No. 13-482

In the Supreme Court of the United States

AUTOCAM CORPORATION, et al.,
Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,
Respondents.

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

AMICI BRIEF OF AMERICAN CENTER FOR LAW AND JUSTICE AND TWENTY-ONE FAMILY BUSINESS OWNERS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI*[1]

Amicus, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or for *amici*, *e.g.*, *FCC v. Fox TV*, 132 S. Ct. 2307 (2012); *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007).

The ACLJ has been active in litigation concerning the Affordable Care Act ("ACA"), the statute on which Respondents rely to promulgate the regulatory mandate, at issue here, to require employers to cover contraceptive services, including abortion-inducing drugs, sterilization and related patient education and counseling services in their health insurance plans ("the Mandate"). The ACLJ filed several *amicus curiae* briefs in support of various challenges to provisions of the ACA, for example, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), and represented the plaintiffs in their challenge to provisions of the ACA in *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *superseded on other grounds by* 132 S. Ct. 2566 (2012).

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[1] Counsel of record for the parties received timely notice of the intent to file this brief pursuant to S. Ct. R. 37.2(a). The parties have consented to *Amici* filing this brief. Copies of the parties' written consent are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

In addition, the ACLJ has been active in litigation concerning the Mandate. It currently represents thirty-two individuals and corporations in seven pending actions against the government and has obtained preliminary injunctive relief for its clients in all seven cases.[2] The ACLJ has thereby developed special expertise in this area which would be of benefit to the Court.

Amici, Frank O'Brien, Cyril and Jane Korte, Paul and Henry Griesedieck, Francis and Phillip Gilardi, Catherine and Milton Hartenbower, William Lindsay, the Bick Family,[3] and Robert and Jacquelyn Gallagher, are owners of family businesses with religious objections to paying for and providing contraceptive services pursuant to the federal regulation mandating that their companies do so. The majority of these individuals and the closely-held corporations they own and control have filed suit against Respondents claiming, *inter alia*, that the Mandate violates their

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[2] *See O'Brien v. U.S. HHS*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Am. Pulverizer Co. v. U.S. HHS*, 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012); *Korte v. Sebelius*, No. 12-3841, 2012 U.S. App. LEXIS 26734 (7th Cir. Dec. 28, 2012); *Lindsay v. U.S. HHS*, No. 1:13-cv-01210, ECF Docs. 20-21 (N.D. Ill. Mar. 20, 2013); *Gilardi v. U.S. HHS*, No. 13-5069, 2013 U.S. App. LEXIS 15806 (D.C. Cir. Mar. 29, 2013); *Bick Holdings, Inc. v. U.S. HHS*, No. 4:13-cv-462-AGF, ECF Doc. 19 (E.D. Mo. Apr. 1, 2013); *Hartenbower v. U.S. HHS*, No. 1:13-cv-2253, ECF Doc. 16 (N.D. Ill. Apr. 18, 2013).

[3] The Bick Family includes Mary Frances Callahan, Mary Clare Bick, James Patrick Bick, Jr., William Joseph Bick, Mary Patricia Davies, Joseph John Bick, Francis Xavier Bick, Mary Margaret Jonz, and Mary Sarah Alexander.

rights under the Religious Freedom Restoration Act ("RFRA"). All *Amici* who have filed suit have been awarded preliminary injunctive relief from having to comply with the Mandate.[4] The future ability of these *Amici* to manage their businesses pursuant to their religious beliefs is directly at stake in this case.

INTRODUCTION

Amici business owners wish to run their businesses in a manner consistent with their religious beliefs. This is not a novel concept. Most, if not all, religious traditions teach that every dimension of one's life, whether personal or public, in the home or in the workplace, should be lived in a manner consistent with one's religious beliefs. For such people of faith, religion is not a matter of mere taste, preference, or inclination that can be set aside or ignored when materially advantageous to do so. It is a fundamental and guiding principle that shapes how they think, act, and live their lives in the world.

