Nos. 13-354 and 13-356

In the
Supreme Court of the United States

KATHLEEN SEBELIUS,
Secretary of Health and Human Services, et al.,
v. *Petitioners,*
HOBBY LOBBY STORES, INC., et al.,
Respondents.
and
CONESTOGA WOOD
SPECIALTIES CORPORATION, et al.,
v. *Petitioners,*
KATHLEEN SEBELIUS,
Secretary of Health and Human Services, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth and Third Circuits

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF NON-GOVERNMENT PARTIES

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QUESTION PRESENTED

Whether a for-profit business corporation can assert rights under the Free Exercise Clause of the First Amendment or under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq*.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF), Reason Foundation (Reason), and Individual Rights Foundation (IRF) respectfully submit this brief amicus curiae in support of Hobby Lobby Stores, Inc., and Conestoga Wood Specialties Corporation.[1]

PLF is widely recognized as the largest and most experienced non-profit legal foundation representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and federalism. PLF has litigated cases and appeared as amicus curiae in many lawsuits involving the constitutional rights of people who choose to do business in the corporate form—including *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 133 S. Ct. 1723 (2013); *Citizens United v. FEC*, 558 U.S. 310 (2010), *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), and *Mercer, Fraser Co. v. County of Humboldt,* No. C 08-4098 SI, 2008 WL 4344523 (N.D. Cal. Sept. 22, 2008). PLF attorneys have also published scholarly research on issues relating to corporate personhood and the interface of economic and personal freedom. *See*, *e.g.*, Timothy Sandefur, *The Right to Earn a Living* 32-36

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(2010); Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004).

Reason is a nonpartisan nonprofit public policy thinktank, founded in 1978. Reason's Mission is to promote free markets, individual liberty, equality of rights, and the rule of law. To further Reason's commitment to "free minds and free markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

IRF was founded in 1993. IRF opposes attempts by those on any point of the legal spectrum to undermine freedom of speech and equality of rights and it combats overreaching government activity that impairs individual rights.

PLF, Reason, and IRF believe their public policy experience will assist this Court in its consideration of the merits of this case.

SUMMARY OF ARGUMENT

"Corporate personhood" is a long-standing doctrine in American law, and one critical to protecting the individual rights of natural persons and securing the foundations for economic and social progress. Although this doctrine has come under assault in recent years—thanks largely to misunderstandings and misrepresentations of this Court's holding in *Citizens United*, 558 U.S. 310 (2010)—it rests on sound legal foundations and is strongly supported by policy considerations. Nor should courts resort to ad hoc distinctions between "for-profit" and "non-profit" corporations when recognizing and protecting constitutional rights in the corporate context.

In its decision below, the Third Circuit Court of Appeals declared that it "simply [could] not understand how a for-profit, secular corporation—apart from its owners—can exercise religion." *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 385 (3d Cir. 2013). But in fact corporations regularly exercise religion in precisely the same manner that they exercise freedom of speech, private property rights, or other constitutional freedoms. Americans routinely exercise their constitutional rights in the corporate form, and discriminating against those who choose to do so in the for-profit context has no constitutional foundation.

ARGUMENT

I

THE DOCTRINE OF CORPORATE PERSONHOOD IS DEEPLY ROOTED IN THIS NATION'S HISTORY AND TRADITION

A. Corporate "Personhood" Is Simply Shorthand for the Rights of Individuals

Despite the superficial appeal of arguments that corporations are not real persons and should not be treated as such for constitutional purposes, such contentions ignore the history and context of the doctrine known as "corporate personhood."

Anglo-American law has treated corporations as persons since long before the Constitution was written. In the seventeenth century, Lord Coke wrote that a legal prohibition applying to "persons" included "persons politicke and incorporate, as to naturall

persons," 2 Edward Coke, *Institutes* *736, and William Blackstone—who traced their origin to the ancient Romans—referred to corporations as "artificial persons," which exist "to preserve entire and for ever those rights and immunities" which would "be utterly lost" when the corporators died. 1 William Blackstone, *Commentaries* *467. The first edition of the Encyclopedia Britannica defined corporation as "a body politic, or incorporate, so-called, because the persons or members are joined into one body, and are qualified to take and grant, &c." 2 *Encyclopedia Britannica* 281 (1771).

