No. 13-356

In the Supreme Court of the United States

CONESTOGA WOOD SPECIALTIES CORP. ET AL,
PETITIONERS

v.

KATHLEEN SEBELIUS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN, OHIO, AND 16 OTHER STATES FOR PETITIONERS

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QUESTIONS PRESENTED

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 Mandate of the Affordable Care Act.

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INTEREST OF *AMICI CURIAE*[1]

In addition to the reasons provided by the petitioners in this case, the State *amici* believe that this Court should grant a writ of certiorari to review the Third Circuit's decision below because it undermines important state interests. To begin with, the decision below violates the religious liberty of the States' citizens. The States have a substantial interest in protecting one of the central features of American democracy. Religious liberty is a foundational freedom. Each state constitution has provisions safeguarding the religious exercise of the State's citizens. Like the federal government, many States have also enacted additional laws to guarantee robust religious freedom.

The States also seek to foster a robust business climate in which diverse employers can succeed to the benefit of all: the States have an interest in the businesses and jobs that the harsh penalties of the HHS Mandate threaten to eradicate. Consequently, they seek to prevent courts from revising the Religious Freedom Restoration Act through judicial fiat to exclude coverage of enterprises operated by families that are guided by their faiths as they engage in commerce. RFRA as written advances both liberty and prosperity. The facts of this case provide a good example why. Without protections for religious freedom, the HHS Mandate would force Conestoga Wood Specialties—a family-owned business that has created numerous employment opportunities—to close or to operate in a manner

[1] Consistent with Rule 37.2, the state *amici curiae* provided notice to the parties more than 10 days before filing.

that violates central principles of the family's religious faith on threat of draconian fines.

In addition to this harm to the citizens and businesses within the *amici* States, the decision below also intrudes upon the traditional prerogatives of the States themselves. For one thing, the decision below rests on the notion that a for-profit company may act only to maximize profits and cannot take into account matters of corporate conscience. That view contradicts traditional principles of the States' corporations law, and interferes with their power over corporate entities. For another, the United States relies on "police power" rationales historically reserved to the States to claim that it has a compelling interest to force religious objectors to follow the HHS Mandate—even though it exempts a host of other entities. Where, as here, the United States seeks to act under the Necessary and Proper Clause, the States have an interest in ensuring that it properly balance the competing goals of promoting secular public interests and protecting religious liberty. The United States has failed to do so here.

In sum, the State *amici* believe both that a family-owned, for-profit business formed to operate consistent with religious principles may raise claims under RFRA, and that the HHS Mandate is a substantial burden on Plaintiffs and others like them. Because the Third Circuit's contrary decision intrudes on interests important to the *amici* States, they request that the Court grant the petition for certiorari in this case to reverse.

INTRODUCTION AND SUMMARY OF ARGUMENT

> "No provision in our Constitution ought to be dearer [ ] than that which protects the rights of conscience against the enterprises of civil authority."
>
> Thomas Jefferson (Letter to Methodist Episcopal Church, February 4, 1809)

The threshold question here is whether for-profit, secular businesses may exercise religion and therefore fall within the religious liberty protections of RFRA. It is a question that is basic to American democracy. Its answer requires this Court to return to first principles. And the answer is a simple one.

Americans may form a corporation for profit and at the same time adhere to religious principles in their business operation. This is true whether it is the Hahns operating a wood cabinet business based on their Christian principles, a Jewish-owned deli that does not sell non-Kosher foods, or a Muslim-owned financial brokerage that will not lend money for interest. The idea is as American as apple pie. And RFRA guarantees that federal regulation may not substantially burden the free exercise of religion absent a compelling governmental interest advanced through the least restrictive means.

Any contrary conclusion creates an untenable divide between for-profit and non-profit corporations. But a church no more prays than does a wood business. Nothing in RFRA limits its application to administratively-certified religious entities.

The argument put forward by the United States and adopted below is predicated on a view that seeking profit changes everything. Not so. The Hahns, and others, seek to operate their business according to religious principles. That they seek also to earn a profit does not nullify or discredit their beliefs. The federal courts cannot rewrite state law on corporations somehow to change this reality.

