Docket No. 13-1144

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONESTOGA WOOD SPECIALTIES CORPORATION, a Pennsylvania Corporation; NORMAN HAHN; ELIZABETH HAHN; NORMAN LEMAR HAHN; ANTHONY H. HAHN; KEVIN HAHN,
Plaintiffs-Appellants

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of Health and Human Services; SETH D. HARRIS, in his official capacity as Acting Secretary of Labor; JACOB J. LEW, in his official capacity as Secretary of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants-Appellees

BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., IN SUPPORT OF APPELLEES AND FOR AFFIRMANCE OF THE DISTRICT COURT

On Appeal from the Order Dated January 11, 2013 of Judge Goldberg of the United States District Court for the Eastern District of Pennsylvania, at No. 5:12-CV-6744, Denying the Motion of Plaintiffs-Appellants for Preliminary Injunction

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 13-1144

CONESTOGA WOOD SPECIALTIES CORPORATION, et al.

v.

KATHLEEN SEBELIUS, et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Lambda Legal Defense and Education Fund, Inc. makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

/s Thomas W. Ude, Jr.
(Signature of Counsel or Party)

Dated: April 23, 2013

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INTEREST OF *AMICUS CURIAE*

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and those with HIV through impact litigation, education and public policy work. In furtherance of this mission, Lambda Legal has litigated numerous cases to promote equality and to reduce the discrimination and hostility that LGBT people and people with HIV have historically faced in various realms, including the workplace. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding that the state's termination of transgender employee was unconstitutional sex discrimination); *Taylor v. Rice*, 451 F.3d 898 (D.C. Cir. 2006) (holding that evidence warranted trial in challenge to U.S. Foreign Service's blanket exclusion of HIV-positive applicants).

Lambda Legal has participated in numerous cases involving the assertion by an individual or corporate entity that enforcement of neutral statutes, rules, or policies regulating employment practices or the provision of professional services to the public would infringe upon the individual's or entity's religious freedom. *See Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011) (public university's requirement that counseling student counsel lesbian and gay clients without discriminating based on sexual orientation, irrespective of student's religious beliefs, did not infringe upon student's right to free speech or free exercise of

religion); *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court (Benitez)*, 189 P.3d 959 (Cal. 2008) (rejecting claim by physician that enforcement of nondiscrimination requirement in the provision of medical care infringed upon physician's right to free speech and free exercise of religion); *Catholic Charities of Springfield Diocese v. Illinois*, No. 2011-MR-245 (Sangamon Cty., Aug. 18, 2011) (involving claim by not-for-profit religious social services agency that nondiscrimination requirement in provision of foster care services violated First Amendment and state Religious Freedom Restoration Act). Lambda Legal also has been involved in cases challenging unequal employee compensation in the form of discriminatory restrictions on health insurance. *See, e.g., Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011). Thus, Lambda Legal has expertise concerning Appellants' claims that their asserted religious objections should exempt them from the federal requirement to provide certain health insurance coverage to employees. Lambda Legal is interested in this case because it believes Appellants' arguments undermine equality guarantees and other religiously neutral regulations of the public marketplace to the detriment of our society generally and, in particular, the vulnerable constituencies Lambda Legal serves. Conversely, rejection of these arguments would affirm core principles that remain essential for maintaining public harmony in our diverse nation.

AUTHORITY TO FILE

Appellants and Appellees consent to the filing of this brief.

STATEMENT OF AUTHORSHIP

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amicus states that: (1) no party's counsel authored this brief in whole or in part, and (2) no party, party's counsel, or person other than *amicus*, its members, or its counsel, contributed money intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court correctly held that Appellants are unlikely to prevail on their claims under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq.*, because the federal rule they challenge – the provision of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 300gg-13 requiring contraception (among other preventive services) to be offered in employer-sponsored health coverage – does not substantially burden Appellants' free exercise of religion. *See* App. 4-37. *Amicus* also agrees with the government's arguments, below and on appeal, that the rule challenged by Appellants "advance[s] compelling government interests in public health and gender equality" – and, more specifically, the related individual interest in a woman's control over her procreation. Gov. Br. at 34. The Supreme Court has emphasized the compelling nature of this individual liberty interest, explaining that

"our laws and traditions accord constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" because such matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the Fourteenth Amendment." *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003), quoting *Planned Parenthood of Southeastern Pennsylvania. v. Casey*, 505 U.S. 833 (1992).

This brief provides additional authority concerning three interrelated points to underscore the important differences between commercial businesses and religious entities – differences that Appellants blithely ask this Court to disregard – and to explain the harmful potential consequences of ignoring or minimizing those differences.