Thus—as its etymological roots suggest—the term "corporation" refers to any collective entity treated by the law as a single body. This includes even governments; many cities are referred to as "municipal corporations" to this day, and are treated like corporations by the law. *See, e.g., Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 664-90 (1978). Thus the phrase "corporate personhood" is redundant, since to "incorporate" something means to regard the thing as a distinct body or entity. As early as 1826, this Court regarded the principle of corporate personhood as "unquestionable." *United States v. Amedy*, 24 U.S. (11 Wheat.) 392, 412 (1826); *see also Beaston v. Farmers' Bank of Delaware*, 37 U.S. 102, 134 (1838) (regarding corporation as a person was so commonplace that "authorities need not be cited" to support it).

Of course, the modern concept of a "corporation" is relatively new, a creation of the early nineteenth century. In the 1760s, Blackstone wrote that the English had "considerably refined and improved upon" the ancient Roman idea of a corporation, 1 William Blackstone, *Commentaries* *469, and antebellum

Americans further refined and improved it. Before the 1830s, profit-making corporate enterprises were often government-created franchises enjoying chartered privileges to exercise a sovereign prerogative (such as constructing roads or canals) or monopoly status. *See* Robert Hessen, *In Defense of the Corporation* 3-11, 26-27 (1979). But beginning in the early nineteenth century, private companies began using the corporate form to conduct purely private business. Legislatures soon enacted private incorporation statutes so that by the time this Court decided *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), the concept of a corporation had been "radically transformed." *See* Gordon S. Wood, *Empire of Liberty* 462 (2009). That transformation meant—as explained below, part I.B.—that corporations were no longer "creatures of the state."

Charles River Bridge's holding that corporations are not inherent monopolies marked the climax of this rapid transformation.

> All private corporations, not just the four dozen or so educational institutions existing in 1819, but the hundreds of business corporations that had been created since the Revolution, had become different from their monarchical predecessors: most were no longer exclusive monopolies, and most were no longer public. They became private property belonging to individuals, not the state.

Id. at 466. *See also* Lawrence M. Friedman, *A History of American Law* 137 (3d ed. 2005) ("Old decisions and doctrines, from the time when most corporations were academies, churches, charities, and cities, had little to

say . . . that was germane to the [new] world of business corporations.").

Yet this change did not alter the idea that corporations are legal "persons." On the contrary, it provided a firmer foundation for the notion of corporate personhood, because it made clearer that a corporation's rights are the rights of the individuals who comprise it, rather than the arbitrary fiat of a government-granted charter. Corporate "personhood" in the modern era is therefore akin to "sovereignty" in a democratic society: just as democracy replaced the monarchical concept that the sovereign is an irreducible and arbitrary entity with the idea that sovereignty is ordained and established by the people, so the modern corporation enjoys personhood not at the pleasure of the state but because it is an aggregation of individuals who choose representatives to act on their behalf as a unit. *See* Roger Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 Ga. L. Rev. 1245, 1321 (1979).

By the time the Fourteenth Amendment was written, American law had for decades recognized that private corporations were protected by the Due Process or Law of the Land Clauses of state and federal constitutions. *See*, *e.g.*, *Trustees of the Univ. of N. Carolina v. Foy*, 5 N.C. (1 Mur.) 58, 67 (N.C. 1805); *Terrett v. Taylor*, 13 U.S. (9 Cranch.) 43, 52 (1815); *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 561-67 (1819) (argument of Mr. Webster); *Soc'y for the Propagation of the Gospel in Foreign Parts v. Town of New Haven*, 21 U.S. (8 Wheat.) 464, 481-82 (1823); *Slee v. Bloom*, 5 Johns. Ch. 366, 387 (N.Y. Ch. 1821), *rev'd on other grounds*, 19 Johns. 456 (N.Y. 1822); *Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 260,

