No. 13-482

In The Supreme Court of the United States

AUTOCAM CORP., et al.,

Petitioners,

v.

KATHLEEN SEBELIUS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

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INTRODUCTION

The government's arguments against certiorari do not withstand scrutiny and should be rejected. It is nonsensical to suggest that entry of a judgment ordered by the very decision which petitioners seek to have reviewed actually moots the request for review. The opposite is true: review is more necessary. And the claim that granting review of the Tenth Circuit's decision will resolve the questions presented here is undermined by the government's own petition, which recognizes that the Tenth Circuit did not rule on the claims advanced by the individual owners.

The petition should be granted. Acceding to the government's request will permit aberrant applications of this Court's standing doctrine to undermine the proper role of the federal courts in adjudicating religious liberty claims by those who try to keep their faith while doing business; and the consequences of the error reach beyond claims advanced under the Religious Freedom Restoration Act (RFRA). Acceding to the government's request will also deprive this Court of an opportunity to consider the legality of the HHS Mandate as applied to a business that has an employee benefits plan which respects the religious convictions of the owners while empowering employees to make their own healthcare choices. RFRA certainly protects this exercise of religious conviction in the marketplace. This Court should grant review and say so.

REPLY ARGUMENT

I. Petitioners' Case Is Properly Before This Court And Anything But Moot.

The government's claim that petitioners' request for review is moot makes absolutely no sense as a matter of fact or law. As a matter of fact, petitioners ask this Court to review the Sixth Circuit decision holding that "the Kennedys cannot bring claims in their individual capacities under RFRA, nor can Autocam assert the Kennedys' claims on their behalf," and ordering the district court to "dismiss the Kennedys' individual claims." App. 14; *see also* App. 25 (ordering dismissal of the Kennedys' claims). The district court duly followed the Sixth Circuit's order on remand, denying petitioners' motion for stay, "in light of the clear guidance from our Circuit on the merits of the case," App. 28, and entering a final judgment dismissing petitioners' RFRA claim with prejudice, App. 30. Petitioners appealed the final judgment to the Sixth Circuit, which granted their motion to abate the proceedings pending this Court's disposition of their Petition. Pet. at 9 n. 1.

Given these facts of record, the government's mootness argument is strange indeed. Surely, the government does mean to suggest that the Sixth Circuit is going to reverse its newly-minted (and published) decision. In fact, the Sixth Circuit has already applied the decision as binding circuit precedent to the individual claims advanced by other business

owners in a parallel case. *See Eden Foods, Inc. v. Sebelius*, ___ F.3d ___, 2013 U.S. App. LEXIS 21590, at **16-17 (6th Cir. Oct. 24, 2013) (stating "[a]s this court held in *Autocam*, individual shareholders/owners of a corporation have no standing to challenge provisions of laws that the corporation must obey under risk of legal penalty. It follows that [the owner's] claims must be dismissed for lack of jurisdiction."). Petitioners seek review precisely because the decision and order at issue here puts the writing on the wall for their claims.

As for the law, the government's effort to thwart review does not square with this Court's precedent. First, this Court's jurisdiction is not limited to final orders so petitioners' request for review of an interlocutory decision is wholly proper. *See*, *e.g.*, *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 685 n. 3 (1949) (noting that Court chose to review non-final order because the jurisdictional issue was important to the proper conduct of the case). Indeed, this Court has taken pains to point out that "there is no absolute bar to review of nonfinal judgments of the lower federal courts." *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997). In *Mazurek*, for example, this Court reviewed a decision on a preliminary injunction where the injunction was plainly inconsistent with precedent and produced immediate adverse consequences for the party seeking review. *Id*. In other cases this court has reviewed interlocutory decisions that resolved dispositive legal questions

early in the litigation. *See*, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (reviewing district court's denial of preliminary injunction); *Gonzales v. O'Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418 (2006) (reviewing grant of preliminary injunction); *McCreary County v. ACLU*, 545 U.S. 844 (2005) (grant of preliminary injunction); *Gonzales v. Raich*, 545 U.S. 1 (2005) (denial and then grant of preliminary injunction after appellate decision).