First, Conestoga Wood Specialties Corporation ("Conestoga Wood") is a secular, for-profit corporation that was formed not for worship, but to manufacture wood cabinets. Accordingly, it does not hold religious beliefs and does not engage in religious exercise protected by RFRA. The contrary conclusion that Appellants seek would depart dramatically from the established, fundamental distinction between religious and commercial corporations reflected in our statutes as well as court precedents. For example, unlike religious organizations, Conestoga Wood is

prohibited from discriminating based on religion in employment decisions and may not require or coerce employees to follow the tenets of any particular faith.

Second, even if a secular for-profit corporation could be seen to engage in exercise of religion as a general matter, any free exercise claim premised on its conduct would fail here because the manner in which such a company provides employee health coverage under a complex regulatory scheme is not a form of religious exercise within the meaning of RFRA, and even if it were, the burden imposed by the contraception coverage requirement is far from substantial. As described below, a significant body of law establishes that those who enter commerce and hire employees to make a profit voluntarily accept limitations on commercial conduct imposed by laws regulating that business, including their employment relationships – even against religious beliefs that some conduct required by those regulations, or some employee conduct protected by such laws, is sinful. Accordingly, even if the present limitation on Conestoga Wood's conduct did burden its exercise of religion incidentally, it is not a substantial burden.

Third, as numerous courts have noted, laws and regulations governing for-profit businesses, including employers, provide essential safeguards when a commercial participant's activities, in the absence of those laws and regulations might harm third parties, whether in employment, public accommodations, or other

commercial transactions. Here, Conestoga Wood's employees are entitled to their own beliefs about contraception, reproductive health, and related health decisions. This Court should reject Appellants' demand for an exemption from rules that protect those employees' ability to make "the most intimate and personal choices a person may make in a lifetime." *Casey*, 505 U.S. at 851. *See also Lawrence*, 539 U.S. at 578 (explaining that *Casey* confirmed that decisions concerning intimate adult relationships "are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment" for both married and unmarried persons, and that those decisions are protected regardless of gender or sexual orientation).

ARGUMENT

I. For-profit secular corporations do not exercise religion within the meaning of RFRA.

Many people, including owners of for-profit corporations, may look to their religious beliefs for guidance during their daily lives, including when making business decisions. But a secular for-profit corporation is, by definition, created to make a profit, not to further religious or even charitable goals. Our multicultural, polyglot society distinguishes between religious and for-profit secular corporations, and restrains for-profit employers from imposing their own (or their owners') religious constraints on employees based, at least in part, on a shared respect for one another's right to hold different beliefs, whether religious or derived from other sources. By contrast, religious corporations often are accorded

significantly greater latitude, particularly when making employment decisions; churches and religiously-affiliated entities often are permitted to behave in ways different from the ways our laws require people and corporations in commercial settings to interact.

For example, the religion clauses grant not-for-profit religious corporations unique authority to make employment decisions for positions deemed "ministerial" exempt from federal antidiscrimination laws. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S.Ct. 694, 710 (2012). In *Hosanna-Tabor*, the Supreme Court expressly distinguished the right to free exercise from freedom of association, which is enjoyed "by religious and secular groups alike," explaining pointedly that "the text of the First Amendment itself . . . gives special solicitude [with respect to free exercise] to the rights of religious organizations." *Id.* at 706.

That solicitude exists not only in the Constitution, but also in many statutes. For example, consider two court decisions involving health clubs, one operated by a not-for-profit religious organization; the other by a for-profit corporation. The religious organization operating a health club was exempt from liability under Title VII for firing a janitor who did not conform to the religious precepts of the club's owner, the Mormon Church. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter- Day Saints v. Amos*, 483 U.S. 327, 337 (1987). By contrast, a for-

profit health club was not exempt from liability under a state antidiscrimination law for refusing to hire and promote persons whose religious faith differed from that of the owners. *Minnesota by McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985).

Indeed, it is beyond dispute that for-profit employers are not free to discriminate because of their religious beliefs. *See, e.g., EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 804-13 (S.D. Ind. 2002) (rejecting free exercise and RFRA claims of for-profit employer charged with violating Title VII by discriminating against employees who did not conform to employer's religious beliefs); *Minnesota by Johnson v. Porter Farms, Inc.*, 382 N.W.2d 543, 548 (Minn. App. 1986) (rejecting free exercise claim by for-profit corporate employer who fired employee for unmarried cohabitation in employer-provided housing).