This is no less true when it comes to business, whether working for a company or owning and controlling one. With respect to Catholics, including many of the individual *Amici*, for example, the Pontifical Council for Justice and Peace has stated, "Dividing the demands of one's faith from one's work in business is a fundamental error which contributes to much of the damage done by businesses in our world today. . . . The divided life is not unified or integrated;

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[4] *See* n.2, *supra*.

it is fundamentally disordered, and thus fails to live up to God's call."[5]

Until the promulgation of the Mandate at issue here, no federal law or regulation ever compelled *Amici* to run their businesses in violation of their religious beliefs or the religious-based principles of their corporations. *Amici* were free to practice their respective trades, such as manufacturing industrial materials, practicing law, and publishing Bibles, in a manner consistent with their religious beliefs. Now, however, as a direct result of the Mandate, Petitioners and *Amici* face a stark choice: abandon their beliefs in order to stay in business, or abandon their businesses in order to stay true to their beliefs. That is a choice that the federal government, bound by RFRA, "the most important congressional action with respect to religion since the First Congress proposed the First Amendment,"[6] may not lawfully impose upon them.

The Sixth Circuit's decision below upholds a government-imposed Hobson's choice between fidelity to religion and conducting business. According to the Sixth Circuit, RFRA does not stand in the way of this governmental override of religious conscience. Worse still, the court below held that neither a corporation nor its owners and controllers can pursue such a claim at all. Though the Third Circuit has also rejected RFRA

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[5] *Vocation of the Business Leader: A Reflection* at ¶ 10 (Nov. 2012), http://www.stthomas.edu/cathstudies/cst/Vocation BusinessLead/VocationTurksonRemar/VocationBk3rdEdition.pdf (last visited Oct. 29, 2013).

[6] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 243 (1994).

claims brought by corporations and their owners against the Mandate, *Conestoga Wood Specialties Corp. v. Sec'y of United States HHS*, 724 F.3d 377 (3d Cir. 2013), the Sixth Circuit's decision conflicts with an en banc decision of the Tenth Circuit and decisions by motions panels of the Seventh, Eighth, and D.C. Circuits. *See Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc); *Korte*; *O'Brien*; *Gilardi* (*supra*, n.2); *Annex Med. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013). It also conflicts with established principles articulated by this Court.

The Court should grant certiorari in this case.

ARGUMENT

The Sixth Circuit's decision in *Autocam Corp. v. Sebelius*, No. 12-2673, 2013 U.S. App. LEXIS 19152 (6th Cir. Sept. 17, 2013),[7] has announced a principle of First Amendment jurisprudence hitherto unknown: "Heads: the government wins. Tails: the religious claimant loses."

The Sixth Circuit arrived at this technical "win-win" for the government in two steps. First, because the decision to comply with the Mandate belongs to the corporation, according to the Sixth Circuit, and not to those who own and control it, the owners and controllers suffer no harm under the Mandate and thus have no viable RFRA claim against it. Second, because a for-profit corporation is not a person capable of

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[7] All citations to the Sixth Circuit's *Autocam* decision will be made to Petitioners' Appendix ("Pet. App.").

exercising religion under RFRA, the corporation cannot challenge the Mandate either.

Thus, according to the Sixth Circuit, neither a for-profit corporation nor the owners of that corporation may *ever* challenge a law under RFRA that burdens the religious exercise of the corporation or its owners when the corporation is the object of the regulation. The owners could not bring the claim because they are legally distinct from the corporation, and thus are not harmed by the regulation, and the corporation itself could not bring the claim because a corporation is not a person that can exercise religion.

The practical result of such a holding is nothing short of extraordinary: a shop owned by Seventh Day Adventists that does not open on Saturday for religious reasons would have to comply with a law requiring businesses to remain open seven days a week. A deli run by a Jewish family that does not sell pork for religious reasons would have to comply with a regulation that requires businesses to sell pork. A medical practice operated by Catholics who do not perform abortions for religious reasons would be forced to do so by a law requiring all OB/GYN medical practices to offer abortion services. No court would be able to reach the merits of any religious freedom claim brought by these or similar parties.

