NO. _____

In the Supreme Court of the United States

CONESTOGA WOOD SPECIALTIES CORP., et al.,
Petitioners,

v.

KATHLEEN SEBELIUS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

JORDAN W. LORENCE
STEVEN H. ADEN
GREGORY S. BAYLOR
MATTHEW S. BOWMAN
ALLIANCE DEFENDING FREEDOM
801 G. Street, N.W., Ste. 509
Washington, D.C. 20001
(202) 393–8690

DAVID A. CORTMAN
Counsel of Record
KEVIN H. THERIOT
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd.
N.E., Ste. D-1100
Lawrenceville, GA 30043
(770) 339–0774
dcortman@alliancedefendingfreedom.org

Counsel for Petitioners
[Additional Counsel Listed on Inside Cover]

CHARLES W. PROCTOR, III
LAW OFFICES OF PROCTOR
LINDSAY & DIXON
1204 Baltimore Pike, Ste. 200
Chadds Ford, PA 19317
(610) 361–8600

RANDALL L. WENGER
INDEPENDENCE LAW CENTER
23 North Front Street
Harrisburg, PA 17101
(717) 545–0600

Counsel for Petitioners

QUESTION PRESENTED

Federal regulations implementing the Patient Protection and Affordable Care Act of 2010 (ACA) compel certain employers, including Petitioners, to provide health-insurance coverage for FDA-approved contraceptives. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) ("the Mandate").

Petitioners, a family of five Mennonites and their closely-held, family-run woodworking corporation, object as a matter of conscience to facilitating contraception that may prevent the implantation of a human embryo in the womb, and therefore brought this case seeking review of the Mandate under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993.

The decision below rejected these claims, carving out an exception to the scope of religious free exercise. The court denied that either "a for-profit, secular corporation" or its family owners could claim free exercise rights. Pet. App. at 10a. In so holding, the Third Circuit expressly rejected contrary decisions of the Ninth and Tenth Circuits, and ruled at odds with prior decisions of the Second Circuit and Minnesota Supreme Court, but accorded with a recent decision of the Sixth Circuit.

The question presented is:

Whether the religious owners of a family business, or their closely-held, for-profit corporation, have free exercise rights that are violated by the application of the contraceptive-coverage Mandate of the ACA.

PARTIES TO THE PROCEEDING

Petitioners are Conestoga Wood Specialties Corp. and its family owners, Norman and Elizabeth Hahn, and their three sons, Norman Lemar, Anthony, and Kevin Hahn.

Respondents are the Departments of Health and Human Services, Treasury, and Labor, and the Secretaries thereof, Kathleen Sebelius, Jacob Lew, and Thomas E. Perez, respectively, sued in their official capacities. During the litigation below, the Secretaries of the Treasury and Labor Departments were replaced by Mr. Lew and Mr. Perez, respectively.

CORPORATE DISCLOSURE STATEMENT

Petitioner Conestoga Wood Specialties Corp. is a Pennsylvania business corporation. It does not have parent companies and is not publicly held.

Petitioners Norman, Elizabeth, Norman Lemar, Anthony, and Kevin Hahn are individual persons.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

Regulations:

Other Authorities:

INTRODUCTION

Petitioners, a Mennonite family and their closely-held, family-run woodworking business, object as a matter of conscience to facilitating certain contraceptives that they believe can destroy human life. Regulations promulgated under the Patient Protection and Affordable Care Act of 2010 (ACA), however, compel employers with more than fifty full-time employees to provide health-insurance coverage, and compel most kinds of insurance plans to cover abortifacients among other FDA-approved contraceptives. Petitioners challenged the regulation as burdening their free exercise of religion under the First Amendment and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq*. The decision below rejected those claims, holding as a "threshold" matter that neither a "for-profit, secular corporation" nor its proprietors have free exercise rights in their business activities, Pet. App. at 10a, and that no cognizable burden falls on the Mennonite family that owns and runs the closely-held business, *id*. at 26a–27a.

The Third Circuit's decision below squarely conflicts and "respectfully disagree[s]" with the Tenth Circuit's contrary holding recognizing two for-profit corporations' religious exemption from the very same regulation. *Id.* at 19a n.7. It also "decline[s] to adopt the [Ninth Circuit's] theory" allowing a business' family owners to claim free exercise rights as passing through the corporate form, and likewise refuses to recognize the proprietors' claim of a burden on their own free exercise rights. *Id.* at 25a. And it diverges from

decisions of the Second Circuit and Minnesota Supreme Court that entertained similar free exercise claims by proprietors and their for-profit corporations. *Id.* at 67a n.21. A recent decision by the Sixth Circuit adopting, in large part, the Third Circuit's analysis and holding that neither family owners nor their closely-held businesses may seek free exercise protection from the Mandate further entrenches the existing circuit conflict. *See Autocam Corp. v. Sebelius*, No. 12-2673, 2013 WL 5182544, at *4–9 (6th Cir. Sept. 17, 2013).

As the Solicitor General noted two terms ago in petitioning for certiorari, the enforceability of the ACA "involves a question of fundamental importance." *Dep't of Health & Human Servs. v. Florida*, Pet. for a Writ of Cert. at 29, (No. 11–398) (Sept. 2011). Family business owners and corporations incorporated in the Third Circuit, including the many incorporated in the State of Delaware, are denied the free exercise protections enjoyed by those in several other circuits, encouraging forum-shopping and distorting the market for incorporation. They urgently need this Court's guidance and this case is a clean vehicle for clarifying free exercise law. Further review by this Court is warranted.

DECISIONS BELOW

The panel opinion of the court of appeals is not yet reported but is available at No. 13–114, 2013 WL 3845365 (July 26, 2013) and reprinted in Pet. App. at 1a–93a. The Third Circuit's order denying rehearing en banc is unreported but reprinted in

Pet. App. at 1c–2c. The district court's opinion is reported at 917 F. Supp. 2d 394 (E.D. Pa. 2013) and reprinted in Pet. App. at 1b–45b.

