the Hahns' personal finances. App. 48.

SUMMARY OF THE ARGUMENT

I. CONESTOGA'S RELIGIOUS EXERCISE IS PROTECTED BY RFRA AND THE FIRST AMENDMENT

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.

RFRA protects the religious freedoms of "persons." 42 U.S.C. § 2000bb(b). The United States Code defines the word person to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Further Pennsylvania law states that a corporation "shall have the legal capacity of natural persons to act." 15 PA. CONSOL. STAT. § 1501. There is no corporate or business exception to RFRA or the Free Exercise Clause.

Denying Conestoga's exercise of religion assumes two untenable premises: (1) that 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 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).

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"). Although *Citizens United* was a Freedom of Speech case, the Court did not carve Freedom of Religion rights from their application of the First Amendment to corporations.

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. Just as individuals make decisions for corporations in terms of political speech as is protected by *Citizens United*, individuals also make decisions for the corporation in terms of its religious, spiritual, or moral purpose.

II. THE MANDATE SUBSTANTILLY BURDENS CONESTOGA'S AND THE HAHNS' RELIGIOUS EXERCISE

The Mandate substantially burdens the religious exercise of both the Hahns and Conestoga because their Mennonite religious beliefs and ethical guidelines

specifically forbid them from paying for or providing, whether directly or indirectly, products and services that the challenged Mandate requires. Thus, the Mandate requires Conestoga and the Hahns to take actions that violate their religious faith in order to avoid ruinous penalties for non-compliance. The Mandate, therefore, "put[s] substantial pressure on [Plaintiffs] to modify [their] behavior and to violate [their] beliefs," *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981).

The District Court incorrectly concluded that the substantiality of the burden imposed upon Conestoga's religious exercise is dependent upon the actions of third parties, employees who may decide to use the objectionable products and services for which Conestoga must provide and pay. App. 32. But the violation of religious liberty at issue here is the coerced coverage, not the later purchase or use of contraception and the other requirements of the Mandate.

For purposes of the substantial burden imposed by the Mandate, the interests of the Hahns and Conestoga are virtually indistinguishable. Business owners who desire to operate their businesses in accordance with the tenets of their religious faith do not forfeit their religious freedom with respect to their business operations. The exercise of religious freedom should not be something just designed for private worship on a Sunday morning.

III. THE MANDATE BURDENS CONESTOGA'S AND THE HAHNS' FREE EXERCISE RIGHTS

Moreover, the Mandate is not a neutral law of general applicability and, as such, Conestoga and the Hahns are reasonably likely to succeed on their Free Exercise Clause claim. *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2003). A law is not generally applicable where, as here, countless millions of individuals and organizations are excused from compliance with its requirements. The Mandate is not neutral because it discriminates among organizations based on the Government's self conceived, narrow definition of what makes an entity religious enough to warrant accommodation of its religious exercise.

IV. THE GOVERNMENT CANNOT SATISFY STRICT SCRUTINY

Because the Mandate substantially burdens Conestoga's religious exercise, the Government must satisfy strict scrutiny. They must prove both that substantially burdening Conestoga's religious exercise is necessary to further a compelling governmental interest and that the Mandate is the least restrictive means of doing so. *See ACLU v. Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008). The Government cannot meet this high burden. They have not demonstrated that there is a "high degree of necessity" for the Mandate, that there is "an 'actual problem' in need of solving," and that substantially burdening Conestoga's religious exercise is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738, 2741 (2011).

The Government cannot meet their burden because they have exempted from the Mandate the employers of millions of people and their families, bringing to mind the Supreme Court's observation that "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993). In addition, the Government could provide greater access to contraceptive services through various alternative means that would not substantially burden Conestoga's religious exercise.

V. CONESTOGA SATISFIES THE PRELIMINARY INJUNCTION ELEMENTS

Conestoga and the Hahns are likely to prevail on the merits of the action. Furthermore, Conestoga would be irreparably harmed in the absence of injunctive relief, as they would be forced to either forego adherence to their religious faith or face ruinous financial penalties. App. 41. Neither the public interest nor the Government's interests would be harmed by the issuance of an injunction. Thus, the four factors are met in Conestoga's favor.

Consequently, this Court should reverse the decision of the District Court and hold that Conestoga and the Hahns are entitled to preliminary injunctive relief.

STANDARD OF REVIEW

The District Court's denial of Plaintiffs' Motion for a Preliminary Injunction is reviewed for abuse of discretion. *Graham v. Triangle Pub., Inc.*, 344 F.2d 775, 776 (3d Cir. 1965). Questions of law are reviewed de novo while questions of fact are reviewed for clear error. *Paredes v. Attorney General of the United States*, 528 F.3d 196, 198 (3d Cir. 2008).

To be successful, a motion for a preliminary injunction must demonstrate: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the non-moving party; and (4) that the public interest favors such relief. *Kos Pharm., Inc. v. Andrx Corp.,* 369 F.3d 700 (3d Cir. 2004).

ARGUMENT

> No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority.[6]

Corporations and other businesses possess religious freedom rights under RFRA and the Free Exercise Clause. Both case and statutory law supports the protection of Conestoga's religious exercise and no precedent demands otherwise.

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[6] Writings of Thomas Jefferson: Replies to Public Addresses: To the Society of the Methodist Episcopal Church at New London, Conn., on Feb. 4, 1809 (Monticello ed. 1904) vol. XVI, pp. 331, 332.

The Mandate substantially burdens Conestoga's religious exercise because it forces them to face a stark and inescapable dilemma: either arrange and pay for contraceptive and sterilization procedures, including abortion-inducing drugs, in violation of their religious beliefs and the ethical standards of their company, or face ruinous penalties imposed by the government. *See* App. 39-41, 48.

