

Case No. 13-1144

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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

Plaintiffs-Appellants,

v.

**KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S.
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,**

Defendants-Appellees.

**On Appeal from the United States District Court
for the Eastern District of Pennsylvania
The Honorable Mitchell S. Goldberg
No. 5:12CV06744**

**BRIEF *AMICI CURIAE* OF BART STUPAK AND DEMOCRATS FOR LIFE
OF AMERICA IN SUPPORT OF PLAINTIFFS/APPELLANTS
AND SUPPORTING REVERSAL**

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I. STATEMENT OF AUTHORSHIP AND FUNDING

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amici* or their counsel contributed money that was intended to fund preparing or submitting this brief.

II. CORPORATE DISCLOSURE STATEMENT

Democrats for Life of America (DFLA) has no parent corporation, and no publicly held corporation owns stock in DFLA.

III. STATEMENT OF CONSENT TO FILE

This Brief is filed with the consent of all parties to the case.

IV. IDENTITY AND INTEREST OF *AMICI CURIAE*:

Former Congressman Bart Stupak (D-Michigan) served as an active member of the Congressional Pro-Life Caucus throughout his 18 year career (1993-2011), including his last six years as Co-Chair. The Pro-Life Caucus is composed of both Republican and Democratic Members of the U.S. House of Representatives. The principal tenet of Caucus Members is their belief that life begins at conception and that any man-made disturbance of the embryo is considered a form of abortion.

Democrats for Life of America (DFLA) is the preeminent national organization for pro-life Democrats. We believe that the protection of human life is the foundation of human rights, authentic freedom, and good government. These beliefs animate our opposition to abortion, euthanasia, capital punishment, embryonic stem cell research, poverty, genocide, and all other injustices that directly and indirectly threaten human life. As pro-life Democrats, we share the party's historic commitments to supporting women and children, strengthening families and communities, and striving to ensure the equality of opportunity, a reduction in poverty, and the existence of an effective social safety net that guarantees that all people have sufficient access to food, shelter, healthcare, and life's other basic necessities.

Both *amici* supported the Affordable Care Act (the ACA or the Act); Stupak was among the pro-life Democratic members of Congress who voted for it. Throughout the process leading to the ACA's passage, *amici* offered means by which it could ensure comprehensive health-care coverage while respecting unborn life and the conscience of individuals and organizations opposed to abortion. The House approved a version of the bill with the Stupak-Pitts Amendment, which prohibited the use of federal funds "to pay for any abortion or to cover any part of the costs of any health plan that includes coverage of abortion." Roll No. 884, 155 Cong. Rec. H12962 (Nov. 7, 2009).

As the ACA passed in final form, Rep. Stupak helped negotiate an Executive Order by President Obama reinforcing that under the Act the Hyde Amendment's restriction on federal funding for abortions applied, and that "longstanding Federal laws to protect conscience . . . remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions." Executive Order No. 13535, 75 Fed. Reg. 15599, Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act, 2010 WL 1169591 (Mar. 24, 2010). Likewise, Rep. Stupak's colloquy in the final House debate made clear that "current law [on abortion] should apply"

under the ACA and that “the intent behind both the legislation and the Executive order is to maintain a ban on Federal funds being used for abortion services, as is provided in the Hyde amendment.” 156 Cong. Rec. H1859, H1860 (Mar. 21, 2010) (statements of Reps. Stupak and Waxman). Thereafter, DFLA defended the Executive Order’s validity and identified mechanisms for ensuring that the ACA and the Order would successfully restrict funding for abortion and impositions on conscience.

Amici therefore have a strong interest in ensuring that neither the ACA nor its implementation imposes on longstanding conscience rights of individuals and organizations. *Amici* strongly support the ACA’s mandate to cover preventive services and its emphasis on health care for women. DFLA’s members take varying positions on the mandate’s inclusion of contraception among required preventive services. But all *amici* are committed to protecting the conscience rights of individuals and organizations—including those engaged in commerce—with objections to facilitating abortion, including emergency contraceptives that may act as abortifacients.

V. SUMMARY OF ARGUMENT:

The District Court erred in denying Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs object to providing insurance coverage to employees for what Plaintiffs consider "abortifacient contraception." District Court Memorandum Opinion ("Mem. Op."), DDE #49 at p. 7. Plaintiffs' objection to covering emergency contraception falls within our nation's tradition of broadly protecting conscientious objections to facilitating abortions.

A. Multiple federal and state laws show that the nation's tradition of protecting conscience, including religious conscience, is at its strongest and broadest for individuals and organizations that object to facilitating abortions. In fact, the mandate, as applied to emergency contraceptives that may cause abortions, violates several such provisions, including in the Affordable Care Act itself.

This vigorous and pervasive protection of conscientious objection to abortion in American law has several characteristics relevant to plaintiffs' claims. First, and generally, objections to abortion carry especially strong weight in American law because protecting conscientious objection to abortion falls within our tradition of protecting objectors from participating in actions that the objectors believe unjustly take human life—including assisted suicide, abortion, capital

punishment, and war. For this reason, although health-care conscience laws cover religious and moral objections to several procedures, protections for conscientious objection to abortion are particularly strong.

