

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

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

v.

KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; HILDA SOLIS, Secretary of the United States Department of Labor; TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY,
Defendants-Appellees.

**On Appeal from the United States District Court
for the Eastern District of Pennsylvania**

BRIEF *AMICUS CURIAE* OF PROFESSOR OF LAW BRADLEY P. JACOB, THE TEXAS CENTER FOR DEFENSE OF LIFE, AND THE NATIONAL LEGAL FOUNDATION,
supporting Appellants and urging reversal

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae, Professor of Law Bradley P. Jacob, Texas Center for Defense of Life, and The National Legal Foundation have not issued shares to the public, and no *Amicus* has any parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

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INTEREST OF *AMICI CURIAE*

Bradley P. Jacob is Associate Professor of Law at Regent University Law School. He specializes in Constitutional Law and religious liberty. From 1991 to 1993, Professor Jacob was Executive Director and CEO of the Christian Legal Society, which was a leading member of the Coalition for the Free Exercise of Religion during the legislative debates that led to the passage of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (2012) (“RFRA”). Professor Jacob is concerned to see RFRA applied in a way, contrary to the district court’s decision, that affirms RFRA’s robust protection for religious liberty.

Texas Center for Defense of Life (TCDL) is a 501(c)(3) organization. It operates to defend human life, from conception to natural death, in both state and federal court. TCDL serves persons, businesses, and non-profits to protect their rights of conscience on life-related issues. This case concerns the rights of Plaintiffs, as part of their religious liberty, not to violate their consciences on a life-related issue. TCDL believes the district court’s decision uncritically conflates the notion of “indirect” with “unsubstantial,” as it relates to funding of abortifacient coverage forced upon Plaintiffs’ business against their sincerely held religious beliefs.

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and

religious foundation on which America was built. The NLF and its donors and supporters, including those in Pennsylvania, are vitally concerned with the outcome of this case because of the impact a case such as this one will have on religious business owners who seek to imbue their business with their own values, regardless of the business form chosen. The NLF counts such business owners among its donors and supporters.

Amici Curiae file this Brief with all parties' consent.

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(c)

No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than *Amici Curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the Brief.

SUMMARY OF THE ARGUMENT

This Brief makes two arguments that amplify points the Appellants make in their brief. First, the Brief argues that the district court erred in concluding that because the HHS regulation mandating that employers provide employees health insurance covering abortifacients technically applies to Conestoga Wood Specialties Corporation ("Conestoga"), and not the Hahns, any burden the mandate imposes on the Hahns' exercise of their religion is too indirect to be substantial.

Second, the Brief argues that the Hahns, based on commonly understood moral principles, could reasonably conclude that providing abortifacient coverage would be morally wrong and thus violate their faith and that, in any event, federal courts are incompetent to decide whether the Hahns' conclusion that complying with the HHS mandate would violate their faith is correct.

1. The district court opined that because Conestoga is a corporation, and thus a legally separate entity from its owners, the Hahns, and because the mandate applies to the corporation, any burden the HHS mandate imposes on the Hahns is too indirect to be substantial under RFRA. This reasoning fails for several reasons. First, Conestoga cannot provide abortifacient coverage to employees unless the Hahns, who own and operate the corporation, direct it to provide the coverage. The mandate thus effectively commands the Hahns to direct their business to provide abortifacient coverage. Commanding the Hahns to direct their business to provide abortifacient coverage is in effect no different than commanding the Hahns to provide that coverage. And the Hahns cannot escape moral culpability because the corporation technically provides the coverage any more than a corporation's owner-operator can escape culpability for directing corporate employees to kite corporate checks to pay corporate bills or an assassin can escape moral culpability because his gun fired the fatal shot. Thus, the mandate effectively commands the Hahns to perform an act they believe violates their faith. Second, the fact that the

mandate technically imposes penalties on Conestoga is irrelevant. The Hahns own Conestoga. If Conestoga is harmed financially, the Hahns' investment in the business will be harmed (and possibly destroyed). To threaten substantial harm to the business is to threaten substantial harm to the Hahns. Therefore, by threatening substantial penalties on the business, the HHS mandate directly coerces the Hahns to violate their faith. Third, in any event, RFRA prohibits the federal government from imposing "substantial" burdens on the exercise of religion. A threat to harm one person or entity can exert substantial pressure on another person to do something he would otherwise not do. Nobody would deny that the threat "I'll kill your family if you do not kill the mayor" does not exert substantial pressure to comply with the demand even if one considers that pressure "indirect." Likewise, even if one characterizes as indirect the pressure the HHS mandate imposes on the Hahns—the threat of huge penalties being imposed on their business if the Hahns do not direct the business to provide abortifacient coverage—that threat imposes substantial pressure on the Hahns to act contrary to their faith.