JURISDICTION

The court of appeals issued an opinion on July 26, 2013 and denied a timely petition for rehearing *en banc* on August 14, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ….

U.S. CONST. Amend. I

The Religious Freedom Restoration Act of 1993 provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb–1(a), unless "it demonstrates that the application of the burden to the person—(1) is in the furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. § 2000bb–1(b).

"[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc–5 of this title." 42 U.S.C. § 2000bb–2(4). "The term 'religious

exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7). "Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb–3(b).

The Dictionary Act provides, in relevant part, that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise," the word "person … include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

The Patient Protection and Affordable Care Act of 2010 states, in relevant part, that "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for … (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. § 300gg–13(a) & (a)(4).

Other relevant statutory provisions are excerpted in Pet. App. at 1e–18e. Pertinent regulatory provisions are excerpted in Pet. App. at 1f–19f

STATEMENT OF THE CASE

I. Factual Background

Petitioners Norman and Elizabeth Hahn and their three sons, Norman Lemar, Anthony, and Kevin Hahn, are devout Mennonite Christians who integrate their faith into their daily lives, including their work. As part of their Mennonite faith, they oppose taking any human life. The Hahns view artificially preventing the implantation of a human embryo as an abortion. As the government has conceded, a number of FDA-approved contraceptives may work by inhibiting the implantation of an embryo in the womb. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1123 n.3 (10th Cir. 2013) (en banc) (noting the government's concession that some FDA-approved contraceptives "have the potential to prevent uterine implantation"); FDA, Birth Control: Medicines To Help You, *available at* http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications /ucm313215.htm (last visited Sept. 11, 2013) [excerpted in Pet. App. at 1i–5i] (stating that Plan B, Ella, and certain intrauterine devices (IUDs) may "prevent[]" "implant[ation]"). The Hahns accordingly object to facilitating their use. Pet. App. at 3g, 10g–11g, 22g–23g.

For decades, the Hahn family has solely owned and operated petitioner Conestoga Wood Specialties Corporation, a for-profit corporation based in Lancaster County, Pennsylvania. Conestoga makes doors and other wooden parts for kitchen cabinets. Conestoga has provided generous health benefits, including preventative care coverage that went

beyond what was required by law, to its 950-plus employees, but omitted coverage of abortifacients. *Id.* at 3g, 10g–11g, 21g. Its Board of Directors has adopted "The Hahn Family Statement on the Sanctity of Human Life," proclaiming the family's "belie[f] that human life begins at conception" and "our moral conviction [against] be[ing] involved in the termination of human life through abortion … or any other acts that involve the taking of human life." *Id.* at 22g–23g. Because Conestoga Wood is organized under subchapter S of the Internal Revenue Code, its income is not taxed at the corporate level but passes through to its owners. *Id.* at 3h–5h.

II. Statutory Background

In 2010, Congress passed the ACA. PUB. L. NO. 111–148, 124 Stat. 119 (2010). The ACA mandates that many health-insurance plans cover preventive care and screenings without requiring recipients to share the costs. 42 U.S.C. § 300gg–13(a)(4). The ACA exempts grandfathered plans (those having made minimal changes since 2010) from its preventive-care mandate, and ACA regulations exempt churches and their integrated auxiliaries from having to cover contraceptives or sterilization. 42 U.S.C. § 18011; 45 C.F.R. § 147.131. The ACA does not require companies with less than fifty employees to offer insurance coverage. 26 U.S.C. § 4980H.

Though Congress did not require contraceptive coverage in the ACA's plain text, the Department of Health and Human Services incorporated guidelines formulated by the private Institute of Medicine

(IOM) into its preventative-care regulations. *See* Pet. App. at 10a–11a. The IOM guidelines mandate that Petitioners include all FDA-approved contraceptives, sterilization procedures, and related counseling in their healthcare plan. *Id.* at 11a, 35a–36a; *see also* 45 C.F.R. § 147.130; 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012). Employers that violate the Mandate face government lawsuits under ERISA and fines of up to $100 per plan participant per day. 29 U.S.C. § 1132; 26 U.S.C. § 4980D. Multiplied by at least 950 employees, the financial penalty here is roughly $35 million per year, an amount that would "rapidly destroy [Conestoga's] business and the 950 jobs that go with it." Pet. App. at 36a. If Conestoga attempted to avoid these fines by dropping its healthcare plan altogether, it would still incur a massive government penalty "of $2,000 per full-time employee per year (totaling $1.9 million)," as well as put itself at a steep competitive disadvantage in the marketplace. *Id.* at 36a n.4 (citing 26 U.S.C. § 4980H).

III. Proceedings Below

Petitioners filed suit in the U.S. District Court for the Eastern District of Pennsylvania, challenging the Mandate under the First Amendment's Free Exercise Clause and RFRA and seeking declaratory and injunctive relief. Pet. App. at 23g–27g.[1] They moved for a temporary restraining order and

[1] The complaint also alleges violations of the Establishment Clause, the Free Speech Clause, the Fifth Amendment Due Process Clause, and the Administrative Procedure Act. Pet. App. at 27g–33g. Petitioners relied only on RFRA and the Free Exercise Clause in their preliminary injunction motion.

preliminary injunction before their health plan was set to renew on January 1, 2013.

The district court first granted the temporary restraining order but later denied the preliminary injunction. *Id.* at 45b. It held that Conestoga, as a for-profit corporation, could not exercise religion under the First Amendment or RFRA and that the contraceptive-coverage Mandate did not substantially burden the Hahn family's religious exercise. *Id.* at 18b–22b, 32b–38b. Lacking injunctive relief, Conestoga's health issuer inserted coverage of the contraceptives into their plan over Petitioners' objection, because the issuer sought to avoid penalties on itself. Petitioners' only other option to avoid the Mandate at that point would have been to immediately drop all health insurance coverage for their 950 employees and their families, which also would have violated Petitioners' religious principles, devastated their work force, and compromised Conestoga's competitive position in the marketplace.[2] Pet. App. at 11g, 14g–15g, 21g–22g.

