Nos. 13-354; 13-356

In The Supreme Court of the United States

KATHLEEN SEBELIUS, et al.,

Petitioners,

v.

HOBBY LOBBY STORES, INC., et al.,

Respondents.

and

CONESTOGA WOOD SPECIALTIES CORP., et al.,

Petitioners,

v.

KATHLEEN SEBELIUS, et al.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Tenth And Third Circuits

BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"), ET AL., IN SUPPORT OF RESPONDENTS IN NO. 13-354 AND IN SUPPORT OF PETITIONERS IN NO. 13-356

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AGUDATH ISRAEL OF AMERICA

NATIONAL COUNCIL OF YOUNG ISRAEL

RABBINICAL ALLIANCE OF AMERICA

RABBINICAL COUNCIL OF AMERICA

TORAH UMESORAH

THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases ***Page***

Statutes

Other Authorities

TABLE OF AUTHORITIES

Page

Other Authorities

BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"), AGUDAS HARABBANIM, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, TORAH UMESORAH, AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, IN SUPPORT OF RESPONDENTS IN NO. 13-354 AND IN SUPPORT OF PETITIONERS IN NO. 13-356

INTEREST OF THE AMICI[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed *amicus* briefs in this Court in 29 cases since 1968, usually on behalf of major Orthodox Jewish organizations. It has also supported laws protecting the right of observant Jews -- and that of their non-Jewish co-religionists -- to the reasonable accommodation of their religious observances when they conflict with governmental regulation or with societal practices.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *amici* has made a monetary contribution to this brief's preparation or submission. All parties have consented in writing to the filing of this *amicus* brief.

Agudas Harabbanim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

Agudath Israel of America ("Agudath Israel"), founded in 1922, is a national grassroots Orthodox Jewish organization. Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel intervenes at all levels of government -- federal, state, and local; legislative, administrative, and judicial -- to advocate and protect the interests of the Orthodox Jewish community in the United States in particular, and religious liberty in general. Agudath Israel played a very active role in lobbying for the passage of the Religious Freedom and Restoration Act ("RFRA") and the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

National Council of Young Israel ("NCYI") is the umbrella organization for over 200 Young Israel branch synagogues with over 25,000 families within its membership. It is one of the premier organizations representing the Orthodox Jewish community, its challenges and needs, and is involved in issues that face the greater Jewish community in North America and Israel.

Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400

members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

The Rabbinical Council of America, with national headquarters in New York City, is a professional organization serving more than 1,000 Orthodox Rabbis in the United States of America, Canada, Israel, and around the world. Membership is comprised of duly ordained Orthodox Rabbis who serve in positions of the congregational rabbinate, Jewish education, chaplaincies, and other allied fields of Jewish communal work.

Torah Umesorah (National Society for Hebrew Day Schools) serves as the pre-eminent support system for Jewish Day Schools and yeshivos in the United States providing a broad range of services. Its membership consists of over 675 day schools and yeshivos with a total student enrollment of over 190,000.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly 1,000 congregations coast to coast. The Orthodox Union has participated in many cases before this Court which have raised issues of importance to the Orthodox Jewish community. Among those issues, of paramount importance is the constitutional guarantee of religious freedom. Because of our community's stake in the most expansive protection of this "first freedom," the Orthodox Union was an active member of the coalition that advocated for the enactment of RFRA.

And because of the Orthodox Union's recognition that religious liberty must be afforded to people of all faiths on an equal and vigorous basis, it has consistently expressed concerns about the Affordable Care Act's "contraceptives mandate" and its impact on religious liberty. The Orthodox Union has lodged this concern with the President,[2] with the Department of Health and Human Services,[3] with the Congress,[4] and does so today, to the Supreme Court.

For the reasons specified in this *amicus* brief the Orthodox Jewish community in the United States will be substantially affected by how this Court construes the Religious Freedom Restoration Act ("RFRA"). If the limiting interpretation of the law suggested by the Government's position in these cases is approved by this Court, observances of American Jews may be significantly curtailed.

