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.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 13-482

AUTOCAM CORPORATION, ET AL., PETITIONERS

v.

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

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is not yet reported but is available at 2013 WL 5182544. The subsequent opinion of the district court entering final judgment (Pet. App. 26-30) is unreported. The earlier opinion of the district court denying a preliminary injunction (Pet. App. 31-58) is unreported but is available at 2012 WL 6845677.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2013. The petition for a writ of certiorari was filed on October 15, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Most Americans with private health coverage obtain it through an employment-based group health plan. Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 4 & tbl. 1-1 (2008). The cost of such employment-based health coverage is typically covered by a combination of employer and employee contributions. *Id.* at 4.

The federal government heavily subsidizes group health plans[1] and has also established certain minimum coverage standards for them. For example, in 1996, Congress required such plans to cover certain benefits for mothers and newborns. 42 U.S.C. 300gg-4 (Supp. II 1996); 26 U.S.C. 9811 (Supp. III 1997); 29 U.S.C. 1185 (Supp. II 1996). In 1998, Congress required coverage of reconstructive surgery after covered mastectomies. 42 U.S.C. 300gg-6 (Supp. IV 1998); 29 U.S.C. 1185b (Supp. IV 1998).

2. In the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable Care Act or Act),[2] Congress provided for additional minimum standards for group health plans (and health insurers offering coverage in both the group and individual markets).

---

[1] While employees pay income and payroll taxes on their cash wages, they typically do not pay taxes on their employer's contributions to their health coverage. 26 U.S.C. 106 (2006 & Supp. V 2011). The aggregate federal tax subsidy for employment-based health coverage was nearly $242 billion in 2009. Office of Mgmt. & Budget, *Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2011*, Tbl. 16:1 & n.7 (2010).

[2] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

a. As relevant here, the Act requires non-grandfathered group health plans to cover certain preventive-health services without cost sharing—that is, without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. 42 U.S.C. 300gg-13 (Supp. V 2011) (preventive-services coverage requirement).[3] "Prevention is a well-recognized, effective tool in improving health and well-being and has been shown to be cost-effective in addressing many conditions early." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 16 (2011) (IOM Report). Nonetheless, the American health-care system has "fallen short in the provision of such services" and has "relied more

[3] This preventive-services coverage requirement applies to, among other types of health coverage, employment-based group health plans covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, and, with respect to such plans, is subject to ERISA's enforcement mechanisms. 29 U.S.C. 1185d (Supp. V 2011). It is also enforceable through imposition of tax penalties on the employers that sponsor such plans. 26 U.S.C. 4980D; see 26 U.S.C. 9815(a)(1), 9834 (Supp. V 2011). With respect to health insurers in the individual and group markets, States may enforce the Act's insurance market reforms, including the preventive-services coverage requirement. 42 U.S.C. 300gg-22(a)(1) (Supp. V 2011). If the Secretary of Health and Human Services determines that a State "has failed to substantially enforce" one of the insurance market reforms with respect to such insurers, she conducts such enforcement herself and may impose civil penalties. 42 U.S.C. 300gg-22(a)(2) (Supp. V 2011); see 42 U.S.C. 300gg-22(b)(1)(A) (Supp. V 2011); 42 U.S.C. 300gg-22(b)(2). The Act's grandfathering provision has the effect of allowing certain existing plans to transition to providing coverage for recommended preventive services without cost sharing and to complying with some of the Act's other requirements. See Pet. at 30, *Sebelius* v. *Hobby Lobby Stores, Inc.*, petition for cert. pending, No. 13-354 (filed Sept. 19, 2013).

on responding to acute problems and the urgent needs of patients than on prevention." *Id.* at 16-17. To address this problem, the Act requires coverage of preventive services without cost sharing in four categories.

First, group health plans must cover items or services that have an "A" or "B" rating from the U.S. Preventive Services Task Force (Task Force). 42 U.S.C. 300gg-13(a)(1) (Supp. V 2011). The Task Force is composed of independent health-care professionals who "review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community." 42 U.S.C. 299b-4(a) (Supp. V 2011). Services rated "A" or "B" are those for which the Task Force has the greatest certainty of a net benefit for patients. 75 Fed. Reg. 41,733 (July 19, 2010). The Task Force has awarded those ratings to more than 40 preventive services, including cholesterol screening, colorectal cancer screening, and diabetes screening for those with high blood pressure. *Id.* at 41,741-41,744.