2. The Hahns could reasonably conclude that providing abortifacient coverage to Conestoga employees is morally wrong and therefore contrary to their faith. If the Hahns comply with the HHS mandate and provide health insurance that specifically provides abortifacient coverage, the Hahns would be intentionally acting to provide a fund for covered employees specifically to pay for

abortifacients. Thus, the Hahns would be manifesting an intent to see that Conestoga employees would be able to pay for, and thus obtain (or more readily obtain), abortifacients (just as an employer who establishes a “Hitman Compensation Fund” would be manifesting an intent to see that his employees would be able to pay for, and thus obtain, murder-for-hire services). That not all Christians might agree with the Hahns’ conclusion that complying with the HHS mandate would be morally wrong is irrelevant. The Supreme Court has made clear that courts are not competent to determine whether a believer’s understanding of what his faith requires is correct.

For employers like the Hahns, who believe on religious grounds that abortion is morally wrong and that providing health insurance that covers abortifacients is morally wrong, the HHS mandate imposes a stark choice—violate your faith, or subject your business to enormous penalties. The district court’s holding that this choice imposes no substantial burden on the Hahns’ exercise of their Christian faith is not only wrong; it nullifies the protection RFRA promises for the free exercise of religion.

ARGUMENT

I. INTRODUCTION

This case poses one fundamental question: May the federal government impose a significant penalty on a business whose owners and operators refuse to

act in a way that they believe violates their religious faith? The Religious Freedom Restoration Act provides that the federal government “shall not substantially burden a person’s exercise of religion” unless that burden is the “least restrictive means” of furthering a “compelling government interest.” 42 U.S.C. § 2000bb-1(a) & (b) (2012). A federal mandate that commands a person to violate his sincerely held religious beliefs (in other words, commands a person to sin) and penalizes him if he does not would seem to be the quintessential substantial burden on religious exercise. That conclusion is consistent with Supreme Court precedent defining what constitutes a substantial burden on religious exercise for Free Exercise Clause purposes (and quite frankly, with common sense). *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (law requiring parents to send their children to school or face small fines and three-months imprisonment imposed a “severe” burden on Amish parents by “compell[ing] them to perform acts undeniably at odds with the fundamental tenets of their religious beliefs”); *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981) (“where a state conditions receipt of an important benefit upon conduct proscribed by religious faith . . . , thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a [substantial]¹ burden on religion exists.”)

¹ Whether a burden is substantial is, of course, a critical component of the analysis in this case. Your *Amici* do not insert the word “substantial” into this quotation a

The Hahns are Mennonite Christians who strive to direct their family-owned-and-operated business, Conestoga, in accord with their Christian faith. The Hahns believe, based on their faith, that abortion is morally wrong. The Hahns also believe that they would violate their Christian faith—that is, they would sin—if they directed the business they own and operate to provide employees with health insurance that covers abortion-causing drugs and devices.

The Department of Health and Human Services, however, has promulgated a regulation requiring that employers (with exceptions that do not cover Conestoga) provide their employees with health insurance that covers all Food and Drug Administration-approved contraceptive methods and sterilization procedures. Among the approved contraceptives are drugs (Ella, Plan B) that act as abortifacients.² If the Hahns follow their consciences and do not comply with the HHS mandate, their business will be subject to financial penalties of \$34 million every year. (*See* Appellants' Br. 11 (citing App. 48).) Because the mandate would impose enormous penalties on Conestoga if the Hahns do not direct the company to provide their employees with the HHS-mandated coverage, and because the Hahns believe that to provide the coverage would violate their Christian faith, the HHS mandate imposes on the Hahns a stark choice: Do what your consciences tell

second time to stack the deck. Rather, it is derived from the next sentence in the *Thomas* opinion. *Id.*

² *See* Michael Fragoso, *The Stealth Abortion Pill* (Aug. 17, 2010) <http://www.thepublicdiscourse.com/2010/08/1515/> (last visited Mar. 14, 2013).

you violates your Christian faith—in other words, sin—or subject your family business, your means of livelihood, to substantial and possibly ruinous penalties. In the words quoted above from *Yoder* and *Thomas*, the mandate “compels [the Hahns] to perform acts . . . at odds with the fundamental tenets of their religious beliefs” and puts “substantial pressure on [the Hahns] . . . to modify [their] behavior and to violate [their] beliefs.” If that does not substantially burden the Hahns’ exercise of their faith, RFRA is meaningless.