This Court should not tolerate the Sixth Circuit's sacrifice of religious freedom to a narrow devotion to hyper-technical formalism.

I. This Court should grant review to resolve whether a for-profit corporation's owners and controllers have a right under RFRA to challenge a law that compels the owners and controllers to manage the corporation in a manner contrary to their religious beliefs.

The Sixth Circuit, per its application of the shareholder-standing rule, has rejected the idea that owners and controllers of a closely-held, family-owned, for-profit corporation have any rights under RFRA in how they manage and operate that corporation when a law requires the corporation to act. With respect to the Mandate at issue here, the court held that because the responsibility of complying with the Mandate technically belongs to the family-owned corporation, Autocam, and not the family members who own and control the corporation, the Kennedys, the family suffers no harm and thus has no viable RFRA claim against the Mandate. As the court put it, because the "[t]he decision to comply with the mandate falls on Autocam, not the Kennedys . . . the Kennedys cannot bring claims in their individual capacities under RFRA. . . ." Pet. App. at 14.

This line of reasoning echoes the Third Circuit's statement in *Conestoga*, where that court similarly opined: ". . . the Mandate does not actually require *the Hahns* to do anything. All responsibility for complying with the Mandate falls on *Conestoga*." 724 F.3d at 388 (emphasis in original).

Although it is true that a corporation is legally distinct from its owners and controllers, the Sixth and Third Circuits failed to appreciate that a corporation cannot decide to comply with a regulation, or take any

steps toward compliance, unless its owners and controllers choose to have it comply. *See Robinson v. Cheney*, 876 F.2d 152, 159 (D.C. Cir. 1989) ("[A] corporation cannot act except through the human beings who may act for it."). Corporations like Autocam and the corporations owned by *Amici* are not self-willing, self-thinking automatons that can operate independently, untethered from human agency; they cannot define themselves or their mission, or establish or implement policies, in the absence of those who control the corporations.

Normally, of course, there is no need to state the obvious reality that "a corporation acts only through its directors, officers, and agents." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 165 (2001). Owners and managers of corporations routinely ensure that their corporations comply with any number of local, state, and federal regulations. But where, as here, the owners and controllers must violate their own religious beliefs in the course of ensuring that their corporation complies with a regulation, it is baseless to suggest, as do the Third and Sixth Circuits, that they are not harmed in the exercise of their religion. This point was not lost on the Seventh Circuit, which correctly understood that compliance with the Mandate would require the owners "to violate *their religious beliefs* to operate the company in compliance with it." *Korte,* 2012 U.S. App. LEXIS 26734, *9 (emphasis added).

The Sixth Circuit held that the harm to the Kennedys is purely derivative of the alleged harm to the corporation, as though the Kennedys are mere shareholders with only a monetary interest in its

financial success. Pet. App. at 12-13. This is not true. Although the failure to comply with the Mandate would have financially ruinous results for the Kennedys (and *Amici*), the harm that they assert is not merely financial. Rather, *the coercion to violate their own consciences* is what makes the Mandate antithetical to RFRA. In other words, the specter of financial ruin is a source of substantial pressure placed upon the Kennedys (and *Amici*) personally to take actions that are prohibited by their faith, much like the threatened loss of unemployment benefits imposed a substantial burden upon religious exercise in *Sherbert v. Verner*, 374 U.S. 398 (1963).

Religious owners and controllers of closely-held corporations, like the Kennedys and *Amici*, sincerely believe that they are religiously and morally responsible for how they manage the assets and resources of their businesses. In addition to the *legal* obligations imposed upon all owners and controllers by corporate law, these individuals are subject to *religious and moral* obligations as they own and manage their companies. For these individuals, the intricacies of corporate law do not absolve them of the moral culpability that they would bear by managing their corporations to comply with the Mandate against their religious beliefs. Thus, the manner in which the Sixth Circuit characterizes the harm faced by the Kennedys—that "the value of their closely held company will be significantly diminished"—is woefully incomplete. Pet. App. at 12.