The Government has decided not to impose this same choice upon thousands of other employers (some of whom share the same religious objection as Conestoga), leaving millions of employees and their families outside the requirements of the Mandate. This intentional, massive under-inclusiveness illustrates that the Government cannot meet their burden of proving that applying the Mandate to Conestoga and the Hahns is the least restrictive means of achieving a compelling governmental interest.

For profit plaintiffs are involved in the many lawsuits filed against the Mandate and are protected by injunctions preventing application of the Mandate in twelve cases[7], while injunctive relief has been denied in only four other cases.[8]

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[7] *Korte v. Sebelius*, No. 12–3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012) (granting injunction pending appeal); *O'Brien v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012) (same); *Triune Health Grp. v. U.S. Dep't of Health & Human Servs.*, No. 12-06756, slip op. (N.D. Ill. Jan. 3, 2013) (granting preliminary injunction); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459, 2012 WL 69513316 (W.D. Mo. Dec. 20, 2012) (same); *Tyndale House Publ'rs v. Sebelius*, No. 12-1635, 2012 WL 5817323 (D.D.C. Nov. 16, 2012) (same); *Legatus v. Sebelius*, No. 12-12061, 2012

(Footnote continues on following page.)

I. CONESTOGA'S RELIGIOUS FREEDOM IS PROTECTED

The District Court incorrectly concluded that Conestoga, "as a for profit, secular corporation" does not possess rights under RFRA or the Free Exercise Clause. DCT Doc. 49 at 20. However, we assert that Conestoga and the Hahns can exercise religion, either under RFRA or the Free Exercise Clause. Both provisions have generous concepts of what constitutes religious exercise. 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.

WL 5359630 (E.D. Mich. Oct. 31, 2012) (same); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (same); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-0092, 2012 WL 6738489 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order); *Monaghan v. Sebelius*, No. 12-15488, 2012 WL 6738476 (E.D. Mich. Dec. 30, 2012) (same); *Annex Medical, Inc. v. Sebelius*, No. 13-1118, slip op. (8th Cir. Feb. 1, 2013) (granting injunction pending appeal); *Grote v. Sebelius*, No. 12-00134, slip op. (7th Cir. Jan. 30, 2013) (same); *Sioux Chief Mfg. Co., Inc., v. Sebelius*, No. 13-0036, slip op. (W.D. Mo. Feb. 28, 2013) (granting unopposed motion for preliminary injunction).

[8] *Hobby Lobby Stores v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (denying preliminary injunction), *appeal docketed*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012) (denying injunction pending appeal), *and* 133 S. Ct. 641 (2012) (Sotomayor, J., in chambers) (same); *Autocam Corp. v. Sebelius*, No. 12-1096, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012) (denying preliminary injunction), *appeal docketed*, 2012 U.S. App. LEXIS 26736 (6th Cir. Dec. 28, 2012) (denying injunction pending appeal); *Briscoe v. Sebelius*, No. 13-00285, 2013 WL 755413 (D. Colo. Feb. 27, 2013) (denying temporary restraining order); *Gilardi v. Sebelius*, No. 13-0104, 2013 WL 781150 (D.D.C. Mar. 3, 2013) (denying preliminary injunction).

Conestoga is organized, shaped, and run entirely by the Hahns as its owners, directors and officers. Pennsylvania law empowers the Hahns to shape every characteristic of the company, and directs that a corporation "shall have the legal capacity of natural persons to act." 15 PA. CONSOL. STAT. § 1501. Just as the Hahns define the company's financial and personnel policy and exercise thereof, they define its religious policy and exercise thereof. The Hahns exercise their religion through their company, and their company exercises the Hahn's beliefs.

Denying that Conestoga can exercise religion assumes two untenable premises: (1) that the corporate form, and/or (2) a for profit purpose exclude the exercise of religion. Corporate form cannot be a reason Conestoga cannot exercise religion for the simple fact that the United States Supreme Court has vindicated 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) (captioned as a "New Mexico corporation" in the lower courts' decisions). The fact that these corporations were churches or were not-for-profit is immaterial to the present issue. These cases make the point that corporate form cannot possibly be a reason to declare an entity incapable of exercising religion.

RFRA applies to "persons," 42 U.S.C. § 2000bb(b), and person as defined by 1 U.S.C. § 1 includes corporations.[9] The United States Code requires the conclusion that corporations can exercise religion. Concluding otherwise would mean that incorporated churches, religious hospitals, and religious nonprofits cannot bring claims either under RFRA or under the Free Exercise Clause.

Citing *First Nat. Bank of Boston v. Bellotti*, the District Court asserted that religious exercise is purely "personal" in such a way that it cannot be exercised by corporations. 435 U.S. 765, 778 n.14 (1978). This view point misconstrues *Bellotti* and cannot be reconciled with the Supreme Court's allowance of religious exercise by corporations in *Lukumi* and *O Centro*. Rather, *Bellotti* states that the First Amendment's scope cannot be resolved on formalities like 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. A law forcing any religious believer to choose between their family business and their religious beliefs is squarely within the kind of religious exercise triggering judicial scrutiny.

The District Court below misconstrued *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), when it declared that

[9] Likewise under Pennsylvania law, a corporation shall have the legal capacity of a natural person to act . 15 PA. CONSOL. STAT. §1501.

only religious organizations can exercise religion. No Supreme Court case, including *Hosanna-Tabor*, makes that assertion. The *Hosanna-Tabor* court made clear that religious corporations are protected by Free Exercise Clause concerns relating to their selection of ministers, but the Court in no way concluded that this protection is limited to religious nonprofits.

The District Court also cites *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217 (3d Cir. 2007) relative to the limiting of religious exercise to religious corporations. However, *LeBoon* is not a First Amendment case. In *Leboon*, this Third Circuit Court interpreted Title VII of the Civil Rights Act, which explicitly only applies its exemptions to "religious corporations." *Id.* at 226. The Free Exercise Clause of the First Amendment contains no language limiting its application to only free exercise by religious corporations. There is no justification for imposing Title VII's narrower scope on the Free Exercise Clause.

