No. 13-354

In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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In a divided decision, the en banc court of appeals held that the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, allows respondent for-profit corporations to deny employees the health coverage to which they are otherwise entitled by federal law, based on the religious objections of the respondent individuals who own a controlling stake in the corporations. As the government explains in its petition for a writ of certiorari (at 16-35), that unprecedented decision merits review because it raises important questions about RFRA's application to regulation of commercial enterprises and because there is an acknowledged conflict in the courts of appeals on the question presented.

1. The conflict in the circuits has deepened since the petition for a writ of certiorari was filed. On November 1, 2013, a divided panel of the D.C. Circuit

affirmed in part and reversed in part a district court's denial of a preliminary injunction against enforcement of the contraceptive-coverage requirement. See *Gilardi* v. *United States Dep't of Health & Human Servs.*, No. 13-5069, 2013 WL 5854246, at *15. The court of appeals rejected the claims asserted by the corporate plaintiffs, which are two for-profit corporations that package and distribute fresh produce, on the ground that such "secular corporations" are not persons exercising religion for purposes of RFRA. *Id.* at *5; see *id.* at *2-*6. In reaching that conclusion, the court rejected the Tenth Circuit's contrary determination in this case. See *id.* at *2.

The D.C. Circuit, however, concluded that the corporations' individual owners could assert a RFRA challenge to regulations that apply only to the corporations. See *Gilardi*, 2013 WL 5854246, at *6-*10. That separate ruling conflicts with contrary holdings by the Third and Sixth Circuits. See *Conestoga Wood Specialties Corp.* v. *Secretary of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 386-389 (3d Cir. 2013), petition for cert. pending, No. 13-356 (filed Sept. 19, 2013) (*Conestoga Wood*); *Autocam Corp.* v. *Sebelius*, No. 12-2673, 2013 WL 5182544, at *3-*5 (6th Cir. Sept. 17, 2013), petition for cert. pending, No. 13-482 (filed Oct. 15, 2013) (*Autocam*).

Finally, the D.C. Circuit held in *Gilardi* that the individual owners were likely to succeed on the merits of their RFRA claim. 2013 WL 5854246, at *10-*14. The court remanded to the district court for consideration of the other preliminary injunction factors. *Id.* at *15.

In partial dissent, Judge Edwards disagreed with the majority that regulation of the corporations "*sub-*

stantially burden[ed]" the individual owners' religious exercise. *Gilardi*, 2013 WL 5854246, at *28 (Edwards, J., concurring in part and dissenting in part); see *id.* at *28-*31. He noted that the mandate does not require the owners to use contraceptives or to "encourage [the corporations'] employees to use contraceptives any more directly than they do by authorizing [the corporations] to pay wages." *Id.* at *29. Judge Edwards explained that none of this Court's free-exercise decisions "has recognized a substantial burden on a plaintiff's religious exercise where the plaintiff is not *himself* required to take or forgo action that violates his religious beliefs, but is merely required to take action that *might* enable other people to do things that are at odds with the plaintiff's religious beliefs." *Ibid.* Judge Edwards also disagreed with the majority's holding that the mandate could not survive scrutiny under RFRA, concluding that the mandate "satisfies the compelling interest test." *Id.* at *31; see *id.* at *31-*34.[1]

2. Respondents in this case agree that certiorari should be granted, stating that "[t]he case for plenary review of the critically important issues presented by the government's petition could hardly be clearer." Br. 15. In particular, respondents recognize the im-

[1] In another decision issued after the filing of the petition for a writ of certiorari in this case, the Sixth Circuit affirmed the denial of a preliminary injunction sought by a for-profit corporation and its sole shareholder advancing the same type of RFRA claim as respondents here. See *Eden Foods, Inc.* v. *Sebelius*, No. 13-1677, 2013 WL 5745858, at *1 (Oct. 24, 2013). The Sixth Circuit panel explained that the plaintiffs' claims were foreclosed by *Autocam*, but stated that "even if the *Autocam* decision had not been issued, [it] would not have ruled differently on [the shareholder's] claims." *Id.* at *5; see *id.* at *5-*6 (rejecting corporation's claims).

portance of the question presented (*id.* at 16-17), and the circuit conflict (*id.* at 17-18).

In addition, respondents explain that "[t]his case presents an excellent vehicle" for addressing this issue. Br. 19. The government agrees with that assessment. In particular, the court of appeals here addressed "not only the threshold issue of whether for-profit corporations may sue under RFRA, but the merits as well." *Id.* at 19-20 (citing Pet. App. 23a-43a, 44a-56a, 56a-61a). By contrast, the courts of appeals in *Autocam* and *Conestoga Wood* "addressed only the threshold issue." *Id.* at 20; see Gov't Br. at 13-15, *Conestoga Wood Specialties Corp.* v. *Sebelius*, No. 13-356 (Oct. 21, 2013); Gov't Br. at 16-17, *Autocam Corp.* v. *Sebelius*, No. 13-482 (Oct. 21, 2013).[2]

While the court of appeals in this case did not address the separate RFRA claims of the individual respondents, those claims were preserved below, were addressed by several court of appeals judges in separate opinions, and have been advanced by respondents as an alternative ground for affirmance. See Resp. Br. 27-29; see also Gov't Br. at 15-16, *Conestoga Wood Specialties Corp.*, *supra*, (No. 13-356). The government agrees that those claims would be appropriately addressed in the context of this case.[3]

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[2] In addition, as the government has explained, the petition in *Autocam* should be denied because the challenge by petitioners there to the denial of a preliminary injunction is now moot in light of the final judgment of dismissal entered in that case. See Gov't Br. at 14-16, *Autocam*, *supra* (No. 13-482).

[3] Contrary to the contention of petitioners in *Conestoga Wood* (Reply Br. at 6, *Conestoga Wood Specialties Corp.*, *supra*, No. 13-356 (Nov. 4, 2013)), the district court on remand in this case did not take any "evidence." Moreover, the district court on remand did not readdress the merits of respondents' claims, which had already

3. Respondents also defend the court of appeals' decision on the merits. Br. 23-36. The government obviously disagrees for the reasons stated in its petition for a writ of certiorari, but, as respondents recognize, "[t]here will be time enough to explore the merits if this Court grants plenary review." *Id.* at 23.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2013

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been decided by the court of appeals. Instead, the district court simply heard oral argument on the legal issues surrounding the additional preliminary injunction factors. See Resp. Br. 22 n.16.