The court's statement that "[t]he Kennedys' actions with respect to Autocam are not actions taken in an individual capacity, but as officers and directors of the

corporation," *id*., does not address the harm suffered by the Kennedys in having to manage their business contrary to their religious beliefs. The Kennedys, like *Amici*, strive to act consistently with their religious beliefs not only in their "individual capacities," but in *all* dimensions of their lives, including as officers and directors of the corporation. As the Fourth Circuit noted in a different context, "Free religious exercise would mean little if restricted to places of worship or days of observance, only to disappear the next morning at work." *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 319 (4th Cir. 2008). The Kennedys do not ask this Court to "ignore the choice [they] made to create a separate legal entity to operate their business," Pet. App. at 13-14, but rather to recognize that they are persons whose religious exercise has been substantially burdened under RFRA because the Mandate requires them to take actions that conflict with their faith.

In buttressing the seemingly impenetrable wall it erects between a corporation and its owners and controllers, the Sixth Circuit noted that "[t]he corporate form offers several advantages 'not the least of which was limitation of liability,' but in return, the shareholder must give up some prerogatives. . . ." Pet. App. at 13 (citations omitted). But this Court has never held that one such prerogative is the ability to manage one's corporation consistent with one's religious beliefs. In fact, as this Court reiterated last term, in the context of unconstitutional conditions, "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (quoting *Regan v. Taxation With Representation of Wash*., 461 U.S. 540, 545 (1983)); *see also Frost & Frost Trucking*

Co. v. Railroad Comm'n of Cal., 271 U.S. 583, 592–593 (1926) (invalidating regulation that required the petitioner to give up a constitutional right "as a condition precedent to the enjoyment of a privilege"); *Southern Pacific Co. v. Denton*, 146 U.S. 202, 207 (1892) (invalidating statute "requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution").

As Judge Hartz observed in *Hobby Lobby*, "What does limiting financial risk have to do with choosing to live a religious life? Although a corporation takes on a legal identity distinct from the sole shareholder, First Amendment jurisprudence is based on the substance of the constitutional protections, not matters of form." *Hobby Lobby*, 723 F.3d at 1148 (Hartz, J., concurring). In other words, a legal separation between a company and its owners and controllers for purposes of liability, for example, does not necessitate a legal separation for purposes of managing that company with moral and religious values.

The court's failure to see the distinct harm faced by the Kennedys is seen most palpably in the fact it ignores this Court's decisions recognizing that a substantial burden upon religious exercise is present when the government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981). Requiring owners and controllers of a corporation to manage their business in a manner contrary to their religious beliefs, as the Mandate does here, cannot be described as anything but substantial pressure by the government. The Mandate forces

business owners like *Amici* and the Kennedys to choose between following the precepts of their religion and incurring huge penalties on the one hand, and abandoning one of the precepts of their religion on the other hand. *See Sherbert*, 374 U.S. at 404. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against *Amici* and the Kennedys for objecting to personally participating in, or facilitating, abortion or contraception. *Id*.

Even if one were to characterize the burden on the owners and controllers as "indirect," because the Mandate is technically imposed on the corporation, not its managers, that is of no moment. Under the substantial burden test enunciated by this Court, courts are to examine the substantiality of "the coercive impact" on the claimants' religious exercise, *Thomas*, 450 U.S. at 717, *not* how direct or indirect that coercive impact is. *Id*. at 718 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial").

The Sixth Circuit's decision, holding that family members who own and control a closely-held corporation suffer no cognizable, redressable harm when a law requires them to manage their corporation in violation of their religious beliefs, is wrong. Left undisturbed, it will leave employers like *Amici* with no other choice but to (1) comply and violate their religious beliefs, (2) not comply and require their businesses to pay substantial fines, or (3) give up entirely and go out of business.

