No. _____

In the Supreme Court of the United States

FRANCIS A. GILARDI, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Francis J. Manion
Geoffrey R. Surtees
[redacted]

Edward L. White III
Erik M. Zimmerman
[redacted]

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Jordan Sekulow
Colby M. May
Walter M. Weber
Carly F. Gammill
[redacted]

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Federal regulations implementing the Patient Protection and Affordable Care Act of 2010 ("ACA") require certain employers, including Petitioners, to cover birth control, including abortion-inducing drugs, sterilization, and related education and counseling services in their health insurance plans ("the Mandate").

Petitioners, Francis and Philip Gilardi, and their closely-held S corporations, Freshway Foods and Freshway Logistics ("the Freshway Companies"), object on religious grounds to paying for and providing the services required by the Mandate in their self-funded health plan, which services they have excluded for over ten years. Petitioners sought a preliminary injunction based on their claim under the Religious Freedom Restoration Act ("RFRA"), which the district court denied.

Although the D.C. Circuit held that the Mandate burdens the Gilardis' religious exercise under RFRA, the court rejected the companies' RFRA claim, holding there was "no basis for concluding a secular organization can exercise religion." This conflicts with a decision of the Tenth Circuit regarding the same Mandate at issue here. The D.C. Circuit's related holding that a closely-held corporation cannot assert the free exercise rights of its owners also conflicts with two Ninth Circuit decisions.

The question presented is whether a closely-held business corporation operated in accordance with the religious beliefs of its owners can exercise religion under RFRA.

PARTIES TO THE PROCEEDINGS

Petitioners are Fresh Unlimited, Inc., d/b/a Freshway Foods, Freshway Logistics, Inc., and their owners Francis Gilardi and Philip Gilardi.

Respondents are the Departments of Health and Human Services, Treasury, and Labor, and the Secretaries thereof, Kathleen Sebelius, Jacob Lew, and Thomas E. Perez, respectively, who are sued in their official capacities. During the litigation below, previous Treasury and Labor Secretaries were replaced by Mr. Lew and Mr. Perez, respectively.

CORPORATE DISCLOSURE STATEMENT

Petitioners Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. are Ohio business corporations. Neither corporation has parent companies or is publicly held.

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INTRODUCTION

Petitioners, Francis and Philip Gilardi, and the two closely-held corporations that they own and control, the Freshway Companies, object on religious and moral grounds to paying for and providing birth control and sterilization in the companies' self-funded insurance plan. They have intentionally excluded such drugs, methods, and services from their employee health plan for over ten years because they believe that they would act contrary to the teachings of the Catholic Church by including them in the plan.

Regulations promulgated under the ACA, however, compel employers with at least fifty full-time employees to provide health-insurance coverage, and require most kinds of insurance plans to cover all FDA-approved contraceptives and sterilization procedures. Petitioners contend, among other things, that the regulations substantially burden their free exercise of religion under RFRA, 42 U.S.C. § 2000bb *et seq*., and they sought a preliminary injunction based on this claim. Although the decision below accepted this claim with respect to the Gilardis, it rejected the claim with respect to the companies, holding that there was "no basis for concluding a secular organization can exercise religion." App. 16.

The D.C. Circuit's decision conflicts directly with the Tenth Circuit's decision in *Hobby Lobby v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), which held that two corporations that challenged the Mandate at issue here, Hobby Lobby and Mardel, "are persons exercising religion for purposes of RFRA." *Id*. at 1128. In addition, the decision below expressly rejected the "pass-through theory of corporate standing" set forth in

the Ninth Circuit's decision in *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988), which held that a corporation could assert the free exercise rights of its owners.[1]

Adding to the conflicts among the courts of appeal stemming from cases challenging the Mandate, the Sixth Circuit held that a for-profit corporation "is not a 'person' capable of 'religious exercise' as intended by RFRA." *Autocam Corp. v. Sebelius*, No. 12-2673, 2013 U.S. App. LEXIS 19152, *11 (6th Cir. Sept. 17, 2013). And the Third Circuit held that a for-profit corporation cannot exercise religion, although it did not decide whether such a corporation is a "person" under RFRA. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013).