Moreover, although the Ninth Circuit concluded that the Free Exercise Clause insulated a *religious* corporation that engaged in "shunning" a woman who left her former congregation after it had "disfellowshipped" her parents, *Paul v. Watchtower Bible and Tract Soc'y of New York, Inc.*, 819 F.2d 875, 876 (9th Cir. 1987), it is simply not the case that a for-profit manufacturing corporation like Conestoga Wood would be similarly insulated from liability for religious discrimination if it were to "shun" an employee who had been "disfellowshipped" – even if religious beliefs motivated the corporation's owner to do so. Indeed, the

Supreme Court has explained, in an employment-related case that did not involve Title VII, that the First Amendment does not permit an unequivocal preference for those whose conduct is motivated by religious belief; instead, consideration must also be accorded to the interests of others – including those for whom and with whom they work – whether those interests are religious or not. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (statute violated Establishment Clause by requiring employers to accommodate Sabbath observers without allowing consideration of the interests of the employer or of other employees who do not observe a Sabbath).[1]

Conestoga Wood could not condition female employees' continued employment on their agreement to refrain from using contraception or from using their wages to purchase it. *Cf. Int'l Union v. Johnson Controls*, 499 U.S. 187, 198-200 (1991) (it was unlawful sex discrimination to limit women's employment opportunities based on their fertility when imposing no such limits on men). Nor, under Title VII, could Conestoga Wood discharge or punish an employee for

[1] Likewise, Title VII's requirement that a covered, for-profit employer not only avoid discriminating based on religion but also accommodate employees' religious exercise rights (42 U.S.C.A. § 2000e(j)) has been construed "to require the employer, who structures the workplace to a substantial degree, to travel the extra mile in adjusting its free exercise rights, if any, to accommodate [the employee]" when the religious beliefs of an employer and employee conflict. *See, e.g., EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 621 (9th Cir. 1988) (employer must accommodate employee's request to be excused from at-work prayer meetings).

exercising her right to make pregnancy-related decisions – including whether to have an abortion. *See, e.g., Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3rd Cir. 2008) (reversing entry of summary judgment for employer because evidence was sufficient to support finding that employee was discharged for terminating her pregnancy); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (affirming trial court's finding that employer violated Title VII because employee's contemplated abortion, "which caused controversy among her coworkers, was a motivating factor for her discharge"). That Conestoga Wood may not lawfully impose a no-contraceptives rule on its female employees makes two things evident: 1) the absence of any substantial burden imposed by a regulatory requirement ensuring employees access to the medical care necessary to make contraception choices; and 2) the degree of intrusion into employee privacy and procreative decision-making that Conestoga Wood seeks.

Thus, as these examples from the Title VII context demonstrate, a new rule of law permitting a for-profit business to exempt itself from regulation based on its owner's religious convictions would up-end the principles embraced and the balance struck in constitutional precedents and statutory protections for religious liberty within our secular society. Indeed, in many cases, granting secular for-profit employers exemption, based on their owners' religious beliefs, from laws and regulations that protect their employees would negate those laws entirely.

II. Even if a for-profit corporation could engage in religious exercise, the contraception coverage requirement is not a substantial burden on the religious exercise of those who choose to pursue profit in a business regulated to protect others.

RFRA does not require that owners of a for-profit company or the company itself be permitted to impose on others, such as employees, the religious constraints that the owners voluntarily assume for themselves. Under RFRA, the federal government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling government interest. 42 U.S.C. § 2000bb-1(a), (b). Even if Conestoga Wood could engage in religious exercise, the contraception coverage requirement does not burden Appellants' exercise of religion, let alone burden it substantially. As the Supreme Court explained more than thirty years ago, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982).

In reviewing free exercise challenges to commercial regulations governing employers, courts consistently have rejected employers' claims that regulatory schemes protecting employees substantially burdened the employer's religious exercise. For example, in *Donovan v. Tony and Susan Alamo Found.*, 722 F.2d

397, 403 (8th Cir. 1983), *aff'd* 471 U.S. 290 (1985), the court concluded that "enforcement of wage and hour provisions" against a religious non-profit that both engaged in evangelism and also employed convicts and recovering addicts to operate commercial businesses as part of their rehabilitation "cannot possibly have any direct impact on appellants' freedom to worship and evangelize as they please." *Id.* Because "there comes a time when secular endeavor must be recognized as such, and passes over the line separating it from the sacred functions of religious worship," and this "metamorphosis or transmogrification occurs when a religious organization turns from the things of God to the things of Caesar," the court concluded that the religious organization's free exercise claim was "clearly without merit." *Id.* at 400, 403.