SUMMARY OF ARGUMENT

These consolidated cases will determine whether federal law withdraws statutory protection for the observances of religiously conscientious Americans if (1) they choose to do business through corporate

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[2]http://www.jewishpress.com/news/breaking-news/orthodox-push-obama-on-israel-contraceptives-in-white-house-meeting/2012/06/06/

[3]http://www.ou.org/index.php/torah/article/ou_files_comments_on_womens_health_services_mandate/#.Uua5DidOm70

[4]Congressional Record, Senate, S1120, Feb. 29, 2012

structures that limit their personal financial liability and (2) they engage in profit-seeking commercial activity. The Government acknowledges that, if not for their choice to engage in profit-seeking commerce through a closely held corporation, the Green family in No. 13-354 and the Hahn family in No. 13-356 would qualify for protection under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb, et seq. Federal law would exempt them from paying for contraceptive coverage in their employees' health insurance plans if they could establish that such payment is a substantial burden on the exercise of their religious beliefs and that the Government cannot demonstrate a compelling interest in subjecting their business to this financial requirement. The Government asserts that their eligibility for federal protection is dependent, however, on non-corporate and non-profit status.

The Government's interpretation of RFRA denies to owners and managers of closely held corporations and to all owners of for-profit businesses the protection of federal law. It is a miserly construction of a remedial statute that was designed to guarantee broadly that governmental regulation would not, directly or indirectly, impede religious freedom. It severely restricts the protection of a law that Congress enacted virtually unanimously in a ringing endorsement of religious liberty.

The two-edged limitation that the Government would place upon RFRA's application in these cases can have a particularly harmful impact on Jewish Americans who observe Jewish ritual laws in operating individual or family-owned businesses. If

the Government's position in these cases is sustained, their religious observances may be hindered by government regulation simply because they are engaged in for-profit commerce and have chosen, for personal financial security, to operate their businesses in a corporate format. Neither the language of RFRA nor its legislative policy supports the abridgment of religious exercise that results from this crabbed reading of language that was intended to be a protective shield for the observances of devout Americans.

ARGUMENT

I.

NEITHER JEWISH LAW NOR THIS COURT'S PRECEDENT DISTINGUISHES, IN DEFINING RELIGIOUS OBSERVANCE, BETWEEN BUSINESSES OPERATED AS CLOSELY HELD CORPORATIONS AND THOSE OPERATED AS SOLE PROPRIETORSHIPS OR PARTNERSHIPS

The Solicitor General acknowledges that the sincerely held religious beliefs of the Green family in the *Hobby Lobby* case "merit the full measure of protection that the Constitution and laws provide." Brief for the Petitioners, No. 13-354, p. 12. This includes, one supposes, protection under RFRA for their religious conviction that they may not finance contraceptive insurance coverage by their employees. But the shield afforded by RFRA disappears, according to the Government, if the Greens choose to operate their businesses through closely held

corporations rather than as sole proprietorships or as a partnership.

This is a singularly confounding distinction for any religiously observant Jewish business-owner. His or her religious duty is totally unaffected by the existence of a corporate entity. "The concept of a corporation existing as a separate entity distinct from the persons who own its stock is not recognized in Jewish Law." D.B. Bressler, "Ethical Investment: The Responsibility of Ownership in Jewish Law," in Levine & Pava, Jewish Business Ethics 181 (1999). See generally 12 Encyclopedia Judaica 604-608 ("Legal Person") (2d ed. 2007); Michael J. Broyde and Steven H. Resnicoff, "The Corporate Veil and *Halakhah*: A Still Shrouded Concept," in Levine & Pava, *supra* at 203-272; J. David Bleich, Contemporary Halakhic Problems, Vol. III, 388 (1989) ("Property must be held by individuals, otherwise it is ownerless. Corporations, at least for purposes of holding property, are regarded in Jewish law as partnerships.")