Petitioners timely appealed and moved for an injunction pending appeal. A divided panel of the court of appeals denied the injunction pending appeal. *Conestoga Wood Specialties Corp v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 8, 2013). A second

---

[2] S*ee also* Pet. App. at 91a ("Faced with ruinous fines, the Hahns and Conestoga are being forced to pay for … offending contraceptives, including abortifacients, in violation of their religious convictions …."); 26 U.S.C. § 4980H (imposing substantial fines on any "large employer" that fails to provide health insurance coverage to full-time employees).

divided panel of the Third Circuit affirmed the district court's denial of the preliminary injunction. Pet. App. at 29a. As a "threshold" matter, it held that "for-profit, secular corporations cannot engage in religious exercise" under the First Amendment or RFRA. *Id.* at 10a. In so doing, it "respectfully disagree[d]" with the Tenth Circuit's contrary holding on the very same regulation. *Id.* at 19a n.7 (citing *Hobby Lobby*, 723 F.3d 1114). It also "declined to adopt the *Townley*/*Stormans* theory," in which the Ninth Circuit allowed corporations to claim the free exercise rights of their family owners, which pass through the corporate form when the family implements their religious beliefs in an incorporated business. *Id.* at 25a (discussing *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619–20 (9th Cir. 1988), and *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 (9th Cir. 2009)).

The panel further rejected the Hahns' own claims because the contraceptive-coverage Mandate imposes its commands and penalties on Conestoga, "a legally distinct entity," *id.* at 30a, not directly on the Hahns, *id.* at 28a–29a. The panel expressly declined to reach the equitable factors governing preliminary injunctions, relying exclusively on the merits holdings above, thus establishing a *per se* rule that free exercise protections are unavailable to for-profit businesses and their owners. *Id.* at 29a.

Judge Jordan dissented. He noted that the majority's suggestion that only natural persons, not corporations, can exercise religion conflicts with this Court's precedents. *Id.* at 50a–54a. "[N]umerous Supreme Court decisions have recognized the right

of corporations to enjoy the free exercise of religion." *Id.* at 50a–51a (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525–26 (1993); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.29 (1983)); *see also O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 973 (10th Cir. 2004), (a "New Mexico corporation"), *aff'd by Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010) (an "ecclesiastical corporation"), *rev'd by Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012). Religious believers routinely associate and organize to exercise religious rights collectively. Pet. App. at 55a. And RFRA explicitly extends to corporations through the Dictionary Act. *Id.* at 71a n.23.

Judge Jordan likewise explained that the exercise of religion is not confined to non-profit corporations. *Id.* at 61a–65a. Precedents of this Court and others have allowed entrepreneurs to challenge laws, such as Sunday-closing laws, on free exercise grounds. *Id.* at 65a (citing *Braunfeld v. Brown,* 366 U.S. 599, 601 (1961) (plurality op.)). And other areas of First Amendment law, including the free speech doctrine, recognize that "First Amendment protection extends to corporations," *id.* at 53a–54a (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010)), "*both for-profit and nonprofit*," *id.* at 63a (quoting *Citizens United,* 558 U.S. at 354 (emphasis in original)). Judge

Jordan thus found that both Conestoga and the Hahns could raise free exercise claims and that the Mandate imposes a substantial burden on them by forcing them to comply or have their business face significant penalties. *Id.* at 75a–79a.

He further concluded that the Mandate failed strict scrutiny and was not generally applicable because the government already exempts many health-insurance plans from the contraceptive-coverage Mandate, undermining its argument against accommodating Petitioners. *Id.* at 82a–84a. And the government failed to prove that the Mandate was the least restrictive means of promoting access to contraception. *Id.* at 84a–87a.

By a vote of 7 to 5, the Third Circuit denied a timely petition for rehearing en banc. *Id.* at 2c. This petition follows.

REASONS FOR GRANTING THE WRIT

In holding that neither for-profit corporations nor their proprietors can ever exercise religion within the meaning of the Free Exercise Clause or RFRA, the Third Circuit created a circuit conflict on an issue of vital national importance. The decision below expressly rejected contrary decisions of the Ninth and Tenth Circuits, the latter of which involved the very same challenge to the very same regulation. As the dissent noted, the majority also failed to follow contrary decisions of the Second Circuit and the Minnesota Supreme Court. The Third Circuit's ruling is at odds not only with this Court's free exercise cases involving corporations

and entrepreneurs, but also with other areas of First Amendment law such as the freedom of speech. Now that the Tenth Circuit has ruled en banc and the Third Circuit has refused to rehear this case en banc, the conflict is firmly entrenched.

The scope for enforcing the ACA is a question of exceptional importance, as this Court recognized two terms ago in reviewing the law's individual-coverage mandate. The contraceptive-coverage Mandate is no less important, pitting freedom of conscience against purported nationwide uniformity. Review cannot wait, as the contraceptive-coverage Mandate is already in effect.

This case is a clean vehicle for reviewing the issue: the relevant facts are undisputed, and the issue was briefed, argued, and squarely ruled on below. Moreover, Petitioners exemplify the case for protecting free exercise: their woodworking business is closely held and has been owned and operated by the same Mennonite family for decades. Further review by this Court is warranted.

I. Circuits Are in Conflict Over Whether Corporations or Their Proprietors May Challenge Substantial Burdens upon Their Free Exercise of Religion.

In its decision below, the Third Circuit expressly declined to follow contrary decisions of the Ninth and Tenth Circuits, even though the Tenth Circuit vindicated a corporation's free exercise challenge to the exact same regulation. The dissent further noted that the panel opinion was at odds with decisions of

the Second Circuit and Minnesota Supreme Court. The Third and Tenth Circuits' opportunity to consider the matter en banc and a recent decision by the Sixth Circuit largely mirroring the Third Circuit's analysis have entrenched the conflict. Only this Court can resolve it.