Second, the Act requires coverage of immunizations recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention. 42 U.S.C. 300gg-13(a)(2) (Supp. V. 2011). The Committee has recommended routine vaccination to prevent a variety of vaccine-preventable diseases that occur in children and adults. 75 Fed. Reg. at 41,740, 41,745-41,752.

Third, the Act requires coverage of "evidence-informed preventive care and screenings" for infants, children, and adolescents as provided for in guidelines supported by the Health Resources and Services Ad-

ministration (HRSA), which is a component of the Department of Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(3) (Supp. V 2011). The relevant HRSA guidelines were developed "by multidisciplinary professionals in the relevant fields to provide a framework for improving children's health and reducing morbidity and mortality based on a review of the relevant evidence." 75 Fed. Reg. at 41,733. They include a schedule of examinations and screenings. *Id.* at 41,753-41,755.

Fourth, and as particularly relevant here, the Act requires coverage, "with respect to women, [of] such additional preventive care and screenings" (not covered by the Task Force's recommendations) "as provided for in comprehensive guidelines supported" by HRSA. 42 U.S.C. 300gg-13(a)(4) (Supp. V 2011). Congress included this provision in response to a legislative record showing that "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); see IOM Report 18. In particular, "[w]omen of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein). And women often find that copayments and other cost sharing for important preventive services "are so high that they avoid getting [the services] in the first place." *Id.* at 29,302 (statement of Sen. Mikulski); see IOM Report 19-20.

Because HRSA did not have relevant guidelines at the time of the Act's enactment, HHS requested that the Institute of Medicine (Institute or IOM) develop recommendations for it. 77 Fed. Reg. 8726 (Feb. 15, 2012); IOM Report 1. The Institute is part of the

National Academy of Sciences, a "semi-private" organization Congress established "for the explicit purpose of furnishing advice to the Government." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 460 & n.11 (1989) (citation omitted); see IOM Report iv.

To formulate recommendations, the Institute convened a group of experts, "including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines." IOM Report 2. The Institute defined preventive services as measures "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." *Id.* at 3. Based on its review of the evidence, the Institute then recommended a number of preventive services for women, such as screening for gestational diabetes for pregnant women, screening and counseling for domestic violence, and at least one well-woman preventive care visit a year. *Id.* at 8-12.

The Institute also recommended coverage for the "full range" of "contraceptive methods" approved by the Food and Drug Administration (FDA), as well as "sterilization procedures" and "patient education and counseling for all women with reproductive capacity." IOM Report 10; see *id.* at 102-110. FDA-approved contraceptive methods include oral contraceptive pills, diaphragms, injections and implants, emergency contraceptive drugs, and intrauterine devices (IUDs). FDA, *Birth Control: Medicines To Help You*, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last visited Oct. 11, 2013).

In making that recommendation, the Institute noted that nearly half of all pregnancies in the United

States are unintended and that unintended pregnancies have adverse health consequences for both mothers and newborn children. IOM Report 102-103 (discussing consequences, including inadequate prenatal care, higher incidence of depression during pregnancy, and increased likelihood of preterm birth and low birth weight). In addition, the Institute observed, use of contraceptives leads to longer intervals between pregnancies, which "is important because of the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103. The Institute also noted that greater use of contraceptives lowers abortion rates. *Id.* at 105. Finally, the Institute explained that "contraception is highly cost-effective," as the "direct medical cost of unintended pregnancy in the United States was estimated to be nearly $5 billion in 2002." *Id.* at 107.