But despite the penalties the HHS mandate imposes on the Hahns’ business if the Hahns refuse to violate their faith, the district court reached the startling conclusion that the mandate imposes no substantial burden on the Hahns’ exercise of their religion. While purporting to accept that the Hahns are exercising their religion by refusing to provide health insurance covering abortifacients, *see Conestoga Wood Specialties Corp. v. Sebelius*, No. 12–6744, 2013 WL 140110, at *10 (E.D. Penn. Jan. 11, 2013) (order denying preliminary injunction), the court found the burden imposed on the Hahns to be insufficiently “direct” to constitute a *substantial* burden, *id.* at *14.

The district court reached this conclusion primarily because “Conestoga’s corporate form further separates the Hahns from the requirements of the [mandate]” *Id.* The court also noted the reasoning first set forth by the district court in *O’Brien v. United States Dept. of Health and Human Services*, 2012 WL 4481208

(E.D. Mo. Sept. 28, 2012). The *O'Brien* court opined that the HHS mandate did not substantially burden a Catholic employer's exercise of his faith (a faith that led him to conclude that he could not provide health insurance covering contraception, abortifacients, or sterilizations) because the employer would have to subsidize those goods and services only "after a series of independent decisions" by covered employees and their health care providers. *Id.* at *6; *See Conestoga*, 2013 WL 140110, at *14 (citing *O'Brien*).³

The district court's reasons for finding that the mandate imposes no substantial burden on the Hahns' exercise of their faith badly miss the mark. Even if insurance would pay for abortifacients only if employees decide to use the coverage to purchase abortifacients, the fact remains that the Hahns sincerely believe that it would be inconsistent with their faith—that is, it would be a sin—to facilitate the use of abortifacients by *directing the corporation they own and operate* to provide employees that coverage. To say that any burden the mandate imposes on the Hahns is too indirect to be substantial because the mandate technically requires Conestoga to provide the objectionable coverage ignores the fact that the business will provide that coverage only if the Hahns, as the owners and operators, direct the business to provide that coverage. Conestoga's "decision"

³ *O'Brien*'s reasoning was also adopted by the district court and the Tenth Circuit in the *Hobby Lobby v. Sebelius* litigation, and the district court in the instant case cited those courts for this proposition as well. *See Conestoga*, 2013 WL 140110, at *12-14.

to provide the coverage is *the Hahns'* decision to provide coverage. And to say that the burden is too indirect to be substantial because the penalties technically fall on Conestoga likewise ignores the relationship between the Hahns and their business. The Hahns own Conestoga; therefore harming Conestoga harms the Hahns (not to mention putting at risk their employees' jobs, which in itself would weigh heavily on anyone concerned with the welfare of his business's employees). The mandate's threatened penalties on Conestoga thus operate to coerce *the Hahns* to violate their faith.

If one grants the Hahns' understanding of what their faith requires, the HHS mandate does not impose, to quote *O'Brien*, 2012 WL 4481208 at *5, an "insignificant or remote" burden on the exercise of that faith. Rather, by imposing substantial penalties on their business if the Hahns do not do what their consciences tell them is a sin, the mandate imposes substantial and direct compulsion on the Hahns to violate their faith.

The district court purported to recognize that "it is not within a court's province to question a plaintiff's religious beliefs." *Conestoga*, 2013 WL 140110, at *12 (citing approvingly *Hobby Lobby, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1293 (W.D. Okla. 2012)). Indeed, "it is not the province of the court to tell the plaintiffs . . . whether their beliefs about abortion should be understood to extend to how they run their corporations . . . or to decide whether such beliefs are

