NO. 13-356

In the Supreme Court of the United States

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

v.

KATHLEEN SEBELIUS, et al.,
Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

As the government concedes in its Brief for Respondents ("Resp."), this case poses essentially the same question presented in *Hobby Lobby*: whether the Affordable Care Act's ("ACA") contraceptive-coverage Mandate (the "Mandate") violates the free exercise rights of families and their closely-held businesses. *See* Resp. at 12; *see also* Pet. for Writ of Cert. at I, *Sebelius v. Hobby Lobby Stores, Inc.*, No 13-354 (U.S. filed Sept. 19, 2013). While the government explicitly opposes the petition filed in *Autocam*, it does not ask the Court to deny Conestoga's petition. Nor does it assert that this case has a fatal flaw that would prevent the Court from reaching and resolving the question presented.

Conestoga Wood Specialties is the ideal vehicle for reviewing this question. The Third Circuit created a circuit conflict on an essential component of the question presented—whether family owners exercise religion in a business corporation—that *Hobby Lobby* did not. This case frames the question cleanly because the Hahn family members are co-plaintiffs who directly "own 100 percent of the voting shares of Conestoga" without intermediate entities. Pet. App. at 12a. In contrast, *Hobby Lobby* and *Autocam* involve subsequent collateral proceedings absent here.

This Court has never denied families or their business corporations the free exercise rights enjoyed by other corporations and sole proprietors. Nor does this Court's precedent or the Religious Freedom Restoration Act ("RFRA") create two

standards for reviewing free exercise rights: one in business, and another everywhere else.

ARGUMENT

I. This Case is the Ideal Vehicle for Resolving the Question Presented.

This case is the cleanest vehicle for resolving the question presented because the decision below frames all of the threshold issues and circuit conflicts without procedural or factual complications, and the important issue of strict scrutiny was fully argued.

A. *Conestoga's* Simple Facts and Clean Ruling Make It the Best Vehicle.

Conestoga is the best vehicle for reviewing the free exercise issues raised in these cases for three reasons.

1. *Conestoga* Ruled On the Threshold Conflict Over Family Owners' Religious Exercise; *Hobby Lobby* Did Not.

First, the court below actually ruled, and created a conflict with the Ninth Circuit, on the issue of family owners' ability to exercise religion through their corporation (including under RFRA). Pet. App. at 28a–29a; *see also id.* at 25a–27a. But *Hobby Lobby* did not. Instead, the Tenth Circuit held only that "Hobby Lobby and Mardel," the corporations, "have established they are likely to succeed on their RFRA claim." *Hobby Lobby Stores, Inc. v. Sebelius*, 723

F.3d 1114, 1145 (10th Cir. 2013). The government urges this Court to review the family exercise issue, but it admits that "the Tenth Circuit did not formally address the RFRA claims of the individual owners in that case." Resp. at 15. (The majority did not even rule on it "informally.")

The issue of a family's religious exercise in business is essential to resolving these claims because family owners argue both that their corporations exercise religion and that *they* exercise religion *through* those corporations. The Third and Sixth Circuits both agreed that this issue must be resolved. *See* Pet. App. at 26a–29a; *Autocam Corp. v. Sebelius*, No. 12-2673, 2013 WL 5182544, at *5 (6th Cir. Sept. 17, 2013). And the D.C. Circuit just telegraphed this issue's importance by recognizing religious exercise for family owners *but not* for their corporation. *Gilardi v. U.S. Dep't Health & Human Servs.*, No. 13-5069, slip op. at 15–17 (Nov. 1, 2013). In *Conestoga* (but not *Hobby Lobby*) the court created an explicit conflict with the Ninth Circuit, which has long followed the common-sense view that when a family closely holds a business corporation, it can exercise religion therein. *See EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619–20 (9th Cir. 1988).

The government and plaintiffs all agree that a family's religious exercise in business is a threshold issue, presents a circuit conflict, and needs to be resolved. This Court should review a ruling that actually presents that conflict. *Conestoga* does; *Hobby Lobby* does not.