In sum, the lower courts are deeply divided as to whether for-profit and/or "secular" corporations are persons capable of exercising religion, whether under RFRA or the Free Exercise Clause. This petition is now the *fourth* to be filed with this Court, this term, concerning the same legal questions raised by the Mandate. *See Sebelius v. Hobby Lobby Stores*, No. 13-354 (petition filed Sept. 19, 2013); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-356 (petition filed Sept. 19, 2013); *Autocam Corp. v. Sebelius*, No. 13-482 (petition filed Oct. 15, 2013).

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[1] On this point, the decision below also conflicts with the Ninth Circuit's decision in *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009).

Moreover, other cases involving businesses and their owners challenging the Mandate have been briefed and argued in both the Seventh and Eighth Circuits and await decisions. *See Korte v. Sebelius,* No. 12-3841, and *Grote v. Sebelius*, No. 13-1077 (7th Cir. argued May 22, 2013); *O'Brien v. HHS*, No. 12-3357, and *Annex Med., Inc. v. Sebelius*, No. 13-1118 (8th Cir. argued Oct. 24, 2013).[2] Many of the legal issues in these cases are the same as the issues involved in the pending petitions for certiorari, including this one. And there are numerous other federal cases concerning the Mandate that have been stayed pending the outcome of one of the cases on appeal. Seldom before has there been so much litigation, leading to so many conflicting lower court opinions, concerning a regulation that implicates the free exercise of religion.

In *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012), Justice Ginsburg observed, "A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause." *Id*. at 2624 (Ginsburg, J., concurring in part and dissenting in part). This case directly poses such an example. This Court should grant review.

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[2] Injunctions pending appeal are in place in all four cases. *Korte v. Sebelius*, No. 12-3841, 2012 U.S. App. LEXIS 26734 (7th Cir. Dec. 28, 2012); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *O'Brien v. U.S. HHS*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Annex Med. v. Sebelius*, No. 13-1118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013).

OPINIONS BELOW

The panel opinion of the court of appeals is not yet reported but is available at No. 13-5069, 2013 U.S. App. LEXIS 22256 (Nov. 1, 2013), and reprinted at App. 1-76. The decision of the court of appeals granting Petitioners an injunction pending appeal is not reported but is available at No. 13-5609, 2013 U.S. App. LEXIS 15806 (Mar. 29, 2013), and reprinted at App. 79-80. The district court's opinion is reported at 926 F. Supp. 2d 273 (D.D.C. 2013), and reprinted at App. 81-102.

JURISDICTION

The court of appeals issued an opinion on November 1, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant constitutional and statutory provisions are set forth in the appendix to this petition. App. 105-111.

STATEMENT OF THE CASE

I. Factual Background

Francis and Philip Gilardi are brothers who are devout Catholics. They adhere to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. App. 115, 119, 135, 159. The Gilardis sincerely believe that actions intended to terminate an innocent human life by abortion, including through the use of drugs that act post-conception, are gravely sinful. App. 115, 119, 135, 159. They also hold to the Catholic Church's teachings

regarding the immorality of artificial means of contraception and sterilization. App. 115, 119, 135, 159.[3]

The Gilardi brothers are the sole owners and directors of the Freshway Companies, two S corporations that are incorporated, and based, in the State of Ohio. App. 115, 118, 134-35, 158-59. Freshway Foods is a closely-held fresh produce processor and packer that has approximately 340 full-time employees. App. 118, 135, 159. Freshway Logistics is a closely-held for-hire carrier of mainly refrigerated products that has approximately fifty-five full-time employees. App. 118, 135, 159.