The Mandate also imposes a substantial burden on Plaintiffs. Conestoga seeks to adhere to the Hahns' belief about the inviolability of human life. No one doubts their sincerity or the importance of this belief to them. Courts should not become enmeshed in evaluating the interpretive merits or proper doctrinal weight of religious principles. The religious propriety of the Hahns' belief is not for the courts to second guess. And the United States lacks a compelling interest justifying this burden on the Hahn family business. The Affordable Care Act includes several sweeping exceptions. The claim that the Mandate must be applied to those with a sincere religious objection is belied by the fact that tens of millions of plan participants are already excluded.

The indirect effect of the United States's argument that for-profit businesses cannot exercise religion is to push religious beliefs expressed by the ordinary person or business out of the public square. Government directives cannot confine religious liberty to the sanctuary or sacristy. Such a truncated view of religion threatens to create a barren public square, empty of the religious beliefs of ordinary Americans. This is an important principle, and it applies to all citizens and all faiths.

ARGUMENT

I. Congress did not exclude for-profit corporations from RFRA's protections.

Congress deliberately chose to extend the protections of RFRA not only to individuals, but to "persons." 42 U.S.C. § 2000bb(b)(2) (purpose of RFRA is "to provide a claim or defense to persons whose religious exercise is substantially burdened by government"). RFRA thus provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the test of strict scrutiny is satisfied. 42 U.S.C. § 2000bb-1(a). And Congress has made itself clear—in the very first section of the first Chapter of the United States Code—that unless otherwise indicated by context, "the word[ ] 'person' … include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1; cf. *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1707 (2012) (federal statutes and courts typically use the word "*individual*" when seeking "to distinguish between a natural person and a corporation").

The panel majority takes the view that, while non-profits or corporations the government deems not "secular" are "able to engage in religious exercise" under RFRA, "for-profit, secular corporations" are categorically excluded from RFRA protections. But RFRA's statutory language makes no such distinction.

State *amici* submit that this distinction between corporations based on whether they seek to earn a profit has no basis in RFRA or in logic. Especially because the Third Circuit majority rests in significant part on what appears to be an unintended shift toward a new federal common law of corporate purpose that could sow significant confusion, the State *amici* hope that this Court will grant review to resolve the circuit split that has developed on this issue.

The panel majority concedes that in the context of RFRA, the protection of "persons" is not limited to individuals, but has in fact been applied to combinations including corporations. See Pet. App. 21a (citing *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), a RFRA case involving a New Mexico corporation).[2] Rather than accepting the binary choice the Dictionary Act suggests between a context in which "persons" includes corporations and one in which, contrary to general rule, "persons" excludes corporations, the panel majority nevertheless divines that Congress intended—silently—to distinguish among different types of corporations and exclude from RFRA protection those authorized by state charter to engage in for-profit commerce. Pet. App. 21a.

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[2] The panel majority does not analyze the RFRA question apart from its First Amendment discussion, but conflates the two issues by stating that "[o]ur conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion.… [,so Conestoga] cannot assert a RFRA claim." Pet. App. 21a.

The majority opinion points to no enactment or even congressional statements drawing such a distinction, but rather leans upon an apparent amalgam of judicially determined religious theory and a federal gloss on state corporations law. The majority errs both in believing that religious belief cannot be practiced in a commercial setting, and in superimposing onto state law a concept that religious practice somehow is incompatible with state law principles of limited liability (principles that emphatically do not hinge on profit status).

A. The panel majority identifies no universal religious principle excluding the for-profit corporate form as a "means" for the practice of religion.

The record is unequivocal that the devout Mennonite family that owns Conestoga Wood understands as a matter of their religious faith that their family company provides a "means by which individuals [should] practice religion" (to use the formulation of the panel majority). "It is undisputed that the Hahns are entirely committed to their faith, which influences all aspects of their lives. They feel bound, as the District Court observed, 'to operate Conestoga in accordance with their religious beliefs and moral principles.'" Pet. App. 32a (Jordan, J., dissenting) (quoting *Conestoga Wood Specialties Corp.* v. *Sebelius,* 917 F. Supp. 2d 394, 402 (E.D. Pa. 2013); cf. Pet. App. 30a ("our decision here is in no way intended to marginalize the Hahns' commitment to the Mennonite faith").