More specifically, laws protecting conscience rights for those objecting to abortion are not limited to individuals or to non-profit or religious organizations. Instead, the right not to facilitate or support abortions protects a wide range of objectors, regularly extending to individuals engaged in for-profit commerce and to for-profit businesses.

Finally, our tradition protects objectors to abortion far beyond the case of direct involvement in the performance of the abortion. This reflects the recognition that is the conscience of the objector that must be protected and it is not for the government to decide what degree of involvement should trigger moral culpability in the objector's mind.

B. Although the government has made statements that terminating an embryo before it implants in the uterus is not an abortion, the relevant matter for the claim of conscience under the Free Exercise Clause and the Religious Freedom Restoration Act ("RFRA"), is *Plaintiffs' belief* that a distinct human life begins at fertilization. It is no salve to plaintiffs' conscience to be told that the government defines abortion differently. Furthermore, Plaintiffs have a colorable cause for

concern that emergency contraceptives may act to terminate embryos. And even applying the government's definition, there is evidence that Ella may terminate embryos after implantation.

C. The longstanding tradition of broadly accommodating conscientious objections to facilitating abortions supports plaintiffs' claims under the Free Exercise Clause and RFRA. The pattern of conscience protection for objectors to abortion demonstrates that the contraception mandate "substantially burdens" plaintiffs' religious exercise, triggering the government's duty under RFRA to demonstrate that this burden serves a "compelling governmental interest" and does so by the "least restrictive means." 42 U.S.C. § 2000bb-1(a), (b).

The mandate requires Plaintiffs to provide insurance coverage for procedures they believe are grave moral evils. The denials of this burden, by the district court and the government, must be rejected. The district court held that for-profit corporations cannot engage in religious exercise; it also held that an employer suffers only an insubstantial, "attenuated" burden from being forced to cover methods and procedures that employees choose for themselves whether or not to use. Mem. Op., DDE #49 at pp. 20, 24.

Both of the court's holdings are irreconcilable with our tradition of protecting health-care-related conscience in the commercial sphere—in particular

the strong tradition, under federal and state laws, of protecting objections to abortion. Protections for objections to facilitating abortion have extended to multiple categories of for-profit entities and individuals engaged in commerce, and to many kinds of indirect facilitation, including mandatory coverage of abortion in insurance plans. When impositions are repeatedly prohibited under various conscience provisions, they cannot be dismissed as “insubstantial” burdens under RFRA. Therefore, this Court should find that the mandate substantially burdens plaintiffs by requiring them to cover methods they fear may act to terminate an embryo after fertilization.

Finally, plaintiffs are likely to succeed on the merits of their RFRA and constitutional claims, because the government has articulated no arguments that would demonstrate a compelling interest in requiring coverage of such methods. The strong tradition of exempting objections to abortion—among other factors—undercuts the government’s claim that it has a compelling interest in requiring coverage of possible abortifacients.

VI. ARGUMENT:

A. THIS CASE IMPLICATES THE NATION'S STRONG TRADITION OF BROADLY ACCOMMODATING OBJECTIONS TO FACILITATING ABORTION, INCLUDING OBJECTIONS BY ORGANIZATIONS AND INDIVIDUALS IN FOR-PROFIT SETTINGS.

1. Numerous Laws, Including the Affordable Care Act Itself, Reflect the Nation's Strong Tradition of Accommodating Conscientious Objections to Facilitating Abortions.

Our nation's tradition of protecting conscience is strongest, and broadest, for those who object to supporting abortions. Many federal and state laws protect such objections, including several provisions directly applicable to this case. See Am. Compl. ¶¶144-46. The Hyde-Weldon Amendment, included each year since 2005 in continuing appropriations acts, prohibits federal funds for the HHS and Labor departments from being “made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, *provide coverage of*, or refer for abortions.” Consolidated Appropriations Act, 2012, § 507(d)(1), Pub. L. No. 112-74, 125 Stat. 786 (112th Cong. 1st Sess. Dec. 23, 2011) (emphasis added). The protected entities include “health insurance plan[s],” as well as other commercial entities, including “a hospital, a provider-sponsored organization, [or] a health

maintenance organization.” *Id.* § 507(d)(2). Thus, Plaintiffs’ refusal to provide coverage for abortifacients in Conestoga’s health plan is directly protected by the Amendment. See Am. Compl. ¶145.