The District Court erred by finding 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 has often recognized the ability of for profit enterprises to bring free exercise claims. An Amish business exercised religion in *United States v. Lee*, 455 U.S. 252, 257 (1982). Although that employer lost on another unrelated element of the claim, the Court specifically protected the exercise of religion. *Id.* Because his business was indisputably operated for profit,

it cannot be true that operating for profit excludes the exercise of religion. Other cases likewise show that a for profit company can exercise religion and bring free exercise claims on behalf of itself or its owners.[10]

The Court has 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) ("corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis"). For profit corporations such as the New York Times could never have won seminal cases without possessing First Amendment rights. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Although *Citizens United* was a Freedom of

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[10] *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, id. at 200, to bring Free Exercise and Establishment Clause claims, and 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. *See* also *Tyndale House Publishers*, No. 12-1635, 2012 WL 5817323 at *5–9 (finding owner standing in a for profit company).

Speech case, the Court did not carve freedom of religion rights from their application of the First Amendment to corporations.

Corporations are no more purely "secular" or purely religious than are the people that run them. 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 those very businesses with religious missions such as serving the community charitably, respecting their workers, and being good stewards of the environment. It would run contrary to case law as well as common sense and public policy to declare that business corporations may pursue these aspirations, but in the eyes of the court, only seek profit and will only have rights that protect such. Just as individuals makes decisions for corporations in terms of political speech as is protected by *Citizens United,* individuals also make decisions for their corporation in terms of its religious, spiritual, or moral operation irrespective of their intent to earn an income for themselves, their families, and their employees.

II. THE MANDATE SUBSTANTIALLY BURDENS CONESTOGA AND THE HAHNS' RELIGIOUS EXERCISE

In denying Plaintiffs' Motion for a Preliminary Injunction, the District Court held that the Mandate does not substantially burden Plaintiffs' religious exercise. App. 31-32. This is reversible error because the Mandate requires Conestoga and the Hahns to take direct actions that violate the tenets of their faith, with the threat of substantial penalties for non-compliance. The Mandate presents a classic

example of a substantial burden upon religious exercise, which triggers the application of strict scrutiny under RFRA.

RFRA's purposes are 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 to guarantee its application in all cases where free exercise of religion is substantially burdened." Further, RFRA was intended to "provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). The general rule under RFRA is that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a) The term "exercise of religion" "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A), *incorporated by* 42 U.S.C. § 2000bb-2(4).

RFRA provides an exception to this general rule for instances in which the federal government "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). In other words, the Government must satisfy strict scrutiny. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006) (noting that RFRA imposes the "strict scrutiny test").

Under RFRA, a law substantially burdens religious exercise when, among other things, a person is required to choose between (1) doing something his faith forbids or discourages (or not doing something his faith requires or encourages), and (2) incurring financial penalties, the loss of a government benefit, criminal prosecution, or other substantial harm. *See, e.g., Sherbert*, 374 U.S. at 404.

In *Sherbert*, the Supreme Court held that a state's denial of unemployment benefits to a Seventh-Day Adventist, whose religious beliefs prohibited her from working on Saturdays, substantially burdened her exercise of religion. The regulation

> force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

374 U.S. at 404. Also, in *Yoder*, the Court held that a compulsory school attendance law substantially burdened the religious exercise of Amish parents who refused to send their children to high school. The burden in *Yoder* was a fine of five dollars ($5) not to exceed fifty dollars ($50). 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." 406 U.S. at 218.

Here, Conestoga faces an inescapable choice similar to the claimants in *Sherbert* and *Yoder*: they must either directly provide and pay for drugs and

services that they believe are immoral (and thereby commit an immoral act) or suffer severe penalties for non-compliance with the Mandate. The Mandate is akin to the hypothetical "fine imposed against appellant for her Saturday worship" referenced in *Sherbert*, 374 U.S. at 404, and, as in *Yoder*, the Mandate requires Plaintiffs "to perform acts undeniably at odds with fundamental tenets of their religious belief." 406 U.S. at 218. Thus, contrary to the District Court's decision, the Mandate bears direct responsibility for placing substantial pressure on Conestoga to take actions that violate their religious beliefs, which renders their religious exercise, refraining from immoral acts, effectively impracticable.

The District Court stated that the burden on Conestoga's religious beliefs is not substantial because the burden is "the speculative 'conduct of third parties.'" App 32. As noted previously, however, a person's religious exercise may be substantially burdened *in one of two ways*: a law that puts substantial pressure upon the person to (1) commit an act discouraged or forbidden by the person's faith, *or* (2) refrain from an act encouraged or required by the person's faith. *Cf. United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000) ("The Free Exercise Clause . . . provides considerable . . . protection for the ability to practice (through the performance or non-performance of certain actions) one's religion."). The District Court essentially minimized Conestoga's participation in

the government mandated scheme and relates the Mandate directly to the employee even though the pressure and coercion is placed only upon the employers.

This lawsuit is *not* based upon an objection to something that *an employee* may do. Rather, the Mandate *requires Conestoga and the Hahns to do something* that they believe is gravely immoral: directly arrange for, pay for, and provide coverage for objectionable goods and services. *See* DCT Doc. 15 at 3.

Here, the Mandate attempts to lower the cost of these covered goods and services for some individuals (employees of non-exempted employers who are not part of a grandfathered plan and their families) by shifting the cost *to employers* through the medium of employer-provided insurance. The extra cost is expressly contracted for and paid for by employers at the government's command. As the District Court in *Tyndale House Publishers v. Sebelius* correctly noted in a similar context, "[*b*]*ecause 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." No. 12-1635, 2012 WL 5817323 at *13 (citing *Thomas*, 450 U.S. at 718) (emphasis added).

