IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-00563-RBJ-BNB

W.L. (BILL) ARMSTRONG;
JEFFREY S. MAY;
JOHN A. MAY;
DOROTHY A. SHANAHAN; and
CHERRY CREEK MORTGAGE CO., INC., a Colorado Corporation

Plaintiffs

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services;
SETH D.HARRIS, in his official capacity as Acting Secretary of the United States Department of Labor;
JACOB LEW, in his official capacity as Secretary of the United States Department of the Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF THE TREASURY

Defendant(s).

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF COLORADO IN SUPPORT OF PLAINTIFFS

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INTEREST OF AMICUS CURIAE

Protecting the religious liberty of its citizens is a central concern of the State of Colorado. Like its federal counterpart, the Colorado Constitution specifically seeks to "secure[ ] the liberty of conscience" and declares that "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed." Colo. Const. art II, § 4. It goes on: "no person shall be denied any civil or political right, privilege, or capacity, on account of his opinions concerning religion." *Id*

As the chief legal officer of the State, the Attorney General is interested in – indeed focused on – protecting the rights of Colorado's citizens. *See People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003) (quoting *State Railroad Commission v. People ex rel. Denver & R.G.R. Co.*, 44 Colo. 345, 354, 98 P. 7, 11 (1908) ("The Attorney General himself, as the chief legal officer of the state, is here in the interests of the people to promote the public welfare . . ."). This case was filed by a Colorado corporation and Colorado citizens. The position the United States has advanced in defending the provisions in question in similar cases around the country would severely limit the liberty of conscience and religious exercise of the citizens of Colorado.[1] The Attorney General and the State of Colorado have a

[1] The Attorney General is aware that the Tenth Circuit is preparing to hear en banc a similar case involving Oklahoma residents and corporations. *Hobby Lobby Stores,*

fundamental, constitutional interest in ensuring that does not happen.

ARGUMENT

The United States' position on the HHS Mandate is based on a long-discarded premise—that since the mandate applies to business corporations and not directly to natural persons, the mandate cannot burden rights protected by the Constitution. But both Colorado business association law and U.S. Supreme Court precedent (aged and new) recognize that citizens are not required to sacrifice their faith when they go into business. And because the *Religious Freedom Restoration Act* ("RFRA") is *broader* than the First Amendment, the United States' position is doubly tenuous: it would require this court to hold that in *broadening* religious freedom by statute, Congress shrunk back from case law recognizing that corporations, just like individuals, have religious rights under the First Amendment. Avoiding significant burdens on religiously motivated businesses may make it more difficult for the federal government to impose what it views as important policies, as the Supreme Court held in *Employment Division v. Smith*, 494 U.S. 872 (1990); but RFRA was enacted precisely for this reason.

I. Individuals do not forfeit their First Amendment rights merely because they choose to operate and associate as corporations.

A. Under Colorado law, a business can incorporate to pursue interests other than making a profit.

Colorado law allows corporations and other business associations to exist and operate for any lawful purpose. § 7-103-101(1), C.R.S. (2012) ("Every corporation . . . has the purpose of engaging in any lawful business unless a more limited purpose is stated in the articles of incorporation."). While many businesses are focused solely on making and maximizing profits, this is not always true. Business entities and the people that form them often seek to make profits while serving other goals, such as environmental protection, healthy lifestyles, safety, development of underprivileged communities, and so on.[2] Colorado therefore

[2] Examples of businesses with missions that include goals other than profit are easily found on the Internet. *See, e.g.*, Catering Consciously, http://www.cateringconsciously.com/news-events.php ("Catering Consciously[is] a Colorado catering service dedicated exclusively to an eco-friendly culinary experience . . . ."); Beanstalk Solar Hosting, http://www.beanstalksolarhosting.com/company/history/ ("[We] wanted to make a socially responsible statement that reflected [our] personal beliefs and [our] overall business philosophy," including "a concern for the environment and a plan to lower, and help others on the Internet lower, the overall carbon footprint. We think green and act green."); Holy Family Books & Gifts, http://holyfamilybooks-gifts.com/index.htm ("Holy Family Books & Gifts opened on August 15, 1994 in response to the Holy Father's call to evangelization. The owners wish to promote the Roman Catholic Faith with solid, orthodox literature (Vatican Documents, Papal Encyclicals, Bibles, Books, Pamphlets, and Prayer Books, etc.)."); Aharon's Books and Judaica, http://www.milechai.com/milechai-milehigh.html ("We were told no one could make a living selling Jewish Books in Denver. So we rolled up our sleeves and went to work . . . . What drives us to do this? To bring a bit of Torah to the world that wasn't

recognizes the unremarkable proposition that business entities are not instruments of the state, but are associations of individuals with countlessly diverse reasons for engaging in private enterprise.