Second, the Affordable Care Act itself protects qualified health plans from being forced to cover abortion. The Act states that “nothing in this title [which includes the section concerning “preventive services”] shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year.” 42 U.S.C. § 18023(b)(1)(A)(i). This provision protects plaintiffs’ refusal to cover abortifacients in their health plan. See Am. Compl. ¶144. The Act has other abortion-conscience protections: It restates the Hyde-Weldon principle that “[n]o individual health care provider or health care facility,” including commercial entities, may be discriminated against because of a religiously or morally based refusal “to provide, pay for, provide coverage of, or refer for abortions.” 42 U.S.C. § 18023(b)(4). And it expressly states that “[n]othing in [t]he Act shall be construed to have any effect” on federal laws concerning “conscience protection; willingness or refusal to provide abortion; and “discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion.” 42 U.S.C. § 18023(c)(2)(A).

President Obama summarized these provisions in his March 2010 Executive Order, which *amicus* Stupak helped negotiate:

Under the [ACA], longstanding Federal laws to protect conscience (such as the Church Amendment and the Weldon Amendment) remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions.

Executive Order No. 13535, 75 Fed. Reg. 15599, 2010 WL 1169591 (Mar. 24, 2010) (citations omitted).

Thus, we agree with plaintiffs that the mandate violates the ACA, 42 U.S.C. § 18023(b)(1)(A)(i), and the Hyde-Weldon Amendment by requiring plaintiffs to cover drugs that may cause abortions. But these provisions are also highly relevant to the issues before this Court concerning RFRA and the First Amendment. The ACA and Hyde-Weldon provisions offer just two examples of the nation's tradition of broad protection for objections to facilitating abortion. As we discuss *infra*, this Court should take that tradition into account in interpreting RFRA and the Free Exercise Clause.

Protections for objectors to abortion pre-date *Roe v. Wade*, 410 U.S. 113 (1973): states that liberalized their abortion laws before *Roe* “included explicit conscience protections for individuals and institutions in the [liberalization] statutes” or in separate laws. Mark L. Rienzi, *The Constitutional Right Not to*

Participate in Abortions: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers, 87 Notre Dame L. Rev. 1, 30-31 & n.142 (2011). In announcing constitutional abortion rights in *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973), the Supreme Court simultaneously endorsed conscience protections. *Doe*, for example, noted that the Georgia statute in question had provisions “to afford appropriate protection to the individual and to the denominational hospital”: for example, “the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee.” 410 U.S. at 197-98.

Soon after *Roe*, Congress passed the Church Amendment of 1973, which protects federally funded entities and their personnel from having to perform or provide facilities for abortions or sterilization against their “religious beliefs or moral convictions.” Health Programs Extension Act of 1973, § 401, Pub. L. No. 93-45, 87 Stat. 91, 95 (1973), codified at 42 U.S.C. § 300a-7. The Church Amendment also protects individual health-care personnel against discrimination by their employers for such refusals. *Id.* Similar conscience clauses have been enacted in other federal laws and, as of 2007, in 47 states. James T. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. Pa. J. Lab. & Emp. L. 235, 269-71 (2007). Quite a few of those states have covered objections concerning other procedures besides abortion. See *id.* at 271 (14 states protect health-care

provider conscience concerning contraception, 18 concerning sterilization, and 3 concerning all health procedures). But every one of the 47 states protects provider conscience concerning abortion, and the abortion provisions “are remarkable” in, among other things, “the range of persons covered.” *Id.*

Federal law also protects, for example, federally funded entities from any sex-discrimination challenge for refusing “to provide or pay for any service, including the use of facilities, related to an abortion.” 20 U.S.C. § 1688. It protects “any health care entity,” including an individual, from discrimination by federal or state governments for refusing to provide training, to undergo training, or even to refer someone for training, in performing abortions. 42 U.S.C. § 238n(a), 238n(c)(2). It prohibits the use of legal aid funds to assist any proceeding or litigation that seeks “to compel any individual or institution” to perform, assist with, or provide facilities for an abortion in violation of religious or moral convictions. 42 U.S.C. § 2996f(b)(8). And it protects various health plans and providers from having to cover counseling or referral concerning a service if they object to the provision of such service on moral, ethical, or religious grounds. 42 U.S.C. § 1396u-2(b)(3)(B); 42 U.S.C. § 1395w-22(j)(3)(B); 48 C.F.R. § 1609.7001(c)(7).

2. Our Laws Give Especially Broad Protection for Conscientious Objections to Facilitating Abortions.

Several conclusions follow from this array of federal and state conscience protections. As a general matter, although protections for objections to a number of health-care procedures are well established in American law, conscientious objections to abortion carry especially strong weight. See Rienzi, 87 Notre Dame L. Rev. at 35 (“The unique history of abortion-related conscience protections shows a collective judgment, arguably over the entire history of the nation, that healthcare providers should not be forced by the government to participate in abortions against their will.”). These provisions reflect a more general principle: the seriousness of the burden on conscience when the objector is forced to take a life. The “right to refuse to take a human life over a sincere religious or moral objection” has “been consistently protected for health care practitioners in the context of abortion, abortifacient drugs, assisted suicide, and capital punishment,” as well as for “conscientious objectors to military service.” *Stormans v. Selecky*, 844 F. Supp. 1172, 1183 (W.D. Wash. 2012); see Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 147-48 (2012) (“government efforts to ensure that unwilling individuals are not forced to engage in what they believe to be killings” have been “systematic and all encompassing”). The special

breadth of abortion-conscience protection is relevant to this case in two specific ways.