Similarly, in *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990), the court rejected a religious school's free exercise claim that the school be exempt from the Fair Labor Standards Act's minimum wage and equal pay requirements. The school argued that these requirements impaired its ability to determine matters of internal church governance "as well as those of faith and doctrine," including "its head-of-household practice," which "was based on a sincerely-held belief derived from the Bible," and which required payment of a salary supplement to male but not female teachers. *Id.* at 1397. The school's employees intervened in support of the school, arguing that allowing their wages to

be set by the government, rather than by church governors acting under divine guidance, deprived them of blessings they would otherwise receive by allowing their Lord to supply their needs. *Id.* Nevertheless, the court concluded that "any burden [imposed by fair pay requirements] would be limited." *Id*. The "increased payroll expenses to conform to FLSA requirements is not the sort of burden that is determinative in a free exercise claim." *Id.* at 1397-98.

More recently, the D.C. Circuit rejected a company's free exercise claim seeking exemption from the ACA's provisions in their entirety. *Seven-Sky v. Holder*, 661 F.3d 1, 5 n.4, 9 (D.C. Cir. 2011) (affirming dismissal of RFRA claim because requiring company to purchase health insurance in contravention of belief that "insurance expresses skepticism in God's ability to provide" imposed only a de minimis burden on those religious beliefs), *abrogated on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

These cases upholding regulations of employers are consistent with precedent in other commercial contexts finding that generally applicable rules governing marketplace conduct impose only minimal burdens, if any cognizable burden at all, on a commercial participant's religious beliefs. For example, courts repeatedly have rejected individual employees' assertions that they should be exempt for religious reasons from generally applicable constraints on professional conduct when offering services to the public. Indeed, rather than requiring

accommodation, courts consistently have held that an employee's religious objection to such constraints renders the employee unqualified to perform the job. *See, e.g., Bruff v. North Mississippi Health Services, Inc.*, 244 F.3d 495, 497-98 (5th Cir. 2001) (holding that Title VII did not require employer to accommodate counselor-employee's request that she be excused from counseling patients on subjects conflicting with her religious beliefs; in contrast to typical religious accommodation requests, the counselor refusing to counsel patients about nonmarital relationships "determined that she would not perform some aspects of the position itself"); *Knight v. Connecticut Dept. of Public Health*, 275 F.3d 156, 164-65 (2d Cir. 2001) (denying free exercise claims of two public employees, a nurse and sign language interpreter, noting that their religious speech at work impeded their ability to do the job); *Berry v. Department of Social Services*, 447 F.3d 642 (9th Cir. 2006) (county social services employer entitled to prohibit employee from discussing religious beliefs with clients); *Moore v. Metropolitan Human Service Dist.*, Slip Copy, 2010 WL 3982312 (E.D. La. 2010) (public employee social worker not entitled to religious accommodation after being told not to engage in Christian counseling methods).

In other commercial contexts, too, courts have held that a decision to engage in for-profit activity necessarily accepts certain regulatory constraints, and that therefore any burden imposed by generally applicable marketplace regulations are

insufficiently substantial to support a free exercise claim. *See*, *e.g.*, *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 389-91 (1990) (applying strict scrutiny test now relevant to RFRA claims, and finding generally applicable sales tax did not impose "constitutionally significant" burden on ministry's sale of religious material because such a tax is "no different from other generally applicable laws and regulations – such as health and safety regulations – to which [the ministry] must adhere," and "is not a tax on the right to disseminate religious information, ideas, or beliefs, *per se*; rather, it is a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California"); *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001) (under RFRA, regulation banning sale of t-shirts on National Mall did not substantially burden claimants' religious exercise, even though t-shirts bore religious message); *Smith v. Fair Employment and Housing Commission*, 913 P.2d 909 (Cal. 1996) (applying strict scrutiny and holding burden imposed by fair housing law on landlord with religious objection to unmarried tenants not substantial).

Moreover, the supposed burden alleged by Conestoga Wood is even more attenuated than the pay equity requirement in *Shenandoah Baptist Church*, the requirement to purchase health insurance in the face of a belief that such a purchase conveys lack of trust concerning God's will in *Seven- Sky*, or the

requirement to help patients resolve conflicts with behavior considered sinful in *Bruff*. Those requirements demanded that complainants directly engage in conduct violating their professed religious beliefs. Here, the contraception coverage requirement does not force Conestoga Wood or its owners to use contraception themselves in contravention of religious beliefs, or even to involve themselves in evaluation of options and prices for separate contraception coverage. Instead, the requirement allows the company's employees to make decisions for themselves about their own contraceptive use based on recommendations of medical professionals for selection from among covered options. Accordingly, the burden here consists of – at most – paying for a group plan that includes coverage for many services chosen by others for inclusion, which may or may not be used by employees or their family members, based on private decisions (and health needs) in which the employer will not be involved nor even aware. Neither Conestoga Wood nor its owners, the Hahns, can claim burdens on religious exercise, much less substantial burdens, merely because Conestoga Wood complies with a generally applicable regulatory scheme that makes possible the independent choices of other people.