A. The Third Circuit's Decision Openly Conflicts with Decisions of the Ninth and Tenth Circuits.

The Third Circuit held, as a "threshold" matter, that "for-profit, secular corporations [and their family owners] cannot engage in religious exercise" protected by the Free Exercise Clause or RFRA. Pet. App. at 10a. In so holding, the Third Circuit expressly acknowledged that its holding conflicted with decisions of the Ninth and Tenth Circuits.[3] *Id.* at 19a n.7, 25a.

1. Conflict with the Tenth Circuit.

The Tenth Circuit's decision in *Hobby Lobby* is squarely against the decision below. In that case, two closely held, for-profit corporations and the family that founded, owned, and operated them challenged the very same contraceptive-coverage Mandate under RFRA and the Free Exercise Clause.

---

[3] The Third Circuit's holding also squarely conflicts with unpublished decisions of the Seventh and Eighth Circuits that grant injunctions pending appeal barring enforcement of the Mandate against for-profit businesses and their individual owners. *See, e.g.*, *Annex Medical, Inc. v. Sebelius*, No. 13–1118, 2013 WL 1276025, at *3 (8th Cir. Feb. 1, 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. 2012 Dec. 28, 2012).

723 F.3d at 1120. The plaintiffs there had a similar objection to covering contraceptives that may prevent the implantation of a human embryo in the womb. *Id*. at 1124–25.

Sitting en banc, the Tenth Circuit ruled for the plaintiffs under both the First Amendment and RFRA. On RFRA, it "h[e]ld as a matter of statutory interpretation that Congress did not exclude for-profit corporations from RFRA's protections. Such corporations may be 'persons' exercising religion for purposes of the statute." *Id*. at 1129. The Dictionary Act provides that a statutory definition of "person" ordinarily includes corporations and the like, and nothing in RFRA, other statutes, or case law indicates otherwise. *Id*. at 1129–32 (citing 1 U.S.C. § 1).

On the First Amendment, the Tenth Circuit held that, "as a matter of constitutional law, Free Exercise rights may extend to some for-profit organizations." *Id*. at 1129. It noted that this Court has allowed corporations, as well as the individual proprietors of for-profit businesses, to claim free exercise rights. *Id*. at 1133–34. The line between for-profit and non-profit businesses is unwarranted and untenable, it reasoned. *Id*. at 1135–36. Thus, the Tenth Circuit held that the corporate plaintiffs exercised religion within the meaning of RFRA and the Free Exercise Clause and had proven a substantial burden on their exercise of religion due to the Mandate's commands and penalties requiring them to violate their religious principles. *Id*. at 1137–43. It also held that the Mandate's many exemptions undercut the government's claimed

compelling interest and that the government had not shown that it had chosen the least restrictive means. *Id*. at 1143–44.

Accordingly, the Tenth Circuit insisted that "the Free Exercise Clause is not a 'purely personal' guarantee[] … unavailable to corporations." *Id.* at 1133 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978)). In reaching the opposite conclusion in this case, the Third Circuit analyzed the very same question, *i.e.*, whether "the Free Exercise Clause has historically protected corporations, or whether the guarantee is 'purely personal' or is unavailable to corporations based on the 'nature, history, and purpose of [this] particular constitutional provision.'" Pet. App. at 17a (quoting *Bellotti*, 435 U.S. at 778 n.14).

The Tenth Circuit's en banc ruling on the same contraceptive-coverage Mandate contested here is directly on point. The decision below explicitly acknowledged the Tenth Circuit's holding and its import, but "respectfully disagree[d] with that Court's analysis" and declined to follow it. *Id.* at 19a n.7.

2. Conflict with the Ninth Circuit.

The Ninth Circuit has likewise allowed for-profit corporations to raise free exercise claims, in effect letting the family owners' rights and the substantial burden on their religious exercise pass through the corporation. In *Townley*, a closely-held manufacturer of mining equipment required its employees to attend weekly devotional services. 859 F.2d at 611–

12. The Townleys, who founded the business and owned 94% of the stock, claimed the Free Exercise Clause exempted them from Title VII's ban on religious discrimination. *Id*. at 611, 619.

The Ninth Circuit treated the corporation "Townley [as] merely the instrument by which Mr. and Mrs. Townley express their religious beliefs." *Id*. at 619. Because "Townley present[ed] no rights of its own different from or greater than its owners' rights," the court held that "the rights at issue are those of Jake and Helen Townley." *Id*. at 620. Because the command on Townley to cease requiring devotional services would "make it more difficult" for the Townley family "to impart their religious message," the court found a constitutionally sufficient "adverse[] impact" on the Townleys' religious exercise. *Id*. at 621. Having satisfied this preliminary showing, the Ninth Circuit proceeded to the strict scrutiny test, examining "[t]he strength of the government's interest" and the "least restrictive means" doctrine. On those grounds, the court upheld Title VII's application to Townley. *Id*.

The Ninth Circuit reiterated this pass-through doctrine in *Stormans*. In that case, a pharmacy sought a preliminary injunction against a free exercise challenge to a state requirement that it stock Plan B, one of the contraceptives at issue here. 586 F.3d at 1117. The Ninth Circuit stressed that the pharmacy was a "fourth-generation, family-owned business whose shareholders and directors are made up entirely of members of the Stormans family." *Id*. at 1120. The pharmacy was "an extension of the beliefs of members of the Stormans

family, and … the beliefs of the Stormans family are the beliefs of the pharmacy." *Id*. The Ninth Circuit again "h[e]ld that, as in *Townley*, Stormans has standing to assert the free exercise rights of its owners." *Id*. The Ninth Circuit then proceeded to the scrutiny analysis applicable under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and held that the law was neutral and generally applicable on the facts at bar and that the rational basis test therefore applied. 586 F.3d at 1128–38.