(a) Laws protecting conscience rights regarding abortion extend to for-profit businesses, not just individuals and non-profit businesses.

Second, the right not to facilitate or support abortions regularly extends to individuals engaged in for-profit commerce, and to for-profit businesses. Both the Affordable Care Act and the Hyde-Weldon Amendment protect not only health insurance plans—directly covering this case—but other commercial entities such as hospitals, HMOs, and provider-sponsored organizations. See *supra* pp. 11-13. All of the relevant provisions, from the Church Amendment through state conscience clauses to Hyde-Weldon and the ACA, protect individuals engaged in commerce—health-care personnel of various kinds—from having to participate in abortions.

(b) Laws protecting conscience rights regarding abortion extend far beyond direct involvement in performing abortions.

Finally, our tradition protects objectors to abortion far beyond the case of direct involvement in the performance of the abortion. Health-insurance plans are exempt, under the Hyde-Weldon Amendment and the ACA, from having to facilitate abortions through the provision of coverage. Entities and individuals are

protected not only from having to participate in the abortion, but from having to refer anyone for an abortion, or for abortion training, or from having to assist in other ways. See statutes cited *supra* p. 14-15; Rienzi, 87 Notre Dame L. Rev. at 34 (“[t]hese protections extended not only to direct personal performance of an abortion, but more broadly to providers who have an objection to being forced to ‘participate,’ ‘refer,’ ‘assist,’” or facilitate in other ways concerning abortion).

As discussed more fully in Part C, the broad range of objectors and actions that these protections cover indicate society’s recognition of the seriousness of the burden on the objector who believes abortion takes a life. The protections indicate powerfully that—for purposes of RFRA and the Free Exercise Clause—mandating coverage of abortifacients imposes a “substantial burden,” even on for-profit entities, and does not serve a “compelling governmental interest.”

B. PLAINTIFFS’ OBJECTION TO COVERING EMERGENCY CONTRACEPTIVES FALLS WITHIN THE TRADITION OF ESPECIALLY STRONG PROTECTIONS FOR ABORTION OBJECTIONS BECAUSE OBJECTORS HAVE A COLORABLE BASIS FOR FEARING THAT EMERGENCY CONTRACEPTION MAY CAUSE TERMINATION OF A NEWLY-FERTILIZED EMBRYO.

This case implicates the tradition of protecting conscientious objections to abortion, in that plaintiffs object to “emergency contraceptives” because they may

act to terminate a newly fertilized embryo. This is true for plaintiffs' claims under RFRA, 42 U.S.C. § 2000bb *et seq.*, as well as under the Free Exercise Clause.

Plaintiffs—Conestoga Wood Specialties Corporation and the Hahns, owners and operators of the business—“object to prescription plan coverage of ‘Plan B’ . . . and ‘Ella.’” Mem. Op., DDE #49 at p. 8 (citing Am. Compl. ¶¶ 45-46). “The Hahns are practicing Mennonite Christians whose faith requires them to operate Conestoga in accordance with their religious beliefs and moral principles.” Mem. Op., DDE #49 at p. 6. “The Mennonite Church teaches that taking of life[,] which includes anything that terminates a fertilized embryo[,] is an intrinsic evil and a sin against God.” Mem. Op., DDE #49 at p. 7 (quoting Am. Compl. ¶30). The Hahns believe that “human life begins at conception . . . and that it is a sacred gift from God and only God has the right to terminate human life.” Mem. Op., DDE #49 at p. 7 n.5 (quoting the Hahn Family Statement on the Sanctity of Human Life [Pls.’ Br., Ex. 5]). Thus, the Hahns view the intentional termination of an embryo, at any time after fertilization, as an impermissible abortion, which destroys a sacred life and is tantamount to murder. See *id.* As a result, they also “believe it would be sinful for them to pay for, or contribute in any way to, the use of abortifacient contraception, which they define as, any drug or device that may ‘terminate[] a fertilized embryo.’” Mem. Op., DDE #49 at p. 7 (quoting Am.

Compl. ¶¶30, 32). In short, the mandate requires plaintiffs “to choose between providing coverage to employees for abortifacient contraception, which they contend violates their right to religious freedom, or pay significant financial penalties.” Mem. Op., DDE #49 at p. 8.

The strong tradition of protecting conscience concerning abortion applies here notwithstanding statements by the government that the emergency contraceptives to which plaintiffs object are not abortifacients because the latest point at which they operate is to prevent implantation of a newly fertilized embryo in the uterus. See, e.g., Kelly Wallace, *Health and Human Services Secretary Kathleen Sebelius Tells iVillage "Historic" New Guidelines Cover Contraception, Not Abortion* (Aug. 2, 2011), <http://www.ivillage.com/kathleen-sebelius-guidelines-cover-contraception-not-abortion/4-a-369771>. This assertion by the government is both irrelevant to a claim under RFRA and wrong on its merits.

