IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPEAL CASE NO. 13-1144

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

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as
Secretary of the United States Department of Health and Human Services;
HILDA SOLIS, in her official capacity as
Secretary of the United States Department of Labor;
TIMOTHY GEITHNER, in his official capacity as
Secretary of the United States Department of the Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR; and
UNITED STATES DEPARTMENT OF THE TREASURY;

Defendants-Appellees.

APPELLANTS' PETITION FOR EN BANC REVIEW

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INTRODUCTION

Until the panel majority's decision in this case, no precedential appellate decision has ever categorically excluded family business activity from the "free exercise of religion." Appellants the Hahn family are devout Mennonites from East Earl, Pennsylvania, who own a closely-held wood cabinet business called Conestoga Wood Specialties. They wish to continue operating their business consistently with their religious belief that human life is sacred and that they cannot facilitate the provision of drugs and devices that ends a human life, but they are foreclosed from doing so by a federal health insurance mandate (see 42 U.S.C. § 300gg-13(a)(4) and implementing regulations).

The panel majority invented a rule that makes religious families incapable of exercising religion in a business corporation. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 2013 WL 3845365 (3d Cir. July 26, 2013) (slip op. attached as Exhibit 1). The decision does not merely prevent the Hahns' claim from succeeding; it blocks a family business company from being able to exercise religion *at all*. This eviscerates the rights of devout business owners of all kinds, from religious families running companies like Conestoga, to kosher butchers and Bible publishers. The panel judicially amends the Constitution by adding a novel exception to the Free Exercise Clause.

The panel majority's rule conflicts with Third Circuit precedent, which has long held that religious exercise can occur in the context of profitable activity and by corporations. *See, e.g., Fraternal Order of Police v. City of Newark*, 170 F.3d

359, 366–67 (3d Cir. 1999) (paid employee); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) (corporation).

The panel majority created a direct circuit split with the Tenth, Ninth and Second Circuits. The Tenth Circuit recently decided, en banc, that a family business corporation challenging this same insurance mandate can exercise religion, that they face a substantial burden on that exercise, and that the government failed in its strict scrutiny showing under the Religious Freedom Restoration Act (RFRA). *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103 (10th Cir. June 27, 2013). In response, the panel majority here offered one sentence tucked away in a footnote: "We respectfully disagree with that Court's analysis." *Conestoga* slip op. at 20 n.7. Longstanding Ninth Circuit case law also allows free exercise claims by religious owners of closely-held incorporated businesses; the panel majority admits a split with this precedent as well. *Id*. at 26. The Second Circuit allowed a kosher butcher corporation and its owners to make free exercise claims. *See Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194 (2d Cir. 2012). In fact, there is not any circuit that agrees with the panel majority in a precedential opinion.

In his thorough dissent, Judge Jordan correctly showed that the panel majority's decision conflicts with Supreme Court precedent. The Supreme Court has recognized First Amendment and free exercise rights for corporations and businesses in many contexts. This Court should grant appellants' petition and resolve these conflicts en banc.

STATEMENT OF COUNSEL

Pursuant to Local App. Rule 35.1, undersigned counsel hereby expresses the belief, based on a reasoned and studied professional judgment, that the panel majority's decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States. Consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court. The panel majority's decision is contrary to the following decisions of the Supreme Court, among others discussed below:

Braunfeld v. Brown, 366 U.S. 599 (1961);
First Nat. Bank of Boston v. Bellotti, 435 U.S. 765 (1978);
United States v. Lee, 455 U.S. 252 (1982);
Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); and
Citizens United v. FEC, 558 U.S. 310 (2010).

And the panel majority's decision runs contrary to decisions of this Court, such as:

Am. Future Sys., Inc. v. Penn. State Univ., 688 F.2d 907 (3d Cir. 1982);
Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999);
Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002); and *Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007).

This appeal involves questions of exceptional importance, including because the panel created direct conflicts with the Tenth, Ninth and Second Circuits.

ARGUMENT

En banc review is necessary because the panel majority decision disregards well-established free exercise jurisprudence and conflicts with multiple U.S. Courts of Appeals.

I. This Is an Issue of Exceptional Importance Because the Panel Created an Open Split with the Tenth, Ninth and Second Circuits.