fundamental to their belief system or peripheral to it.” *Hobby Lobby*, 870 F. Supp. 2d. at 1293. But by finding insubstantial the significant and rather obvious compulsion (\$34 million in penalties every year on their business) that the HHS mandate places on the Hahns to do what they believe is a sin (that is, compulsion to direct their corporation to provide health insurance that covers abortifacients), the court in effect refused to countenance the Hahns’ understanding of what their faith requires. In other words, it is fair to conclude that the district court, at least implicitly, decided that the Hahns are wrong to believe that complying with the mandate would violate their faith. The district court thus effectively made itself the arbiter of what the Hahns’ faith requires of them. Perhaps the court found it difficult to believe or understand that employers like the Hahns could conclude it is deeply morally wrong to make health insurance covering abortifacients available to employees who may or may not use that coverage, thus rendering any burden relating thereto insubstantial: “If every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed that it was the case, then the standard expressed by Congress under the RFRA would convert to an ‘any burden’ standard.” *Conestoga*, 2013 WL 140110, at *13. But this skeptical view proves too much. A religious belief need not be “comprehensible to others” to warrant protection, *Thomas*, 450 U.S. at 714. And

the Supreme Court has made clear that courts are legally incompetent to determine whether a believer's understanding of what his faith requires is correct. *Id.* at 715-16.

This Brief will discuss in greater detail why the HHS mandate imposes a substantial burden on the Hahns' religious exercise even though the mandate technically applies to Conestoga. The Brief will proceed to explain why employers like the Hahns could reasonably conclude that it would be morally wrong (that is, a sin) to provide health insurance covering abortifacients,⁴ but that in light of the Supreme Court's admonition in *Thomas*, federal courts must in any event refrain from deciding whether people like the Hahns correctly understand what their faith requires.

II. ALTHOUGH THE HHS MANDATE TECHNICALLY APPLIES TO CONESTOGA, THE MANDATE EXERTS SUBSTANTIAL PRESSURE ON THE HAHNS TO ACT IN A WAY THAT VIOLATES THEIR FAITH.

The district court concluded that because the Hahns' business, Conestoga, is a for-profit corporation, it has no free exercise rights. *Conestoga*, 2013 WL

⁴ Your *Amici* do not address this point necessarily to convince this Court that complying with the mandate would be morally wrong, because as we have noted and will expand upon further, it is not generally within a court's competence to determine whether a believer's understanding of his faith is correct. Rather, we address this point to demonstrate how the district court gave short shrift to the Hahns' beliefs and to demonstrate that the Hahns' understanding of their duty as Christians is "not so bizarre . . . as not to be entitled to protection," *Thomas*, 450 U.S. at 715.

140110, at *8. Yet, the district court also concluded that the corporate form somehow insulates the Hahns from any burden the HHS mandate imposes, so that any burden on the Hahns' exercise of their faith could not be substantial. *Id.* at *14. These conclusions, however, make no sense because they ignore three basic points: First, because the Hahns own and operate Conestoga, for the business to provide the objectionable coverage, *the Hahns* must act contrary to their faith. Second, because the Hahns own Conestoga, harming (or threatening to harm) Conestoga harms (or threatens to harm) the Hahns. Third, harm threatened to X can impose substantial compulsion on Y to act in a way that he would not otherwise act so he can prevent the harm to X. Even if one characterizes the compulsion on Y as "indirect," that compulsion can still be substantial.

A. For Conestoga to provide abortifacient coverage, the Hahns must direct the business to provide that coverage; the HHS mandate therefore effectively commands the Hahns to provide abortifacient coverage.

The district court rejected the Hahns' "alter ego" theory. *Conestoga*, 2013 WL 140110, at *7. However, the only reason it gave was that, because the Hahns have availed themselves of the corporate form, it would be "inconsistent" to ignore the corporate veil here. *Id.* However, in the context of moral responsibility for corporate action, it is not inconsistent to see Conestoga as the Hahns' alter ego.

Although considered a "person" at law, a corporation cannot think or act on its own. A corporation can only act through its human agents and at the direction

of those who have the responsibility to make decisions on its behalf and manage its affairs. Here, the people who have that responsibility for Conestoga are the Hahns. Conestoga can provide their employees with health insurance that covers abortifacients only if *the Hahns* direct the business to provide that insurance. In reality, any decision by Conestoga to provide the HHS-mandated coverage is a decision by the Hahns to provide that coverage. The HHS mandate, therefore, while technically applying to Conestoga, in reality commands *the Hahns* to provide the mandated coverage. The mandate thus commands the Hahns, under threat of substantial and likely ruinous penalties to their business, to perform an act their consciences tell them is a sin.