269-70 (Tenn. 1829); *Gowen v. Penobscot R.R. Co.*, 44 Me. 140, 145 (1857). Later decisions by federal courts holding that corporations were entitled to constitutional protections under the Fourteenth Amendment were hardly novelties; it is unsurprising that this Court did not require argument to establish such a well-settled point in *County of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).[2]

Because corporations were no longer public entities, courts soon recognized that they could assert the constitutional rights of the individuals whose interests they comprised. As Justice Field explained in *Railroad Tax Cases*, 13 F. 722 (C.C.D. Cal. 1882), corporate personhood is simply shorthand for the constitutional rights of the persons who choose to come together to do business in the corporate form. "[T]he property of a corporation is in fact the property of the

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[2] Howard Jay Graham famously argued that the Fourteenth Amendment's drafters did not mean to include corporations as "persons" entitled to the Amendment's protections. *See The "Conspiracy Theory" of the Fourteenth Amendment*, 47 Yale L.J. 371 (1938) (part 1), 48 Yale L.J. 171 (1938) (part 2). Graham, however, only claimed to show that the congressional drafters of the Amendment had not intentionally used the word "persons" so as to include corporations. He did not show that they intended to exclude corporations; on the contrary, he acknowledged that "corporate personality, as a constitutional doctrine, antedated the Fourteenth Amendment," and was "vital and natural" to post-war jurisprudence. 48 Yale L.J. at 194. Neither Graham nor any other scholar has provided any evidence warranting the conclusion that "business-friendly Justices [on] the Supreme Court . . . invented concepts such as corporate personhood and equal corporate constitutional rights." David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. Marshall L. Rev. 643, 673 (2011). In any event, this case does not involve the Fourteenth Amendment.

corporators," he wrote. "To deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value." *Id.* at 747. For instance, if a banking corporation buys land or other assets, no stockholder could claim ownership of any specific part of that property,

> but he owns an interest in the whole of it which the courts will protect . . . . Now, if a . . . state takes the entire property, who suffers loss by the legislation? Whose property is taken? Certainly, the corporation is deprived of its property; but at the same time, in every just sense of the constitutional guaranty, [shareholders] are also deprived of their property.

Id.

The notion that corporations can exercise rights is the corollary of the proposition that corporations can suffer entity-specific harms and are obligated to discharge entity-specific legal duties. The corporation as an entity can suffer losses which cannot be ascribed to any particular stockholder—as when an office photocopier is broken or a company car is vandalized. The corporation must therefore be free to act as an entity to prevent or mend these injuries. Government also imposes a wide array of restrictions on corporations *qua* corporations, and consequently corporations must have the right to defend their interests. *Citizens United*, 558 U.S. at 354-55;

Chamber of Commerce of the U.S. v. Brown, 554 U.S. 60, 67-68 (2008).[3]

Although Justice Field appeared to deny that a corporation could also exercise the liberties of the individuals who comprise it, *Railroad Tax Cases*, 13 F. at 747, this Court later made clear that corporations are an important means by which individuals exercise liberties other than property rights. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court acknowledged that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause," and "it is immaterial whether the beliefs sought to be advanced by association pertain to political, *economic*, religious or cultural matters." *Id.* at 460 (emphasis added). Although in that case the corporation was primarily in the business of political advocacy, people also employ their freedom of association when acting in the corporate form for commercial purposes. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (The Constitution protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."). And corporations

[3] In the post-World War II era, corporations can even be held liable for violations of constitutional and natural rights—a principle made meaningful only through corporate personhood. If corporations are not persons for purposes of rights, they would also not be persons for purposes of obligations, and could not be held responsible for violating human rights. Lucien J. Dhooge, *Human Rights for Transnational Corporations*, 16 J. Transnat'l L. & Pol'y 197, 204-05 (2007) ("Obligations and rights accrue only to those who are recognized subjects of international law . . . . To the extent individuals may benefit from . . . compulsory obligations and voluntary undertakings, society at large has a stake in the recognition of corporate personality.").

undertake a variety of overlapping pursuits: commercial entities often need to engage in political advocacy to protect their rights and reputations, *see*, *e.g.*, *Nike Inc. v. Kasky*, 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003) (commercial entity engaging in speech to defend its reputation in political debate), while non-commercial corporations often engage in commercial transactions to further their larger purposes. *See*, *e.g.*, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (private school engaging in contracts as part of its mission to teach).