Courts have recognized this principle in other contexts. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (school voucher program did not violate Establishment Clause because parents' private choice to use a voucher broke the

circuit between government and religion); *Agostini v. Felton*, 521 U.S. 203, 226 (1997) (no Establishment Clause violation where individual decision-making interrupts connection between governmental source of funding and religious recipient); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486-87 (1986) (accord). The same principle – that intervening decisions by an independent actor disconnect the source of funding from the conduct eventually undertaken with the funding – has been recognized in other First Amendment contexts as well. *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (concluding that, when the government funded a legal services program designed to facilitate private speech, not to promote a governmental message, any connection between the government and the resulting legal advocacy was indirect and incidental). Even more squarely on point, courts have affirmed dismissal of free exercise challenges by those who, based on religious beliefs, objected to use of tax or student fee dollars to help pay for broad health insurance programs that included abortion coverage. *Tarsney v. O'Keefe*, 225 F.3d 929, 932 (8th Cir. 2000) (rejecting challenge by taxpayers who objected on religious grounds to use of their tax dollars to pay for Medicaid recipients' medically necessary abortions); *Goehring v. Brophy*, 94 F.3d 1294, 1297 (9th Cir. 1996) (rejecting public school students' RFRA and free exercise-based objections to university tuition fee used, in part, to subsidize school's health insurance program, which included abortion

care), *abrogated on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997).

Appellants also argue that the contraception coverage requirement burdens their free exercise by forcing them to engage in "encouragement of immoral behavior" (Appellants' Br. at 30).[2] This argument, too, fails as a matter of law. Courts repeatedly have rejected similar assertions that compliance with generally applicable rules governing workplace conduct constitutes any form of expression, let alone "encouragement" of regulated conduct. When a company complies with a regulatory scheme, its compliance with a legal mandate does not send any message at all, let alone a message of embrace or promotion of the content of the regulation. For example, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*"FAIR"*), the Court rejected a claim by law schools that it sent a message of agreement with the recruitment policies of the military for the law schools to comply with a statutory mandate to facilitate military recruitment on campus in the same way that the law schools supported recruitment by other employers. The Court concluded that compliance with the mandate is not expressive and does not send any message at all, let alone a message "that law schools agree with any speech by recruiters." *Id. at* 65, (citing *Pruneyard Shopping Ctr. v. Robins,* 447 U.S. 74, 88 (1980), which upheld a state

[2] In fact, as the government explains in detail, the ACA does not actually require the Hahns to purchase anything. Gov. Br. 22-34.

law requiring shopping center owners to allow expressive activities by others on their property, explaining that "there was little likelihood that the views of those engaging in expressive activities would be identified with the owner, who remained free to disassociate himself from those views and was "not … being compelled to affirm [a] belief in any governmentally prescribed position or view"); *see, also, Catholic Charities of Sacramento v. Superior Court (Sacramento)*, 32 Cal.4th 527, 558-559 (2004)) (explaining that "Catholic Charities' compliance with a law regulating health care benefits is not speech. The law leaves Catholic Charities free to express its disapproval of prescription contraceptives and to encourage its employees not to use them. … [S]imple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose").

Furthermore, the contraception coverage requirement, as a matter of logic as well as law, does not "promote" use of contraception over childbearing any more than coverage for chiropractic care "promotes" that treatment option as opposed to spinal surgery, pain medication, or physical therapy for severe back pain. Inclusion of coverage for multiple care options for particular health needs does not endorse or promote any particular choice beyond the overall choice to pursue wellness with professional medical guidance.

Consequently, even if Conestoga Wood were permitted to bring a free exercise claim based on its owners' or shareholders' religious objections, or if its owners were permitted to bring one based on their company's regulatory obligations, the burden on free exercise rights posed by the contraception coverage requirement is simply too slight to trigger RFRA's protection. Compliance by a for-profit company with a complex regulatory scheme governing an employer's compensation to employees is not a burden on the employer's free exercise as a matter of law. Just as "[t]here is surely no constitutional right, under the religion clauses of the First Amendment, to pay substandard wages" irrespective of an employer's sincerely-held religious beliefs about employee compensation, *see Donavan*, 722 F.3d at 402 n.21, there is no constitutional right, under the religion clauses, to provide employees with health insurance (Appellants' Br. at 11) while evading rules requiring inclusion of certain types of reproductive health care.

III. To exempt Conestoga Wood from the contraception coverage requirement would contravene sound, settled precedents requiring commercial actors, whether religiously motivated or not, to respect the rights and interests of third parties.