As the sole owners and directors of the Freshway Companies, the Gilardis set the policies that govern all phases of their operations. App. 117-18, 135, 159. As a result, the Freshway Companies have endeavored to act in a manner that reflects, and is consistent with, the teachings, mission, and values of the Catholic faith, and they desire to continue to do so. App. 119, 135, 159. For example, for approximately the last ten years, a sign stating "It's not a choice, it's a child" has been affixed to the back of trucks that bear the Freshway Foods name as a way for the companies to express a Catholic viewpoint regarding the sanctity of human life to the public. App. 141 (photo); *see also* App. 120, 136, 160.

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[3] Moral opposition to contraception, abortion, and sterilization has been a longstanding teaching of the Catholic Church. *See, e.g., Catechism of the Catholic Church*, Nos. 2270-75, 2370, 2399 (2d ed. 1997).

In addition, Freshway Logistics donates a trailer for use by the local Catholic parish for its annual parish picnic, and uses its trucks to deliver the food donated by Freshway Foods to local food banks. App. 120, 136, 160. Furthermore, Freshway Foods makes annual donations to community organizations, including Holy Angel's Soup Kitchen, Compassionate Care, Bill McMillian's Needy Children, Elizabeth's New Life Center, the YMCA, United Way, Habitat for Humanity, American Legion, and local schools. App. 120, 136, 160.

The Freshway Companies also endeavor to ensure that their employees' religious practices are accommodated as much as possible. For example, the companies provide alternative foods at monthly employee lunches to accommodate employees' religious dietary requirements, adjust break periods during Ramadan to allow their Muslim employees to eat after sundown pursuant to their religion, and provide their Muslim employees with space to pray during breaks and lunches. App. 120-21, 136-37, 160-61.

The Freshway Companies, as managed and operated by the Gilardis, consider the provision of employee health insurance—in a manner that is consistent with the Catholic faith—to be an integral component of furthering their mission and values. App. 121, 137, 161. As such, the companies provide their full-time employees with a self-insured prescription drug and health insurance plan through a third-party administrator and stop-loss provider, which is annually renewed on April 1. App. 121, 137, 161.

For approximately the last ten years, the Freshway Companies have specifically excluded coverage of all contraceptives, abortion, and sterilization from their

health plan because paying for those products and services would violate the sincerely-held religious beliefs and moral values of both the companies and the Gilardis. App. 115, 121, 137-39, 161. Because, however, the health plan is not "grandfathered," the companies are subject to the Mandate, App. 122-23, 138-39, 162, which requires them to include those products and services in their employee health plan contrary to Petitioners' religious beliefs and moral values. App. 115-16, 138-40, 161-64. If the companies fail to comply with the Mandate, they would likely incur over $14.4 million in annual penalties, which would greatly harm both the companies and the Gilardis financially. App. 124, 139, 163.[4]

II. Regulatory Background

The ACA requires non-exempt group health plans to provide coverage for preventative care and screening for women without cost-sharing in accordance with guidelines created by the Health Resources and Services Administration. 42 U.S.C. § 300gg-13(a)(4). These guidelines include, among other things, "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive

[4] Dropping the health plan would harm Petitioners' employees, trigger annual penalties because the companies have over forty-nine employees, 26 U.S.C. § 4980H, and have a severe impact on the Freshway Companies' ability to compete with other companies that offer insurance coverage. App. 124, 139-40, 163.

capacity."[5] FDA-approved contraceptive methods include emergency contraception that can act post-conception (such as "Plan B" and "Ella"), diaphragms, oral contraceptive pills, and intrauterine devices.[6]

The requirement to provide coverage for these goods and services applied to non-exempt employers as of the first time that their group health plans were renewed on or after August 1, 2012; non-compliance will lead to significant annual penalties. 45 C.F.R. § 147.130(a)(1)(iv); 77 Fed. Reg. 8725. Although the Mandate applies to Petitioners with respect to their approximately 395 employees, Defendants have provided several exemptions that, taken together, leave *about 190 million Americans* who are covered by plans that need not comply with the Mandate and/or are employed by entities that are not required to provide a health plan at all. *E.g.,* App. 30-31; *Conestoga Wood*, 724 F.3d at 413 n.26 (Jordan, J., dissenting).