HRSA adopted guidelines consistent with the Institute's recommendations, including a coverage requirement for all FDA-approved "contraceptive methods [and] sterilization procedures," as well as "patient education and counseling for all women with reproductive capacity," as prescribed by a health-care provider. HRSA, HHS, *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines/ (last visited Oct. 11, 2013). The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 45 C.F.R. 147.130(a)(1)(iv) (HHS); 29 C.F.R. 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. 54.9815-2713(a)(1)(iv) (Treasury) (collectively referred

to in this brief as the contraceptive-coverage requirement).

b. The implementing regulations authorize an exemption from the contraceptive-coverage requirement for the group health plan of an organization that qualifies as a "religious employer." 45 C.F.R. 147.131(a). A religious employer is defined as a non-profit organization described in the Internal Revenue Code provision that refers to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. *Ibid.* (cross-referencing 26 U.S.C. 6033(a)(3)(A)(i) and (iii)).

The implementing regulations also establish certain religion-related accommodations for group health plans established or maintained by "eligible organization[s]." 45 C.F.R. 147.131(b). An accommodation is available to a non-profit religious organization that has religious objections to providing coverage for some or all contraceptive services. *Ibid.* If a non-profit religious organization is eligible for such an accommodation, the women who participate in its plan will have access to contraceptive coverage without cost sharing through an alternative mechanism established by the regulations. 78 Fed. Reg. 39,870, 39,872, 39,874-39,886 (July 2, 2013).

"Consistent with religious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964," the definition of an organization eligible for an accommodation "does not extend to for-profit organizations." 78 Fed. Reg. at 39,875. The Departments that issued the preventive-services coverage regulations explained that they were "unaware

of any court granting a religious exemption to a for-profit organization, and decline[d] to expand the definition of eligible organization to include for-profit organizations." *Ibid.*

3. Petitioners are two affiliated for-profit corporations, Autocam Corporation and Autocam Medical, LLC (collectively referred to here as Autocam), and the corporations' controlling shareholders, who are five family members (collectively referred to here as the Kennedys). Pet. App. 3-4. Autocam engages in high-volume manufacturing for the automotive and medical industries. *Ibid.* It has 1500 employees in facilities worldwide, including 661 employees in the United States. *Id.* at 5. Autocam employees obtain health coverage through the Autocam group health plan. Pet. App. 68 para. 34.

The Kennedys "are practicing Roman Catholics," Pet. App. 4, and they "accept their church's teaching that artificial contraception and sterilization are immoral," *id.* at 6. In this suit, petitioners contend that the requirement that the Autocam group health plan cover FDA-approved contraceptives violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, which provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1(a) and (b). Specifically, petitioners contend that RFRA entitles the Autocam plan to an exemption from the contraceptive-coverage requirement because the Kennedys object to being required to "provide, fund, or participate in health care insurance that covers artificial contracep-

tion." Pet. App. 69 para. 37; see also *id.* at 96 para. 159.[4]

a. The district court denied petitioners' motion for a preliminary injunction, holding that neither Autocam nor the Kennedys had established a likelihood of success on the merits of their RFRA claims. Pet. App. 38-48. The court concluded that, even assuming that a for-profit, secular corporation like Autocam is a person that engages in the exercise of religion within the meaning of RFRA, *id.* at 39, any burden on Autocam's religious exercise does not qualify as substantial because employee benefits will not be used for contraceptives unless an employee makes an independent decision to purchase them. *Id.* at 42-44. The court concluded that "the application of the contraceptive coverage requirement to the Kennedy Plaintiffs is even more removed." *Id.* at 45. The court explained that the requirement "does not compel the Kennedys as individuals to do anything," and that "[i]t is only the legally separate entities they currently own that have any obligation under the mandate." *Id.* at 46. The court rejected petitioners' contention that Autocam should be treated as "the *alter ego* of its owners for purposes of religious belief and exercise." *Ibid.*

b. After denying an injunction pending appeal, the court of appeals affirmed the order of the district court denying the preliminary injunction. Pet. App. 1-19.[5] The court concluded that "for-profit, secular

---

[4] Petitioners also presented claims under the First Amendment and Administrative Procedure Act, but they did not raise those claims on appeal.