Appellants' argument, if accepted, would open a door for other secular, for-profit businesses to claim religious immunity from the full spectrum of generally applicable laws protecting people – including employees, customers, and coworkers – who may not conform to the employer's religious beliefs. Like

Appellants' contention here, such claims would run afoul of principles that our laws have deemed long settled, under which businesses cannot create their own immunity from laws that protect third parties from harm by asserting a religious motive for business conduct. Thus, even when courts have found that a challenged regulation of commercial conduct *does* burden free exercise, they nevertheless generally have upheld such regulations in service of governmental interests in protecting others whose religious beliefs may differ from those of the claimant, and who could be harmed if the claimant received an exemption from the challenged regulatory scheme. *See, e.g.*, *Lee*, supra, 455 U.S. at 261.

Because *Lee* has striking parallels to Appellants' free exercise claims, the facts in *Lee* bear close examination. Note first that the claimant in *Lee* was not a corporation but an individual self-employed farmer who also employed others. He asserted that the Free Exercise Clause exempted him from responsibility to pay social security taxes for his employees, because of his and his employees' religious beliefs that acceptance of social security benefits, and payment of social security taxes, is a sin.[3] The Court acknowledged a conflict between Mr. Lee's religious beliefs and his social security tax obligation. *Id.* at 257. However, although a statutory provision exempted him from payment of such taxes for his own self-

[3] Mr. Lee "indicate[d] that his scriptural basis for this belief was: 'But if any provide not . . . for those of his own house, he hath denied the faith, and is worse than an infidel.'" *Lee*, 455 U.S. at 256 n.3 (citing I Timothy 5:8).

employment, the Court held that Mr. Lee was nonetheless required to pay social security taxes due for his employees because "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees." *Id.* at 261.

The Supreme Court's conclusion in *Lee* represents the governing rule. Indeed, courts have considered religious exercise claims in diverse contexts and consistently have rejected such claims where accommodating one's religious belief would cause harm to others. On this point, the Second Circuit has noted that courts frequently "have held that the state's interest outweighs any First Amendment rights" where there is a "clear interest, either on the part of society as a whole or at least in relation to a third party, which would be substantially affected by permitting the individual to assert what he claimed to be his 'free exercise' rights." *Winters v. Miller*, 446 F.2d 65, 70 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971), *citing Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (violation of child labor laws); *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *People v. Handzik*, 102 N.E.2d 340 (Ill. 1951) (criminal prosecution of faith healers who practice medicine without a license); *People v. Pierson*, 68 N.E. 243 (N.Y. 1903) (serious illness of a child). *See also, e.g., Spratt v. Kent Cnty.*, 621 F. Supp. 594, 600-02 (D.C. Mich. 1985) (public employer justified in firing social worker for

inclusion of religious practices in counseling inmates); *North Coast Women's Care Med. Grp., supra,* 189 P.3d at 967 (no federal or state free exercise exemption from nondiscrimination law for physicians with religious objection to treating lesbian patients); *Keeton v. Anderson-Wiley,* 664 F.3d 865, 880 (11th Cir. 2011) (college not required to accommodate counseling student's religious accommodation request that would allow her "to evade the curricular requirement that she not impose her moral values on clients").

Likewise, many *employees* also have religious beliefs that inform their conduct, but settled legal principles place limits on the extent to which they can act on their religious beliefs when interacting with coworkers and business associates. *See, e.g., Bodett v. Coxcom, Inc*., 366 F.3d 736 (9th Cir. 2004) (Christian supervisor wrongfully claimed a religious right to harass lesbian subordinate); *Bruff,* 244 F.3d at 497-98 (Title VII did not require employer to accommodate counselor-employee by excusing her from counseling patients on relationships to which she had religious objection); *Chalmers v. Tulon*, 101 F.3d 1012, 1021 (4th Cir. 1996) (employee not entitled to send religiously motivated letters to co-workers criticizing their private lives).

Consistent with this body of law, Title VII also protects employees' religious liberty from harm posed by an employer's insistence on conformity with the employer's religious creed, and will not permit firing an employee "simply

because he did not hold the same religious beliefs as his supervisors." *Shapolia v. Los Alamos Nat'l. Laboratory*, 992 F.2d 1033, 1037 (10th Cir. 1993). *See also, e.g., Noyes v. Kelly Services*, 488 F.3d 1163, 1166, 1168-69 (9th Cir. 2007) (plaintiff presented evidence sufficient to proceed with claim that supervisor wrongfully denied her promotion because she was not part of his small religious group); *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997) ("Venters need only show that her perceived religious shortcomings [her unwillingness to strive for salvation as Ives understood it, for example] played a motivating role in her discharge.").[4] Under this standard, an employee who gets a divorce, has an extramarital affair, or simply fails to adhere generally to the employer's religious precepts, can invoke Title VII if the employer fires him or her on that basis.[5]