This Court should grant review to correct this insupportable result.

II. This Court should grant review to resolve whether a for-profit corporation is a person that can exercise religion under RFRA.

Having rejected the idea that the Mandate imposes a harm on owners and controllers of closely-held corporations distinct from the harm suffered by the corporation, the court turned to evaluate the rights of the corporation itself. Instead, however, of evaluating the merits of Autocam's RFRA claim, *i.e.*, whether the Mandate's substantial burden on the corporation satisfies strict scrutiny, the court held that Autocam, as a for-profit corporation, could not exercise religion for purposes of RFRA.

The general rule under RFRA is that the "[g]overnment shall not substantially burden a *person's exercise of religion*." 42 U.S.C. § 2000bb-1(a) (emphasis supplied). Though it is "unquestionable" that "corporations are in law, for civil purposes, deemed persons," *United States v. Amedy*, 24 U.S. 392, 11 Wheat. 392 (1826), 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), and that RFRA broadly defines "religious exercise" to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief," 42 U.S.C. § 2000bb-2(4), *as amended by* 42 U.S.C. § 2000cc-5(7)(A), the Sixth Circuit concluded that for-profit corporations are not "persons" entitled to RFRA's protections. It has thus rewritten RFRA to now mean that the government "shall not substantially burden a person's exercise of religion, *unless that person is a for-profit corporation*."

The basis for the court's holding is that, according to the court, "Congress did not intend to include corporations primarily organized for secular, profit-seeking purposes as 'persons' under RFRA." Pet. App. at 19. As evidence of Congress' intention, the court points to decisions of this Court and RFRA's legislative history. Pet. App. at 20-22. However, in mustering evidence to support this assertion, the court does not point to *one* decision of this Court rejecting the free exercise claim of a corporation based on its for-profit status, nor does it point to *one* piece of RFRA's legislative history explicitly excluding for-profit corporations from the definition of "person." All the court can point to is *silence*: that this Court "has never recognized [free exercise] rights on behalf of corporations pursuing secular ends for profit," and that RFRA's "legislative history makes no mention of for-profit corporations." Pet. App. at 20, 22. In the absence of *any* evidence that this Court or Congress has affirmatively rejected the idea that a for-profit corporation is a person capable of exercising religion, the Dictionary Act's presumptive definition of "person" must hold: "unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

The Sixth Circuit's observation that religious liberty belongs to "the individual" makes no relevant point. *See* Pet. App. at 20 ("Moreover, the Supreme Court has observed that the purpose of the Free Exercise Clause 'is to secure religious liberty *in the individual* by prohibiting any invasions thereof by civil authority.'" (quoting *Sch. Dist. of Abington Twp., Pa. v. Schempp*,

374 U.S. 203, 223 (1963) (emphasis by court below))). This Court has time and again recognized the right of religious exercise as practiced in the *corporate*, *i.e.*, not purely personal or individual, form. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525–26 (1993); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.29 (1983); *see also O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973, 973 (10th Cir. 2004) (a "New Mexico corporation"), *aff'd by Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010) (an "ecclesiastical corporation"), *rev'd by Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (this Court "has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion").

Though the Sixth Circuit stated that it "does not question those decisions," Pet. App. at 20, it failed to appreciate the significance of those decisions, *i.e.*, that the right to religious exercise can be practiced in the corporate form and is thus not a "purely personal" one like the privilege against compulsory self-incrimination or a right to privacy equivalent to that enjoyed by individuals. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (citing *Wilson v. United States*, 221 U.S. 361, 382-86 (1911), and *California Bankers Assn. v. Shultz*, 416 U.S. 21, 65-67 (1974)).