Because corporations are groups of people acting voluntarily in concert—exchanging rights that they possess and undertaking obligations that they are free to undertake—the corporate entity they create can be regarded as an entity in itself, and for convenience should be. The rights it exercises are the rights of the individuals who comprise it. Pilon, *supra*, at 1321.

B. Corporations Are Not Creatures of the State, and Corporate Status Does Not Entitle Government to Treat Them as Such

Among the most common arguments advanced by people who would strip constitutional protections from those who act under the corporate form is that corporations are "creatures of the state"—that they are privileges granted by the government, and that the government may therefore control or limit their activities more than it could with regard to natural persons. This argument, however, is fallacious. Hessen, *supra*, at 25-33.

While ancient corporations on the government-charter model may have been essentially public

entities, and thus "created by the state," the modern for-profit business corporation is not created by the state, and does not enjoy privileges under the type of "charter" that ancient corporations enjoyed. Under today's private incorporation statutes, anyone meeting basic, formal requirements can apply for and receive authority to operate as a corporation. Hessen, *supra*, at 25-33. Many, if not most, states provide that the issuance of a corporate charter is a ministerial function, so that the state *cannot* deny corporate status to one who meets the criteria. *See*, *e.g.*, Cal. Corp. Code § 200(c) ("the corporate existence begins upon the filing of the articles"). The government does not *choose* to grant corporations their existence—it simply recognizes the fact of their existence. Arthur W. Machen, Jr., *Corporate Personality*, 24 Harv. L. Rev. 253, 260-61 (1911). *See also* Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 Sup. Ct. Econ. Rev. 95, 100 (1995) ("Government 'creates' corporations only in the sense that it 'creates' other types of contractual relationships—by enforcing them."). Corporations are therefore no more "creatures of the state" than are marriages—which are also private agreements recognized in the form of a government license issued when specified criteria are proven.

It is often argued that the corporate form consists of certain privileges—*e.g.*, perpetual duration and limited liability—which natural persons do not enjoy, and therefore the government may restrict corporations' rights in exchange for these privileges. But this, too, is incorrect. As this Court recognized in *Dartmouth College*, a corporation's immortality "no more confers on it . . . a political character, than

immortality would confer such power or character on a natural person." 17 U.S. (4 Wheat.) at 636.

Nor is limited liability a state-created privilege. First, shareholders cannot be justly charged with corporate wrongdoing over which they have no control. Pilon, *supra*, at 1309-12. Principles of justice—not any favor from the state—require that their personal liability be limited to their actual blame for acts they can control. Second, even if that were not the case, limited liability for torts is a contractual arrangement, not a state-vested privilege. "A clause could be put into every contract by which the apposite party limited his right of recovery to the common fund: the incorporation act may fairly be construed as legislating into all corporate contracts an implied clause to that effect." Adolf A. Berle & Gardiner C. Means, *The Modern Corporation & Private Property* 120 n.2 (Transaction Publ'ns 1991) (1932).

As Berle and Means write, the entire "quality of 'privilege'" in the corporate form is "elusive, to say the least," *id.*, because incorporation is simply a shorthand for a bundle of rights which could be established with equal validity, but less efficiency, through voluntary private contracts. Hessen, *supra*, at 17.

The analogy to marriage is again instructive: although two people could validly subscribe to a series of contracts governing their joint property, the distribution of their income, the raising of any children they might have, and so forth, the legal concept of "marriage" simply groups these voluntary agreements together under one convenient label. So, too, the concept of "corporation" does nothing more than aggregate a series of legal principles, including limited liability, perpetual duration, the right to do business

under a single name, and so forth—all of which rest on the contractual rights of those who participate. To take another analogy, when the government recognizes a group of people as a church, it does not *create* their right to worship or to call themselves a congregation; it simply recognizes that they have chosen that particular arrangement for the exercise of their rights.