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[4] Lower federal court decisions applying this principle are legion. *See, e.g., Panchoosingh v. General Labor Staffing Services, Inc*., No. 07-80818-CI, 2009 WL 961148, *6 (S.D. Fla. Apr. 8, 2009); *Tillery v. ATSI, Inc.*, 242 F. Supp. 2d 1051, 1062-63 (N.D. Ala. 2003), *aff'd without opinion*, 97 Fed. Appx. 906 (Table) (11th Cir. 2004) (unpublished); *Backus v. Mena Newspapers, Inc*., 224 F. Supp. 2d 1228, 1233 (W.D. Ark. 2002); *Henegar v. Sears, Roebuck and Co*., 965 F. Supp. 833, 837 (N.D. W.Va. 1997); *Yancey v. Nat'l Ctr. on Insts. and Alternatives*, 986 F. Supp. 945, 955 (D. Md. 1997); *Sarenpa v. Express Images Inc.*, Civ.04-1538(JRT/JSM), *3 (D. Minn. Dec. 1, 2005); *Kaminsky v. Saint Louis University School of Med*., No. 4:05CV1112 CDP, 2006 WL 2376232, *5 (E.D. Mo. Aug. 16, 2006).

[5] *See Kaminsky*, 2006 WL 2376232, *5 (getting a divorce); *Sarenpa v. Express Images Inc.*, 2005 WL 3299455 at *3 (extramarital affair); *Henegar*, 965 F. Supp. at 834 (living with a man while still in divorce proceedings against her husband); *Noyes*, 488 F.3d at 1166, 1168-69 (failure to live up generally to employer's religious beliefs); *Venters*, 123 F.3d at 972 (same).

No doubt some forms of religiously motivated discrimination have receded. And yet, American history captures the recurring saga of successive generations positing anew the question whether our secure protections for religious liberty warrant exemptions from laws protecting others' liberties and right to participate equally in public life. Our courts rightly and consistently have recognized that the answer to that question must remain the same: religious beliefs do not entitle any of us to exemptions from generally applicable laws protecting all of us.

Thus, for example, during the past century's struggles over racial integration, some Christian schools restricted admissions of African American applicants based on beliefs that "mixing of the races" would violate God's commands. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 583 n.6 (1983). Some restaurant owners refused to serve African American customers citing religious objections to "integration of the races." *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944-45 (D.S.C. 1966), *rev'd* 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). Religious tenets also were used to justify laws and policies against interracial relationships and marriage. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (in decision invalidating state interracial marriage ban, quoting the trial judge's admonition that "Almighty God created the races white, black, yellow, malay and red, and he

placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix."); *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (firing of white clerk typist for friendship with black person was not protected exercise of religion despite church's religious objection to interracial friendships).

As our society began coming to grips with the desire and need of women for equal treatment in the workplace, some who objected on religious grounds sought exemptions from the employment non-discrimination laws as a free exercise right. Notwithstanding the believers' sincerity and longstanding religious traditions on which such claims often were premised, courts recognized that these religious views could not be accommodated in the workplace context without vitiating the sex discrimination protections on which American workers are entitled to depend. *See, e.g.*, *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (school violated federal antidiscrimination law by offering unequal health benefits to female employees based on religious tenets); *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (employer improperly refused to hire women bus drivers due to religious objection of Hasidic male student bus riders).

Similarly, after some state and local governments enacted fair housing laws that included protections for unmarried renters, those protections came under fire from certain landlords who sought exemptions based on their belief that they

would commit a sin if they were to provide a residence in which their tenants would commit the sin of fornication. *See, e.g., Smith*, 913 P. 2d at 925 (rejecting religious freedom claim of landlord who refused to rent to unmarried heterosexual couple, finding fair housing law did not substantially burden her free exercise rights); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (same).

And yet again, as laws and company policies began to offer more protections against discrimination based on sexual orientation, gender identity, and HIV status, some who objected to this development on religious grounds tested whether the courts would hold their course or allow religious exemptions where they had not done so in past discrimination cases. For the most part, the past principle has held true and the rights of third parties have been safeguarded in these regulated commercial contexts. *See, e.g.*, *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (under Title VII, rejecting free exercise wrongful termination claim of employee fired for anti-gay proselytizing at work); *Knight*, 275 F.3d 156 (rejecting free exercise wrongful termination claim of visiting nurse fired for antigay proselytizing to home-bound AIDS patient); *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1342 (8th Cir. 1995) (rejecting Title VII religious discrimination claim by fired employee who insisted on wearing graphic antiabortion button that upset coworkers and disrupted workplace); *Hyman v. City*