For example, grandfathered health plans are indefinitely exempt from compliance with the Mandate. Grandfathered plans are those that were in existence on March 23, 2010, when the ACA was signed into law, and that have not undergone any of a defined set of changes. *See* 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140. The government describes the rules for grandfathered health plans as preserving a "right to

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[5] Health Res. & Servs. Admin., *Women's Preventive Services: Required Health Plan Coverage Guidelines,* http://www.hrsa.gov/womensguidelines/ (last visited Nov. 2, 2013).

[6] Food and Drug Admin., *Birth Control: Medicines To Help You*, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last visited Nov. 2, 2013).

maintain existing coverage." 42 U.S.C. § 18011; 45 C.F.R. § 147.140.[7] Defendant Department of Health and Human Services has estimated that "98 million individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. 41726, 41732. Although the Mandate does not apply to grandfathered plans, many provisions of the ACA do (for example, the prohibition on excessive waiting periods).[8]

"Religious employers," defined to include entities such as churches, their auxiliaries, church associations, and the exclusively religious activities of religious orders, are also exempt from the Mandate. 45 C.F.R. § 147.131. Moreover, employers with fewer than fifty full-time employees have no obligation to provide employee health insurance under the ACA, 26 U.S.C. § 4980H(c)(2)(A); as of 2010, over 31 million individuals worked for employers with fewer than fifty employees.[9] These employers can avoid providing the coverage that Petitioners cannot provide without violating their religious beliefs by not offering any employee health plan.

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[7] The Congressional Research Service has noted that "[e]nrollees could continue and renew enrollment in a grandfathered plan indefinitely." Cong. Research Serv., RL 7-5700, *Private Health Insurance Provisions in PPACA*, at 11 (May 4, 2012).

[8] *Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans*, http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited Nov. 2, 2013).

[9] *See Statistics of U.S. Businesses (SUSB) Main*, http://www.census.gov/econ/susb/ (last visited Nov. 2, 2013) (select "U.S., NAICS sectors, small employment sizes").

A non-exempt employer that provides a health insurance plan that does not comply with the Mandate faces penalties of $100 per day for each "individual to whom such failure relates," 26 U.S.C. § 4980D, as well as potential enforcement lawsuits, 26 U.S.C. §§ 1132, 1185d. For Petitioners, that would amount to over $14.4 million in penalties *every year* for continuing to exclude the coverage that Petitioners cannot provide without violating their religious principles.

III. Lower Court Proceedings

Petitioners brought suit in the U.S. District Court for the District of Columbia, alleging that the Mandate violates their rights under RFRA and the Free Exercise and Free Speech Clauses of the First Amendment; they also alleged that the Mandate violates the Administrative Procedure Act. App. 112-33. Petitioners filed a motion for a preliminary injunction based upon their RFRA claim, preserving their other claims for further proceedings. App. 82. The district court denied the motion, holding that Petitioners had not established a likelihood of success on the merits of their RFRA claim because they did not show that the Mandate substantially burdens their religious exercise. App. 89-101.

Petitioners filed a notice of interlocutory appeal and the district court stayed all proceedings. Petitioners also filed an emergency motion with the court of appeals seeking an injunction pending appeal because the Mandate would soon begin to apply to Petitioners (as of April 1, 2013). A motions panel initially denied the motion but later reconsidered and granted it. App. 79-80.

On November 1, 2013, a majority of a three-judge panel of the D.C. Circuit (Judges Brown and Edwards) rejected the RFRA claim with respect to the Freshway Companies. App. 7-16. The court held that only individuals and "religious organizations"—a category that the majority did not define—can exercise religion for purposes of RFRA and the Free Exercise Clause, rejecting the government's reliance upon a line between for-profit and non-profit organizations. App. 9-14. The court acknowledged that though "the [Supreme] Court has never seriously considered such a claim by a secular corporation or other organizational entity [this] is not to say it never will." App. 12. The court also rejected the reasoning of the Ninth Circuit's decision in *Townley*, 859 F.2d 610, which held that a closely held corporation can assert the free exercise rights of its owners in some contexts. App. 14-16.