Similarly, Judge Jordan dissented from the majority of the motions panel that denied Conestoga's Injunction Pending Appeal explaining that the Hahns and

Conestoga "turn to their government and ask, can you rightly make us pay for something poisonous to our religious beliefs or face the destruction of our business." CTA Doc. 16 at 12. Conestoga's "religious liberty is directly threatened by the government's edict. We are thus dealing with the prospect of grievous harm …" *Id.*

Furthermore, the District Court's holding that the burden imposed upon Conestoga's religious exercise is insubstantial also conflicts with the Supreme Court's decision in *Thomas*. There, a Jehovah's Witness was denied unemployment benefits because he quit his job after he was transferred to a department that produced tanks for the military. 450 U.S. at 710. His religious beliefs "specifically precluded him from producing or directly aiding in the manufacture of items used in warfare." *Id.* at 711. In holding that the claimant's religious exercise was substantially burdened by the denial of unemployment benefits, the Court explained:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith . . . thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Id. at 717-18.

The claimant's religious objection in *Thomas* is analogous to Conestoga's religious objection here. As in *Thomas*, Conestoga's religious faith dictates that the

direct facilitation and encouragement of immoral behavior is prohibited. App. 32-35, 38-41. The substantiality of the burden in *Thomas* was not negated by the independent decisions of various individuals as to whether and how the objectionable weapons would be used. Likewise, the substantiality of the burden that the Mandate imposes upon Conestoga is not dependent upon an employee's decision whether to use the objectionable goods and services. Just as the denial of unemployment benefits in *Thomas* "put[] substantial pressure on [the claimant] to modify his behavior and to violate his beliefs" by participating in the manufacture of objectionable goods, the significant penalties for non-compliance with the Mandate put substantial pressure on Conestoga to modify their behavior and violate their beliefs by directly facilitating the provision of objectionable goods and services.[11]

The conclusion that the Mandate substantially burdens Conestoga's religious exercise is bolstered by the Government's acknowledgment of the significant impact that the Mandate has upon many employers' religious exercise. Recognizing that paying for or providing contraceptive and sterilization services

[11] Also, Conestoga's religious objection is not comparable to a restriction on employees choose to spend their salaries. Paying money *with no strings attached* as compensation for an employee's work, which the employee may decide to save, donate, or spend on one of a thousand different goods or services, is completely different from Conestoga being forced to enter a contract and pay money for the express purpose of making *a specific good or service that they morally object to* readily available to others without cost-sharing.

would conflict with "the religious beliefs of certain religious employers," The Government has given a class of employers, *e.g.*, churches and their auxiliaries, a wholesale exemption from complying with the Mandate. 76 Fed. Reg. 46621, 46623; 77 Fed. Reg. 8725-28. In addition, the Government has provided a temporary enforcement safe harbor for any employer, group health plan, or group health insurance issuer that is sponsored by a nonprofit organization that meets certain criteria.[12]

Moreover, the Government is considering ways of "accommodating non exempt, nonprofit religious organizations' religious objections to covering contraceptive services [while] assuring that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost sharing." 77 Fed. Reg. 16501, 16503. The Government is also considering whether "for-profit religious employers with [religious] objections should be considered as well," *id.* at 16504. This is a tacit acknowledgment that the Mandate may substantially burden the religious exercise of some for profit corporations and their owners (such as Conestoga and the Hahns). The bottom line is that the exercise of religion cannot be carved into a shape that is convenient for the Government.

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[12] Dep't of Health & Human Servs., *Guidance on the Temporary Enforcement Safe Harbor* 3 (2012), http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Jan. 24, 2013).

As discussed thoroughly above, the District Court incorrectly held that because Conestoga is a for profit business, as opposed to a religious, nonprofit organization, it cannot exercise religion for purposes of RFRA. App. 20. RFRA protects "a person's exercise of religion," 42 U.S.C. § 2000bb-1(a), and a corporation is a "person" for purposes of federal law where, as here, the term is not otherwise defined and the context does not require a different reading of the term. *See* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise. . . 'person' . . . include[s] corporations . . . as well as individuals."); *see also Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1707 (2012) (explaining that the word "person" often includes corporations, and Congress and the Supreme Court often use the word "individual" "to distinguish between a natural person and a corporation"); *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 687 (1978) ("[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.").

The District Court in essence rewrote RFRA to apply only to the free exercise of *a religious person*, as opposed to RFRA's broad protection of any religious exercise *of a person*. This misreading of RFRA has wide ranging implications for organizations and individuals alike.

Similarly, religious freedom extends both to an organization that primarily engages in religious acts and to an organization that primarily engages in secular acts in a manner consistent with religious principles. Although the Free Exercise Clause "gives special solicitude to the rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012), that does not mean that the Free Exercise Clause (or RFRA) *only* protects religious organizations.

Indeed, just as a for profit corporation need not be organized, operated, and maintained for the primary purpose of engaging in free speech activity to invoke First Amendment free speech protections, *see First National Bank v. Bellotti*, 435 U.S. 765 (1978), a for-profit corporation need not be organized, operated, and maintained for the primary purpose of religious exercise to invoke the protections of the Free Exercise Clause and RFRA. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120, n.9 (9th Cir. 2009) ("[A]n organization that asserts the free exercise rights of its owners need not be primarily religious. . . .").[13] The Supreme Court has stated that "First Amendment protection extends to corporations" without excepting or carving out the Free Exercise Clause. See *Citizens United*, 130 S.Ct.

[13] *Stormans* and *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988), held that a business has standing to assert the free exercise rights of its owners, which further indicates that business owners do not entirely forfeit their religious freedom by entering the marketplace.

at 899. It should also be noted that the authors of the First Amendment only separated the Free Exercise Clause and the Free Speech Clause by a semi-colon, thus showing the continuation of intent between the two. U.S. Const. amend. I.