1. Under RFRA, It Is Not the Government’s Definition of Abortion, but the Plaintiffs’ Definition, Which Is Relevant to this Case.

The fundamental issue in a case involving RFRA or the Free Exercise Clause is the *objector’s belief*. The government imposes a substantial burden on religious exercise under RFRA when it (among other things) “puts substantial

pressure on an adherent . . . to violate his beliefs.” *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007) (interpreting identical standard in the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*). The Hahns, like millions of other Americans, believe that the life of a distinct human person begins at fertilization and that the grave wrong of abortion includes intentionally preventing the embryo’s implantation. The government, of course, cannot question the validity of that moral view. See *Thomas v. Review Board*, 450 U.S. 707, 714 (1981) (under Free Exercise Clause, whether a law conflicts with a claimant’s religious belief “is not to turn upon a judicial perception of the particular belief or practice in question”); accord *DeHart v. Horn*, 227 F.3d 47, 56 (3d Cir. 2000) (en banc) (relying on “long line of Supreme Court precedent” acknowledging that it is not within the “judicial ken” to evaluate the centrality or validity of a sincerely held religious belief).

Since these objectors believe that a distinct life begins at conception, it is no salve to their conscience to be told that the government defines abortion differently. Whatever the definition in the government’s statements, objectors like plaintiffs are suffering the particularly serious burden of being forced to facilitate acts that they believe take a life. The nation’s tradition of broadly protecting

abortion objections must extend to them, and to their claims under RFRA and the Free Exercise Clause.

Plaintiffs' beliefs also include a factual component: that emergency contraceptives pose a risk of terminating a new embryo (a risk in turn sufficiently great that they may not facilitate such medicines' use). This judgment too must receive deference from a court. Objectors such as plaintiffs weigh the risk in the light of the seriousness with which they view the intentional termination of embryonic life; proper deference to this weighing means the court should give objectors great leeway on evaluating the extent of the risk. When it is colorable to believe that a drug or method may operate before implantation, the objector's claim should fall within our tradition of particularly broad protection for objections to abortion.

2. Objectors Have a Colorable Basis for Fearing that Emergency Contraception May Cause Termination of Embryos.

The labeling information on both Ella (ulipristal acetate) and Plan B (levonorgestrel) states that although the primary mechanism for preventing pregnancy is inhibition or delay of ovulation, “[a]lterations to the endometrium that may affect implantation may also contribute to efficacy.” *Ella Full Prescribing Information*, 12.1 (Aug. 2010), *available at*

http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf. See also Plan B One-Step Prescribing Information, 12.1 (rev. July 2009), available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf (stating that Plan B is believed to act principally by preventing ovulation or fertilization; “[i]n addition, it may inhibit implantation (by altering the endometrium).”).¹ Making the endometrium, the uterine lining, unreceptive to implantation is one way to cause the abortion of a new embryo. Based on these statements, an organization or individual convinced that a distinct human life begins at fertilization has a reasonable basis for objecting that the medicines they are being forced to cover can act as abortifacients. On a matter as grave as the risk of terminating life, the objector is entitled to take seriously the government’s statements that the risk exists.

With respect to Ella (ulipristal) in particular, objectors clearly have ample reason to conclude that the medication may terminate an embryo. Ulipristal is a selective progesterone receptor modulator (SPRM); as such it is structurally similar

¹ As already noted, Secretary Sebelius herself has admitted that FDA-approved emergency contraceptives are “a category [of drugs] that prevent fertilization and implantation.” Kelly Wallace, *Health and Human Services Secretary Kathleen Sebelius Tells iVillage "Historic" New Guidelines Cover Contraception, Not Abortion* (Aug. 2, 2011), <http://www.ivillage.com/kathleen-sebelius-guidelines-cover-contraception-not-abortion/4-a-369771>.

and “has similar biological effects to mifepristone, the antiprogesterin used in medical abortion.”² Although Ella involves lower doses of mifepristone than does RU-486, the so-called abortion pill, the record of the FDA’s approval for Ella contains multiple statements that when administered after ovulation, the drug affects the endometrium in a way that could prevent implantation of a fertilized embryo. For example, the background document for the FDA advisory committee on Ella states that “[a]dministration of ulipristal in the luteal phase [of the menstrual cycle] also alters the endometrium. Based on the findings of the pharmacodynamic studies, ulipristal appears to exert an anti-progesterone contraceptive effect on both the ovary and endometrium, depending on the dose and time of drug administration during the menstrual cycle.”³ As one member of

² G. Bernagiano & H. von Hertzen, “Towards more effective emergency contraception?,” 375 *The Lancet* 527-28 (Feb. 13, 2010), at 527.