The panel majority's view is so novel that it conflicts with at least three circuits, while being shared by no other appellate precedent.

A. The en banc Tenth Circuit affirms religious exercise in business.

In *Hobby Lobby*, the Tenth Circuit Court of Appeals decided to convene en banc in the first instance. It ruled that family-owned corporate businesses can exercise religion, that the government mandate at issue here is a substantial burden on that exercise, and that the government fails in its requirements under RFRA to show a compelling interest and that it is employing the least restrictive means to pursue its interest. *Hobby Lobby*, 2013 WL 3216103 at *9–*24.

The panel majority in this case contradicts *Hobby Lobby*. The majority observes, in footnote 7, that "We respectfully disagree with that Court's analysis." *Conestoga* slip op. at 20 n.7. Beyond that footnote, the panel majority does not discuss its sister circuit's ruling. The panel instead quotes at length from the District Court decision that the en banc Tenth Circuit has now reversed. *Id.* at 21.

For reasons carefully explained in Judge Jordan's dissent and outlined below, *Hobby Lobby* was correctly decided and the panel majority here has staked out a position irreconcilable with Supreme Court case law. The issue on which *Conestoga* and *Hobby Lobby* disagree is not whether business claimants should *win*. The issue is whether family business companies can exercise religion *at all*. Answering that question in the affirmative still allows the government to show, perhaps in the majority of cases, that a particular law impacting the pursuit of religious values should be sustained. But categorically excluding religious

exercise by a family business company, as the panel majority did here, ruptures First Amendment jurisprudence and negates Congress' intent in RFRA.

B. The panel majority acknowledges a split with the Ninth Circuit.

The panel majority acknowledges it also deviates from longstanding case law of the Ninth Circuit. *Conestoga* slip op. at 26, 28. For many years the Ninth Circuit has recognized that when a family owns and operates a business, including a corporation, the family can exercise religious beliefs through its business, and a government mandate against those values substantially burdens the family's religious exercise. *Stormans Inc. v. Selecky*, 586 F.3d 1109, 1120 & 1120 n.9 (9th Cir. 2009) (rejecting the argument that an incorporated pharmacy cannot bring free exercise claims against a government mandate); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619–20 n.15 (9th Cir. 1988) (holding that a corporation could raise free exercise rights of its owners). Until now, no precedential appellate case diverged from that rule. *See, e.g., McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985) (calling it "conclusory" and "unsupported" to say "a corporation has no constitutional right to free exercise of religion").

C. The panel majority contradicts Second Circuit precedent.

The panel majority's decision is so far-reaching that it renders even a kosher butcher or deli incapable of exercising religion. Thus it is incompatible with the Second Circuit's decision in *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194 (2d Cir. 2012), where that court recognized the free exercise claims of an incorporated kosher butcher and its owners. *Id.* at 210. The court declared that "[at] a minimum," the "protections of the Free Exercise Clause pertain" to

religious claims by owners of a business corporation. *Id*. (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)).

Again, whether a family business ultimately wins its claims should depend on applying the appropriate scrutiny level to the circumstances of the law being challenged. But the panel majority here adopted an absolute rule prohibiting free exercise of religion claims from families doing business.

D. This issue is pending before six circuits.

This case presents an issue of exceptional importance meriting en banc review due to its presence before so many United States Courts of Appeals. Six separate circuits, including this one, have cases raising this same claim by similar plaintiffs. Third Circuit (*Conestoga*; *Geneva College (Seneca Hardwood)*, No. 13-2814); Sixth Circuit (*Autocam Corp.*, No. 12-2673; *Legatus*, Nos. 13-1092, 13-1093); Seventh Circuit (*Korte*, No. 12-3841; *Grote Indus.*, No. 13-1077); Eighth Circuit (*O'Brien*, No. 12-3357; *Annex Medical*, No. 13-1118); Tenth Circuit (*Hobby Lobby*, No. 12-6294; *Newland*, No. 12-1380); D.C. Circuit (*Gilardi*, No. 13-5069). The panel majority not only created a circuit split, it caused a wide divergence in how the Patient Protection and Affordable Care Act of 2010 will be implemented nationally. The en banc court should address that inconsistency.