Corporations, whether for profit or nonprofit, can, and often do, engage in a plethora of quintessentially religious acts such as tithing, donating money to charities, and committing oneself to act in accordance with the teachings of a religious faith. The Commonwealth of Pennsylvania, where Conestoga is incorporated and does business, recognizes that a corporation "shall have the legal capacity of natural persons to act." 15 PA. CONSOL. STAT. §1501.

Moreover, for purposes of substantial burden analysis, it would improperly exalt form over substance to draw hard and fast lines between a group health plan and its issuer, and between the business and its management that arranges for the plan. A group health plan does not will itself into existence. It can only be created through a business that arranges for the plan. And a business does not make such decisions or take necessary actions except through human agency, *i.e.*, through its managers, officers, and owners pursuant to the policies established by those individuals. Consequently, it would ignore reality to suggest that group health plan requirements can have no impact whatsoever upon the religious exercise of businesses that create and pay for such plans and their owners.

Judge Jordan agreed and stated that: "An entity's incorporated status does not, however, alter the underlying reality that corporations can and often do reflect the particular viewpoints held by their flesh and blood owners – a fact that has been recognized in the great many cases holding that corporations can indeed assert First Amendment rights. Religious bodies frequently operate through corporations." CTA Doc. 16 at 8.

The Mandate imposes the same substantial burden on the Hahns as it does on Conestoga. The Mandate requires the Hahns to manage their closely-held, family company in a way that violates the company's ethical guidelines and their religious faith. Because Conestoga is an S corporation, all financial penalties suffered by Conestoga for refusing to comply with the Mandate will have a direct financial impact on the Hahns, solely because of their refusal to compromise their Mennonite beliefs.

A corporation, like Conestoga, does not think, act, or establish business values and practices through its corporate documentation. It acts only through human agency. It is this same human agency that defines the corporation's purposes and shapes its character and ethos, in addition to fulfilling the business's commercial mission. The Mandate will prevent the Hahns from continuing to run their family company pursuant to the tenets of their Mennonite faith. As such, the

Mandate substantially burdens the religious exercise of both the Hahns and Conestoga.

Business owners who operate their businesses in accordance with religious principles do not consent, even by implication, to the imposition of any and all substantial burdens upon their religious exercise by entering the commercial marketplace. In *United States v. Lee*, 455 U.S. 252 (1982), for example, the Supreme Court held that the requirement to pay Social Security taxes substantially burdened a for profit Amish employer's religious exercise. The Court held that "[b]ecause the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the Social Security system interferes with their free exercise rights." *Id.* at 257. Although the Court noted in the context of applying strict scrutiny that religious adherents who enter the commercial marketplace do not have an *absolute* right to receive a religious exemption from *all* legal requirements that conflict with their faith, *id.* at 261, the fact that the Court concluded that there was a substantial burden and proceeded to apply strict scrutiny illustrates that the government does not have *carte blanche* to substantially burden the religious exercise of business owners.

Under the District Court's reading of RFRA, a business operated with religious values, like Conestoga, would be foreclosed from ever challenging a law that imposes a substantial burden on religious exercise, no matter how extreme,

and no matter how trivial the government's asserted interests. For example, a kosher deli would have no possible claim against a mandate forcing it, under pain of penalty, to sell pork, and a physicians' practice operated by pro-life doctors would have no possible claim against a mandate forcing it, under pain of penalty, to perform abortions, regardless of how attenuated those mandates were to the protection of any important, let alone compelling, governmental interest.

RFRA does not give businesses an unbounded right to ignore anti-discrimination laws, refuse to pay payroll taxes, violate OSHA requirements, etc. in the name of religious freedom. Such government regulations should be resolved based on whether the law at issue satisfies strict scrutiny. They are not rejected on the grounds that the employer could *never* have its religious exercise substantially burdened. The idea that RFRA categorically excludes employers, like Conestoga, whose religious tenets dictate that some action is required or forbidden by their faith is untenable. For this reason, the Government is incorrect that religious freedom protection does not extend beyond Title VII of the Civil Rights Act which offers exemptions only to "religious corporations."

III. CONESTOGA AND THE HAHNS ARE LIKELY TO SUCCEED ON THEIR FREE EXERCISE CLAIM

The District Court denied Conestoga and the Hahns' Motion for Preliminary Injunction with respect to their Free Exercise Clause claim, concluding that "the regulations are 'rationally related to a legitimate government objective.'" App. 22.

As explained previously, however, the Mandate substantially burdens Conestoga's religious exercise. And as explained herein, the District Court reversibly erred in holding that there is a substantial likelihood that the Mandate is a neutral law of general applicability.

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. "Neutrality and general applicability are interrelated" and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 532.

A. THE MANDATE IS NOT GENERALLY APPLICABLE

The Mandate also faces strict scrutiny under the First Amendment because it is not generally applicable. This Court has previously explained the contours 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. But the law contained categorical exceptions to the annual fee while not

making the same allowance for religious objections. On this ground, the Court applied strict scrutiny. *Id.* at 212.

The District Court incorrectly concluded that the Mandate was generally applicable because it did not specifically target religion. DCT. Doc. 49 at 17. 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 the religious reasons raised, when the secular exclusions "undermine[] the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *See Blackhawk*, 381 F.3d at 209.

The Mandate is massively underinclusive, yet the Government refuses to offer Conestoga an exemption. 191 million employees are exempt from the contraceptive coverage Mandate coverage by grandfathered plans alone. Mandate, 76 Fed. Reg. at 46623 & n.4; *Newland*, 881 F. Supp. 2d 1287; *Tyndale House Publishers*, No. 12-1635, 2012 WL 5817323 at *17. Further, the Government has provided no information whatsoever about the number of employees excluded under the other exemptions or exclusions. This exclusion implicates identical, indistinguishable interests as the interests the government claims justify the Mandate in this case, women's health and equality. The Government, through the underinclusive Mandate, has chosen on its own accord to leave most women in the

nation without the health and equality that they claim must be imposed through Conestoga and the Hahns. The grandfathering exclusion exempts or does not reach a substantial category of conduct that is not religiously motivated because plans that don't comply with the Mandate due to grandfathering are doing so based on secular reasons related to whether they made plan changes implicating grandfathered status. But the Mandate "burdens a category of religiously motivated conduct" of exactly the same kind. Pursuant to *Blackhawk*, refusing to exempt Conestoga renders the Mandate not generally applicable.