The government's mootness argument fares no better, at least if one is concerned with substance, not form. It is well settled that even "[w]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." *Powell v. McCormack*, 395 U.S. 486, 496-97 (1969) (citation omitted). In *Super Tire Engineering v. McCorkle*, 416 U.S. 115 (1974), for example, this Court held a petitioner's request for a declaratory judgment that a state law extending benefits to striking workers interfered with federal labor policy was *not moot* due to the "existence of an immediate and definite governmental action . . . that . . . adversely affected and continued to affect [its] present interest." *Id.* at 125. And this was true even though the request for injunctive relief was mooted by the settlement. *Id*.

This precedent shows that petitioners' request for review is proper and anything but moot. Petitioners seek review of the Sixth Circuit's decision which denied their request for preliminary relief and ordered dismissal of their claims. Here, the Sixth

Circuit's decision turns on dispositive legal questions albeit decided at the preliminary stage, as in *Larson*, *Mazurek*, *Pleasant Grove*, *O'Centro*, *McCreary County*, and *Raich*. Here, as in *Mazurek*, the Sixth Circuit's decision is wholly inconsistent with this Court's precedent, and that decision now dictates petitioners' course of action, *i.e.*, it forces petitioners to violate their religious convictions upon pain of ruination.

Nothing the district court has done "moots" the need for review. Quite the contrary, the need for review is more pressing precisely because the decision before this Court sounds the death-knell for their claims. The government notes that "generally" an appeal related to a preliminary injunction becomes moot when the district court takes later action. *See Grupo Mexicano v. Alliance Bond Fund*, 527 U.S. 308, 314 (1999). But in *Grupo Mexicano*, this Court reviewed a decision regarding preliminary relief because review and reversal would have practical consequences for the party seeking review. *See Grupo Mexicano*, 527 U.S. at 314-17 (continued dispute over injunction bond saves not only the bond question from mootness but also the issue of the validity of the preliminary injunction itself).

The death-knell impact of the Sixth Circuit's decision makes petitioners' request for review anything but moot. Here, as in *Grupo Mexicano*, the district court's entry of judgment shows that petitioners have a continued need for review of the Sixth Circuit's decision ordering dismissal of their claims. *See Grupo Mexicano*, 527 U.S. at 314-17. Here, as in *Super Tire*,

petitioners have an ongoing interest in review of the Sixth Circuit's order because, as a consequence thereof, "the challenged governmental activity . . . is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts . . . a substantial adverse effect on the interests of the petitioning parties." *Super Tire*, 416 U.S. at 122. Doubtless, this explains why the Sixth Circuit does not share the government's view of the matter. After all, it agreed to stay petitioners' appeal from the district court's judgment, rendered pursuant to the Sixth Circuit's earlier decision, pending this Court's disposition of the Petition now before this Court. The Sixth Circuit knows too well that petitioners' appeal is a dead letter unless this Court takes action.

It bears noting that the government's mootness argument employs strange logic. On one hand, the government asserts that this petition is "moot" because the district court entered a final judgment as ordered. On the other, it suggests that this Court should review the Tenth Circuit's denial of a preliminary injunction. How strange that seems since the district court in that case also took action on remand – action based on that very Tenth Circuit decision. *Hobby Lobby v. Sebelius*, Case No. 5:12-CV-01000 (W.D. Okla. July 19, 2013) (granting preliminary injunction on remand). That certainly does not make the Tenth Circuit decision in *Hobby Lobby* unreviewable. Thus, the government recognizes that this Court can review an appeal that originates from a district court order *denying* a preliminary injunction, even though the

district court subsequently issued a preliminary injunction. This is so because the district court's actions were based on the Tenth Circuit's decision under review. The case at bar here is not different – at least if one is concerned with substance, not form.

The bottom line is that the cases challenging the HHS Mandate and dividing the federal courts around this country involve the grant or denial of a preliminary injunction. In this case, the decision on preliminary injunction has now been embodied in a final judgment, which makes the dispositive consequences of the appellate decision on the preliminary injunction plain to see.