2. The Hahn Family's Direct Ownership Ideally Frames These Issues.

Second, the Hahn family's direct and complete ownership of Conestoga's voting shares cleanly raises the twin issues of family and corporate religious exercise. One reason that *Hobby Lobby* failed to garner a majority holding on the family religious exercise question is apparently due to a factual complication in that case. There, the voting shares of the plaintiff companies are owned, not by the individual family plaintiffs directly, but by a management trust that the family members own, and that trust is not itself named as a co-plaintiff. *See Hobby Lobby*, 723 F.3d at 1122. Citing this fact, the dissent protested that "the majority would apparently have us disregard two organizational structures: first, the corporate structure of Hobby Lobby and Mardel; second, the organizational structure of the trusts that actually own Hobby Lobby and Mardel." *Id.* at 1171 n.7 (Briscoe, C.J., concurring in part and dissenting in part). Concurring opinions would have held that the family owners exercise religion, but they could not garner a majority. *See id.* at 1156 (Gorsuch, Kelly, and Tymkovich, JJ., concurring); *id.* at 1179 (Matheson, J., concurring).

Here, in contrast, Hahn family members directly "own 100 percent of the voting shares of Conestoga." Pet. App. at 12a. This presents a unity between the named plaintiff family owners of Conestoga, and their ownership, direction, and operation of the company. It led the Third Circuit to rule both on the

question of Conestoga's corporate religious exercise, Pet. App. at 14a–23a, and on the Ninth Circuit's doctrine of "pass through" religious exercise and substantial burden ("impos[ition]") upon family owners, *id.* at 23a–27a. Although religious exercise happens in family businesses of various sizes, the facts here show a clear nexus between family beliefs and religious business practices because they reside in a comparatively smaller, home-grown Mennonite company.

Petitioners strongly believe that the plaintiffs in *Hobby Lobby* and *Autocam* should be recognized as exercising religion because families guide their closely owned and operated companies in a variety of structures and settings. Business arrangements such as those used by Hobby Lobby often represent an attempt to preserve religious exercise more faithfully in a business. But this Court needs to review the fundamental issues of whether a company and its family owners exercise religion. *Conestoga Wood Specialties* presents those issues without layers of complexity that might distract from the merits of the case, as seen in the *Hobby Lobby* dissent's citation of structural facts, and the majority's inability to rule at all on the issue of family owners' religious exercise. This Court is best served by reviewing legal issues in a clean factual setting.[1]

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[1] Respondents in *Hobby Lobby* suggest that "self-insured" healthcare plans uniquely empower a company to avoid reliance on "the cooperation of a third-party insurer." Br. for Resp'ts at 21, *Hobby Lobby*, No. 13-354 (U.S. filed Oct. 21, 2013). This distinction is not material. Employers regularly

3. *Hobby Lobby* and *Autocam* Involve Subsequent Appeals and Procedural Irregularities.

Third, this case does not involve collateral procedural complications presented by the other petitions.

In *Hobby Lobby*, the government is pursuing a subsequent appeal of the plaintiffs' injunction request. No. 13-6215 (10th Cir. docketed Sept. 18, 2013) ("*Hobby Lobby II*"). This occurred after the en banc Tenth Circuit divided 4–4 on several equitable factors necessary for preliminary injunctive relief. *See Hobby Lobby*, 723 F.3d at 1159–61 (Bacharach, J., concurring). As a result, the Tenth Circuit did not award plaintiffs an injunction; on remand, the district court considered additional arguments and evidence, found in plaintiffs' favor on the equitable factors, and granted an injunction. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. CIV-12-1000, 2013 WL 3869832, at *1–2 (W.D. Okla. July 19, 2013). The government then filed a second appeal. *Hobby Lobby II*, No. 13-6215 (10th Cir. docketed Sept. 18, 2013).

Although the Tenth Circuit stayed *Hobby Lobby II*, the case remains pending. *Id.* at Doc. 01019132328 (10th Cir. order filed Sept. 26, 2013). It

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make substantive health-coverage decisions, including moral choices, in their externally purchased plans. Here, there is no dispute that Conestoga has historically done so and could continue that practice with appropriately tailored injunctive relief. *See* Pet. App. at 9b–10b; 11g, 20g—23g; *see also Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025, at *3 (8th Cir. Feb. 1, 2013) (specifically protecting the insurance issuer).

would be highly irregular for this Court to grant review of a petition where there exists a pending, subsequent appeal that has a more fully developed district court ruling and record. If this Court granted review or relief in *Hobby Lobby*, it could possibly be mooted by *Hobby Lobby II*.