The panel majority provides no support for its implicit assumption that while the non-profit corporate form may provide a "means by which individuals practice religion," the for-profit corporate form cannot. See Pet. App. 21a ("That churches—as means by which individuals practice religion—have long enjoyed the protections of the Free Exercise Clause is not determinative of this question of whether for-profit, secular corporations should be granted these same protections"). The question of what sort of corporate entity may provide a "means by which individuals practice religion" would seem intrinsically a religious question and not readily or appropriately susceptible of government determination. But to the extent that it is fitting for government to ponder the matter, it seems far easier to conceive of religious views that would understand all aspects of endeavor as a "means by which" to practice religion than it would be to identify any certain religion that insists that religious practice be confined exclusively to church services.

Because the Hahns believe that their religion mandates that they live out their faith in all their walks of life, it is not clear by what principle the panel majority concludes that church corporations may provide a "means by which" the Hahns may practice their religion but their family-held business cannot. To whatever extent this unexplained conclusion is advanced as a matter of religious doctrine, the panel majority exceeded its proper scope in opining on the subject. As this Court has underscored: "Courts are not arbiters of scriptural interpretation." *Thomas* v. *Review Board*, 450 U.S. 707, 716 (1981); see also, e.g., *McCarthy* v. *Fuller*,

714 F.3d 971, 980 (7th Cir. 2013) (issuing "a reminder to the district court that federal courts are not empowered to decide … religious questions").

If it is the view of at least some religions, or some religious adherents, that religion is to inform all aspects of one's life and can be practiced behind the checkout counter at a wood-products store, the kosher deli, or the local family bookstore, it is not for the Third Circuit panel to gainsay such belief. And that principle directing judicial deference in determining matters of religious faith is especially true in this RFRA context, where Congress has defined the "exercise of religion" broadly as "any exercise of religion, whether or not compelled by or central to, a system of religious belief." 42 U.S.C. § 2000bb-2 (referencing 42 U.S.C. § 2000cc-5's definition).

These are issues of first principle that require this Court's guidance and merit further review to ensure consistent application throughout the circuits. The only real light that the panel majority sheds on the religious theory component of its determination comes with its quotation from the reversed opinion in *Hobby Lobby Stores, Inc.* v. *Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), rev'd en banc, 723 F.3d 1114 (10th Cir. 2013), that "[g]eneral business corporations do not … exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." Pet. App. 20a. But this contention is unavailing.

The fact that corporations can act only through human agency in no way distinguishes for-profit corporations from the non-profits and churches that the panel concedes can exercise religion. Churches do not pray or "observe the sacraments or take other religiously-motivated actions separate and apart" from their individual actors any more than Conestoga does, and RFRA protections extend to guard their corporate religious exercise precisely to safeguard the religious liberties of the "individual actors" involved. See *Hobby Lobby*, 723 F. 3d at 1137 ("The Church of Lukumi Babalu Aye, Inc., for example, did not *itself* pray, worship, or observe sacraments—nor did the sect in *O Centro*. But both certainly have Free Exercise rights.") (emphasis in original).

People commonly associate to exercise religion, and religion can be exercised through the corporate form. See, e.g., *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 525 (1993) ("[The] Church of the Lukumi Babalu Aye, Inc. is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion."). And neither the panel majority nor the district court *Hobby Lobby* opinion on which it relies ever explains how any corporate entity—including those that they and the United States acknowledge *do* qualify for RFRA protection—can exercise religion apart from the direction and management of the human beings who run them. That is the way that all entities work. See, e.g., *Grote* v. *Sebelius*, 708 F.3d 850, 853-54 (7th Cir. 2013) (injunction pending appeal).