II. The Panel Majority Decision is Inconsistent with Third Circuit Precedent Governing the Free Exercise of Religion.

The panel majority's conclusion that families cannot vindicate free exercise rights in the context of profit, *see Conestoga* slip op. at 21, or of the corporate

form, *see id.*, is sharply at odds with Third Circuit precedent. The Third Circuit has entertained free exercise claims arising from an individual's for-profit activities. *See Shelton v. Univ. of Med. & Dentistry of New Jersey*, 223 F.3d 220, 229 (3d Cir. 2000) (hearing free exercise claim of nurse objecting to job conditions); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366–67 (3d Cir. 1999) (enjoining police department from punishing Muslim officers who wore beards). Moreover, the Third Circuit permits corporate plaintiffs to bring free exercise claims. *See, e.g.*, *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) (issuing preliminary injunction on free exercise claim); *Tressler Lutheran Home for Children v. N.L.R.B.*, 677 F.2d 302, 303 (3d Cir. 1982) (hearing free exercise challenge of nursing home).

Notwithstanding this precedent, the panel majority apparently believed that the *combination* of a profit motive and the corporate form rendered the Free Exercise Clause a nullity. *See Conestoga* slip op. at 21. It is unclear why. As Judge Jordan pointed out in dissent, no prior Third Circuit case supports that proposition. *Id.* at 24–25. And the Third Circuit has not treated other First Amendment rights that way. *See Free Speech Coal., Inc. v. Attorney Gen. of U.S.*, 677 F.3d 519, 524–25 (3d Cir. 2012) (finding "a collection of individuals and entities [in] industry" stated a free speech claim); *Conchatta Inc. v. Miller*, 458 F.3d 258, 261–62 (3d Cir. 2006) (allowing an incorporated bar to bring a free speech claim); *Am. Future Sys., Inc. v. Penn. State Univ.*, 688 F.2d 907, 913 (3d Cir. 1982) (permitting a corporate seller of cookware to bring a free speech claim).

III. The Panel Majority Contradicts Supreme Court and Third Circuit Precedent Defining a "Substantial Burden."

In just one paragraph, the panel majority declared that no substantial burden exists on the religious exercise of the Hahn family, owners of Conestoga. *Conestoga* slip op. at 29. This position contradicts Third Circuit and Supreme Court precedent. "[A] substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other[s] versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007). One likewise exists when being forced to choose between "forfeiting benefits, on the one hand, and abandoning one of the precepts of [her] religion in order to accept [benefits], on the other hand," *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), or being subject to "substantial pressure on an adherent to modify his behavior and to violate his beliefs," *Thomas v. Review Bd. of Ind. Emp't. Sec. Div.*, 450 U.S. 707, 718 (1981).

The Hahns face an unavoidable substantial burden under either definition. The Hahn family exclusively owns, directs, and operates Conestoga Wood Specialties. The government mandate imposes massive fines and government lawsuits on Conestoga if it does not provide religiously objectionable items in its health insurance plan. Such a mandate "force[s]" and "pressures" the Hahns. First, there is no one who can implement the mandate other than the Hahns. Coercing the company to do something necessarily coerces its sole holding family owners and operators. Second, the only way in which this mandate is *not* a

command on the Hahns is if the court imagines that the Hahns have the "choice" of *abandoning their family business* or subjecting it to ruin. But this "choice" is the very definition of a being "forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available." Forcing the Hahns to choose between their religion or running a family business is a heavy burden.

In *Sherbert* and *Thomas*, where employees refused to work certain jobs and were denied unemployment benefits, the Court *rejected* the argument that no substantial burden existed simply because "no criminal sanctions directly compel appellant to work a six-day week," and "the Indiana law does not *compel* a violation of conscience." 374 U.S. at 403; 450 U.S. at 717. But the panel here used this same flawed argument, simply declaring that "[t]he Mandate does not impose any requirements on the Hahns." *Conestoga*, slip op. at 29. The panel relied on Conestoga's corporate status, but limited legal liability is not the same as limited *moral and religious* liability. The Hahns are substantially burdened when they must operate their business in violation of their beliefs, regardless of the corporate form they use. And limited liability is itself a "benefit[] otherwise generally available," which the mandate forces the Hahns to forego in exchange for their religious beliefs. That, too, is a substantial burden under *Sherbert* and *Klem*. *U.S. v. Lee* held that a government mandate on a business constituted a substantial burden on religious exercise. 455 U.S. at 257. The same is true for the unbearable burden that the Hahns face under this mandate.