Autocam likewise involves procedural impediments. As the government points out, the district court in *Autocam* subsequently entered final judgment. Br. in Opp. at 13–14, *Autocam Corp. v. Sebelius*, No. 13-482 (U.S. filed Oct. 21, 2013) (citing Dkt. Nos. 65 & 66, *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096 (W.D. Mich. Sept. 30, 2013)). The original district court ruling in *Autocam* also held against the plaintiffs on the other equitable factors for relief besides their likelihood of success on the merits. No. 1:12-CV-1096, 2012 WL 6845677, at *12 (W.D. Mich. Dec. 24, 2012).

Conestoga Wood Specialties involves no subsequent rulings or appeals, and no alternative rulings on equitable factors. Moreover, unlike *Autocam*, the present case was fully considered by the Third Circuit. In *Autocam*, the plaintiffs did not petition the en banc Sixth Circuit to review the 3–0 panel opinion or to offer dissenting views. Here, Judge Jordan wrote an extensive dissent from the panel opinion and en banc review was denied over the dissent of five circuit judges. Pet. App. at 30a–93a; 2c.

This Court should grant review in this case, while holding *Hobby Lobby* and, if the Court desires, *Autocam*. Petitioners agree with the government,

however, that if this Court grants review in *Hobby Lobby* (or *Autocam*) and not here simultaneously, it should hold this petition.

B. Strict Scrutiny Was Fully Argued Below and Extensively Considered in Dissent.

The government contends that *Conestoga* is a less appropriate vehicle for review because the decision below did not apply strict scrutiny to the Mandate. Resp. at 14–15. But if such an omission is significant, it more sharply cuts against the *Hobby Lobby* petition.

In these cases, strict scrutiny can be analyzed only after the Court decides the threshold issues of corporations' and family owners' free exercise rights under RFRA or the First Amendment. The court below created a circuit conflict on both issues, but *Hobby Lobby* did not, based in part on complex ownership facts. Yet the government asks the Court to grant review in *Hobby Lobby* simply because it went on to review the important but derivative issue of strict scrutiny. The Court should grant review not only in a case where the issues were argued sufficiently for the Court to reach the entire question, but also where the threshold conflicts are directly presented. This is true in *Conestoga Wood Specialties*, but not in *Hobby Lobby*.

Recognizing this deficiency, the government argues that the family religious exercise issue can be reviewed in *Hobby Lobby* because it was fully argued and analyzed in non-majority opinions. Resp. at 15–16. But the same is true here of the strict scrutiny

question. *See* Pet. App. at 80a–87a; Appellants' Br. at *44–52, *Conestoga Wood Specialties Corp. v Sebelius*, No. 13-1144, 2013 WL 1193682 (3d Cir. filed Mar. 15, 2013). The key difference is that this case puts the threshold issues and circuit conflicts squarely before the Court without needing a workaround and without factual or procedural complications. The Court can then use the "pressed-or-passed-upon" rule to review the fully argued issue of strict scrutiny. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (holding that the pressed-or-passed-upon rule "operates (as it is phrased) in the disjunctive"); *accord Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002). The government concedes, albeit grudgingly, that "the Court could choose to grant both petitions and consolidate" *Conestoga* and *Hobby Lobby*. Resp. at 16. Therefore, no fundamental obstacle prevents review of this case.

While this Court gives due weight to issues the government deems worthy of review, the government is not entitled to select vehicles that allow it to argue peripheral factual complications on central merits issues. Nor should the government's vehicle choice be favored simply to give it an extra (and final) brief in reply as the petitioner. Conestoga's direct family control and straightforward procedural history make this case an ideal vehicle.

II. This Court Has Never Denied Free Exercise Rights to Families and Their Business Activities.

As explained in the Petition, this Court should grant review to clarify that families can exercise

religion in business and are not denied that right simply because they operate through a corporation. Pet. at 20–25. *United States v. Lee* explicitly held that religious exercise occurred in that business and that a government command against the exercise caused a cognizable burden. 455 U.S. 252, 257 (1982). It is true that *Lee* went on to justify a particular command associated with "commercial activity." *Id.* at 261. But it did so only after engaging in strict scrutiny analysis. Applying strict scrutiny to the Mandate yields a vastly different result.