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. Here, in addition to the Mandate's categorical exemptions such as for grandfathered plans, Appellees admit that they possess "discretion" over the exemption they created for "religious employers" *and the scope of who is covered.* Mandate, 76 Fed. Reg. at 46623–24; 77 Fed. Reg. at 8726. Meanwhile, their scheme exempts millions for secular reasons. Because the Mandate is not generally applicable, the Government must satisfy strict scrutiny merely for "burdening" Appellants' conduct, *Blackhawk*, 381 F.3d at 209, even if the burden was not "substantial."

As noted in *Lukumi*, "[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* at 542. Unlike in *Employment Division v. Smith*, 494 U.S. 872 (1990), which involved an "across-the-board criminal prohibition on a particular form of conduct," *id.* at 884, the Mandate is not an "across-the-board requirement" that all employers nationwide include contraceptive services in health plans for their employees. As noted previously, grandfathered health plans, employers with fewer than fifty full time employees, and employers that meet Defendants' definition of a religious employer are all exempt from the Mandate. Moreover, various other nonprofit employers fall within the temporary enforcement safe harbor. A legal mandate can hardly be said to be generally applicable when literally millions of entities or individuals are not subject to its commands.[14]

In addition, it would be a circular argument to conclude that the Mandate is generally applicable for purposes of the Free Exercise Clause because it applies to all employers or plans that are not otherwise exempt. The issue is not whether the Mandate applies generally to whom it applies, but rather whether the Mandate's numerous categories of exemptions (based on both secular and religious criteria)

[14] As noted previously, the district court's characterization of grandfathered plan status as a "gradual transition," App. 14, is erroneous.

render it not generally applicable in the first place. Although a law need not necessarily be *universal* to be generally applicable, a law cannot contain *sizable* and *substantial* exemptions, as the Mandate does, and still be generally applicable.

B. THE MANDATE IS NOT RELIGIOUSLY NEUTRAL

Under the Mandate, certain religious organizations, such as houses of worship, are exempted, but religious families running a business corporation are not. In *Lukumi*, the Supreme Court reaffirmed that the "protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs." 508 U.S. at 532. It reiterated that the Free Exercise Clause does not tolerate laws that "impose special disabilities on the basis of religious status," *id.* at 533 (citation omitted), and held that the "*minimum* requirement for neutrality is that a law not discriminate on its face." *Id.*

The District Court for the Western District of Pennsylvania found that the Mandate's requirements are facially neutral because they are directly pointed toward benefiting the public health, and are not directed at any particular religious conduct. *Geneva College v. Sebelius*, No. 12-0207, 2013 WL 838238 at *25 (W. D. Pa. March 6, 2013). However, the court went further and stated that "the court's analysis, however, must extend beyond the face of the regulations in question," *id.*, and went on to quote the Court of Appeals for the Third Circuit which acknowledged that:

> the Free Exercise Clause's mandate of neutrality toward religion prohibits government from "deciding that secular motivations are more important than religious motivations." ... Accordingly, in situations where government officials exercise discretion in applying a facially neutral law, so that whether they enforce the law depends on their evaluation of the reasons underlying a violator's conduct, they contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct.

Id. at *26 (*citing Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165–66 (3d Cir. 2002). Thus, while attempting to implement the objected to Mandate the Government has been impermissibly exercising its discretion by exempting large numbers of potentially insured people and employers while refusing to extend the protection of the Free Exercise Clause to entities like Conestoga.

The Mandate fails this minimum requirement. Granting a wholesale and blanket exemption to a certain category of employers based on the government's own narrow definition of religion, while requiring employers like Conestoga to abandon their religious beliefs in their choice of employee health insurance, is just plain discriminatory. The Mandate's narrow definition of religion creates an impermissible line between employers that exercise their religion in an insular, self-contained, and institutionalized fashion and those employers that, equally motivated by their religious convictions, exercise their religion through charitable works or through their conduct in the commercial marketplace. *See Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1337 (D.C. Cir. 2001) (the religion clauses protect

more than just "religious institutions with hard-nosed proselytizing . . . that limit their enrollment to members of their religion") (relying on *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)). The Free Exercise Clause protects non church related entities like Conestoga just as it protects houses of worship and traditional religious organizations. *See generally Frazee v. Emp't Sec. Dep't*, 489 U.S. 829 (1989); *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

Because the Mandate is neither generally applicable nor neutral, and cannot survive strict scrutiny, the District Court reversibly erred in holding that Conestoga and the Hahns were unlikely to succeed on their Free Exercise Clause claim.

IV. APPLYING THE MANDATE TO CONESTOGA AND THE HAHNS DOES NOT WITHSTAND STRICT SCRUTINY

Because the District Court held that the Mandate does not substantially burden Conestoga's religious exercise, it did not apply RFRA's strict scrutiny test. App. 21-22. This test, which requires "the most rigorous of scrutiny," *Lukumi*, 508 U.S. at 546, "is the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

When the Supreme Court applied strict scrutiny in both *Sherbert* and *Yoder*, it "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431. It is therefore not enough for the government to describe a compelling interest in the

abstract or in a categorical fashion; the Government must demonstrate that the interest "would be adversely affected by granting an exemption" *to the religious claimant*. *Id.* In this case, the Government must specifically demonstrate *that exempting Conestoga* from the Mandate would significantly jeopardize the Government's asserted interests, not just general assertions.