So the government's argument really reduces to an insistence that petitioners go through the motions, pursuing a feckless appeal, and re-filing in this court after their appeal is rejected. *See* Resp. at 16. The government's argument relies upon a mechanical (indeed mindless) application of this Court's mootness doctrine. But this Court does not countenance manipulation of mootness doctrine to thwart review. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) ("Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here."). Accordingly, it should reject the tendentious application of mootness principles advanced in the government's response.

II. This Petition Merits Review Because It Presents Issues Different In Kind And Of Great Significance.

Petitioners' request for review should be granted quite apart from the disposition of other petitions in parallel cases coming out of the Tenth Circuit and Third Circuit. As petitioners have explained, the Sixth Circuit rejected the Kennedys' claims based on an aberrant application of this Court's standing jurisprudence. Pet. at 15-18. In so doing, the Sixth Circuit relied upon the Third Circuit's erroneous decision in *Conestoga Wood Specialties Corp. v. Sebelius*, ___ F.3d ___, 2013 WL 3845365 (3d Cir. July 26, 2013), which misapplied standing doctrine to render a decision on the merits. Pet. at 16-17.

Thus the Sixth Circuit's error implicates two distinct but critically important elements of this Court's standing jurisprudence. This Court has said that the purpose of its standing jurisprudence is to ensure that the federal courts perform their proper role in the constitutionally mandated separation of powers. *See Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 611 (2007). And this Court has repeatedly emphasized that there is a critical distinction between standing and the merits of claims advanced. *See*, *e.g.*, *L. v. Matheson*, 450 U.S. 398, 430 (1981) ("standing is a jurisdictional issue, separate and distinct from the merits").

Consequently, review is warranted in this case because the question presented here is distinct from,

but just as important as, the question raised in the parallel petitions. The Sixth Circuit's decision introduces uncertainty into the application of this Court's subtle and demanding standing doctrine. Worse still, its error creates an idiosyncratic application of standing doctrine limited to claims advanced by individuals who seek to keep their faith while doing business through the corporate form. *Id.* And the error has consequences that reach beyond claims advanced under RFRA; it will serve to bar claims advanced under the Free Exercise Clause, and for that matter, state law claims properly advanced in the federal courts.

Here again, the government employs strange logic in order to thwart review. In its petition, the government forthrightly acknowledges that the Tenth Circuit did not reach either standing or the merits with respect to the individual claims. *Hobby Lobby* Pet. at 12. The government also argues that the Tenth Circuit's decision should be reviewed because that case presents an opportunity for a conclusive resolution of the RFRA claims. *See id.* at 32-35. But by way of response in this case, the government argues that the Petition should be denied because the individual owners' claims provide alternative grounds for affirmance in that case. Resp. at 18.

Something does not follow. If the Court rules on the merits of the RFRA claim advanced by the corporate entity in the Tenth Circuit, then there will be no need for the Court to address the questions presented by petitioners here. On the other hand, if the Court does not do so and therefore takes up the questions

presented by individual owners here, then a Tenth Circuit decision which did not rule on those questions provides an especially poor vehicle for review. Petitioners' suspect the real principle driving these arguments is the government's self-serving view of vehicle attractiveness.

These considerations show that review is necessary in this case. For one thing, review would give this court an opportunity to address the distortion of standing doctrine that provides the basis for the Sixth Circuit's decision precisely because "*Autocam*'s resolution of that standing issue now constitutes the law of this circuit," *Eden Foods*, 2013 U.S. App. LEXIS 21590, at *15. Only this Court can correct the distortion of standing doctrine at the heart of the decision below, and in so doing, address and correct the Third Circuit's related error in *Conestoga*, which the Sixth Circuit built upon. For another thing, review would allow this Court to address the crux of the current circuit splits while resolving a comprehensive challenge to the HHS Mandate advanced by petitioners whose benefits plan is consistent with their religious convictions but also allows employees to make their own healthcare choices. Petitioners respectfully submit that this Court should take the opportunity to do so.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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