³ See Background Document for meeting of Advisory Committee for Reproductive Health Drugs, FDA Advisory Committee Materials, NDA 22-474 (Ella) (June 17, 2010), at 11-12, available at <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/ReproductiveHealthDrugsAdvisoryCommittee/UCM215425.pdf> (hereinafter “FDA Background Document”). See also Transcript of Proceedings, Advisory Committee on Reproductive Health Drugs (June 17, 2010), at 121 (Dr. Ronald Orleans, FDA Medical Officer) (“Another possible mode of action is delaying the normal endometrial maturation which occurs in the luteal phase of the cycle. This delay of maturation could possibly prevent implantation.”), available at <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials>

the FDA's advisory committee stated: "I'll even concede that the primary mechanism of action might be delayed ovulation, but not in this group that's five days out from unprotected intercourse. . . . I can't imagine how we can put all of these numbers together to say that delayed ovulation explains this continued efficacy [at five days after intercourse]." ⁴

There is also evidence that Ella may have effects post-implantation, a time period that satisfies even the asserted definition for abortion in the government's statements. The FDA's own materials cite studies in pregnant rats and rabbits in which ulipristal "at drug exposures comparable to human exposure based on surface area (mg/m²)" were lethal to embryos. ⁵ Similarly, the European Medicines Agency (EMA), the EU equivalent of the FDA, found embryotoxic effects in rats, rabbits, guinea pigs, and macaques (similar to monkeys). See European Medicines Agency, "CHMP Assessment Report for EllaOne," (Doc.Ref.: EMEA/261787/2009), at 16, 10 (finding that *ella* "is embryotoxic at low doses, when given to rats and rabbits" and "[was] approximately equipotent at the dose levels of 10 and 30 mg/day in terminating pregnancies in guinea-pigs"), available at http://www.ema.europa.eu/docs/en_GB/document_library/EPAR_-

s/Drugs/ReproductiveHealthDrugsAdvisoryCommittee/UCM218560.pdf (hereinafter "Advisory Committee Proceedings").

⁴ Advisory Committee Proceedings, *supra* note 3, at 160, 164 (Dr. Scott Emerson).

⁵ FDA Background Document, *supra* note 3, at 10.

[_Public_assessment_report/human/001027/WC500023673.pdf](#). These studies may not have conclusively determined the drug's effect on fetal development after implantation,⁶ but they unquestionably raise significant concerns for the objector who believes that the genetically distinct human life that begins at fertilization must be protected.

With respect to Plan B, although some scientific studies have concluded that it does no more than prevent conception,⁷ other studies, as well as the government's own labeling and statements, indicate that it may act after fertilization. For example, a summary of various effectiveness studies for levonorgestrel concludes that there are significant discrepancies between the effectiveness reported and the effectiveness that can be attributed to the drug's disturbance of ovulation. The authors conclude that "[e]ither the actual clinical effectiveness is far lower than has been estimated in the literature to date" or "that mechanisms of action other than disturbance of ovulation contribute to the

⁶ *Id.* at 10-11.

⁷ See, e.g., Sandra E. Reznik, "Plan B": How It Works, *Health Progress* (Jan.-Feb. 2010), at 59, available at www.chausa.org/workarea/DownloadAsset.aspx?id=6159. These arguments concerning the mechanism of action of levonorgestrel do not apply to ulipristal, which "is a new chemical entity, has a different mechanism of action, and a more limited safety profile." Advisory Committee Proceedings, *supra* note 3, at 222-23 (statement of Dr. Carol Ben-Maimon).

reduction of clinical pregnancy, including mechanisms acting after fertilization.”⁸ Given such uncertainties, together with the medication’s labeling and the government’s other statements, objectors have a colorable basis for believing that that Plan B may affect implantation.

In short, the colorable fears that plaintiffs have that Ella and Plan B may terminate a new embryo are sufficient to bring this case within the tradition of making especially broad accommodation for conscientious objections to facilitating abortions.

C. PLAINTIFFS HAVE A SUFFICIENT LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR RFRA CLAIM.

RFRA provides 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,” unless the government demonstrates that imposing that burden “(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(a), (b).

⁸ Rafael T. Mikolajczyk and Joseph B. Stanford, *Levonorgestrel: emergency contraception: a joint analysis of effectiveness and mechanism of action*, 88 *Fertility and Sterility* 565, 569, 570 (Sept. 2007).

These widespread exemptions we have listed are highly probative for plaintiffs' claims under RFRA and the First Amendment. They provide strong indication, under our traditions, that mandating coverage of abortions imposes a "substantial burden" on an objector, including a for-profit closely-held business and its individual owners. And the fact that the protections are so numerous indicates that there is not a compelling interest, generally, in forcing objectors to facilitate abortions.

1. The Mandate Imposes a Substantial Burden on Plaintiffs' Religious Exercise.

We agree with Plaintiffs that they are engaged in "religious exercise" by seeking to run their closely-held business according to the principles of their Mennonite faith. Appellants' Br. at pp. 12-13, 19-24. We also agree that the government substantially burdens plaintiffs' religious exercise when it requires them to support abortifacients, which they regard as sinful, by including them in their insurance plan and paying premiums to cover them. *Id.* at 13-14, 24-30. Accordingly, plaintiffs' claims trigger RFRA, and the government must show a compelling interest in imposing these burdens on them.