Moreover, while organizing their business as a corporation may shield the Hahns from corporate *financial* liabilities, it does not shield them from *moral* culpability for the acts they direct that corporation to perform. A simple example illustrates this. Suppose that Able, who owns and serves as President and Chairman of the Board of a closely-held corporation, directs corporate employees in the course of their employment duties to kite checks to corporate creditors. It would be absurd to suggest that Able is not *morally* culpable for defrauding the corporation's creditors because it was the corporation, a separate entity, that technically kited the checks. Able is morally culpable for fraud; the corporation is the means he used to defraud the creditors.

Likewise, Conestoga is the means by which the Hahns act—and live out their Christian faith—in the commercial marketplace. Like Able, who used his corporation to defraud corporate creditors, the Hahns, by directing Conestoga to provide abortifacient coverage, would be using the corporation to facilitate abortifacient use by Conestoga employees. The Hahns would no more be shielded from moral culpability than would Able.

Another analogy makes the point more starkly. To suggest that the Hahns would not be morally culpable because their corporation would actually be providing abortifacient coverage makes no more sense than saying that an assassin is not morally culpable for murder because the gun he used actually fired the fatal shot. For the assassin, the gun was an instrument, the means he used to achieve the end of killing his victim. Likewise, if the Hahns were to direct Conestoga to provide abortifacient coverage, the Hahns would be using the corporation—a corporation they control just as the assassin controlled his gun—as the means to the end of providing abortifacient coverage to the corporation’s employees. The Hahns could no more escape moral culpability for using the corporation as the means to accomplish what they believe to be an evil end than the assassin can escape moral culpability for using a gun to achieve his evil end. By compelling the Hahns to use their corporate business in this way, the HHS mandate compels the Hahns to act in a way that violates their faith.

B. Because the Hahns own Conestoga, to threaten substantial harm to the business is to threaten substantial harm to the Hahns; thus, the HHS mandate directly coerces the Hahns to violate their faith.

The district court's conclusion that the burden the HHS mandate imposes on the Hahns' exercise of their faith is "indirect" also ignores the relationship between the Hahns and their business and therefore is also wrong. As explained above, the mandate operates to command the Hahns, as Conestoga's owners and operators, to do what they believe is a sin. Likewise, the means the mandate employs to compel the Hahns to act—the threat of substantial and likely ruinous penalties on Conestoga if *the Hahns* do not direct the business to provide the mandated coverage—applies direct pressure on the Hahns. The Hahns own all the voting stock in Conestoga. *Conestoga*, 2013 WL 140110, at *3 n.4; Appellants' Br. 10 (citing App. 39). The value of that stock, and thus, the Hahns' financial fortunes, depend on the corporation's financial health. If that financial health suffers, it stands to reason that the Hahns' stock would be less valuable. And if Conestoga suffers financial ruin—not a far-fetched possibility given that failing to provide the mandated abortifacient coverage would subject the business to penalties of \$34 million every year—the Hahns' stock would be worthless.

The harm the HHS mandate threatens to Conestoga if the Hahns do not

direct the business to provide abortifacient coverage is thus harm threatened to the Hahns as well. The mandate’s effective command—“sin or subject your business to substantial penalties”—can be reformulated as, “sin or subject the value of your holdings in your business to substantial diminution.” The mandate in effect seeks to coerce the Hahns to act contrary to their faith by threatening them with financial harm. That is not an indirect, insubstantial burden on the Hahns’ exercise of their faith; it is direct, substantial pressure on the Hahns to do that which the Hahns’ consciences tell them is a sin.

C. RFRA prohibits “substantial” burdens on religious exercise; even if the burden the mandate imposes on the Hahns is indirect, it is still substantial.

In any event, even if one characterizes the pressure the HHS mandate imposes on the Hahns to violate their faith as “indirect,” nothing in RFRA suggests that such indirect pressure cannot violate RFRA. RFRA does not prohibit only “direct” burdens on religious exercise; RFRA prohibits “substantial” burdens, and the burden the mandate imposes on the Hahns, even if one characterizes it as “indirect,” is still substantial.