A different majority (Judges Brown and Randolph) then held that the Mandate substantially burdens the Gilardis' religious exercise, App. 16-24, and that applying the Mandate to the Gilardis neither furthered a compelling interest nor was the least restrictive means of doing so. App. 24-34. Thus, the court reversed the district court's denial of a preliminary injunction with respect to the Gilardis, affirmed the denial with respect to the Freshway Companies, and remanded for consideration of the other preliminary injunction factors. App. 34-35, 77-78.

Judge Randolph wrote a concurring opinion in which he argued that the court did not need to reach the issue of whether the Freshway Companies are covered by RFRA's protections because, in his view, "the government could enforce the mandate against the

corporation only by compelling the Gilardis to act." App. 35 (Randolph, J., concurring). He also asked:

> If secular for-profit corporations can never exercise religion, what of profitable activities of organized religions? If only religious for-profit organizations have a free-exercise right, how does one distinguish between religious and non-religious organizations? Why limit the free-exercise right to religious organizations when many business corporations adhere to religious dogma? If non-religious organizations do not have free-exercise rights, why do non-religious natural persons (atheists, for example) possess them?

App. 35-36 (citations omitted).

Judge Edwards wrote a separate opinion in which he argued that the Freshway Companies cannot exercise religion, App. 42-43 (Edwards, J., concurring in part and dissenting in part), the Gilardis have standing to assert their RFRA claim, App. 43-50, the Mandate does not substantially burden the Gilardis' religious exercise, App. 50-68, and the Mandate satisfies strict scrutiny, App. 68-76.

REASONS FOR GRANTING THE WRIT

In holding that a business corporation cannot exercise religion under RFRA or the First Amendment, because, according to the decision below, only religious organizations or individuals may do so, the D.C. Circuit has furthered the divide among the lower courts on a subject of fundamental importance: the ability to practice religion when using the corporate form and in the commercial context. The decision below rejects the

notion that a business corporation can assert *any* religious claim under RFRA or the Free Exercise Clause against a law requiring the corporation to take action in violation of the religious tenets, principles, or policies that govern the corporation. So, for example, a retail store whose religious-based corporate policies require that it close for business on holy days or the Sabbath could not challenge a law requiring businesses to remain open seven days a week. A deli that has a corporate policy against selling pork for religious reasons could not challenge a regulation requiring businesses to sell pork. A medical practice that has a religious-based policy against performing abortions could not challenge a law requiring all OB/GYN medical practices to offer abortion services.

Certainly, not all corporations that are engaged in commercial activity have corporate policies, practices, or procedures that are based upon religious principles. But for those that do, like the Freshway Companies, it is wrong to hold, as did the court below, that they have no religious freedom. A corporation that can assert a *free speech* right to display a sign stating "Respect the Sabbath," should also be able to assert a *free exercise* right to fulfill this religious admonition by closing on the Sabbath. In the case of the Freshway Companies, which have an uncontested First Amendment right to state "It's not a choice, it's a child" on their delivery trucks, App. 141 (photo), they should have a First Amendment right to continue to act on this religious principle by excluding drugs from their health plan that have the potential to cause abortions.

As Judge Noonan of the Ninth Circuit observed with respect to corporations and free exercise:

> 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.

Townley, 859 F.2d at 623 (Noonan, J., dissenting).