Here, the owners of Cherry Creek Mortgage are guided not only by the desire to make a profit but also by their religious convictions. Complaint at ¶¶ 42, 43. This is perfectly consistent with Colorado law, and the federal government's ability to override those convictions for the sake of regulation is restricted by special constitutional and statutory limitations. And when it is sincere religious belief that is at stake, the Constitution and RFRA require a level of care from the federal government that has not been afforded here.

B. The Supreme Court has unambiguously held that "First Amendment protection extends to corporations."

Long ago the Supreme Court recognized that a corporation "can only act through its agents." *Bd. of Comm'rs v. Sellew*, 99 U.S. 624, 627 (1878). A court order to a corporation is therefore generally sufficient to compel the individuals controlling the corporation to take action on its behalf. *See, e.g., Wilson v. United States*, 221 U.S. 361, 376–77 (1911). Requiring action on the part of a corporation is requiring action by individuals; an imposition on the corporate entity is an imposition on the individuals who own and operate it. *Robinson v. Cheney*, 876

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there before—which is why our slogan is 'Spreading Torah at the Speed of Light!'").

F.2d 152, 159 (D.C. Cir. 1989) ("[A] corporation cannot act except through the human beings who may act for it.").

It should be unremarkable, then, that the freedoms recognized by the Constitution do not evaporate when individuals associate, including as corporations. For example, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964), the Court applied the First Amendment's protections to the New York Times Company. *See id.* (holding that to deny First Amendment protection to the newspaper "would be to shackle the First Amendment"). And in 1995, the Court recognized the uncontroversial proposition that constitutional protection of free expression is "enjoyed by business corporations generally and by ordinary people." *Hurley v. Irish Am. Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995). *See also First Nat. Bank of Boston v. Bellotti,* 435 US 765, 778 n.14 (1978) (collecting cases).

Just three years ago, this long jurisprudential history was affirmed; the Court recognized it had consistently "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 900 (2010). *Citizens United* has certainly generated controversy in the debate about campaign finance regulation, but on the basic point at issue here—whether the First Amendment protects

business associations—not a single justice disagreed. The majority could hardly have been more emphatic. *See id.* at 913 ("The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.").[3]

The argument that organizing as a corporation requires relinquishing constitutional rights hearkens back to the confusion that marked *Bellotti; Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)—cases that the Justices debated vigorously in *Citizens United*, although not for the idea that regulations targeting corporations never impose First Amendment burdens. Even in those cases, as in the *Citizens United* dissent, the corporate form was important not because it divested the corporation or its individual actors of First Amendment freedoms, but because it posed particular dangers that satisfied strict scrutiny.

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[3] Even Justice Stevens' dissent does turn on the idea that corporations cannot assert First Amendment rights. Indeed, he agreed that the First Amendment protects corporate associations and that regulation of corporate political activity is, and should be, subject to careful scrutiny. *Citizens United*, 558 U.S. at 945–46 (Stevens, J., dissenting) (explaining that corporations cannot be "silenced" and that laws burdening corporate speech are "always a serious matter, demanding careful scrutiny"). The dissent's argument was focused on what it viewed as the "potentially deleterious effects" corporate political spending might have on politics. *Id.* at 974. The special effects of corporate speech, in the dissent's opinion, allow regulation of corporate political spending to survive the compelling interest test. *See id.* at 930 ("Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.")

Such is not the case here. In this case, avoiding—not satisfying—this test is the Government's goal. Here, the United States argues that the HHS mandate imposes no First Amendment burden *at all* on the Plaintiffs because they have chosen to run their business in the form of a corporation. Even the dissent in *Citizens United* rejected that extreme and unwarranted position.

The Court has also recognized that the treatment of corporations is consistent across the spectrum of First Amendment rights:

> Freedom of speech *and the other freedoms encompassed by the First Amendment* always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, and the Court has not identified a separate source for the right when it has been asserted by corporations.