Leading Orthodox Jewish religious authorities in the modern world overwhelmingly agree that a corporation is not an independent legal person or entity. See Rabbi Yitzchak Yaakov Weisz, Teshuvot Minchat Yitzchak, Vol. III, No. 1; Rabbi Moshe Sternbuch, Moadim Uzmanim, Vol. III, No. 269; Rabbi Yaakov Breisch, Teshuvat Chelkat Yaakov, Vol. III, No. 191; Rabbi Moshe Feinstein, Igrot Moshe, Orach Chaim, Vol I, No. 90 ("A partnership called 'corporation' is also, for Sabbath-observance purposes, like any other partnership.")

From the perspective of the individual Jewish owner of a business whose religious observance is impeded by a government regulation, the burden on his religious exercise is identical whether he operates his business as a closed corporation or a sole proprietorship. His faith does not view the corporation's conduct as independent of his own. If the corporation that he owns or controls is forced to violate a religious duty, he personally suffers the Divine punishment. Since a corporate entity cannot immunize its owner from his or her religious obligation, withdrawing RFRA protection because the business is corporate leaves the "substantial burden" on its owner's religious exercise with no legal protection whatever.

In *Braunfeld v. Brown*, 366 U.S. 599 (1961), and in *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961), this Court held that the Free Exercise Clause did not entitle Sabbath-observing Orthodox Jewish shop-owners to open their businesses on Sunday in violation of local Sunday closing laws. There was no implication in the Court's majority opinions that the Free Exercise Clause distinguished between businesses conducted as sole proprietorships such as appear to have been true of the Philadelphia, Pennsylvania, shops in *Braunfeld*, and those owned by closely held family-controlled corporations such as the Springfield, Massachusetts, market in *Crown Kosher*.

The majority opinion in the *Crown Kosher* case rejected the shop-owners' constitutional claim on the ground that the same claim had been rejected on its merits in *Braunfeld*. See 366 U.S. at 631. To be sure,

the majority opinion in *Crown Kosher* noted that it was "inappropriate" to pass on some "procedural arguments" presented below by the governmental appellants (366 U.S. at 631, n.7). The Massachusetts authorities had contended, as the Solicitor General contends here, that the *Crown Kosher* complaint should be dismissed because the constitutional claim had been asserted by a corporation that allegedly has no standing to assert a freedom-of-religion claim. See *Crown Kosher Super Market of Mass., Inc., v. Gallagher*, 176 F. Supp. 466, 471-472 (D. Mass. 1959).

The Solicitor General contends in these cases that this reservation "confirms that this Court's pre-*Smith* decisions had not afforded free-exercise rights to for-profit corporations." Brief for the Petitioners, No. 13-354, p. 18.

If the Solicitor General's observation were valid, it apparently escaped notice by Justices Brennan and Stewart, both of whom dissented in *Braunfeld* and in *Crown Kosher* without adverting in any manner to a corporation's exclusion from the protection of the Free Exercise Clause that the Government has now discovered. Justice Brennan observed in his dissenting opinion that the effect of the Pennsylvania and Massachusetts Sunday Closing Laws was "that appellants may not simultaneously practice their religion and their trade, without being hampered by a substantial competitive disadvantage." 366 U.S. at 613. Whether this "competitive disadvantage" impacted the individual shop-owners who were the plaintiffs in *Braunfeld* or the closely held corporation that was

threatened with prosecution in *Crown Kosher* apparently made no difference to Justice Brennan.

Justice Stewart's brief dissent emphasized the commercial aspect of the plaintiffs' constitutional claim in both cases. Without distinguishing between corporations and sole proprietorships, he dissented in both cases and said, "Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand." 366 U.S. at 616. Neither dissenting Justice apparently believed that the protection of the Free Exercise Clause of the First Amendment was diminished if the individual subject to a governmental burden operated his business as a closely held corporation rather than as a sole proprietorship or partnership or if he or she was seeking a profit.