There is no question that a threat to harm one person can exert substantial pressure on another person to do something he would otherwise not do. For example, suppose Baker tells Charlie, “I am holding your family hostage. If you do not kill the mayor, I will kill your family.” Although the threatened harm—

death—will fall on Charlie’s family, it defies reality to suggest that the pressure the threat places on Charlie to kill the mayor is not substantial, even if one characterizes that pressure as “indirect.” So it is with the pressure the mandate imposes on the Hahns to direct their business to provide abortifacient coverage. Even if one considers that pressure to be indirect because Conestoga is a legally separate entity from its owners, the Hahns, it defies reality to suggest that the choice the mandate imposes on the Hahns—sin or have substantial penalties imposed on the corporation—does not impose substantial pressure on the Hahns to act in a way they believe violates their faith.

The district court’s reasoning—that is, that threatening harm to a corporation if the owners do not operate the business in a way that violates their religious beliefs does not substantially burden the owners’ religious exercise—leads to absurd results. Suppose the federal government enacts a law requiring all food service businesses affecting interstate commerce to be open seven days a week or pay a fine.⁵ This law would certainly impose a substantial burden on an Orthodox Jew who operates a deli as a sole proprietorship by forcing him either to open the deli on the Sabbath or pay a fine. *Cf. Sherbert v. Verner*, 374 U.S. 398, 403-05 (1963) (denying unemployment benefits to a Sabbatarian who refused to work on

⁵ This hypothetical is adapted from one proposed by Ed Whalen. *See* Ed Whalen, *Re: Another Crazy DOJ Stance Against Religious Liberty* (July 26, 2012), <http://www.nationalreview.com/bench-memos/312422/re-another-crazy-doj-stance-against-religious-liberty-ed-whalen> (last visited Mar. 14, 2013).

Saturdays imposed “unmistakable” pressure to violate Sabbatarian beliefs). But following the district court’s reasoning, if the deli owner incorporated *the very same deli business*, the burden on the owner’s religious exercise would be considered only indirect, and therefore not substantial, and therefore not sufficient to state a claim under RFRA.

That result is not only senseless; it also embodies a perverse reading of RFRA, a statute enacted to protect religious adherents from government-imposed burdens on the exercise of their faith. To deny RFRA’s protection to religious adherents who incorporate their business is to tell those religious adherents that they can be protected from government-imposed burdens on their ability to operate their business consistently with their faith only if they are willing to forego a form of business organization—incorporation—generally available to all other business owners. Forcing business owners to forego incorporation in exchange for receiving protection of their right to operate their business according to their faith is exactly the kind of burden on the exercise of religion that RFRA is meant to protect against.

The district court has stated no logical or coherent reason why Conestoga being a corporation renders the burden the HHS mandate imposes on the Hahns’ exercise of their faith—sin, or subject your business to significant penalties—not substantial under RFRA. It has only baldly asserted that to do so is “inconsistent”

with the corporate form. *Conestoga*, 2013 WL 140110, at *7. The district court's assertion (as demonstrated above) could well lead to absurd and even perverse results. This Court should hold that a substantial burden under RFRA exists when the federal government attempts to coerce business owners to act contrary to their faith by threatening harm to their business, regardless of whether the business is incorporated.

III. AN EMPLOYER WHO BELIEVES, BASED ON HIS FAITH, THAT ABORTION IS MORALLY WRONG CAN REASONABLY CONCLUDE THAT SPECIFICALLY PROVIDING OTHERS THE MEANS TO PAY FOR ABORTIFACIENTS IS MORALLY WRONG; AND IN ANY EVENT, COURTS ARE NOT COMPETENT TO SECOND GUESS AN EMPLOYER'S CONCLUSION CONCERNING WHAT HIS FAITH REQUIRES.

As noted in the Introduction to this Brief, it is reasonable to infer from the district court's decision that the court, at least implicitly, decided that the Hahns are wrong to conclude that complying with the mandate would violate their faith. The district court was not competent to make that decision. *See Thomas v. Review Board*, 450 U.S. 707, 715-16 (1981). But in any event, it is perfectly reasonable for the Hahns to conclude that providing their employees health insurance that covers abortifacients would be morally wrong and thus contrary to their faith.

In reaching their decision that providing their employees abortifacient coverage would be morally wrong, the Hahns, whether or not they would put it this way themselves, were applying a moral principle that Catholic moralists

commonly refer to as cooperation with evil.⁶ While the Hahns are not Catholic, the general moral reasoning behind the Hahns’ religious exercise is also taught by the Mennonite religion. (Appellants’ Br. 10-11 (citing App. 39).)