Similarly, the panel majority's related suggestion that corporations are excluded from RFRA protection because they cannot "'believe' at all," Pet. App. 21a (quoting implication from Judge Briscoe's *Hobby Lobby* dissent), again fails to reckon with the universal acknowledgment that RFRA protects churches and other non-profit religious corporations. Nor can the suggestion be reconciled with decades of precedent that the right to express corporate views (views held and shared corporately, even if deemed not "believed") indeed is constitutionally protected. Pet. App. 18a. After all, "First Amendment protection extends to corporations." *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 342 (2010).[3]

As Judge Jordan observed in his dissent below, "[o]f course, corporations do not picket, or march on Capitol Hill, or canvas door-to-door for moral causes either, but the Majority would not claim that corporations do not have First Amendment rights to free speech or to petition government. Corporations have those rights … because we are concerned in this case with people, even when they operate through the particular form of association called a corporation." Pet. App. 50a, n. 14.

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[3] Moreover, the law is accustomed to looking to the conduct and intent of humans in assessing corporate purposes or intent. See, e.g., M. Rienzi, *God and the Profits: Is There Religious Liberty For Money-Makers?* 30-34, 46-60 (Geo. Mason L. Rev., Vol. 21 (2013), available at http://ssrn.com/ (recognizing that for-profit corporations can form criminal intent, be found liable for religious discrimination, assert rights under the Establishment Clause, and act on corporate ethical and environmental views: "the corporate form does not foreclose assertion of … RFRA rights," and there is "no principled or permissible reason to treat religious exercise in [a]… disfavored manner").

Thus, the panel majority rests here upon its failure to "see how a for-profit 'artificial being, invisible, intangible, and existing only in contemplation of law,' … that was created to make money could exercise such an inherently 'human' right." Pet. App. 20a (citation omitted). Because all corporations are in this sense "artificial …, invisible, intangible, and existing only in contemplation of law," the only distinction the panel identifies between (covered) non-profits and for-profit entities to which the majority says RFRA protections do not extend is found in the phrase "created to make money."

But to say that for-profit corporations are not covered because they are for-profit is not so much an explanation as a tautology. The panel majority provides no real explanation for the analytic distinction. As the Tenth Circuit observes, no legal principle precludes entering "the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values. As a court, we do not see how we can distinguish this form of evangelism from any other." *Hobby Lobby*, 723 F.3d at 1135.

B. The federal judiciary should not impose on the state law of corporations a rule mandating that for-profit corporations pursue only policies best calculated "to make money," to the exclusion of all other considerations.

To the extent that the panel majority's RFRA holding is based on conceptions of corporate law as opposed to the court's understanding of religious beliefs, it is equally in error. Just as "profit" is not a dirty word that automatically should discredit the values by which an enterprise is operated, neither is it necessarily the exclusive animating reason for corporate existence of family owned businesses such as Conestoga. States do not generally require for-profit corporations to reject all goals that do not maximize revenues.

Rather, states allow corporations to be formed for lawful purposes including the pursuit of their owners' conception of the public good in the business context, and the federal courts should not deem pursuit of such higher ends to be somehow inconsistent with a hope of remuneration in the here and now. So long as they act consistent with their fiduciary responsibilities to shareholders, corporate charters, and other applicable requirements, corporate directors may lead their companies to pursue a wide variety of missions. Federal courts should not engraft onto state law new judge-made constraints restricting all corporate policies solely to those best calculated "to make money."

Significantly, neither the United States nor the panel majority identifies any provision of Pennsylvania law that precludes a corporation from operating according to guiding religious principles agreed upon by its ownership. *Amici* are aware of no such Pennsylvania law either. Cf. 15 Pa. Cons. Stat. § 1301 (business corporations may be incorporated "for any lawful purpose or purposes"), 1501 (business corporations given "the legal capacity of natural persons to act"). Family-owned companies that sell products and create jobs may be operated legally, as a general matter, according to agreed-upon guiding religious principles of their owners regardless of whether such companies are organized under Pennsylvania's general business or non-profit statutes. And RFRA ensures that the guiding religious principles under which Conestoga is operated can be overridden by federal dictate only where that federal policy satisfies strict scrutiny.

For example, a corporation formed to foster "green energy," as part of its ownership's commitment to ecological stewardship, should not be barred for that reason by some sort of federal common law of corporate responsibility from seeking to earn a profit. To acknowledge and account for that exercise of corporate citizenship in no way undermines a state's law of corporations. And the United States and the panel majority do not go so far as to suggest that Pennsylvania law constrains closely-held family companies to be guided by principles of social conscience only to the extent that those guiding principles eschew religion. Cf. *Thomas*, 450 U.S. at 718-19.