The views of Justice Brennan are particularly significant in interpreting RFRA and in deciding these cases because Congress explicitly sought in RFRA to reinstate the constitutional rule that Justice Brennan articulated for a majority of this Court two years later in *Sherbert v. Verner*, 374 U.S. 398 (1963). The legislative "purposes" set forth in 42 U.S.C. § 2000bb(b)(1) declare that RFRA was enacted "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." Justice Brennan's dissenting vote in the *Crown Kosher* case and the explicit endorsement of his

majority opinion in RFRA indicate that, contrary to the Solicitor General's assertion, it was not "a foreign concept to the Congress that enacted RFRA" (Brief for the Petitioners, No. 13-354, p. 19) to provide a RFRA shield to religious individuals doing business through closely held corporations.

The irrationality and arbitrariness of distinguishing between businesses operated as closely held corporations and those that are sole proprietorships is demonstrated by the recent controversy in New York City over signs requesting customers to wear modest dress posted by Orthodox Jewish merchants in seven stores in the Williamsburg area of Brooklyn, New York. The signs read as follows:

DRESS CODE FOR STORE

כניסה לפה רק בלבוש הצנוע

[HEBREW TEXT:
"ENTRY HERE ONLY IN MODEST DRESS"]

No Shorts
No Barefoot
No Sleeveless
No Low Cut Neckline
ALLOWED IN THIS STORE
--------*--------
No Rope Escotada
No Pies Descubiertos
No Pantalones Cortos
Mangas Cortas
PERMITIDA EN ESTE NEGOCIO

The New York City Commission on Human Rights sought to impose a civil sanction on the Orthodox Jewish merchants for posting these signs in their stores notwithstanding the undisputed fact that immodest dress violated the merchants' religious convictions. *E.g.*, *York City Commission on Human Rights v. Gestetner Printing*, Complaint No. M-P-SC-12-1027203. Following a settlement conference, the dispute was resolved. The *Wall Street Journal* carried the following AP story on January 22, 2014:

> **NYC DROPS SUIT OVER MODEST DRESS-CODE SIGNS**
>
> New York City has dropped a lawsuit against seven Hasidic storeowners who posted signs in their windows for customers to dress modestly.
>
> The Williamsburg, Brooklyn, merchants had faced steep fines for banning shorts, sleeveless shirts and low-cut necklines.
>
> The Human Rights Commission said the signs discriminated against women and non-Orthodox men.
>
> The owners had maintained the dress-code was religion-based. Hasidic Jews are known for their modest clothing.
>
> Under the settlement reached Tuesday, the businesses will avoid any fines. But any future signs must make clear they do

> not discriminate on the basis of gender or race.
>
> Rabbi David Niederman, the president of the United Jewish Organizations of Williamsburg, called the settlement a victory.

A more detailed report on the disposition of the case appeared under the headline "Williamsburg Store Owners Allowed To Demand Modest Dress Code" in the *Brooklyn Daily Eagle* of January 24, 2014. It identified the stores as including Gestetner Printing and Friedman's Depot Inc., Under the Government's legal rationale Friedman's Depot would have no standing to assert its owner's religion-based ground for requesting modest dress because the store was operated by a closely held corporation. On the other hand, Gestetner Printing, located in the very same neighborhood, could assert a RFRA claim because it does not have corporate ownership.

Had RFRA not been determined in *City of Boerne v. Flores*, 521 U.S. 507 (1997), to be constitutionally inapplicable to local government, the Government's position in these cases would distinguish arbitrarily between the corporate businesses and those operated as proprietorships or partnerships. Although the store-owners had the same religious motivation in posting their signs and are all located in the same neighborhood, the Solicitor General would acknowledge the RFRA rights of sole proprietorships and, if the burden on religious exercise were imposed by the federal government, would arbitrarily deny

to the owners of closely held corporations equivalent legal protection.

II.