The general principle of cooperation with evil is not difficult to grasp, as a simple example illustrates. Suppose that Baker approaches Able and asks in a way that makes it clear that he is serious, “May I borrow your gun so I can kill my wife?” If Able gives Baker the gun knowing that Baker intends to use it to kill his wife, no one would seriously suggest that Able, though he did not pull the trigger, would not be morally culpable for assisting Baker in killing his wife. A like conclusion—that Able has committed a moral wrong by loaning Baker his gun—would hold even if Baker changed his mind and decided not to kill his wife. Able loaned Baker his gun with the intent that Baker would have the gun to kill his wife. Able intended to enable Baker to kill his wife, and this intent made it morally wrong for Able to loan Baker his gun.

Based on this mode of moral reasoning, employers such as the Hahns who morally oppose abortion could reasonably conclude that providing their employees

⁶ See, e.g., William Newton, *Avoiding Cooperation with Evil: Keeping Your Nose Clean in a Dirty World*, *Homiletic & Pastoral Review* (Sept. 21, 2012), available at www.hprweb.com/2012/09/avoiding-cooperation-with-evil-keeping-your-nose-clean-in-a-dirty-world/ (last visited Mar. 14, 2013); Joseph Delaney, *Accomplice*, 1 *The Catholic Encyclopedia* (1907), available at <http://www.newadvent.org/cathen/01100a.htm> (last visited Mar. 14, 2013); *Vatican Statement on Vaccines Derived from Aborted Human Stem Cells* (June 9, 2005), available at www.immunize.org/concerns/vaticandocument.htm (last visited Mar. 14, 2013).

with health insurance covering abortifacients would be morally wrong. Another example helps to illustrate this. Suppose an employer establishes a “Hitman Compensation Fund” for his employees. Any employee who needs a hitman’s services may draw from the fund to pay for those services. By creating the fund, this employer has intentionally chosen specifically to provide his employees access (or more ready access) to murder-for-hire services by specifically providing them the means to pay for those services. It is reasonable to conclude that even if no employee takes advantage of the hitman fund, the employer still harbors an intent to see that his employees are able to pay for and thus obtain murder-for-hire services.

Few would doubt that an employer who intentionally and specifically provides the means for his employees to pay for murder-for-hire services would be acting immorally. That would be so even if no employee takes advantage of the hitman fund, because the employer intended to make available the means to pay for those services. It follows that if the federal government were to mandate that all employers establish hitman funds or pay substantial fines, that mandate would impose a substantial burden on the religious exercise of employers who believe that murder is contrary to their religious beliefs.

But if the employer who establishes the hitman fund is acting immorally, it must be reasonable for the employer who, based on his faith, believes abortion is

morally wrong to conclude that intentionally and specifically providing his employees the means to pay for abortifacients (as the HHS mandate requires) is morally wrong. Just as the employer who establishes the hitman fund is intentionally deciding specifically to provide the means for his employees to pay for murder-for-hire services, the employer who establishes a fund specifically to reimburse employees who purchase abortifacients is intentionally deciding specifically to provide his employees the means to pay for abortifacients. And as with the employer who establishes the hitman fund, it is reasonable to conclude that even if no employee takes advantage of the abortifacient reimbursement fund, the employer is still acting immorally because of his intent to enable his employees to pay for and thus obtain abortifacients.

As noted above, the district court in this case relied upon the district court's opinion in *O'Brien* (and the *O'Brien*-influenced opinions in the *Hobby Lobby* litigation). Here, as elsewhere, the *O'Brien* court's error (sometimes explicitly, sometimes implicitly) affected the district court's analysis. For example, the *O'Brien* court opined that providing employees with health insurance that specifically covers abortifacients is no different than paying employees wages or salary that they could use to pay for abortifacients. 2012 WL 4481208, at *7. The suggestion is that if an employer does not consider paying employees a salary to be morally wrong (even though an employee may use that salary to pay for

abortifacients), it cannot be a substantial burden on the employer's exercise of religion to provide health insurance that covers abortifacients.