This Court has time and again recognized that religion can be practiced in the corporate form. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525–26 (1993); *Corp. of Presiding Bishop of 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 on other grounds by Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

This Court has also recognized that exercising religion and earning a living through commercial activity are not necessarily incompatible. *See United States v. Lee*, 455 U.S. 252 (1982); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

What this Court has yet to recognize explicitly lies at the juxtaposition of these two lines of decisions: the ability of a corporation engaged in commercial activity to operate under religious principles. The Court's silence on this question has undoubtedly contributed to the fractured nature of the multiple, conflicting decisions below wrestling with the question. Now, therefore, is the time for this Court to speak.

I. The Decision Below Raises Issues of Vital Importance Concerning the Exercise of Fundamental Rights, Warranting Review by This Court.

The D.C. Circuit asked the "simple" question this way: "do corporations enjoy the shelter of the Free Exercise Clause?" App. 9. Looking to the "nature, history, and purpose" of the Free Exercise Clause, the court ultimately answered that question: *yes*, for religious organizations, *no* for secular ones (although the court declined to shed light on how to draw the line between religious and secular organizations). The court stated that, while this Court has "heard free-exercise challenges from religious entities and religious organizations . . . . listened to the grievances of religious sects and member congregations . . . . [and] even entertained claims by religious and educational institutions," it could "glean nothing from [this] Court's jurisprudence that suggests other entities may raise a

free-exercise challenge." App. 11-12. (citations omitted). It noted that "[w]hen it comes to the free exercise of religion . . . [this] Court has only indicated that people and churches worship. As for secular corporations, [this] Court has been all but silent." App. 13.

While it is certainly true, as previously mentioned, that this Court has never explicitly held that a "secular" corporation has a right to operate under binding religious norms, it is also true that this Court has never *rejected* that argument either. And though the Court has been silent on this specific issue, it has not been silent on whether religion can be practiced in the corporate form, *see*, *e.g.*, *Lukumi* and *O Centro*; it has not been silent on whether individuals have free exercise rights with respect to their commercial activities, *see*, *e.g.*, *Lee* and *Braunfeld*. And it has not been silent about a corporation's free speech rights, no matter the nature or purpose of the corporation. *See*, *e.g.*, *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.").

In the absence of *any* decision by this Court teaching that a secular corporation cannot follow religious norms, taking these principles together provides ample support for the proposition that all corporations, whether labeled as "religious" or "secular," "for-profit" or "non-profit," can, at least in certain contexts, adhere to religious norms. An opposite conclusion, like the one reached by the court below, would render free exercise secondary to free speech in the First Amendment by protecting the right of *all*

corporations to speak, but protecting the right of only *some* to act pursuant to religion. The First Amendment does not state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, *unless it involves the regulation of a secular corporation*." *See* U.S. Const. Amend. I. And RFRA does not state that the government "shall not substantially burden a person's exercise of religion, *unless that person is a secular corporation*." *See* 42 U.S.C. § 2000bb-1(a).

When this Court observed that "First Amendment protection extends to corporations," *Citizens United*, 130 S. Ct. at 899, it did not exclude recognition of the free exercise rights of secular or for-profit corporations. What this Court teaches with respect to the speech of corporations, secular or not, should extend to the free exercise of religion through the corporate form, secular or not, as the free exercise of religion should not hold second rank to free speech, and the corporate nature of the means of speaking or exercising religion should make no difference. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 796 (1978) ("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).

The court below declined to recognize that the Freshway Companies exercise religion when they act in

accordance with the teachings of the Catholic Church because, according to the court, while there is "a robust body of caselaw giving rise to the constitutional right of corporate political speech, . . . [n]o such *corpus juris* exists to suggest a free-exercise right for secular corporations." App. 14. While there is no doubt that this Court's corporate free speech doctrine is built upon a solid foundation of decisional law, the court below did not sufficiently explain why this Court's corporate free speech cases do not support a secular corporation's right to operate under religious norms as well. It is settled that both an individual and a corporation can speak in a manner protected by the First Amendment, and that both an individual and a corporate body (at least a "religious" one) can engage in religious exercise. Why should characterizing an organization as "secular," according to some undefined criterion, make any dispositive difference concerning the exercise of religion? While it is true that free speech and free exercise rights are not identical, in that they protect different (although sometimes overlapping) types of activity and expression, it is equally true that "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment." *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