Yet the panel majority reasons that to hold that a for-profit corporation can engage in religious exercise as defined by RFRA "would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners." Pet. App. 30a. What the panel majority does not explain is—why? As the majority notes, corporations pursue the freedom of speech with some regularity, *id.* at 18a; the victory achieved in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), for example, has not "eviscerate[d]" the principles of corporate law. An editorial page may reflect the views of individual members of its board, and no one suggests that free speech accommodations in the law of libel demand surrender of a newspaper company's limited liability as some sort of judicially-ordained fair trade. *Amici* find no provision of Pennsylvania law suggesting that limited liability and operation of a family business according to religious principles may not go hand-in-hand.

Again, this is not a judgment for federal courts to be making. The panel majority draws on no provision of Pennsylvania law in decreeing that corporations organized for profit cannot—because they operate under limited liability rules that extend also to non-profit corporations—exercise religion in seeking to follow guiding religious principles established by their ownership. Rather, the panel appears to adopt a general common law rule to that effect. But as this Court has observed, there is no general federal common law of corporations. *Federal Election Comm'n* v. *NRWC*, 459 U.S. 197, 204 (1982); *Burks* v. *Lakser*, 441 U.S. 471, 478 (1979) ("the first place one must look to determine the powers of corporate

directors is in the relevant State's corporation law …. and it is state law which is the font of corporate directors' powers"). And Pennsylvania law is clear that non-profit status—which the panel majority finds to be compatible with religious exercise—does not preclude limited liability treatment for corporate participants. 15 Pa. Cons. Stat. § 5553 ("A member of a nonprofit corporation shall not be liable, solely by reason of being a member, … for a debt, obligation, or liability of the corporation").

Moreover, a federal position that corporations can and should display no corporate conscience is odd given developments in social organization and state law regulation of corporations over the last century. General trends in state law permitting or favoring good corporate citizenship were well underway by the 1930s, and it was commonplace by the 1950s for state courts to observe that "modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate." See, e.g., *A.P. Smith Mf'g Co.* v. *Barlow*, 98 A.2d 581, 586, 590; 13 N.J. 145 (N.J. 1953) (reviewing trends and literature, and lauding corporation's "long-visioned corporate action in recognizing and voluntarily discharging its high obligations as a constituent of our modern social structure"); cf. *Hobby Lobby*, 723 F.3d at 1147 (Hartz, J., concurring) ("no law requires a strict focus on the bottom line, and it is not uncommon for corporate executives to insist that corporations can and should advance values beyond the balance sheet and income statement;" citing ALI Principles of Corporate Governance Analysis and Recommendations § 2.01(b) (2012)).

And the Catch 22 the majority posits whereby closely-held, for-profit companies are precluded from claiming protection under RFRA while the family ownership is also unprotected because only the company is penalized just highlights the flaws in the majority's understanding of RFRA. It may not be much consolation to the Hahn family that the majority "decision … is in no way intended to marginalize the Hahns' commitment to the Mennonite faith," Pet. App. 30a, when it leaves them with little option but to violate their sincere understanding of that faith (through actions by which they must direct the company as coerced by ruinous fines).

The majority—after ballyhooing the notion that this Court has construed free exercise "'to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority'," see Pet. App. 19a (emphasis and citation omitted)—says that RFRA provides no relief because the "family chose to incorporate and conduct business through Conestoga, thereby obtaining both the advantages and disadvantages of the corporate form," *id*. at 27a. Coupled with the majority's emphasis that free exercise is "an inherently 'human right," *id*. at 20a, such reasoning shows Congress's wisdom in extending RFRA protections to "persons," including family businesses and other entities operated according to agreed-upon religious principles.