But there is a significant difference between paying an employee a salary and providing insurance that specifically covers contraception:

The difference is analogous to the difference between giving cash to someone and giving someone, say, a gift certificate to a steakhouse. In the former case, the money you give could be used to buy steak, but there is no essential tie between your gift and that particular use of it. In the latter case, you are giving a voucher for the procurement of *a specific and limited range of goods and services*; there is an intelligible link between your gift and the use to which the recipient might put it.⁷

Just as a person who believes "killing animals is morally wrong would reasonably think it wrong to give a gift certificate to a steakhouse,"⁸ so a person who believes abortion is morally wrong could reasonably believe it wrong to provide health insurance that can be used to pay only for those goods and services the policy covers and that specifically covers abortifacients. It is not reasonable to say that an employer who pays his employees wages has any specific intent regarding how the employees spend those wages. However, it *is* reasonable to say that the employer who provides a means to pay specifically for abortifacients is acting specifically to assist his employees to pay for, and thus obtain, abortifacients. Therefore, that

⁷ Melissa Moschella, *The HHS Mandate and Judicial Theocracy* (Jan. 3, 2013), <http://www.thepublicdiscourse.com/2013/01/7403/> (last visited Mar. 14, 2013).

⁸ *Id.*

employer manifests an intent to enable his employees to pay for, and thus obtain abortifacients.

By mandating that the Hahns provide Conestoga employees with health insurance that covers abortifacients, the HHS mandate in effect commands the Hahns to establish a fund specifically to provide employees the means to pay for, and thus obtain, abortifacients. It is perfectly reasonable for the Hahns to conclude that to provide the mandated coverage would be immoral cooperation with the evil of abortion and therefore contrary to their faith.

Perhaps not all Christians would agree with this conclusion. And as noted in the Introduction to this Brief, perhaps the district court found it difficult to believe or understand that employers like the Hahns could conclude that making health insurance covering abortifacients available to employees who may or may not use that coverage is morally wrong. But that is irrelevant. A religious belief need not be “comprehensible to others” to warrant protection. *Thomas*, 450 U.S. at 715. And as the Supreme Court made clear in *Thomas*, “[i]ntrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences It is not within the judicial competence to decide [who] more correctly perceives the commands of their common faith.” *Id.* at 715-16. The Hahns, like the Petitioner in *Thomas*, drew a line based on their faith regarding whether that faith would allow them to perform

an act that would assist others in doing what their faith tells them is a moral evil. As in *Thomas*, “it is not for [the district court or this Court] to say the line [they] drew was an unreasonable one.” *Id.* at 715.

The Hahns sincerely believe that they cannot comply with the HHS mandate and remain true to their Christian faith. The HHS mandate thus presents the Hahns with a stark choice: do what you believe is a sin according to your understanding of your religious faith, or subject your business to enormous penalties. Being put to that choice substantially burdens the Hahns’ exercise of their religion. The district court’s holding that it does not is not just wrong; that holding usurps the Hahns’ right to follow their own conscientious judgment and thus nullifies the protection RFRA promises for the free exercise of religion.

CONCLUSION

For the reasons stated above and the reasons stated in the Appellants’ Brief, this Court should reverse the district court’s decision denying Conestoga’s and the Hahns’ motion for a preliminary injunction and should remand with instructions to enter a preliminary injunction on behalf of Conestoga and the Hahns.

Respectfully submitted this 22nd day of March, 2013,

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COMBINED CERTIFICATIONS

1. I, Steven W. Fitschen, counsel of record for *Amici Curiae* Professor of Law Bradley P. Jacob, Texas Center for Defense of Life, and The National Legal Foundation, am admitted to the bar of the Third Circuit Court of Appeals.
2. Pursuant to F.R.A.P. 32.2.7(C), the undersigned certifies that this brief complies with the type-volume limitations of F.R.A.P. 32.2.7(B). Exclusive of the exempted portions, this Brief contains 6,373 words in 14 point Times New Roman font. This total was calculated with the Word Count function of Microsoft Office Word 2007.
3. On March 22, 2013, I filed this Brief with the Clerk of the Third Circuit Court of Appeals using the CM/ECF system, which will send notice of the electronic filing to all registered users. I also caused ten copies of the Brief to be mailed to the Clerk via regular first-class mail and one paper copy to be served on Counsel for the Parties.
4. The electronic version of this Brief was scanned and found virus-free using the anti-virus component of AVG Internet Security 2013, updated March 22, 2013.

5. The text of the hard copy of this Brief and the text of the Brief filed electronically via the CM/ECF system are identical.

Dated: March 22, 2013

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