[5] Consistent with the position of both parties, the court of appeals held that Autocam has standing to challenge the contracep-

corporations" such as Autocam are not "persons" capable of "religious exercise" in the sense that RFRA intended. *Id.* at 3, 17-18; see *id.* at 14-23. The court explained that, "[d]uring the 200-year span between the adoption of the First Amendment and RFRA's passage, the Supreme Court consistently treated free exercise rights as confined to individuals and non-profit religious organizations." *Id.* at 19-20 (citations omitted). The court rejected petitioners' contention that, "just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit secular corporations can exercise religion." *Id.* at 21 (quotation marks and citation omitted).

The court of appeals found that its "interpretation is also supported by RFRA's legislative history," which "specifically recognized that individuals and religious organizations enjoy free exercise rights under the First Amendment and, by extension, RFRA," Pet. App. 21, but which "makes no mention of for-profit corporations," *id.* at 22. The court rejected petitioners' "attempt to fill this void by relying on freedom of speech cases," explaining that "[n]o analogous body of precedent exists with regard to the rights of secular, for-profit corporations under the Free Exercise Clause prior to the enactment of RFRA." *Ibid.*

The court of appeals held that the Kennedys lack standing to challenge the contraceptive-coverage requirement, which applies only to Autocam and does not impose any obligation on the Kennedys in their individual capacities. Pet. App. 10-14. The court

---

tive-coverage requirement and that the Anti-Injunction Act does not bar this suit. Pet. App. 8-10.

reasoned that "[i]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Id.* at 12 (quoting *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001)). The court explained that the "Kennedys' actions with respect to Autocam are not actions taken in an individual capacity, but as officers and directors of the corporation." *Ibid.* The court rejected petitioners' invitation to disregard the corporate form and treat the regulation of Autocam as if it were the regulation of the Kennedys as individuals, finding no "authority to ignore the choice the Kennedys made to create a separate legal entity to operate their business." *Id.* at 13-14.[6]

c. On September 30, 2013, after the court of appeals affirmed the district court's denial of a preliminary injunction, the district court granted the government's motion to dismiss petitioners' complaint and entered final judgment against petitioners. Pet. App. 26-30. Petitioners appealed that final judgment, and the court of appeals granted their request to hold that appeal in abeyance pending the filing of a petition for a writ of certiorari in this case. See 13-2316 Docket entry (6th Cir. Oct. 4, 2013) (Order).

ARGUMENT

Petitioners contend that the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*,

---

[6] Because petitioners failed to demonstrate a likelihood of success on the merits of their RFRA claims, the court of appeals did not address the other factors that bear on the issuance of a preliminary injunction. Pet. App. 23.

allows a for-profit corporation to deny its employees the health coverage of contraceptives to which they are otherwise entitled by federal law, based on the religious objections of the controlling shareholders. That question is an important one that has divided the courts of appeals. This petition for a writ of certiorari should nonetheless be denied because petitioners' challenge to the denial of the preliminary injunction they sought is now moot in light of the district court's subsequent entry of final judgment against them. The questions on which petitioners seek review can instead be considered by granting the government's pending petition for a writ of certiorari in *Sebelius* v. *Hobby Lobby Stores, Inc.*, No. 13-354 (filed Sept. 19, 2013) (*Hobby Lobby*).

1. For the reasons provided in the government's petition for a writ of certiorari in *Hobby Lobby* (at 16-32), Autocam's RFRA claim was properly rejected by the lower courts in this case. The court of appeals also properly held that the Kennedys lack standing to challenge a regulation that applies only to Autocam. *Id.* at 23-26; see Pet. App. 10-14. As the government notes in the *Hobby Lobby* petition (at 32-35), the proper disposition of RFRA claims such as those petitioners raise here is a question of exceptional importance that has divided the courts of appeals. Compare Pet. App. 1-23 and *Conestoga Wood Specialties Corp.* v. *Secretary of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), petition for cert. pending, No. 13-356 (filed Sept. 19, 2013), with *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th

Cir. 2013) (en banc), petition for cert. pending, No. 13-354 (filed Sept. 19, 2013).[7]

This Court's consideration of the question presented is therefore warranted, but *Hobby Lobby* is a better vehicle for its consideration because petitioners' challenge to the denial of a preliminary injunction in this case is moot. This petition should therefore be denied.