The decision below recited the holdings and reasoning of both cases and in no way distinguished them. Pet. App. at 23a–27a. Rather, the Third Circuit twice noted its direct divergence from the Ninth Circuit. On the question of whether a family's religious exercise "passes through" to let a corporation bring religious exercise claims because the corporation's religious activities are essentially the family's, the panel below declared that, "[a]fter carefully considering the Ninth Circuit's reasoning, we are not persuaded" and "decline to adopt the *Townley*/*Stormans* theory." *Id.* at 25a. On the mirror-image issue of whether the government's commands against a family corporation "pass through" to substantially burden its family owners and operators, the court rejected that argument "[f]or the same reasons that we concluded that the Hahns' claims cannot 'pass through' Conestoga." *Id.* at 28a. Thus the court held "that the Hahns do not have viable claims" because "[t]he Mandate does not impose any requirements on the Hahns" directly. *Id.*

B. As the Dissent Noted, the Decision Below Is Also at Odds with Decisions of the Second Circuit and Minnesota Supreme Court.

The Third Circuit's holding, as Judge Jordan observed in dissent, is also irreconcilable with decisions of the Second Circuit and Minnesota Supreme Court. Pet. App. at 68a n.21.

For instance, the Second Circuit recently allowed a kosher deli and butcher shop and its owners to raise free exercise challenges to kosher-food labeling laws. *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 200–01 (2d Cir. 2012). Similar to the Ninth Circuit's holdings in *Townley* and *Stormans*, the Second Circuit declared that "[at] a minimum," the "protections of the Free Exercise Clause pertain" to religious claims by owners of a business corporation. *Id.* (quoting *Lukumi*, 508 U.S. at 532).

The Minnesota Supreme Court has likewise held that a sports and health club had standing to raise its owners' free exercise rights as a defense to a state-law discrimination charge. In rejecting the contrary position favored by the Third Circuit, it noted that the "conclusory assertion that a corporation has no constitutional right to free exercise of religion is unsupported by any cited authority." *McClure v. Sports & Health Club*, 370 N.W.2d 844, 850–51 (Minn. 1985).

Both the Second Circuit and the Minnesota Supreme Court proceeded to the applicable scrutiny

test. *Commack* upheld the state law as neutral, generally applicable, and supported by a rational basis, 680 F.3d at 210, and *McClure* held that the government satisfied the compelling interest and least restrictive means tests, 370 N.W.2d at 852–53. Neither decision can be reconciled with the Third Circuit's determination that a corporation and its family owners cannot exercise religion and do not face a burden on that exercise when the government commands them to violate their beliefs.

C. A Recent Sixth Circuit Decision Deepens the Existing Circuit Conflict.

Relying substantially on the same logic employed by the Third Circuit in this case, a Sixth Circuit panel recently held that the family owners of a closely-held business in Michigan lacked standing to challenge the Mandate in their personal capacities. *Autocam Corp.*, 2013 WL 5182544, at *4–5. The Sixth Circuit viewed the family owners' religious dilemma as an injury that could not "fairly be classified as a harm distinct from" that of their business. *Id.* at *5. And it rejected the Ninth Circuit's "'pass through' theory" as an "abandon[ment] [of] corporate law doctrine at the point it matters most." *Id.* Because the Mandate's burden fell directly on the closely-held business, not its owners, the Sixth Circuit concluded not only that the family members lacked standing to "bring claims in their individual capacities under RFRA," but also that the business was unable to "assert … claims on their behalf." *Id.* It consequently remanded for the district court to dismiss the plaintiffs' individual free exercise claims en masse. *Id.*

The Sixth Circuit also agreed with the Third Circuit's conclusion below that a closely-held business "is not a 'person' capable of 'religious exercise' as intended by RFRA." *Id.* at *7. Although the court recognized that "many religious groups organized under the corporate form have made successful Free Exercise Clause or RFRA claims," it excepted from this rule corporations that are "primarily organized for secular, profit-seeking purposes." *Id.* at *8. The panel based this distinction primarily on the fact that RFRA's legislative history made "no mention of for-profit corporations," *id.* at *9, after it severely cabined the scope of the Dictionary Act, *id.* at *7.

The Sixth Circuit thus held as a threshold matter that neither family owners nor their closely-held business have free exercise rights that may shield them from the Mandate. In so doing, it explicitly disagreed with prior holdings of the Ninth and Tenth Circuits, *id.* at *5, *7, adopted much of the Third Circuit's reasoning here, *id.* at *5, *7-9, deepened the existing circuit conflict, and clarified the need for this Court's review.

II. Proprietors and Their Businesses Do Not Forfeit Their Free Exercise Rights Simply Because They Act for Profit Through the Corporate Form.

A. Corporations Can Exercise Religion.

The Third Circuit's rejection of free exercise rights conflicts with this Court's precedents as well.

In places, the panel majority suggested that only natural persons, not corporations, may ever bring free exercise claims. Indeed, the court framed the question as whether, "because the historic function of the particular guarantee has been limited to the protection of individuals, Pet. App. at 16a (quotation omitted), "the Free Exercise Clause … guarantee is purely personal [and so] unavailable to corporations," *id.* at 17a (quotation omitted). It thus treated religious liberty as a purely individual right that corporations, as intangible creatures of law, cannot exercise. *Id.* at 19a–21a.

That logic is unsound. RFRA's statutory structure declares that a "person" who can exercise religion explicitly "include[s] corporations" unless the context indicates otherwise. 1 U.S.C. § 1. And the context of the First Amendment and its Free Exercise Clause does not exclude corporations. Indeed, "[a]n individual's freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added). Therefore, courts have "recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and *the exercise of religion*. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." *Id.* at 618 (emphasis added).

As noted by the dissent below, this Court has repeatedly allowed corporations to bring free exercise claims. Pet. App. at 50a–52a (citing *Lukumi*, 508 U.S. at 525–26; *Amos*, 483 U.S. at 330; *Bob Jones Univ.*, 461 U.S. at 604 n.29; *see also Ashcroft*, 389 F.3d at 973 (a "New Mexico corporation"), *aff'd by Gonzales*, 546 U.S. 418; *Hosanna-Tabor*, 597 F.3d at 772 (an "ecclesiastical corporation"), *rev'd by Hosanna-Tabor*, 132 S. Ct. 694. Each of the corporations in those cases was equally intangible and equally a creature of law.