The panel majority's holding would hobble religious believers from being able to earn a living for their families by running a modern business. Imposing the

"choice" between following one's beliefs or abandoning one's family business constitutes "substantial pressure" on the Hahns "to substantially modify [their] behavior and to violate [their] beliefs." 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. The same is true for business owners. Declaring that the Hahns are "free" to abandon their livelihood does not undermine their substantial burden, it proves it.

IV. Supreme Court and Appellate Precedent Acknowledge That Religious Exercise Happens in Business and in Corporations.

The panel majority's decision rests on faulty premises that are hostile to religious exercise in business and through corporations.

A. Precedent recognizes free exercise of religion in business.

Courts recognize a variety of contexts in which for-profit enterprises exercise religion. The Supreme Court held that an Amish for-profit business exercised religion in *United States v. Lee*, 455 U.S. 252, 257 (1982). The Court likewise acknowledged that merchants in Philadelphia exercised religion when objecting to Sunday closing laws. *See Braunfeld v. Brown*, 366 U.S. 599 (1961); *see also Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 584 (1961) ("religious freedom" challenge from a for-profit corporation). The Supreme Court has repeatedly recognized free exercise claims in money-making activities, even when the free exercise claim sought to entitle the plaintiff to government money. *See Sherbert*, 374 U.S. at 399 (free exercise burden existed when the government refused unemployment benefits); *Thomas*, 450 U.S. at 709 (same).

B. All agree that religion is exercised through corporations.

Courts and the government appellees all concede that religion is exercised through the corporate form. The United States Supreme Court has vindicated religious freedom claims for many incorporated plaintiffs. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (captioned as a "New Mexico corporation" in the lower courts' decisions); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 597 F.3d 769, 772 (6th Cir. 2010), *rev'd by Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012) (an "ecclesiastical corporation"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.29 (1983) (non-profit entities can exercise religion even if they are not "churches or other purely religious institutions"); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295 (11th Cir. 2006) ("corporations possess Fourteenth Amendment rights . . . through the doctrine of incorporation, [of] the free exercise of religion."). Corporations also have rights under the Fourth, Fifth, Sixth and Seventh Amendments.

All of the panel majority's arguments against exercise of religion in ordinary ("for-profit") corporations would equally preclude any exercise of religion by non-profit corporations, since they likewise possess limited liability, are distinct from their members, are not natural persons, and can even earn profits. Therefore the corporate form is not a bar to relief under Supreme Court precedent.

C. Religious exercise is not analyzed using corporate formalities.

The Supreme Court insists that religious exercise cannot be disregarded based on the categorical identity of the plaintiff, as the panel majority did here. The Supreme Court stated in *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 775–76 (1978), that although the "court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights[,] [w]e believe that the court posed the wrong question." The proper question is not *who* the plaintiff is, but *what he is doing*: "whether [the government rule] abridges [rights] that the First Amendment was meant to protect." *Id.* *U.S. v. Lee* and *Braunfeld* both held that religious exercise happens when a business run by religious people objects to a government requirement. Conestoga's and the Hahn's objections must qualify as religious exercise for the same reason. *Bellotti* also rejected the argument that a First Amendment right can only be exercised by an organization devoted to that specific purpose. 435 U.S. at 777. The panel majority here made the same mistake in excluding religious exercise by "secular" entities.

The panel majority also erred in concluding that religious exercise is a "purely personal" right under *Bellotti*. If a right is purely personal, no "corporations and other organizations," including non-profits, can exercise it. *Bellotti*, 435 U.S. at 778 n.14 (citing *White v. United States*, 322 U.S. 694 (1944)). But non-profit corporations can exercise religion, so it cannot be "purely personal." Indeed, religion is significantly social, not merely personal. Corporations also exercise speech, a "fundamental personal" right. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). RFRA protects "any" exercise of religion, 42 U.S.C. § 2000bb-2

(referencing 42 U.S.C. § 2000cc-5), for any "person," including corporations, 1 U.S.C. § 1.[1] The Free Exercise Clause and RFRA contain no "business exception."