Perhaps predicting that this Court may grant certiorari in one or more of the pending cases involving corporations challenging the Mandate, the D.C. Circuit recognized that though this Court "has never seriously considered . . . a [free exercise] claim by a secular corporation or other organizational entity [this] is not to say it never will." App. 12. It even opined that "perhaps [the] constitutional arithmetic, *Citizens*

United plus the Free Exercise Clause equals a corporate free-exercise right, will ultimately prevail." App. 13. With these statements, the D.C. Circuit all but asks this Court to intervene and resolve this issue of vital importance. This Court should do so.[10]

II. The Decision Below Conflicts with Other Lower Court Decisions on the Issue of Corporate Free Exercise.

A. The Decision Below Conflicts with a Tenth Circuit Decision.

The decision below directly conflicts with the Tenth Circuit's decision in *Hobby Lobby* on the issue of whether a secular or for-profit corporation can exercise religion. Like this case, *Hobby Lobby* involved two

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[10] Petitioners recognize that the decision below concerning the Gilardis' RFRA claim could be read as effectively rendering moot the Freshway Companies' RFRA claim, as Judge Randolph would seem to suggest in his concurring opinion. App. 35-37 (Randolph, J., concurring). But the companies' claim is not moot so long as the government adheres to the position it has taken throughout this litigation and all related cases, *viz*., that the Mandate applies solely to the corporate entities themselves as absolutely distinct and separate from the individual owners. In fact, it is Respondents' position that the Gilardis themselves are not the object of the regulations at all, only their companies, and it would be consistent with that position for the government to pursue enforcement of the Mandate against the Freshway Companies regardless of an injunction that may be entered (based on the decision below) in favor of Francis and Philip Gilardi. The decision below therefore leaves the companies exposed to the potential assessment of penalties and costly, disruptive enforcement actions by the government. Whatever Petitioners' prospect may be of ultimate vindication in those actions based on the decision below, they should not be put to the burden of defending against such actions.

closely held, for-profit corporations and the family members that owned and operated them. The corporations and the family members challenged the Mandate that Petitioners challenge here under the same causes of action (RFRA and the Free Exercise Clause). 723 F.3d at 1120.

Contrary to the decision below, the Tenth Circuit held "as a matter of statutory interpretation that Congress did not exclude for-profit corporations from RFRA's protections. Such corporations may be 'persons' exercising religion for purposes of the statute." *Id*. at 1129. The Tenth Circuit noted that nothing in other federal statutes, case law, or the text of RFRA itself altered the default meaning of "person" in the Dictionary Act, "which includes corporations regardless of their profit-making status." *Id*. at 1129–32 (citing 1 U.S.C. § 1).

The Tenth Circuit further held that, "as a matter of constitutional law, Free Exercise rights may extend to some for-profit organizations." *Id*. at 1129. Applying the "First Amendment logic of *Citizens United*," it reached a conclusion wholly contrary to that of the decision below. While the D.C. Circuit stated that there was "no basis for concluding a secular organization can exercise religion," App. 16, the Tenth Circuit held that there is no principled basis to "recognize constitutional protection for a corporation's political expression but not its religious expression." *Id*. at 1135.

The conflict between the irreconcilable decisions of the Tenth and D.C. Circuits on whether a secular or for-profit corporation can exercise religion could not be more palpable.

B. The Decision Below Conflicts with Two Ninth Circuit Decisions.

The D.C. Circuit's decision also conflicts with decisions from the Ninth Circuit allowing for-profit companies to assert, and thereby vindicate, the free exercise rights of their owners. Although the D.C. Circuit found the Ninth Circuit's "pass-through theory of corporate standing [to be] logically and structurally appealing," the D.C. Circuit specifically rejected the Ninth Circuit's decisions in *Townley*, 859 F.2d 610, and *Stormans*, 586 F.3d 1109, wherein the Ninth Circuit permitted two closely-held family businesses to advance the free exercise rights of their owners. App. 14-16.