Contrary to the decisions of the Sixth and Third Circuits, inserting into the analysis whether a corporation makes a profit does not alter whether that same corporation can exercise religion. First, the text of RFRA makes no such distinction. Second, this Court has already recognized that engaging in commercial activity or earning a living and exercising religion are not incompatible. *See Braunfeld v. Brown*, 366 U.S. 599 (1961); *United States v. Lee*, 455 U.S. 252 (1982); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Bd.*, 450 U.S. 707 (1981). Third, none of the cases cited previously that recognize the right to exercise religion in the corporate form required that the corporation be non-profit, just as the decisions in *Lee* and *Braunfeld* did not require Lee and Braunfeld to be unincorporated to bring their free exercise claims. *See Hobby Lobby* 723 F.3d at 1135 ("[W]hen the Supreme Court squarely addressed for-profit individuals' Free Exercise rights in *Lee* and *Braunfeld*, its analysis did not turn on the individuals' unincorporated status."). Fourth, this Court has conclusively resolved that whether a corporation is for-profit or non-profit makes no difference when it comes to the exercise of free speech. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) ("No sufficient governmental interest justifies limits on the political speech of *nonprofit or for-profit* corporations.") (emphasis supplied).

In sum, reliance upon the peculiarities of corporate law makes no sense. Some hospitals, for example, are organized as non-profits; others are for-profit. Why should that structural choice be determinative of a hospital's fundamental right to adhere to religious principles? *Cf. Girl Scouts of Manitou Council v. Girl*

Scouts of the United States of America, 646 F.3d 983, 987 (7th Cir. 2011) ("No gulf separates the profit from the nonprofit sectors of the American economy"); *Camps Newfound / Owatonna v. Town of Harrison*, 520 U.S. 564, 586 (1997) ("For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is . . . wholly illusory").

If, like free speech, religion can be exercised individually or corporately, there is no principled reason not to protect free exercise when practiced through the corporate form, regardless of whether that corporation makes a profit. When this Court observed that "First Amendment protection extends to corporations," it did not carve out an exception for the free exercise rights of for-profit corporations. 130 S. Ct. at 899. And unless this Court is willing to allow lower courts to treat the free exercise of religion as secondary to free speech (something this Court has never held), then what this Court teaches with respect to the speech of corporations, for-profit or not, should extend to free exercise as well. *See Bellotti*, 435 U.S. at 796 ("The proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the law at issue] abridges expression that the First Amendment was meant to protect."); *id.* at 802 ("[T]he First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms.") (Burger, C.J., concurring).

As Judge Noonan observed with respect to corporations and free exercise, decades before the Sixth Circuit considered the matter:

> Just as a corporation enjoys the right of free speech guaranteed by the First Amendment, so a corporation enjoys the right guaranteed by the First Amendment to exercise religion. The First Amendment does not say that only one kind of corporation enjoys this right. The First Amendment does not say that only religious corporations or only not-for-profit corporations are protected. The First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion. All persons—and under our Constitution all corporations are persons —are free.

EEOC v. Townley Engineering & Mfg. Co., 859 F.2d 610, 623 (9th Cir. 1988) (Noonan, J., dissenting).

The Sixth Circuit's befuddlement at how a for-profit corporation can exercise religion is unfounded. *See* Pet. App. at 20 ("[W]e simply cannot understand how a for-profit, secular corporation—apart from its owners—can exercise religion") (quoting *Conestoga*, 724 F.3d at 385). Religious exercise is not limited to engaging in quintessential religious acts such as prayer, worship, and sacramental practice; it also includes activities that are motivated by or proceed from religious belief as well as refraining from engaging in prohibited acts—like a Jewish company that produces only kosher foods; like companies that do not open on Sundays and holy days for religious reasons; like companies such as Interstate Batteries whose mission is "[t]o glorify God

as we supply our customers worldwide with top quality, value-priced batteries, related electrical power-source products, and distribution services."[8] A corporation that has a *free speech* right to display a sign stating "Respect the Sabbath," should have a *free exercise* right to fulfill this religious admonition by closing on the Sabbath.