The panel majority ultimately expressed confusion about how a "for profit, secular" corporation can exercise religion. *Conestoga* slip op. at 21. In this respect the panel majority begs the question. Modern corporations can pursue any lawful purpose; they are not "for profit" or "secular" in ways that exclude religion. Pennsylvania says a corporation "shall have the legal capacity of natural persons to act." 15 Pa. Consol. Stat. § 1501. Thus "for-profit" corporations commonly pursue environmental friendliness, social consciousness, and charitable giving, among other values. Corporations pursue purposes, whether religious or not, simply by the decision-making process authorized by state law, its articles and its bylaws. There is no good reason to exclude religion from the values a corporation can pursue. The panel majority's rule imposes viewpoint discrimination when it singles out religion as a value that ordinary corporations cannot pursue. *Cf. Good News Club v. Milford Central School,* 533 U.S. 98, 107–12 (2001).

D. The Supreme Court routinely grants First Amendment protections to for-profit corporations.

The Supreme Court has emphasized that "First Amendment protection extends to corporations," and the exercise of rights "does not lose First

[1] The fact that other, previously enacted federal statutes such as Title VII make smaller accommodations for religious entities than does RFRA, actually shows that RFRA has a broader scope: "where as here the words of a later statute differ from those of a previous one on the same or a related subject, the legislature must have intended them to have a different meaning." *Klein v. Republic Steel Corp.*, 435 F.2d 762, 765–66 (3d Cir. 1970).

Amendment protection simply because its source is a corporation." *Citizens United v. FEC,* 558 U.S. 310, 342 (2010). The Court also insists that "corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell v. Dept. of Social Services*, 436 U.S. 658, 687 (1978); *see also United States v. Amedy*, 24 U.S. 392, 412 (1826) ("That corporations are, in law, for civil purposes, deemed persons, is unquestionable.")

Many seminal cases have protected the First Amendment rights of for-profit corporations. *Pacific Gas & Elec. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986), protected a privately owned utility company from compelled government speech. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), safeguarded a for-profit newspaper from a libel action. *New York Times Co. v. United States*, 403 U.S. 713 (1971), protected First Amendment rights against prior restraint. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), protected the freedom of speech against the forced inclusion of opposing views. The Supreme Court has never hesitated to confer First Amendment rights simply because of a plaintiff's corporate status.[2]

[2] The government, though not the panel majority specifically, has argued that under *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), the Establishment Clause actually requires the government to coerce religious people in business. This position is unfounded. Neither *Amos* nor the First Amendment require the government to coerce anyone. *Amos* simply held that "[r]eligious accommodations . . . need not" be accompanied by secular exemptions. *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005). *Amos* did not even apply to *religious* (not secular) exemptions in business, and it nowhere prohibits such exemptions. Instead, "legislative" exemptions and accommodations for religious exercise "[are] permitted," and are a proper product of "the political process." *Emp't Div. v.*

(Footnote continues on following page.)

CONCLUSION

This case is not about whether Conestoga Wood Specialties Corp. can "believe" or "go to heaven." Under RFRA and the First Amendment, it need only *exercise* religion. Conestoga exercises religion in the same way it exercises ethical values, worker-friendly values, profit-making values, or any other lawful purpose: by the decision-making and implementation of its sole-holding family owners, the Hahns. Precedent demonstrates that either Conestoga, the Hahns, or both, exercise religion in the operation of their business, and are substantially burdened by a federal mandate prohibiting them from doing so.

For the foregoing reasons, Appellants request that this Court grant their petition for en banc review.

Respectfully submitted on this 31st day of July, 2013,

s/ Matthew S. Bowman

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Smith, 494 U.S. 872, 890 (1990). RFRA is a permissible legislative exemption encompassing "any" religious exercise, including in business and corporations.

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CERTIFICATION OF BAR MEMBERSHIP, ELECTRONIC FILING, PAGE LIMIT AND SERVICE

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I further certify that this petition complies with Federal Rule of Appellate Procedure 35(b)(2), in that it does not exceed 15 pages excluding material not counted under Rule 32.

I further certify that this petition was served on counsel for opposing parties by the Court's ECF filing system. Counsel for opposing parties are Filing Users and are served electronically by the Notice of Docket Activity.

s/ Matthew S. Bowman
Matthew S. Bowman, Esq.