The panel majority's contrary view would mean that RFRA scrutiny would not be triggered if federal regulation required family businesses—in violation of their guiding religious principles, but absent any

showing of a compelling purpose—to be open on their Sabbath, to distribute materials they deem blasphemous, or to market meat products antithetical to their religious observance. Cf. Pet. App. 65a ("the Supreme Court's decisions establish that Free Exercise rights do not evaporate when one is involved in a for-profit business.") (Jordan. J., dissenting). The oddity of such results under a statute designed to protect "Religious Freedom" would seem to flag a need to reexamine the statutory test—but again, RFRA advisedly extends its protections to "persons" as that term is commonly employed throughout federal law, and does not in any way cast out certain businesses based on their tax status. Cf. *Elgin* v. *Dep't of Treasury*, 132 S. Ct. 2126, 2134-35 (2012) ("That Congress declined to include an exemption … indicates that Congress intended no such exception").[4] The anomalous nature of the panel's reasoning justifies this Court's review.

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[4] The Sixth Circuit panel decision in *Autocam Corp.* v. *Sebelius*, 2013 WL 5182544 (6th Cir. Sept. 17, 2013), acknowledges that RFRA's "legislative history makes no mention of for-profit corporations." *Id.* at *9. But from this lack of evidence that Congress considered a carve-out for for-profit corporations, the Sixth Circuit concludes: "This is a sufficient indication that Congress did not intend the term 'person' to cover entities like Autocam when it enacted RFRA." *Id.* at *7. Jurists in equally good faith could conclude precisely the opposite—that the absence of any legislative history that Congress sought to exclude for-profit corporations proves that the Government has failed to overcome the presumption that they qualify as "persons." Regardless, the concept of Congress legislating through silence in legislative history presents a treacherous path, and State *amici* urge that the prudent course is to rely on what Congress actually said in the statute that it passed.

In short, and as indicated "as a matter of statutory interpretation," "Congress did not exclude for-profit corporations from RFRA's protections. Such corporations can be 'persons' exercising religion for purposes of the statute." *Hobby Lobby*, 723 F.3d at 1129. Moreover, here just as in the for-profit Christian publishing company case of *Tyndale House Publishers, Inc.* v. *Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012), where the challenged regulation applies to the company and not directly against the owners, the company has standing to assert free exercise rights that the government argues cannot be advanced by the individuals. See also, e.g., *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009). And "Congress structured RFRA to override other legal mandates, including its own statutes, if and when they encroach on religious liberty." *Hobby Lobby*, 723 F.3d at 1156 (Gorsuch, Kelly, and Tymkovich, JJ., concurring and explaining that RFRA protects individual owners as well as company).

The panel majority's misguided effort to circumscribe religious liberty to only religious organizations is similar to confining religious practice to worship, as if religious principles may not animate a corporation—or a person—in public and commercial life. It is akin to suggesting that only ordained religious officials should express religious views. But this is a misunderstanding of religion and religious freedom. RFRA's protections are for everyone.

II. The HHS Mandate does not pass muster under RFRA.

A. The HHS mandate imposes a substantial burden on Plaintiffs' religion.

Congress passed RFRA to ensure that courts would apply strict scrutiny to generally applicable laws that substantially burden religion. "[L]aws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2).

The two cases that RFRA cites favorably, *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), each examined state laws of general applicability and their effect on the religious exercise of the plaintiffs at issue. In *Sherbert*, this Court determined that a South Carolina law that disqualified from unemployment benefits a Seventh Day Adventist who refused to work on Saturdays had to yield to her free exercise of her religion. 374 U.S. at 410. Even though this was an "incidental burden," i.e., an unintended effect, the State was required to come forward with a compelling interest to justify it. *Id*. at 403. Similarly, in *Yoder*, a Wisconsin law obligated compulsory education. 406 U.S. at 207. This statute was an unconstitutional burden on Amish religious exercise, despite its generality. *Id*. at 220.

RFRA's general standards for determining whether a law "substantially burdens" a person's exercise of religion are informed by *Sherbert* and *Yoder*. The "disqualification for benefits" in *Sherbert* was a substantial burden on religious exercise:

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

Sherbert, 374 U.S. at 404. The same is true here. The HHS Mandate requires Conestoga and the Hahns either to abandon their commitment to their guiding religious principles or face a yearly fine approaching $35 million (some 7,000,000 times the amount of the fine involved in *Yoder*).