A. THE GOVERNMENT CANNOT DEMONSTRATE A COMPELLING NEED TO APPLY THE MANDATE TO CONESTOGA

Just two years ago, the Supreme Court described a compelling interest as a "high degree of necessity," noting that "[t]he State must specifically identify an 'actual problem' in need of solving, and the curtailment of [the asserted right] must be actually necessary to the solution." *Brown*, 131 S. Ct. at 2738, 2741 (citations omitted). The "[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 543 (1980).

While recognizing "the general interest in promoting public health and safety," the Court has held that "invocation of such general interests, standing alone, is not enough." *O Centro*, 546 U.S. at 438. The government must demonstrate "some substantial threat to public safety, peace, or order" (or an equally compelling interest) that would be posed by exempting the claimant. *Yoder*, 406 U.S. at 230. In this context, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert*, 374 U.S. at 406. Also, "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 (internal quotation marks omitted).

Here, the Government has proffered two governmental interests in support of the Mandate: health and gender equality. 77 Fed. Reg. 8725, 8729. What radically undermines the Government's claim that the Mandate is needed to address a compelling harm to its asserted interests, however, is the massive number of people, tens of millions in fact, whose employers are not subject to the Mandate and whose health and equality interests the Government has voluntarily left untouched by the Mandate. *See Newland*, 881 F. Supp. 2d 1287; *Tyndale House Publ'rs*, No. 12-1635, 2012 WL 5817323 at *17-18.

For example, the Government cannot sufficiently explain how their asserted interests can be of the highest order in this context when the Mandate does not apply to plans grandfathered under the Affordable Care Act. Grandfathered plans have a right to permanently maintain their grandfathered status (and thus to permanently avoid the Mandate). *See, e.g.,* 42 U.S.C. § 18011 ("Preservation of *right to maintain* existing coverage") (emphasis added); 45 C.F.R. § 147.140 (same); Cong. Research Serv., RL 7-5700, *Private Health Insurance Provisions in PPACA* (May 4, 2012) ("Enrollees could continue and renew enrollment in a grandfathered plan *indefinitely*.") (emphasis added).

The District Court in *Newland v. Sebelius* found, based on government estimates, that "*191 million* Americans belong to plans which may be grandfathered under the [Affordable Care Act]," 881 F. Supp. 2d at 1291 (emphasis added), and the government itself has estimated that "*98 million* individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. 41726, 41732 (emphasis added). This broad exemption from the Mandate leaves appreciable damage to the government's asserted interests and indicates the lack of any compelling need to apply the Mandate to Plaintiffs in violation of their consciences. *See Newland*, 881 F. Supp. 2d at 1298 ("[T]his massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs."); *Tyndale House Publ'rs*, No. 12-1635, 2012 WL 5817323 at *18 ("[C]onsidering the myriad of exemptions . . . the defendants have not shown a compelling interest in requiring the plaintiffs to provide the specific contraceptives to which they object."); *Am. Pulverizer*, No. 12-3459, 2012 WL 6951316 (explaining that the significant exemptions to the Mandate "undermine any compelling interest in applying the preventative coverage mandate to Plaintiffs").

In addition, although grandfathered plans have a right to indefinitely avoid the Mandate, they must comply with other mandated provisions of the Affordable

Care Act.[15] For example, the *Government's decision* to impose the Affordable Care Act's prohibition on lifetime limits, among other things, upon grandfathered plans, but not the contraceptive Mandate, indicates that the *Government itself* does not consider the Mandate is of the highest order. *See Lukumi*, 508 U.S. at 547.

The Government cannot explain how there is a compelling need to apply the Mandate to Plaintiffs when employers with fewer than fifty employees (employing millions of individuals)[16] can avoid the Mandate entirely by not providing insurance. With respect to the interests offered in support of the Mandate, there is no principled difference between an employer with approximately nine hundred and fifty employees such as Conestoga, which is subject to the Mandate, and an employer with forty-nine employees, which would not be subject to the Mandate. This further illustrates that the Mandate is not a necessary means of protecting any compelling governmental interest. *See O Centro*, 546 U.S. at 432-37 (granting relief under RFRA to 130 members of a religion to allow them to use a Schedule I drug in their religious ceremonies because the government allowed hundreds of

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[15] For a summary of which Affordable Care Act provisions apply to grandfathered health plans, see *Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans*, http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited Jan. 24, 2013).

[16] More than twenty million individuals are employed by firms with fewer than twenty employees. *Statistics about Business Size (including Small Business) from the U.S. Census Bureau*, http://www.census.gov/ econ/smallbus.html (last visited Jan. 24, 2013).

thousands of Native Americans to use a different Schedule I drug in their religious ceremonies).

Furthermore, the Government has failed to meet its burden of demonstrating a "high degree of necessity" for the Mandate, that there is "an 'actual problem' in need of solving," and that substantially burdening Plaintiffs' religious exercise is "actually necessary to the solution." *Brown*, 131 S. Ct. at 2738, 2741. For example, according to a recent study, cost is not a prohibitive factor to contraceptive access. Among women currently not using birth control, only 2.3% said it was due to birth control being "too expensive," and among women currently using birth control, only 1.3% said they chose their particular method of birth control because it was "affordable."[17]

In sum, the Government cannot demonstrate a compelling need to require Conestoga to comply with the Mandate while employers of millions of employees nationwide are exempt from the Mandate. Although health and equality are important interests in the abstract, exempting Conestoga from the Mandate would pose no compelling threat to those interests in actuality.

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[17] *Contraception in America, Unmet Needs Survey, Executive Summary*, http://www.contraceptioninamerica.com/downloads/Executive_Summary.pdf at 14 (Fig. 10), 16 (Fig. 12) (2012) (last visited Jan. 24, 2013).

