No. 13-482

In the Supreme Court of the United States

AUTOCAM CORPORATION, ET AL, PETITIONERS

v.

KATHLEEN SEBELIUS, ET AL.

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

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND OHIO FOR PETITIONERS

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QUESTIONS PRESENTED

I. Whether petitioners have standing to advance the claim that the HHS Mandate violates the Religious Freedom Restoration Act ("RFRA") by forcing individual business owners who are governing their corporation to violate their religious beliefs upon pain of ruinous consequences.

II. Whether the HHS Mandate imposes a substantial burden on petitioners' exercise of religion within the meaning of RFRA by coercing them when conducting business to violate their religious convictions upon pain of ruinous consequences.

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INTEREST OF *AMICI CURIAE*

The protection of religious liberty is one of the central features of American democracy. It is foundational for freedom. All of the state constitutions contain provisions safeguarding the religious exercise of its citizens. The states of Michigan and Ohio seek to foster a robust business climate in which diverse employers can succeed to the benefit of all while religious liberty is maintained. Such freedom is essential to both liberty and prosperity.

The claim here was filed by a Michigan business, Autocam Corporation, owned and controlled by the Kennedys, and they claim that the HHS Mandate violates their religious liberty under the Religious Freedom Restoration Act by requiring them to provide certain products in their insurance plans over their religious objections. Autocam is run consistent with the Catholic beliefs of the Kennedys, but the issue is relevant for all Americans. The principle of religious freedom is one of the hallmarks of America's political order, and the States have a strong interest in encouraging prosperity under the rule of law and in maintaining the integrity of their corporations law.

In the view of the *amici curiae* states, a family-controlled business formed consistent with religious principles as a for-profit corporation may raise claims under RFRA. Also, the HHS Mandate is a substantial burden on these plaintiffs under RFRA.[1]

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

INTRODUCTION

The threshold question here is whether a for-profit, secular business is a "person" that may exercise religion and enjoy the protections of RFRA. That issue raises further questions that are basic to American democracy and that require this Court to return to first principles.

But the answer is a simple one: Americans may form a corporation for profit while still adhering to religious principles, operating their business consistent with them. This is true whether it is the Kennedys as Catholics operating an auto-parts and medical services business as guided by religious principles, a Jewish-owned deli that does not sell non-Kosher foods, or a Muslim-owned financial brokerage that will not lend money for interest. The idea is as American as apple pie. And RFRA guarantees that federal regulation may not unfairly burden the free exercise of such businesses.

Any contrary conclusion creates an untenable divide between for-profit and non-profit corporations. Nothing in RFRA limits its application to administratively certified religious entities.

The argument put forward by the United States and adopted below distinguishes between for-profit, secular corporations and non-profit, religious corporations. Such a divide does not exist in RFRA, or in this Court's jurisprudence, and it has no basis in Michigan's law of corporations. The Kennedys seek to operate their business according to religious principles. RFRA protects this reality, requiring strict scrutiny of the HHS Mandate as applied here.

The Mandate imposes a substantial burden on Plaintiffs. Autocam seeks to adhere to the Kennedys' Catholic faith regarding the inviolability of human life. No one doubts their sincerity or the importance of this belief to them. Courts should not become enmeshed in evaluating the interpretive merits or proper doctrinal weight of religious principles. And the United States lacks a compelling interest justifying this burden on the Kennedy family business. The Affordable Care Act includes several sweeping exceptions. The claim that no exception to the Mandate can be afforded to those with a sincere religious objection is belied by the fact that tens of millions of plan participants are already excluded.

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

The States of Michigan and Ohio already have detailed the legal underpinnings of their support for businesses like Autocam in their brief in support of Conestoga, Case No. 13-356, supported by 16 other states, and these arguments apply equally to Hobby Lobby, which has asked this Court to grant the United States' petition in Case No. 13-354. Michigan and Ohio will not reiterate all these arguments here but shall note a few points applicable to this case.

ARGUMENT

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

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

The record is unequivocal that the devout Catholic family that owns Autocam understands as a matter of their religious faith that they "are called to live out the teachings of Christ in their daily activity." Pet. App. 68. Autocam is "the business form through which the Kennedys endeavor to live their vocation as Christians in the world." *Id.* at 33.

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

The Sixth Circuit decision acknowledges that RFRA's "legislative history makes no mention of for-profit corporations." Pet. App. 11. But from this lack of evidence that Congress considered a broad carve-out of for-profit corporations, the Sixth Circuit concludes: "This is a sufficient indication that Congress did not intend the term 'person' to cover entities like Autocam when it enacted RFRA." *Id*. at 22. Jurists in good faith could conclude precisely the opposite—that the absence of any legislative history that Congress sought to exclude for-profit corporations proves that the Government has failed to overcome the statutory definition that they are "persons."

Regardless, the concept of Congress legislating through silence in legislative history presents a treacherous path; instead, what controls should be what Congress actually said in the statute. The Sixth Circuit takes the view that, while non-profits or

corporations the government deems not "secular" are "able to engage in religious exercise" under RFRA, "for-profit, secular corporations" are categorically excluded from RFRA protections. This distinction is the linchpin of its analysis. But RFRA's statutory language makes no such distinction. As the Seventh Circuit very recently noted in disagreeing with the Sixth: "The government's proposed exclusion of secular, for-profit corporations finds no support in the text or relevant context of RFRA or any related statute." *Korte* v. *Sebelius,* ___ F.3d ___, 2013 WL 5960692 (7th Cir, Nov. 8, 2013).