NEITHER JEWISH LAW NOR THIS COURT'S PRECEDENT DISTINGUISHES, IN DEFINING RELIGIOUS OBSERVANCE, BETWEEN NON-PROFIT AND FOR-PROFIT ACTIVITY

If one of the Williamsburg stores described above had been a thrift shop selling used clothing and furniture for a local religious school and was operated on a non-profit basis, it would have satisfied the second of the Government's novel criteria to qualify for RFRA protection. Why should the religious observance of the manager of such a non-profit business be shielded by law while his neighbor, who runs his business to make a living for his family, be beyond the law's reach? It is most unlikely that the Congress that enacted RFRA contemplated any distinction between businesses that religiously observant individuals operate for a livelihood and identical businesses operated on a non-profit basis.

It was never suggested in either *Braunfeld* or *Crown Kosher* that the religion-based conscientious convictions of the Orthodox Jewish owners of the shops were forfeited because they engaged in profit-making commerce rather than in charitable non-profit activity. Indeed, the fact that both *Braunfeld* and *Crown Kosher* concerned family businesses conducted for profit aggravated, rather than

ameliorated, the injury to the exercise of the plaintiffs' religious observance.

The expressed views of Justices Brennan and Stewart dissenting in *Braunfeld* and in *Crown Kosher* explicitly referred to "trade" and to "economic survival." 366 U.S. at 613, 616. Justices Brennan and Stewart were aware – and, indeed, emphasized – the for-profit nature of the activity which was being restricted and burdened by local law.

The Jewish faith does not prohibit the financing of contraception, which underlies the legal challenge in these cases. Judaism does, however, impose substantial conscientious faith-based restrictions on employers and other individuals in managerial positions. They are obliged, for example, by the Fourth Commandment and its rabbinic interpretation to set aside Saturday as the Sabbath and a day of rest for their employees. An observant Jew may not direct his or her employee – be the employee Jewish or gentile – to labor on the Sabbath.

A federal governmental directive to a Jewish employer – be he the owner of a business operated for profit or the manager of a non-profit charitable entity -- requiring the employer to have employees work on the Sabbath would substantially burden the Jewish employer's religious exercise. It could not, under RFRA, be lawfully demanded unless the governmental interestwere "compelling" and satisfied the statutory "least restrictive means" standard. The burden on the Jewish employer should not be entitled to greater constitutional and

statutory protection if the employer is engaged in charitable work that qualifies under Section 501(c)(3) of the Internal Revenue Code than if he or she operates a for-profit business.

Under Jewish Law the same religious prohibition that bars certain proscribed activity on the Sabbath in a for-profit business applies to non-profit activity. The religious sanction for violating the Sabbath is not reduced if the actor has a non-profit motive.

A graphic illustration of the arbitrary impact on Orthodox Jewish observance that could result from the Government's construction of RFRA is a complaint filed in 2006 before the New York State Division of Human Rights. *Trotman v. The Ben Gilman Spring Valley Medical and Dental Clinic*, Case No. 10113077. The complainants alleged that the operators of the clinic, which provided medical and dental help, discriminated unlawfully by closing the clinic's Spring Valley and Monsey offices on Saturdays because of "the extremity of their own religious beliefs." The Orthodox Jewish owners and operators of the clinics filed a verified answer based on rabbinic instruction that the clinics could not open on the Sabbath. The religious freedom rights of the owners and operators of the clinics resulted in dismissal of the complaint.

Could such clinics, operated by Sabbath-observing Orthodox Jews, be compelled to stay open on Saturdays if they were for-profit medical centers? Such a result is surely a blow to religious freedom but it would be possible under the Government's interpretation of RFRA.

Insofar as it might affect Jewish religious observance, RFRA should apply equally to for-profit conduct as it does to non-profit activity. The burden on the religious exercise of the Jewish faith is the same in either event.

CONCLUSION

For the foregoing reasons, this Court should reject the Government's construction of RFRA as inapplicable to owners of for-profit businesses operated in corporate form.

Respectfully submitted,

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