The district court held that strict scrutiny was not triggered by Conestoga Wood's claims under the Free Exercise Clause or RFRA, or by the Hans' claims as individuals under RFRA. See Mem. Op., DDE #49 at pp. 12-17, 20-29. These

holdings were error as a matter of law, for a variety of reasons. We focus on the right of conscientious objection against abortion and the logical effect that the government's arguments would have on that right. The District Court's narrow conception of religious exercise and "substantial burden" is irreconcilable with the nation's particularly strong tradition of protecting objections to abortion by both organizations and individuals.

The District Court first held that Conestoga Wood could not "exercise religion" within the meaning of the Free Exercise Clause or RFRA, because it is a for-profit corporation. Mem. Op., DDE #49 at pp. 12-17, 20. We agree with Plaintiffs' response: RFRA's protections are not limited to "religious organizations" (Appellants' Br. at pp. 19-24), and that the corporations that individuals form and operate can exercise religion in the for-profit corporate setting.

The court's restrictive approach is wrong for another reason. It would mean that, so far as RFRA and the Free Exercise Clause are concerned, an employer could be forced to cover the cost of procedures that unquestionably cause an abortion. This is irreconcilable with the strong pattern of accommodations in federal and state law for those objecting to participating in abortions—including the objections of commercial entities such as businesses and health insurers. See

supra pp. 11-15, 17. Over and over again, federal and state laws have recognized that entities as well as individuals engaging in commerce exercise their religious conscience in objecting to facilitating abortions and other procedures and should be protected. It makes no sense to say that an interest recognized so frequently does not constitute the “exercise of religion” under RFRA.

In fact, as one state court has recognized, what health-care conscience laws do, “by offering protections to those who seek not to act in the health-care setting due to religious convictions,” is precisely to “bolste[r]” “a person’s exercise of religion.” *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160, 1171 (Ill. App. 4th Dist. 2012) (using state health-care conscience act to protect corporate owners of pharmacies, as well as individual pharmacists, from state rules requiring them to provide emergency contraception), appeal dismissed, --- N.E.2d ---- (Ill. Jan 30, 2013) (Table, No. 115122). The Illinois court treated the purposes of Illinois’s conscience act as harmonious with the state’s own version of RFRA. This Court should do the same for the federal RFRA and the many federal and state conscience acts.

Next, the district court here held that the Hahns’ personal exercise of religion is not “substantially burdened” under RFRA because they are not being

forced to do anything directly sinful themselves. The court held that plaintiffs suffer only an “indirect” and “attenuated” burden when their claim is

[T]hat funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the corporate] plan, subsidize *someone else’s* participation in an activity that is condemned by plaintiff[s]’ religion.

Mem. Op., DDE #49 at pp. 23-24, 26 (quoting, *inter alia*, *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir.), 12/20/12 Order, at 7) (emphasis in original) (order of 2 judges denying injunction pending appeal)). As plaintiffs point out, this ignores that they believe it is wrong for them to facilitate the wrongs of others. Appellants’ Br. at 14, 27-30. Again, the government’s argument conflicts with *Thomas v. Review Board*, 450 U.S. 707 (1981), where the claimant quit his job because, based on his religious beliefs, he was unwilling to work in a factory that produced tank turrets. The state denied him unemployment benefits and argued that his objection was unfounded because he had been willing to work in a different factory that produced materials that might be used for tanks. The Supreme Court held that in determining whether Thomas’s religious beliefs were burdened, it could not second-guess his judgment about what connection to armament production was unacceptably close for him: “Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.” *Thomas*, 450 U.S. at 715. Plaintiffs are entitled, just as much as Mr. Thomas was, to make

judgments about when their connection becomes too close to conduct they believe is immoral.

Under the logic of the district court's holding, there is no burden on *any* employer that is forced to provide insurance coverage for employees' abortions: there would be no burden even on a religious organization, even on a Catholic diocese. As plaintiffs note, HHS's own exemption and accommodation for religious organizations shows that it recognizes that an organization is significantly burdened by having to provide its employees insurance coverage to fund procedures it regards as sinful. Appellants' Br. at 30-31.

The government's position here is also irreconcilable with the long tradition of protecting conscientious objectors from more than just direct personal involvement in the abortion. In multiple ways and contexts, federal and state laws protect those who refuse to help others get or perform abortions. Objectors are freed from having to refer someone to an abortion provider, from having to provide facilities, and from having to conduct training sessions or refer someone for training sessions—even though in all those cases it could be said that the objector was merely facilitating someone else's voluntary participation. See *supra* p. 15, 17-18. And most relevantly, both the ACA and the Hyde-Weldon Amendment specifically protect health plans (and by extension, employers purchasing them)

from having to cover abortions. Burdens that over and over again trigger protections in federal and state laws cannot be dismissed “insubstantial” under RFRA.