In the decision below, the court of appeals affirmed the denial of a preliminary injunction. Pet. App. 1-23. After the court of appeals' decision, the district court dismissed the complaint and entered final judgment for the government. *Id.* at 26-30. Because the district court's earlier denial of the preliminary injunction (as affirmed by the court of appeals) was "merged in" the final judgment dismissing the case, petitioners' challenge to the denial of a preliminary injunction is now moot. See *Shaffer* v. *Carter*, 252 U.S. 37, 44 (1920) (dismissing appeal from the denial of an interlocutory injunction because "the denial of the interlocutory application was merged in the final decree"); *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U.S. 196, 205-206 (1924) (same); see also *Harper* v. *Poway Unified Sch. Dist.*, 549 U.S. 1262, 1262 (2007) (per curiam) ("We have previously dismissed interlocutory appeals from the denials of motions for temporary injunctions once

---

[7] The same question is also pending before other courts of appeals. *E.g.*, *Korte* v. *Sebelius*, No. 12-3841, and *Grote* v. *Sebelius*, No. 13-1077 (7th Cir. argued May 22, 2013); *Gilardi* v. *HHS*, No. 13-5069 (D.C. Cir. argued Sept. 24, 2013); *O'Brien* v. *U.S. Dep't of Health & Human Servs.*, No. 12-3357, and *Annex Medical, Inc.* v. *Sebelius*, No. 13-1118 (8th Cir. oral argument scheduled for Oct. 24, 2013); *Beckwith Elec. Co.* v. *Secretary, U.S. Dep't of Health & Human Servs.*, appeal pending, No. 13-13879 (11th Cir. docketed Aug. 28, 2013).

final judgment has been entered."); *Chaparro-Febus* v. *International Longshoremen Ass'n, Local 1575*, 983 F.2d 325, 331 n.5 (1st Cir. 1992); *SEC* v. *Mount Vernon Mem'l Park*, 664 F.2d 1358, 1361-1362 (9th Cir.), cert. denied, 456 U.S. 961 (1982); *United States* v. *City of Chi.*, 534 F.2d 708, 711-712 (7th Cir. 1976); *cf. Grupo Mexicano* v. *Alliance Bond Fund*, 527 U.S. 308, 314 (1999) ("Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter."); *Smith* v. *Illinois Bell Tel. Co.*, 270 U.S. 587, 588-589 (1926). A preliminary injunction is a "reasonable measure to preserve the status quo pending final determination of the questions raised" in a complaint, *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 290 (1940), but once that final determination has been made, there is no longer any basis to litigate the grant or denial of a provisional remedy.[8]

---

[8] Petitioners appealed the final judgment of dismissal and, on petitioners' motion, the Sixth Circuit stayed the appeal. See p. 12, *supra*; Pet. 9 n.1. Contrary to petitioners' suggestion, see Pet. 9 n.1, the posture of this case is not analogous to the posture of *Hobby Lobby*. The district court in *Hobby Lobby* did not enter final judgment (and has stayed proceedings); there is thus no issue of mootness with respect to the government's challenge to the court of appeals' decision. Instead, the *Hobby Lobby* district court subsequently entered a *preliminary* injunction on remand from the Tenth Circuit's en banc decision. See *Hobby Lobby Stores, Inc.* v. *Sebelius*, No. 5:12-CV-01000-HE, 2013 WL 3869832 (W.D. Okla. July 19, 2013), appeal pending, No. 13-6215 (10th Cir. docketed Sept. 18, 2013). That subsequent decision was based solely on its consideration of "equitable balancing and whether issuance of an injunction would be in the public interest," given that the court of appeals had already resolved the merits and irreparable harm factors. *Id.* at *1.

The mootness of petitioners' current challenge does not mean that they cannot seek further review of their RFRA claim. They may ask the court of appeals to take their pending appeal of the district court's final judgment out of abeyance and summarily affirm it. They may then seek further review of that decision. Alternatively, the court of appeals may continue to hold petitioners' appeal in abeyance until this Court acts on the government's petition in *Hobby Lobby* and, if the petition is granted, this Court's decision in that case. At that point, the court of appeals could resolve the appeal in light of this Court's decision.