The Third Circuit's reasoning further conflicts with this Court's instruction in *Bellotti* as to how a court should determine whether a First Amendment right is at stake. In *Bellotti*, the "court below framed the principal question … as whether and to what extent corporations have First Amendment rights." 435 U.S. at 775–76. But this Court determined that it had "posed the wrong question." *Id.* at 776. "The proper question … [was] not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons." *Id.* "Instead, the question must be whether [the law] abridges [a right] that the First Amendment was meant to protect." *Id.* Accordingly, this Court later recognized that when proprietors religiously object to a government requirement on their businesses, they are exercising religion. *United States v. Lee*, 455 U.S. 252, 257 (1982). The same must be true for business corporations.

The Third Circuit's holding that religious exercise is "purely personal" is contrary to this Court's precedent and calls into question the Free

Exercise Clause and RFRA rights of non-profit corporations, including churches.

B. Religion Can Be Exercised While Pursuing Profit.

Due to the longstanding recognition of corporate religious exercise in the non-profit context, the panel majority fell back upon an attempted distinction between for-profit and non-profit activity. But that line fails as well. This Court has allowed an Amish business owner to raise a free exercise defense to nonpayment of Social Security taxes. *Lee*, 455 U.S. at 254, 257. It has also let Jewish merchants challenge Sunday-closing laws on the same ground. *Braunfeld*, 366 U.S. at 601; *id.* at 610 (Brennan, J., concurring in relevant part and dissenting on other grounds); *id.* at 616 (Stewart, J., dissenting on other grounds). These rulings were indisputably correct as neither RFRA nor the Free Exercise Clause contains an exception for activity carried out for profit. On the contrary, "religious exercise" under RFRA includes "any exercise of religion." 42 U.S.C. § 2000cc–5(7) (incorporated into RFRA by 42 U.S.C. § 2000bb–2(4)).

The Third Circuit's denial of religious exercise to corporations because they are for-profit also conflicts with basic principles of corporate law. The Commonwealth of Pennsylvania, where Conestoga is incorporated, adopts the standard view that a business corporation can pursue all lawful purposes, including those that are religious in nature. 15 PA. CONS. STAT. § 1501 (granting business corporations "the legal capacity of natural persons to act"). Further, Judge Jordan's dissent acknowledged that

the Third Circuit's reasoning incorporates the tax code's definition of "for-profit" versus "non-profit" entities, thus subjecting free exercise rights enshrined in the First Amendment to the vagaries of the Internal Revenue Code.[4] Pet. App. at 31a. This fatal flaw caused the Tenth Circuit to expressly reject the Third Circuit's logic. Adopting a for-profit line against religion, the Tenth Circuit noted, would open a can of worms: "What if Congress eliminates the for-profit/non-profit distinction in tax law? …. Or consider a church that, for whatever reason, loses its 501(c)(3) status. Does it thereby lose Free Exercise Rights?" *Hobby Lobby*, 723 F.3d at 1135.

The Third Circuit majority erred in assuming that one cannot simultaneously make money and do so in a religiously observant way. The Free Exercise Clause is not confined to the Sabbath or Sunday morning church services; it extends throughout the week. Surely kosher butchers could challenge a state's kosher-labeling law if it interfered with the free exercise of the proprietors' Jewish faith, regardless of their businesses' corporate status. *See*

---

[4] As Judge Kleinfeld explained in his concurrence in *Spencer v. World Vision*, 619 F.3d 1109, 1130–31 (9th Cir. 2010),

> There is not much congruence between nonprofit status and the free exercise of religion, or any eleemosynary purpose…. Nonprofit status affects corporate governance, not eleemosynary activities. We lawyers organize corporations as nonprofits when a tax exemption is sought, or so that board members can pick their successors and avoid the need to repurchase stock from surviving spouses after the deaths of the principals. 'For profit' and 'nonprofit' have nothing to do with making money.

Commack, 680 F.3d at 200–01. As the Tenth Circuit observed, "sincerely religious persons could find a connection between the exercise of religion and the pursuit of profit…. A religious individual may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values." *Hobby Lobby*, 723 F.3d at 1135.

C. Corporations Exercise First Amendment Rights Generally.

The Third Circuit's opinion also conflicts with this Court's cases allowing corporations to exercise other First Amendment freedoms. The freedoms of speech and of the press have long protected for-profit newspapers and other publishers. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). More recently, in *Citizens United*, this Court squarely reaffirmed that "First Amendment protection extends to corporations," 558 U.S. at 342, "*both for-profit and nonprofit*," *id.* at 354 (emphasis added). *See also Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978) ("[C]orporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."); *cf. United States v. Amedy*, 24 U.S. 392, 412 (1826) ("That corporations are, in law, for civil purposes, deemed persons, is unquestionable."). The decision below is at odds with these important areas of First Amendment law.

D. Burdens on a Family Business Substantially Impact the Family's Activities in the Business.

Burdens placed upon corporations affect their proprietors, too, especially when the corporations are closely held. Even an "indirect consequence" of a law can amount to a "substantial burden" upon religious free exercise. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717 (1981). Here, the contraceptive-coverage Mandate places "substantial pressure on [the Hahns] to modify [their] behavior and to violate [their] beliefs." *Id.* at 718. That impairs the Hahns' free exercise rights.

In denying the Mandate's impact on the Hahns, the court below failed to heed this Court's instruction that the government need not directly "*compel* a violation of conscience" to burden religious exercise. *Thomas*, 450 U.S. at 717. The Third Circuit's rationale is parallel to the arguments rejected in *Thomas* and *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). In both of those cases, plaintiffs refrained from gainful employment due to their religious objections to job conditions: one did not want to work on the Sabbath, the other in a tank factory. *Sherbert*, 374 U.S. at 399; *Thomas*, 450 U.S. at 709–11. They were not commanded to work under such conditions, but merely faced the denial of unemployment benefits for refraining from doing so.