B. THE MANDATE IS NOT THE LEAST RESTRICTIVE MEANS OF ACHIEVING ANY COMPELLING GOVERNMENTAL INTEREST

The existence of a compelling interest in the abstract does not give the government *carte blanche* to promote that interest through any regulation of its choosing particularly where, as here, a fundamental right is substantially burdened. *See, e.g., United States v. Robel*, 389 U.S. 258, 263 (1967) (noting that compelling interests "cannot be invoked as a talismanic incantation to support any [law]"). Even where, for example, an interest as compelling as the protection of children is the object of government action, "the constitutional limits on governmental action apply." *Brown*, 131 S. Ct. at 2741. 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).

Even if one assumed *arguendo* that cost was a prohibitive factor to contraceptive access, there is no evidence whatsoever that substantially burdening Conestoga's religious exercise by enforcing the Mandate is *actually necessary* (*i.e.,* that none of the various less restrictive alternatives discussed in the next section of this brief would be sufficient). *See Brown*, 131 S. Ct. at 2738; *cf. Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("The Government simply has not provided sufficient justification here. If the First Amendment means anything, it

means that regulating speech must be a last, not first, resort. Yet here it seems to have been the first strategy the Government thought to try.").

Defendants could directly further their interest in providing free access to contraceptive services in a myriad of ways without violating Conestoga's conscience. Of the various ways the Government could achieve its interests, it has chosen perhaps the *most burdensome* means for non exempt employers with religious objections to contraceptive services, such as Conestoga.

For example, the government could (1) offer tax deductions or credits for the purchase of contraceptive services; (2) expand eligibility for already existing federal programs that provide free contraception; (3) allow citizens who pay to use contraceptives to submit receipts to the government for reimbursement; or (4) provide incentives for pharmaceutical companies that manufacture contraceptives to provide such products to pharmacies, doctor's offices, and health clinics free of charge. Each of these options would directly further the Government's proffered interests without substantially burdening Conestoga's religious exercise, and the government cannot prove that *all* of these options would be insufficient or unworkable. *Koger*, 523 F.3d at 801 (noting that the existence of just one plausible less restrictive means by which the government could have furthered its asserted interests is sufficient to conclude that the government has not met its burden under strict scrutiny).

To illustrate, the federal government already provides low-income individuals with free access to contraception through Title X and Medicaid funding. It could raise the income cap to make free contraception available to more Americans.[18] *See Newland*, 881 F. Supp. 2d at 1299 ("'[T]he government already provides free contraception to women.' . . . Defendants have failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women.").

Even if Defendants claim these options would not be as effective as the Mandate, "a court should not assume a plausible, less restrictive alternative would be ineffective." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824 (2000). If a less restrictive alternative would serve the government's purposes, "the legislature must use that alternative." *Id.* at 813.

In sum, Conestoga has shown a likelihood of success on the merits on their RFRA claim, *e.g., Stuller*, 695 F.3d at 678, and the District Court reversibly erred in concluding otherwise.

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[18] In 2010, public expenditures for family planning services totaled $2.37 billion, and Title X of the Public Health Service Act, devoted specifically to supporting family planning services, contributed $228 million during this same year. Guttmacher Institute, *Facts on Publicly Funded Contraceptive Services in the United States,* May 2012, http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited Jan. 24, 2013).

V. CONESTOGA AND THE HAHNS SATISFY THE REMAINING INJUNCTION FACTORS

Conestoga should be granted a preliminary injunction because they satisfy the factors as set forth by this Court. Judge Jordan in his dissent from the motions panel importantly stated:

> although the four factors provide structure for the inquiry, 'in a situation where factors or irreparable harm, interests of third parties and public consideration strongly favor the moving party, an injunction might be appropriate even though plaintiffs did not demonstrate a strong likelihood of ultimate success as would generally be required.

CTA Doc. 16 at 3 (*citing Constructors Ass'n of W. Pa. v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978)); *see also Am. Civil Liberties Union v. Reno,* 929 F. Supp 824, 851 (E.D. Pa. 1996) ("In a case which the injury alleged is a threat to First Amendment interests, the finding of irreparable injury is often tied to the likelihood of success.")

Conestoga and the Hahns' are suffering irreparable injury as they are required to participate in an insurance plan that is a violation of their religious freedom. The Court has stated that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

A preliminary injunction would preserve the status quo between the parties. The last uncontested status between the parties was prior to August 1, 2012, when

the Mandate went into effect. *See Kos Pharm.,* 369 F.3d at 708 (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). Before that date, Plaintiffs had the freedom to fashion a health care plan in accordance with their religious beliefs. The imposition and enforcement of the Mandate has taken that freedom away from Plaintiffs, absent an injunction.

Furthermore, granting Plaintiffs a preliminary injunction would not harm the public interest. An injunction would simply put Plaintiffs' employees in the same position as the millions of employees and their families whose employers have already been exempted from the Mandate. *See AT&T v. Winback & Conserve Program*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994) ("as a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff"). Nor would an injunction harm the Government, who has no legitimate interest in infringing upon Conestoga's religious freedom rights.

CONCLUSION

For the foregoing reasons, Conestoga and the Hahns request that this Court reverse the District Court's decision denying their Motion for a Preliminary Injunction and remand this case with instructions that the District Court enter a preliminary injunction in their favor.

Respectfully submitted on this 15th day of March, 2013.

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

CERTIFICATION OF BAR MEMBERSHIP, ELECTRONIC FILING AND WORD COUNT

I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

I further certify that the text of the electronic Brief filed by e-mail and 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) because it contains 12,323 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 below counsel for Appellees were served with the Brief of Appellants by the Court's ECF filing system on March 15, 2013. Pursuant to Third Circuit Court Rule 31.1, the below counsel for Appellees were served one paper copy of Appendix Volume I via United States First Class Mail on March 15, 2013.

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