In short, to find no substantial burden here would mean that government could force a small or closely held business to fund any abortion whatsoever, with no barrier from RFRA or the Free Exercise Clause. Again, that would be irreconcilable with the nation’s tradition of broad conscience protection for objectors to abortion, including individuals and entities in the for-profit sphere.

2. The Government Has Not Shown That Requiring Employers to Cover Emergency Contraceptives Serves a Compelling Interest, Or That It Is the Least Restrictive Means.

Once the Plaintiff demonstrates a substantial burden, the government has the obligation to demonstrate that application of the burden to the plaintiff furthers a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(b). “[D]emonstrates” means that the government must “mee[t] the burdens of going forward with the evidence and of persuasion.” 42 U.S.C. § 2000bb-2(3).

The government has not met either of those obligations at this stage of the litigation. The government’s general claims—that requiring objecting employers to cover contraception is necessary to promoting women’s health and equity—

cannot suffice to overcome claims of conscience concerning abortifacients, for a combination of reasons, some relating particularly to abortifacients, others applying more broadly.

By the Secretary's own admission, contraception is widely available in "community health centers, public clinics, and hospitals with income-based support," <http://www.hhs.gov/news/press/2012pres/01/20120120a.html>, and there is no demonstration that emergency contraception is different. Like contraception in general, emergency contraceptives are subject to the huge coverage gaps that the ACA leaves: the exemption of small businesses (under 50 full-time employees) from the underlying requirement to provide health insurance, and the grandfathering of thousands of plans covering tens of millions of employees. Appellants' Br. at 46-49.⁹

In addition, there are particular reasons to doubt that the government's interest is compelling with respect to potential abortifacients. First, the nation's tradition of broadly accommodating conscientious objections to facilitating abortion makes it extremely unlikely that the government can show a compelling interest in overriding employers' conscience concerning embryo-terminating

⁹ We agree with Plaintiffs that the foregoing features also mean that the mandate is neither neutral nor generally applicable as required by the Free Exercise Clause. See Appellants' Br. pp. 37-44.

drugs. On abortion the government accommodates the conscientious scruples of for-profit employers, health-insurance plans, health-care facilities, and individual salaried providers. The government cannot overcome the strong claim of conscience here concerning potential abortifacients by the mere declaration that all FDA-approved contraceptives should be covered or that terminating an embryo is not an abortion before implantation.

Second, the government has justified the mandate throughout based on arguments that the costs of contraceptive methods may deter a significant number of women from using them. See, e.g., Final Rules, Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). But even if that argument were valid, there is no specific showing it should also apply to emergency contraceptives. While the proper use of routine contraception should be frequent and regular over months, medicines like Ella and Plan B are appropriate for only a limited range of situations—shortly “after unprotected intercourse or a known or suspected contraceptive failure”—and neither is “intended for routine use as a contraceptive.”¹⁰ The costs of regularly ingested

¹⁰ FDA, Ella Prescribing Information, ## 2, 1, available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf;

contraceptives mount over months; according to one chart, they reach up to \$960 a year for uninsured women taking certain pills.¹¹ Ella and Plan B cost roughly \$35 to \$55 per dose.¹² Thus, it would take multiple uses of Ella or Plan B in a year (up to 20) to equal the yearly cost of routine contraception—a pattern contradicting the direction that neither Ella nor Plan B is “intended for routine use as a contraceptive.” In that light, the government cannot simply equate the expenses for emergency and regular contraception without demonstrating the compelling need to require objecting employers to cover the former. Since there is no such demonstration at this point, the preliminary injunction should be granted.

FDA, Plan B One-Step Prescribing Information, ## 2, 1, available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/0219981b1.pdf.

¹¹ Center for American Progress, *The High Costs of Birth Control: It's Not Affordable As You Think* (Feb. 15, 2012), available at <http://www.americanprogress.org/issues/women/news/2012/02/15/11054/the-high-costs-of-birth-control/>.

¹² See, e.g., Andrea Kim and Mary Barna Bridgman, *Ulipristal Acetate (ella): A Selective Progesterone Receptor Modulator For Emergency Contraception*, 36 *Pharmacy & Therapeutics* 325, and Table 1 (June 2011), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3138379>.

VII. CONCLUSION:

The District Court's Order should be reversed and the preliminary injunction granted.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

As required by Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 6,908 words. I relied on my word processor to obtain the word count (Microsoft Word 2010). I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

CERTIFICATE OF COMPLIANCE WITH DIGITAL SUBMISSIONS

As required by this Court's Order regarding the Electronic Submission of Documents, filed August 10, 2007, the undersigned counsel certifies that (1) no privacy redactions were needed and every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Clerk, and (2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, AVG Anti-Virus 2012, and according to this program, are free of viruses.

/s/ Travis S. Weber _____
Travis S. Weber

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS/APPELLANTS AND SUPPORTING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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