The record below shows religious belief sincerely held. In such circumstances, courts applying RFRA should acknowledge the religious claims of Plaintiffs and defer to their understanding of their own religious doctrine. See *Legatus* v. *Sebelius*, 901 F. Supp.2d 980, 991 (E.D. Mich., 2012), app. pending. Such deference is consistent with Supreme Court precedent. *Thomas.*, 450 U.S. at 716.

In contrast, the district court below engaged in its own assessment of religious doctrine to determine whether the mandate is a substantial burden. It erred in investigating the Hahn family's understanding of their Mennonite faith as Christians. The district court determined that the Mandate did not impose a burden on Conestoga or on the Hahns:

> [A]ny burden imposed by the regulations is too attenuated to be considered substantial. A series of events must first occur before the actual use of an abortifacient would come into play. These events include: the payment for insurance to a group health insurance plan that will cover contraceptive services . . . ; the abortifacients must be made available to Conestoga employees through a pharmacy[ ]; and a decision must be made by a Conestoga employee and her doctor[.] [Pet. App. 35-36b.]

Certain other courts similarly have gone astray. See, e.g., *Hobby Lobby,* 870 F. Supp. 2d at 1294 ("the particular burden of which plaintiffs complain is that funds . . . might, after a series of independent decisions by health care providers and patients covered by [Hobby Lobby's] plan, subsidize someone else's participation in an activity that is condemned[.]"); *Autocam Corp.* v. *Sebelius,* 2012 WL 6845677, *6 (E.D. Mich. Dec. 24, 2012) ("the wages and benefits earned [do not] pay . . . [for the products at issue] unless an employee makes an entirely independent decision to purchase them"). But such analysis misapprehends the religious objection to providing the mandated insurance in the first instance. The Hahn family business objects here not to the use of the insurance by others, but to being itself compelled to provide it contrary to guiding religious principles. See. *Korte* v. *Sebelius*, 2012 WL 6757353, *3 (7th Cir. Dec. 28, 2012) ("The religious-liberty violation at issue here inheres in the coerced coverage of [contested products], not—or perhaps more precisely, not only—in the later purchase or use of [these products].") (emphasis omitted).

As an example, consider a Quaker business's commitment to pacifism and its owner's objection to handguns. If a mandate required the business either to provide handguns to employees for self-defense or to contract with a weapons supplier to provide a handgun, that would be understood as something different from paying the employees' wages. To put it another way, it is one thing for employees to use their paycheck to buy alcohol. It is an entirely different matter to compel the employer to provide beer.

Regardless, the district court should not even have engaged in its weighing of religious doctrine Rather, it should have accepted Plaintiffs' good-faith belief that their religion prohibited them not simply from using abortion-inducing drugs but also from including those drugs in their health plans under the HHS Mandate. *Thomas*, 450 U.S. at 715 (courts could not inquire into whether "the line [plaintiff] drew was an unreasonable one"); see also *Hernandez* v. *Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question . . . the validity of particular litigants' interpretations of [the] creeds [of their faith]."). Once the actual free exercise at stake is identified, the "substantial burden" imposed on that religious exercise is apparent—to exercise their religion by not following the HHS Mandate costs them heavy fines. See *Yoder*, 406 U.S. at 208, 218.

B. The United States has exempted myriad others and does not have a compelling interest in applying this mandate to Plaintiffs.

In *O Centro*, this Court outlined the proper framework for determining whether a compelling governmental interest justifies a substantial burden on a person's religious liberty. 546 U.S. at 424-31. The Court was careful to note that this examination requires an inquiry into whether there is a compelling interest to apply the government mandate to the "*particular* claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-31 (emphasis added).

This focusing of the inquiry undercuts the United States' claim here, where there is no dispute that the Mandate already contains multiple categories of employers to which the mandate does not apply. For one massive example, the mandate does not reach employers with fewer than 50 employees. Moreover, the Act's "grandfathering" provisions exempt millions more health plan participants from the mandate's application. See *Newland* v. *Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo., 2012) ("this massive exemption [for grandfathered plans] completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs"). The United States' position—that the HHS Mandate requires national uniformity—cannot withstand strict scrutiny. The Mandate exceptions demonstrate the lack of any compelling need to abridge religious liberty of the Hahn family business here.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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