2. Even assuming that this Court could reach the merits in this case, the decision below presents a less comprehensive basis for review than does the Tenth Circuit's decision in *Hobby Lobby*. The court of appeals in this case rejected petitioners' RFRA claims based only on threshold defects. In particular, the court held that a for-profit, secular corporation like Autocam is not a "person" capable of "religious exercise" in the sense that RFRA intended. Pet. App. 17-18; see *id.* at 14-23. The court held that the Kennedys lack standing to challenge the contraceptive-coverage requirement because the requirement applies only to Autocam and does not impose any obligation on the Kennedys as individuals. *Id.* at 10-14. The court therefore declined to reach the government's separate arguments that the contraceptive-coverage requirement does not impose a substantial burden on Autocam and that, in any event, the requirement can be justified under RFRA's heightened scrutiny test. *Id.* at 18.

By contrast, the Tenth Circuit addressed each of the elements of the RFRA cause of action. The Tenth

Circuit squarely addressed (and rejected) the government's argument that, assuming Hobby Lobby were a person exercising religion for purposes of RFRA, there would be no "substantial burden" on its religious exercise because an "employee's decision to use her health coverage to pay for a particular item or service cannot properly be attributed to her employer." *Hobby Lobby*, 723 F.3d at 1137; see *id.* at 1137-1143; cf. *Hobby Lobby* Pet. at 26-27 (contending that court of appeals' substantial burden analysis was erroneous). Additionally, the Tenth Circuit held that the government did not identify an adequate compelling interest and, assuming that it did, failed to show that the requirement was the least restrictive means of advancing any compelling interest. See *Hobby Lobby*, 723 F.3d at 1143-1144; cf. *Hobby Lobby* Pet. at 27-32 (contending that the Tenth Circuit's scrutiny analysis was erroneous). For these reasons, the more comprehensive opinion in *Hobby Lobby* is a preferable vehicle for review.

Petitioners observe (Pet. 36) that the court of appeals in this case expressly rejected both Autocam's RFRA claims and those of the Kennedys as individual owners of the corporations. By contrast, the Tenth Circuit did not formally address the RFRA claims of the individual owners in *Hobby Lobby*. See *Hobby Lobby*, 723 F.3d at 1126 n.4. That distinction does not counsel in favor of plenary review here. Four members of the eight-member en banc court in *Hobby Lobby* wrote separately to explain that they would rule in favor of the individual owners (at least in part) on their RFRA claims. See 723 F.3d at 1126 n.4; see also *id.* at 1152-1157 (Gorsuch, J., concurring); *id.* at 1184-1190 (Matheson, J., concurring in part and dis-

senting in part). Moreover, the government explains in its *Hobby Lobby* petition (at 23-24) that the court of appeals in that case had erroneously "disregard[ed] fundamental tenets of American corporate law" by "attribut[ing] the religious beliefs of [Hobby Lobby's owners] to the corporate entities themselves." See *id.* at 23-27. That argument, if accepted, would effectively dispose of the RFRA claims of the individual owners. In addition, respondents in *Hobby Lobby* have argued that the individual owners' RFRA claims provide an alternative ground for affirmance in that case, see Br. for Resp. at 27-29, *Hobby Lobby Stores, Inc.*, *supra* (No. 13-354), and the government anticipates addressing that issue in its merits briefs in that case. The Court can thus consider the question of individual owners' RFRA rights in *Hobby Lobby* and need not grant this petition to do so.

Petitioners also note (Pet. 37) that the Kennedys object to all forms of contraceptive coverage, while the individuals in *Hobby Lobby* (and *Conestoga Wood*) object to coverage of only those forms of contraceptives that may prevent implantation of a fertilized egg in the uterus. The Tenth Circuit's reasoning is not limited to particular contraceptive methods, however, as demonstrated concretely by that court's subsequent decision (based on *Hobby Lobby*) affirming a preliminary injunction that allows a for-profit, secular corporation to exclude all forms of contraceptives from its group health plan. See *Newland* v. *Sebelius*, No. 12-1380, 2013 WL 5481997 (Oct. 3, 2013).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys

OCTOBER 2013