of Louisville, 132 F. Supp. 2d 528, 539-540 (W.D. Ky. 2001) (physician's religious beliefs did not exempt him from law prohibiting employment discrimination based on sexual orientation, or gender identity), *vacated on other grounds by* 53 Fed. Appx. 740 (6th Cir. 2002); *North Coast Women's Care Medical. Group.,supra*, 189 P.3d at 970 (Cal. 2008) (physicians' free exercise rights did not exempt them from civil rights law's prohibition against sexual orientation discrimination); *Stepp v. Review Bd. of Indiana Emp. Sec. Div*., 521 N.E.2d 350, 352 (Ind. 1988) (rejecting religious discrimination claim of lab technician fired for refusing to do tests on specimens labeled with HIV warning because he believed "AIDS is God's plague on man and performing the tests would go against God's will").

Across generations, then, these questions have been asked and answered, echoing with reassuring consistency as courts recognize the government's abiding interests in securing fair access and peaceful co-existence in the public marketplace. Here, Appellants seek an exemption that would mark a sharp turn, newly enabling them to impose religious views about family planning on their female employees and casting an intrusive, condemning spotlight on personal decisions that those women are constitutionally entitled to make freely for themselves. The Supreme Court has recognized our federal laws and traditions as "afford[ing] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."

Lawrence, 539 U.S. at 574, *citing Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. at 851. The Court's explanation of the "respect the Constitution demands for the autonomy of the person in making these choices," *id.*, has particular significance because the "person" whose autonomy is to be protected is the person herself – not her employer.

That there are limits on employers' right to treat differently female and male employees with respect to issues of reproductive health and choices is not a new theme. Before *Casey*, the Court had rejected an employer's arguments that it was entitled to establish employment policies based on its female employees' fertility – specifically, a policy excluding fertile women (but not fertile men) from particular jobs – and held that the policy discriminated based on sex and pregnancy in violation of Title VII. *See Johnson Controls, supra*, 499 U.S. at 198-200. The Court's observation that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities" compels rejection of the religious exemption sought in this appeal. *Id.* at 211. Just as in *Johnson Controls*, here, too:

> It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice for the woman as hers to make.

Id.

Many employees, like many business owners, hold religious and other beliefs that guide their lives and important decisions. Those beliefs remain with them when entering their shared place of business. But as recognized in the decisions discussed above, permitting employers to interject themselves into employees' home lives and decisions concerning conception, contraception, and procreation – which Appellants' arguments do – not only would encourage others to seek to do the same, but would undermine or entirely subvert the compelling interests in autonomy, public health, and gender equity that are furthered by the rule Appellants resist.

Stepping back slightly from the reproductive health context of this case, imagine how American workplace standards would be transformed were our courts to embrace the principle Conestoga Wood offers. Owners of commercial businesses who object for religious reasons to blood transfusion could exempt that life-saving service from the health coverage they provide their employees. Business owners who believe it is a sin to take medications to control pain, to alleviate depression, or to manage HIV could exclude coverage for those medications. Employers who believe all modern medical treatments interfere with Divine will could refuse coverage for all but faith healing.

These examples concern medical care, but the principle Appellants offer is not necessarily confined to employer-provided health coverage. The notion that a

commercial business sins when it complies with rules that decline to condemn the sinful independent conduct of its employees could apply just as well to the non-benefits portion of employee compensation – wages. Logically, a next contention could be that religious liberty vindicates an employer's insistence that its workers attest that they will use only monies procured elsewhere for purchase of any goods or services – from condoms to pornography, from pork to liquor – that an employer views as sinful. That is the principle advanced in this case. It is neither legally nor practically tenable within our religiously pluralistic, secular society.

CONCLUSION

Acceptance of Appellants' arguments would unsettle, if not eviscerate, many well-reasoned principles and practices that have been developed over time based on our Constitution and laws. Because these legal rules and established practices not only permit, but actively encourage, a flourishing coexistence of the myriad religious, secular, and other belief systems that animate our nation, Appellants' inconsistent approach should be rejected and this appeal, dismissed.

Respectfully submitted,

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APRIL 23, 2013

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. R. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. Pursuant to 3d Cir. L.A.R. 31.1(c) (2008) I also certify that this electronic brief is identical to the text in the paper copies to be submitted to the clerk. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,997 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii) and consistent with L.A.R. 29.1(b), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2013, I electronically filed the foregoing brief, including the Corporate Disclosure Statement and Statement of Financial Interest contained therein, with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system. I further certify that pursuant to Third Circuit Local Rule 31.1, ten paper copies of the Brief have been sent to the Clerk of the Court, one paper copy of the Brief has been sent to counsel for the Appellants, and one paper copy of the Brief has been sent to counsel for the Appellees.

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