Bellotti, 435 U.S. at 780 (citations omitted; emphasis added). Other federal courts have done the same, even in the context of the HHS mandate.[4] This consistent,

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[4] See, e.g., *Korte v. Sebelius*, ___ F.3d ___, 2012 U.S. App. LEXIS 26734 , at *8–9 (7th Cir. Dec. 28, 2012) ("[T]he government's primary argument is that because K & L Contractors is a secular, for-profit enterprise, no rights under RFRA are implicated at all. This ignores that Cyril and Jane Korte are also plaintiffs. . . . It is a family-run business, and they manage the company in accordance with their religious beliefs. . . . That the Kortes operate their business in the corporate form is not dispositive of their claim."); *Grote v. Sebelius*, No. 13-1077, 2013 U.S. App. LEXIS 2112, at *10 (7th Cir. Jan. 30, 2013) ("[T]he Grote Family's use of the corporate form is not dispositive of the claim. . . . The members of the Grote Family contend that their faith forbids them to facilitate access to contraception by paying for it, as the mandate requires them to do."); *Geneva Coll. v. Sebelius*, No. 12-cv-207, 2013 U.S. Dist. LEXIS 30265, at *62 (W.D. Penn. Mar. 6, 2013) ("This court will not draw such distinctions in the present case, particularly where crucial First Amendment rights are at stake and where there is no contextual distinction in the

widespread judicial precedent leaves no doubt that the Plaintiffs—both corporate and individual—are protected by the First Amendment.

II. Congress enacted the Religious Freedom Restoration Act to broaden the protection of religious liberty, not to shrink it.

The United States appears to advance two arguments against the application of RFRA to businesses and their owners, one theoretical and one technical. The theoretical argument is that any regulatory burden on sincere religious beliefs is merely "indirect" when the regulation is imposed on a corporation rather than an individual. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, Order Denying Injunction at 7 (10th Cir. Dec. 20, 2012). The technical contention is that the Plaintiffs are not "persons" protected by RFRA. Neither is correct.

Part I above explains that impositions on corporations are, in effect, impositions on those who control them. *See, e.g., Wilson*, 221 U.S. 361. Courts have therefore routinely recognized that corporations can assert constitutional rights to protect the rights of their stakeholders. *See, e.g.*, *New York Times Co.*, 376 U.S. at 265–66; *Citizens United*, 558 U.S. at 900; *supra* § I.B.

As to the Government's second argument, it gets RFRA backwards. RFRA was

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language of the First Amendment between freedom of speech and freedom to exercise religion."); *Legatus v. Sebelius*, No. 12-cv-12061, 2012 U.S. Dist. LEXIS 156144, at *12 (E.D. Mich. Oct. 31, 2012) ("[T]he Supreme Court has famously recognized that First Amendment free-speech protection extends directly to corporations.").

enacted precisely to *expand* protection of First Amendment free exercise rights and to ensure that federal[5] burdens on those rights may stand only if they satisfy strict scrutiny. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) ("Congress had a reason for enacting RFRA . . . . Congress recognized that 'laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise,' and legislated 'the compelling interest test' as the means for the courts to 'strik[e] sensible balances between religious liberty and competing prior governmental interests.'" (quoting 42 U.S.C. §§ 2000bb(a)(2), (5)). In other words, "RFRA protects the same religious liberty protected by the First Amendment, and it does so under a *more rigorous* standard of judicial scrutiny." *Korte v. Sebelius*, 2012 U.S. App. LEXIS 26734, at *13 (emphasis added).

The Government has nonetheless advanced an improperly constrained understanding both of RFRA and of the religious beliefs of individuals like those involved here. In *Hobby Lobby Stores, Inc. v. Sebelius,* 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), for example, the court's ruling was based on the argument that "Religious exercise is, by its nature, one of those 'purely personal' matters

[5] RFRA does not apply to state and local governments. *See City of Boerne v. Flores*, 521 U.S 507 (1997); *see also* 42 USCS § 2000bb-2(1) (defining "government" to mean "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States").

referenced in *Belloti* which is not the province of a general business corporation." This may be true for some Americans. For others, however, religious exercise is not "purely personal," to be kept separate from daily activities like going to work or running a business. For many citizens, including these Plaintiffs, their religious beliefs and religious mission cannot be simply turned off when they leave the church house; their religious mandate is not "purely personal," but requires carrying beliefs into daily life, including at their business. *See* Complaint at ¶¶ 42, 43, 47, 48, 50. *See also EEOC v. Sunbelt Rentals, Inc.,* 521 F.3d 306, 319 (4th Cir. 2008) ("Free religious exercise would mean little if restricted to places of worship or days of observance, only to disappear the next morning at work.").