In *Townley*, a husband and wife owned 94% of a company that manufactured mining equipment. They sought to run the company pursuant to their Christian faith since they were "unable to separate God from any portion of their daily lives, including their activities at the Townley company." 859 F.2d at 612. Their company sought a religious exemption from Title VII of the Civil Rights Act to permit the company to require its employees to attend weekly religious services. The company claimed that it was entitled to invoke the Free Exercise Clause on its own behalf. *Id.* at 619. Although the Ninth Circuit declined to address whether a for-profit company has rights under the Free Exercise Clause *independent* from its owners, the court did determine that because the company was "merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs," it could assert the Townleys' free exercise rights. *Id.* at 619-20. The Ninth Circuit allowed the free exercise rights of the

owners, who were not parties to the action, to pass through their company. *Id.* at 620.

In *Stormans*, one of the plaintiffs was a for-profit grocery store that also operated a pharmacy. The store was owned by family members who, based on their religious beliefs, did not want their pharmacy to be compelled by the government to dispense the Plan B abortifacient. 586 F.3d at 1120. With regard to its standing to bring a free exercise claim, the business argued that its operational principles were an "extension of," and identical to, the beliefs of the family members. Thus, the business argued that it did not "present any free exercise rights of its own different from or greater than its owners' rights." *Id.* The Ninth Circuit held that the company had standing to assert the free exercise rights of its owners, who were not plaintiffs in the action. *Id.*

The D.C. Circuit's ruling that the Freshway Companies cannot assert the free exercise rights of the Gilardi brothers is in direct conflict with the rulings of the Ninth Circuit. The Freshway Companies are instruments through which the Gilardi brothers express their religious beliefs, in particular, their beliefs about actions that they should or should not take concerning the sanctity of human life. The D.C. Circuit erred in ruling that the companies could not advance a claim that the Mandate violates the Gilardis' religious exercise rights as protected by RFRA. The conflict between the D.C. and Ninth Circuits should be resolved by this Court to ensure uniformity in the protection of free exercise rights in this country.

* * *

In the decision below, and in conflict with the Third and Sixth Circuits, the D.C. Circuit held that the owners of two closely-held, family-owned corporations are substantially burdened by the Mandate. And, in conflict with the Tenth Circuit, the court below held that the corporations cannot themselves exercise religion and thus cannot challenge the Mandate in their own right. The D.C., Third and Sixth Circuits have also rejected the Ninth Circuit's approach of allowing a closely-held corporation to assert the free exercise rights of its owners. And, while a majority of the Tenth Circuit held that two "for-profit" corporations are persons capable of exercising religion under RFRA, and thus could challenge the Mandate in their own right, the court did not rule on whether the individual owners of the corporations were themselves burdened by the Mandate.

Clearly, the lower courts are at odds with one another as to who has standing to challenge the Mandate, whose religious exercise is substantially burdened by the Mandate, and whether a secular or for-profit corporation has any religious exercise rights at all. Given these conflicting decisions, and the fact that the Mandate impacts the exercise of a fundamental liberty protected by the First Amendment, there cannot be a more compelling case or controversy warranting this Court's intervention.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and review the D.C. Circuit's decision in tandem with the petitions now pending before this Court in *Hobby Lobby* (No. 13-354), *Conestoga Wood* (No. 13-356), and *Autocam* (No. 13-482). In the

alternative, Petitioners suggest that this Court hold this petition pending the disposition of one or more of these three petitions, and then grant certiorari, vacate the decision below, and remand for further proceedings in light of this Court's decision therein.

Respectfully submitted,

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Jordan Sekulow
Colby M. May
Walter M. Weber
Carly F. Gammill
[redacted]

Francis J. Manion
Geoffrey R. Surtees
[redacted]

Edward L. White III
Erik M. Zimmerman
[redacted]

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