In specific, the fact that corporations can act only through human agency in no way distinguishes for-profit corporations from the non-profits and churches that the Sixth Circuit concedes have been recognized to exercise religion. People commonly associate to exercise religion, and religion can be exercised through the corporate form. See, e.g., *Church of the Lukimi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 525 (1993) ("[The Lukimi Babalu Church] is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion."). And the Sixth Circuit does not explain how any corporate entity—including those that they and the United States acknowledge *do* qualify for RFRA protection—can exercise religion apart from the direction and management of the humans who run them. That is the way that all entities work. See, e.g., *Grote* v. *Sebelius*, 708 F.3d 850, 853-54 (7th Cir. 2013) (injunction pending appeal).

States allow corporations to be formed for lawful purposes including the pursuit of their owners' conception of the public good in the business context, and the federal courts should not deem pursuit of such higher ends to be somehow inconsistent with a hope of remuneration in the here and now. So long as they act consistent with their fiduciary responsibilities to shareholders, corporate charters, and other applicable requirements, corporate directors may lead their companies to pursue a wide variety of missions. It is untenable under RFRA to rest everything on the distinction between profit and non-profit or between secular and religious corporations.

If it is the view of at least some religions, or some religious adherents, that religion is to inform all aspects of one's life and should be practiced behind the checkout counter at an auto parts store, the kosher deli, or the local family bookstore, it is not for the Sixth Circuit to gainsay such belief. And that principle directing judicial deference in determining matters of religious faith is especially true under RFRA, where Congress has defined the "exercise of religion" broadly as "any exercise of religion, whether or not compelled by or central to, a system of religious belief." 42 U.S.C. § 2000bb(2). After all, "[i]t's common ground that *nonprofit* religious corporations exercise religion in the sense that their activities are religiously motivated. So unless there is something disabling about mixing profit-seeking and religious practice, it follows that a faith-based, for-profit corporation can claim free-exercise protection to the extent that an aspect of its conduct is religiously motivated." *Korte*, 2013 WL 5960692, *19.

And the Catch 22 the Sixth Circuit posits whereby closely-held, for-profit companies are precluded from claiming protection under RFRA while the family ownership is also unprotected because only the company is penalized just highlights the flaws in its understanding of RFRA. The Sixth Circuit's view would mean that RFRA scrutiny would not be triggered if federal regulation required family businesses—in violation of their guiding religious principles, but absent any showing of a compelling purpose—to be open on their Sabbath, to distribute materials they deem blasphemous, or to market meat products antithetical to their religious observance.

The oddity of such results under a statute designed to protect "Religious Freedom" would seem to flag a need to reexamine the statutory test—but again, RFRA advisedly extends its protections to "persons" as that term is commonly employed throughout federal law, and does not in any way cast out certain businesses based on their tax status. Cf. *Elgin* v. *Dep't of Treasury*, 132 S. Ct. 2126, 2134-35 (2012) ("That Congress declined to include an exemption . . . indicates that Congress intended no such exception"). The anomalous nature of the panel's reasoning justifies this Court's review.

"Congress did not exclude for-profit corporations from RFRA's protections. Such corporations can be 'persons' exercising religion for purposes of the statute." *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1129 (10th Cir. 2013) (en banc). Here, moreover, just as in the for-profit Christian publishing company case of *Tyndale House*

Publishers, Inc. v. *Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012), where the challenged regulation applies to the company and not directly against the owners, the company has standing to assert free exercise rights that the government argues cannot be advanced by the individuals. See, e.g., *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009). And "Congress structured RFRA to override other legal mandates, including its own statutes, if and when they encroach on religious liberty." *Hobby Lobby*, 723 F.3d at 1156 (Gorsuch, Kelly, and Tymkovich, JJ., concurring, and explaining that RFRA protects individual owners as well as company).

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

II. The HHS Mandate as applied here does not pass muster under RFRA.

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

RFRA's standards for determining whether a law "substantially burdens" a person's exercise of religion are informed by *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). The "disqualification for benefits" in *Sherbert* was a substantial burden on religious exercise:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. [*Sherbert*, 374 U.S. at 404.]

The same is true here. The HHS Mandate requires Autocam and the Kennedys either to foresake their guiding religious principles or face a yearly fine approaching $19 million. "[T]he federal government has placed enormous pressure on the plaintiffs to violate their religious beliefs and conform to its regulatory mandate. Refusing to comply means ruinous fines[.]" *Korte*, 2013 WL 5960692.

The record below shows religious belief sincerely held. In such circumstances, courts applying RFRA should acknowledge the religious claims of Plaintiffs and defer to their understanding of their own religious doctrine. See, e.g., *Legatus* v. *Sebelius*, 901 F.Supp.2d 980, 993 (E.D. Mich., 2012). Such deference is consistent with Supreme Court precedent. *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981).

Moreover, the United States has exempted myriad others and does not have a compelling interest in applying this mandate to these Plaintiffs. In *O Centro*, this Court outlined the proper framework for determining whether a compelling governmental interest justifies a substantial burden on a person's religious liberty. 546 U.S. at 424-31. The Court was careful to note that this examination requires an inquiry into whether there is a compelling interest to apply the government mandate to the "*particular* claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 431 (emphasis added).

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

CONCLUSION

The petition for certiorari should be granted, or held pending determination in the *Conestoga* and/or *Hobby Lobby* cases.

Respectfully submitted,

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