According to the rationale of the Sixth Circuit, limiting corporate free exercise rights to non-profits only, the company that *Amicus* Frank O'Brien operates and manages, O'Brien Industrial Holdings, could not engage in religious exercise, even though its explicit mission is "to make our labor a pleasing offering to the Lord while enriching our families and society."[9] *Amici* Robert and Jacquelyn Gallagher's company, Good Will Publishers, could not engage in religious exercise, even though it publishes Bibles and works of Catholic spirituality and instruction through its St. Benedict Press.[10] Moreover, each of the various businesses owned by *Amici* could not engage in religious exercise even though their companies have a religious-based objection to paying for and providing contraceptive

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[8] http://corporate.interstatebatteries.com/mission/. For other examples, *see* "17 Big Companies That Are Intensely Religious," Business Insider (Jan. 19, 2012), http://www.businessinsider.com/17-big-companies-that-are-intensely-religious-2012-1?op=1.

[9] http://www.christyco.com/mission_and_values.html.

[10] http://www.goodwillpublishers.com/catholicmarketing.html.

services in a group health plan.[11] Though it is not the *sole* purpose of any of *Amici's* corporations to exercise religion—their primary purpose is to practice their trade—no constitutional principle requires that one can only exercise a right if one's *sole* purpose or mission is to exercise that right. As this Court held in *Bellotti*, "if a legislature may direct business corporations to 'stick to business,' it also may limit other corporations—religious, charitable, or civic—to their respective 'business' when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment." 435 U.S. at 785.

The Sixth Circuit's decision, in addition to the Third Circuit's *Conestoga* decision, directly conflicts with the Tenth Circuit's en banc decision in *Hobby Lobby*. There, the Tenth Circuit correctly recognized that free exercise is *not* a "'purely personal' guarantee[] . . . unavailable to corporations and other organizations because the 'historic function' of the particular [constitutional] guarantee has been limited to the protection of individuals." *Hobby Lobby*, 723 F.3d at 1133-34 (quoting *Bellotti*, 435 U.S. at 778 n.14). Applying the "First Amendment logic of *Citizens United*," it observed that there is no principled basis to "recognize constitutional protection for a corporation's political expression but not its religious expression." *Id.* at 1135. Unlike the Sixth and Third Circuits, which

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[11] A corporation may have a religious-based principle just as it may have any number of other principles, like being environmentally friendly, ethnically diverse, respecting of workers' rights overseas, or acting charitably by giving to or creating charitable foundations.

hinged their corporate free exercise holdings on whether a corporation is for-profit or not, the Tenth Circuit was "troubled" by the notion that free exercise rights should turn on the definition of "non-profit":

> What if Congress eliminates the for-profit/non-profit distinction in tax law? Do for-profit corporations then *gain* Free Exercise rights? Or do non-profits *lose* Free Exercise rights? Or what if Congress, believing that large organizations are less likely to have a true non-profit motive, declares that non-profit entities may not have more than 1,000 employees? Would a church with more than 1,000 employees lose its Free Exercise rights? Or consider a church that, for whatever reason, loses its 501(c)(3) status. Does it thereby lose Free Exercise rights?

Id. (emphasis in original).

The conflict between the Sixth and Tenth Circuits on whether a for-profit corporation can exercise religion is not an academic or abstract dispute. It is a conflict with direct implications and consequences for family businesses like those owned and operated by *Amici*. And it is not just a conflict regarding the Mandate promulgated by Respondents at issue here. According to the Sixth Circuit, those corporations could *never* challenge *any* rule, regulation, or law on RFRA or free exercise grounds no matter how great or onerous the burden on the religious principles or activities of the business. Though a corporation may be free to *speak* all it wants to on issues of religious concern, any decision to *act* on those concerns is wholly unprotected.

Allowing a corporation to engage in free speech, but not free exercise, belittles the first liberty protected by the Bill of Rights. No constitutional principle or legal precedent permits this result, and this Court cannot allow it.

CONCLUSION

Amici respectfully ask this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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