The Government's attempt to force these Plaintiffs to keep their religious exercise "purely personal" is just the sort of cramped understanding of religious liberty that led Congress to enact RFRA in the first place.[6] *See O Centro,* 546 U.S. at 435-36 ("But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.' 42 U.S.C. § 2000bb-1(a). Congress determined that the legislated test 'is a workable test for striking sensible balances between religious liberty and competing prior governmental

[6] It also collides with the Tenth Circuit's decision in *Colorado Christian Univ. v. Weaver*, which held that the government may not impose special burdens on the particularly religious relative to those who are less "pervasively" religious. *See* 534 F.3d 1245, 1257–58 (10th Cir. 2008) (citing *Larson v. Valente*, 456 U.S. 228, 244 (1982)).

interests.' § 2000bb(a)(5)."). Accepting the Government's contrary position would threaten any number of religiously-motivated activities that Congress clearly expected to protect.

Under RFRA and the First Amendment, religious liberty is for everyone. It is not just for narrowly religious organizations, or for those whose religious exercise is confined to church or the home. Consider, for example, a Catholic-owned bookstore. The Government's position would lead to the conclusion that this business could be forced to sell books attacking Church doctrine on matters such as female ordination, with no protection from RFRA or the Free Exercise Clause.[7] Or a Muslim-operated butcher's shop could be obligated to process pork or adopt health-related procedures that conflict with halal food preparation. And a family-run Jewish business could be

[7] *See, e.g., Tyndale House Publishers, Inc. v. Sebelius*, No. 12-cv-1635, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); *Hobby Lobby,* 870 F. Supp. 2d 1278, *supra* (both imposing mandate on religious bookstores). The First Amendment's protection of speech rights, to be sure, would be implicated by a law forcing a private bookstore to sell books advocating a certain viewpoint. But the Supreme Court has unanimously rejected the Government's previous efforts to argue that religious groups should be forced to rely on other First Amendment freedoms at the expense of Religion Clauses. *See Hosanna Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694, 706 (2012)* (finding "untenable" the Government's position that other freedoms, such as the freedom of association, might protect religiously motivated conduct, but that the analysis should be the same whether the plaintiffs are religious or secular, and concluding that this position is "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations"). Even more so RFRA, which specifically is intended to require special consideration of burdens on religious freedom. *O Centro*, 546 U.S. at 424 (explaining that RFRA restored the compelling interest test rejected in *Smith*, 494 U.S. 872 (1990)

forced to remain open on the Sabbath. This cannot be squared with what Congress mandated in RFRA.

The Government may well have important reasons for imposing on business entities mandates that conflict with individuals' religious beliefs and liberty, and this includes the mandate at issue in this case. But having reasons to violate religious liberty does not mean that the regulations impose no burden whatsoever. RFRA requires that when such burdens are imposed, they be narrowly tailored to meet a compelling governmental interest. The Government's attempt to read RFRA to exclude the burdens it seeks to impose on Plaintiffs such as these is flatly inconsistent with a law that was passed precisely because Congress believed that *greater* protection of religious liberty is necessary to strike the right balance between government regulation and the free exercise of religion. *See O Centro*, 546 U.S. at 424; *see also* see also Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 102d Cong. 123, 123-124 (1993) (statement of Rep. Solarz) (arguing RFRA is necessary to "revers[e] *Smith*" and avoid "the temptation to pick and choose among the religious practices of the American people, protecting those practices the majority finds acceptable or appropriate, and slamming the door on those religious practices that may be frightening or unpopular, then we will have succeed in codifying rather than reversing Smith."). If the United States cannot

meet RFRA's exacting standard here, then its imposition on the Plaintiffs' religious liberty cannot stand.

CONCLUSION

The Court should reject arguments that the corporate form divests Plaintiffs of the protections of the First Amendment or RFRA.

May 1, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2013, I electronically filed the foregoing with the Clerk of Court via the CM/ECF system. Electronic service has been made to all parties participating in the above case through the CM/ECF system.

//s// Laura-Jane Weimer
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