As this Court explained, "no criminal sanctions directly compel appellant to work a six-day week," *Sherbert*, 374 U.S. at 403, thus the law did "not *compel* a violation of conscience," *Thomas*, 450 U.S.

at 717. Nonetheless, this Court ruled that a substantial burden was imposed on the plaintiffs because the law pressured them to choose between their beliefs and the receipt of benefits. *Sherbert*, 374 U.S. at 404 (holding that despite the lack of direct sanctions, "the pressure upon [Sherbert] to forego that [religious] practice is unmistakable"); *Thomas*, 450 U.S. at 717–18 (holding that despite no direct command to violate conscience, "the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert*").

Here, the Third Circuit echoed the same indirectness rationale rejected in *Sherbert* and *Thomas*, that "[s]ince Conestoga is distinct from the Hahns, the Mandate does not actually require the Hahns to do anything." Pet. App. at 26a. But in *Thomas*, when "the employee was put to a choice between fidelity to religious belief or cessation of work[,] the coercive impact" constituted a substantial burden. 450 U.S. at 717. Likewise the Hahns are faced with the "choice" of (a) operating their business in violation of their religious beliefs, (b) subjecting it to the government's ruinous penalties, or (c) departing the world of business altogether. This constitutes "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718. Yet, the Third Circuit declared that "the Hahns do not have viable claims" due to the Mandate's impact falling on Conestoga. Pet. App. at 28a. But telling religious families that they must violate their beliefs or vacate the business world does not undermine the existence

of a substantial burden on Petitioners' religious exercise; it proves it.

The Third Circuit reasoned that because corporations are distinct legal entities, their proprietors' rights cannot pass through them or be exercised by them. *Id.* at 25a–27a. It concluded that owners may not use corporations to limit their legal and financial liability without treating the companies themselves as distinct for all purposes. *Id.* at 25a–26a. But this view is problematic on two levels. First, legal liability and religious liability are not coextensive. Business owners may be religiously burdened by a government requirement that compels them to run their corporations in unconscionable ways, regardless of whether they incur personal legal liability for rejecting those actions. Limits on legal liability do not restrict the bounds of conscience or the reach of religious free exercise.

Second, corporations are treated as distinct entities for some purposes but not others all the time. The Internal Revenue Code, for instance, allows corporations with no more than one hundred shareholders to elect S-corporation status, in which income is not taxable at the corporate level but passes directly through to the shareholders. *See* 26 U.S.C. §§ 1361–63. Conestoga Wood is just such an S corporation, as it qualifies for that election as a closely held business owned by a small group of family shareholders. Pet. App. at 2h–4h. As a result, on their individual income tax returns, the Hahns report Conestoga Wood's income as their own. *Id.* at 3h. Given the relevant importance of the interests at stake, it makes little sense to allow taxable income

and deductions to pass through the corporate form to business owners, while denying the same treatment to the free exercise of religion, a fundamental right guaranteed by the First Amendment and RFRA.

III. The Question Presented Is Extremely Important, Especially in the Context of the Affordable Care Act's Contraceptive-Coverage Mandate.

The question presented is exceptionally important. Our nation was founded on freedom of religion, and our free-enterprise system allows entrepreneurs to pursue profit while also serving the common good. But the decision below puts these two foundational principles at odds. Must religious believers check their consciences at the door of their businesses, or may they generally live integrated lives of faith at work?

The question is particularly important in the context of the ACA, one of the most sweeping and intrusive federal laws ever enacted. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2649 (2012) (joint dissent) (noting the threat the individual mandate posed to "our constitutional order" by subjecting "*all* private conduct (including failure to act) … to federal control, effectively destroying the Constitution's division of governmental powers"). On the one hand, the government asserts an interest in uniform enforcement across the country, while it engages in broad discretionary and situational enforcement. On the other hand, challengers assert profound interests in freedom from government intrusion, protected

both by the First Amendment and vindicated by Congress in RFRA. Thus, in petitioning for certiorari two years ago, the Solicitor General noted that the enforceability of the ACA "involves a question of fundamental importance." *Dep't of Health & Human Servs. v. Florida*, Pet. for a Writ of Cert. at 29, (No. 11–398) (Sept. 2011). That is as true of the contraceptive-coverage Mandate at issue here as it was of the individual-coverage mandate at issue there.

Conflicting applications of the same federal law matter greatly in the economic realm, where different businesses face different rules and may maneuver to avoid them. Under the decision below, proprietors and corporations based in the Third Circuit are denied the free exercise protections enjoyed by those in several other circuits. Many proprietors, large and small, choose to incorporate in Delaware, one of the leading markets for corporate law. But the circuit conflict encourages forum-shopping and may serve to distort the market for incorporation. Devout entrepreneurs will undoubtedly consider relocating their businesses to the Tenth Circuit to protect their freedom of conscience and their right to freely exercise religion.

The prospect of disparate results across the nation is especially stark because it is currently unclear whether the application of the contraceptive-coverage Mandate will depend on the location where a business' insurance plan is sponsored, or on the location where its business activities occur. *See* 42 U.S.C. § 300gg–13(a) (applying preventive services mandates to the "plan"). Having won in the Tenth

Circuit, Hobby Lobby's Pennsylvania stores may be exempt from the contraceptive-coverage Mandate because its health insurance plan is based in Oklahoma, while Conestoga's operations in Pennsylvania are subject to the same Mandate.

Fundamentally, the Mandate raises several important concerns over the power of the ACA to trump even the most fundamental of rights. As Judge Jordan recognized, the government's assertion of broadly formulated health interests is in obvious tension with its decision to "exempt[] an enormous number of employers from the Mandate, including 'religious employers' who appear to share the same religious objection as Conestoga and the Hahns, leaving tens of millions of employees and their families untouched by it." Pet. App. at 82a. This, along with the other exemptions and discretionary applications of the ACA, undermines any purported compelling interest because it "leaves appreciable damage to [the government's] supposedly vital interest unprohibited." *Id.* at 83a (quoting *Lukumi*, 508 U.S. at 547).