Lee said its rule was "binding on others in that activity," *id.*, and gave "benefits available to all participants," *id.* at 258. But the ACA exempts tens of millions of women at companies indistinguishable from Conestoga from the Mandate merely because their plans are "grandfathered." *See* Pet. at 31 (discussing underinclusiveness). The government calls the ACA's grandfathering exception "transitional." Resp. at 18. But as a matter of law, grandfathering status is a "right" that can be maintained perpetually[2]; and, as a matter of fact, the government's data projects tens of millions of women continuing in grandfathered plans.[3]

Lee called its requirement "uniformly applicable to all, except as Congress provides explicitly." 455 U.S. at 261. But in the ACA, Congress did not require birth control to be included in the Mandate.[4] It simply allowed Respondents to formulate the Mandate and grant whatever religious exemptions

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[2] *See, e.g.*, 75 Fed. Reg. 34,538, 34,540 (June 17, 2010).

[3] *See id.* at 34,552–55.

[4] *See* 42 U.S.C. § 300gg-13(a)(4).

they desire.[5] Respondents have used that unfettered discretion to refuse to exempt families in business, while creating complex, non-profit corporate exemptions[6] that are far broader than the "narrow" exemption in *Lee*. 455 U.S. at 261.

Lee said religious objectors are "indispensable" to serving the government's interests. *Id.* at 258. But no evidence shows that the government's interest of reducing unintended pregnancy requires religious objectors' participation. The government's only source of evidence admits that contraception merely correlates with, rather than causes, health benefits to an unspecified extent.[7] The Mandate is inherently a "trickle down" mechanism, far upstream from its alleged benefits. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738–39 (2011) (requiring "compelling" evidence "of causation" not "correlation," and proof that the means chosen is "actually necessary").

The government also contends that Title VII of the Civil Rights Act of 1964 precludes recognizing religious exercise by a business. Exactly the opposite is true. Title VII does not amend the Free Exercise

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[5] *See* 76 Fed. Reg 46,621, 46,623 (Aug. 3, 2011) (declaring that agencies' "comprehensive" authorization to develop the Mandate includes creating religious exemptions).

[6] *See* 45 C.F.R. § 147.131.

[7] *See* Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* at 103 (2011) (citing Inst. of Med., *The Best Intentions* (1995) (declaring it unclear whether results are "caused by or merely associated with" contraception), and Jessica D. Gipson et al., *The Effects of Unintended Pregnancy*, 39 STUD. FAM. PLAN. 18, 29 (2008) (stating that "causality is difficult if not impossible to show")).

Clause. And while Title VII exempts only "religious corporation[s]," 42 U.S.C. § 2000e-1(a), RFRA instead protects "any" religious exercise, 42 U.S.C. § 2000cc-5(7)(A). "Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988). Moreover, for-profit companies can be "religious corporations" under Title VII. *See, e.g., LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226–27 (3d Cir. 2007) (considering for-profit status to be only one factor among many). This Court has overwhelmingly rejected other recent interpretations of Title VII that would engulf the free exercise of religion. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

Finally, the government suggests that there is no circuit conflict on Petitioners' claim under the Free Exercise Clause. Resp. at 16–17. But the Ninth Circuit explicitly held that family owners of business corporations may assert Free Exercise Clause rights, *see Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009), while the Third Circuit explicitly rejected such rights here, Pet. App. at 23a–29a. Moreover, the Third and Tenth Circuits explicitly ruled on the rights of corporations under both RFRA and the First Amendment. *Id.* at 14a–23a, 27a–28a; *Hobby Lobby*, 723 F.3d at 1133–37. Accordingly, there are circuit conflicts involving the Free Exercise Clause, but unlike *Hobby Lobby*, this case presents both of them.

Petitioners' Free Exercise Clause claim also forms an independent ground for relief, despite the government's contrary suggestion. Resp. at 17. The Mandate is not neutral or generally applicable. Pet. at 31–32. Consequently, and unlike under RFRA, the Mandate is subject to strict scrutiny regardless of whether the burden it imposes is "substantial." *See Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) ("If a law burdening religiously motivated conduct is not neutral and generally applicable it must satisfy strict scrutiny.").

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, this Court should grant review.

Respectfully submitted,

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