The exclusions and discretionary treatment of religion in implementing the ACA further suggest the Mandate is not "generally applicable" or "neutral" within the meaning of *Smith*, 494 U.S. at 880. Judge Jordan cogently explained that the Mandate lacks general applicability because "the government has provided numerous exemptions, large categories of which are unrelated to religious objections, namely, the exemption for grandfathered plans and the exemption for employers with less than 50 employees." Pet. App. at 88a; *see also*

Blackhawk v. Pennsylvania, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.) (recognizing that a law is not generally applicable if it "burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated"). "And it seems less than neutral to say that some religiously motivated employers—the ones picked by the government—are exempt while others are not." *Id.*; *see also Fraternal Order of Police v. City of* Newark, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (noting that a regulation lacks neutrality if it "creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection").

The government's evidence supporting the Mandate is also "research [] based on correlation," not "evidence of causation" that the contraceptive-coverage Mandate is needed to prevent actual problems. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2739 (2011). And, as Judge Jordan noted, the government is readily able to pursue its alleged interests through less restrictive means, such as by the expanded use of programs it already has in place to provide free family planning. *See* Pet. App. at 87a ("[T]he government already provides free contraception to some women, and there has been no showing that increasing the distribution of it would not achieve the government's goals."); *cf. Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 799–800 (1988) (recognizing less restrictive means that may be indirect and involve government expense).

Finally, the Mandate is already in effect, imposing fines and lawsuits on plans that offer employee coverage but omit required items. 77 Fed. Reg. at 8725 (finalizing the Mandate on for-profit companies); 26 U.S.C. § 4980D ($100/plan participant/day fines); 29 U.S.C. § 1132 (government lawsuits). More than thirty other pending cases nationwide raise challenges to this Mandate under the same religious exercise claims that Petitioners press here. Pet. App. at 1l–4l. And Conestoga itself is presently coerced to provide these items or else devastate its employees by dropping their families' insurance coverage altogether, thereby subjecting its employee relations to turmoil. Family business owners and their small businesses urgently need this Court's guidance this Term, to know what insurance coverage they must provide and whether they will be forced out of business or sacrifice their beliefs.

IV. This Case is a Clean Vehicle.

This case presents an ideal vehicle for resolving the question presented. The relevant facts have never been disputed by either side, and no judge below suggested any deficiencies in the record. Indeed, in this and other cases on the same issue, the government has consistently maintained that discovery is unnecessary; it has been content to rest upon the administrative record of the contraceptive-Mandate regulations.[5] All the elements of the Free

---

[5] *See, e.g., Geneva Coll. v. Sebelius*, No. 2:12–cv–00207–JFC Doc. # 82 (W.D. Pa. filed Apr. 12, 2013), Joint Proposed Discovery Plan at 5 [excerpted in Pet. App. at 1j–8j] (in a Pennsylvania case involving both a for-profit family business

Exercise Clause and RFRA claims were thoroughly briefed and argued below. The court of appeals' decision below definitively resolved all claims against Petitioners and left nothing to be determined on remand. Though the Third Circuit affirmed the denial of a preliminary injunction, its legal ruling on the merits forecloses Petitioners' pursuit of their free exercise claims as a matter of law.

Petitioners are also the ideal parties to bring this suit. They comprise both a Mennonite family of business owners and their closely held woodworking corporation, which is run by the family in accordance with their religious principles. Thus, this Court could rest its holding on corporations' own free exercise rights, proprietors' free exercise rights passed through the corporate form, or proprietors' individual right to free exercise. The decision below expressly reached and ruled against Petitioners on all three grounds.

Moreover, the five family member Petitioners wholly own the corporation's voting shares and actively manage the enterprise themselves. Pet. App. at 2h–4h. It is undisputed that the Hahns' faith "requires them to integrate the gifts of the spiritual

---

and a non-profit college, "[t]he parties believe that there are no subjects on which fact discovery may be needed."); *Tyndale House Publishers v. Sebelius*, No. 1:12–cv–01635–RBW Doc. # 42-1 (D.D.C. filed June 17, 2013), Gov't's Statement of Facts in Support of Cross Mot. for Summary Judgment at 1-8 [reprinted in Pet. App. at 1k–13k] (seeking summary judgment after no discovery was conducted, and referencing the same sources cited during the preliminary injunction proceedings, including the administrative record, the 2011 IOM report, the Code of Federal Regulations, and legislative history).

life, [including] the virtues, morals, and ethical and social principles of Mennonite teaching into their life and work." *Id.* at 10g. That faith inspires Conestoga and the Hahns to "make substantial contributions to a variety of charitable and community organizations every year," thus demonstrating that business can be concerned with more than profit. *Id.* at 11g. In short, the Hahn family and their close identification with Conestoga exemplify the case for allowing for-profit businesses and their family owners to live their faith as they participate in the marketplace. If anyone subject to the contraceptive-coverage Mandate can claim free exercise rights, they can.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JORDAN W. LORENCE
STEVEN H. ADEN
GREGORY S. BAYLOR
MATTHEW S. BOWMAN
ALLIANCE DEFENDING FREEDOM
801 G. Street, N.W., Ste. 509
Washington, D.C. 20001
(202) 393-8690

CHARLES W. PROCTOR, III
LAW OFFICES OF PROCTOR LINDSAY & DIXON
1204 Baltimore Pike, Ste. 200
Chadds Ford, PA 19317
(610) 361-8600

DAVID A. CORTMAN
Counsel of Record
KEVIN H. THERIOT
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd.
N.E., Ste. D-1100
Lawrenceville, Georgia 30043
(770) 339-0774
dcortman@alliancedefendingfreedom.org

RANDALL L. WENGER
INDEPENDENCE LAW CENTER
23 North Front Street
Harrisburg, PA 17101
(717) 545-0600

September 19, 2013