Since corporations are not "creatures of the state," there is no merit to the contention that corporate rights "exist[] at state discretion," Gans & Kendall, *supra*, at 681, or that the government "create[s] corporations and . . . provide[s] them with special privileges." *Id.* at 699.

C. Treating Corporations Differently from Other Entities in Constitutional Cases Would Create Dangerous Anomalies in the Law

As Justice Field observed, it would be anomalous to hold that corporations cannot assert rights as persons under the Constitution. "[A] constitutional provision intended for the protection of every person against partial and discriminating legislation" should not "cease to exert such protection the moment the person becomes a member of a corporation." *Railroad Tax Cases*, 13 F. at 744. Indeed, were courts to cease regarding corporations as persons entitled to constitutional protection, the result would be that citizens could exercise the right at issue, could delegate their rights to each other, could join in groups to exercise that right, and could establish by contract all of the rights that make up the corporate form—such as limited liability and permanent duration—but would lose protection for those rights if they chose to call their association a corporation. Were this the law, the

New York Times or the NAACP would lose constitutional protections for their First Amendment rights—yet the persons who comprise these institutions could organize limited liability partnerships or trusts exercising exactly the same "privileges" that they currently enjoy under the corporate form, and assert those same rights. This would make this critical area of the law a semantic game. Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. Marshall L. Rev. 701, 708 (2011) ("individuals standing together as a group should not be stripped of rights that would be constitutionally guaranteed to them standing alone").

But if incorporation is regarded as a state-created privilege, or as something other than the rights of the individuals who comprise it, then a rule of law treating corporations differently from other business forms would raise even more constitutional concerns. In that case, restricting constitutional protections for corporations would implicate the unconstitutional conditions doctrine, because the issuing of a corporate charter—or the recognition of an entity as a de facto corporation or a corporation by estoppel—would require citizens to waive constitutional protections. Yet government may not condition the receipt of a benefit on a relinquishment of constitutional rights. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013).

In *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922), this Court held that states may not require foreign corporations to give up their constitutional rights in order to do business in the state. "[This] principle does not depend for its application on the character of the business the corporation does," the

Court wrote. "It rests on the ground that the federal Constitution confers upon citizens of one state the right to resort to federal courts in another, [and] that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void." Yet if corporations were to be barred from status as persons under the Constitution, states could force citizens to waive constitutional rights in exchange for corporate existence. People would be compelled to sign away rights such as speech, religious exercise, or the right to just compensation for takings of property, in order to exercise their associational rights, or to obtain benefits, by forming a corporation. *See further* Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have But Do Not Want*, 34 Harv. J.L. & Pub. Pol'y 639, 647-48 (2011) ("[T]o assert that the decision to take advantage of limited liability forces individuals who incorporate to suffer restrictions on their [rights] that would be unconstitutional if imposed on them in their individual capacities" would violate the unconstitutional conditions doctrine).

II

"FOR-PROFIT" AND "NON-PROFIT" CORPORATIONS CAN EXERCISE RELIGIOUS FREEDOM RIGHTS

The Third Circuit, in *Conestoga*, 724 F.3d at 385, as well as the D.C. Circuit Court of Appeals in *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1214-15 (D.C. Cir. 2013), drew a distinction between non-profit and for-profit corporations, by which the former could assert Free Exercise rights, but the latter could not. This distinction is unworkable and has no

basis in constitutional law or the theory of corporate rights.

The Free Exercise Clause protects persons and corporate entities regardless of whether they are categorized as "for profit" or "non-profit." Corporations engage in such a wide variety of activities, including religious acts, which do not align with the Internal Revenue Code's distinction between for-profit and non-profit entities. Attempting to draw such a distinction would cause hardship and chill the exercise of widely recognized corporate rights.

A. Corporations Can Exercise Religious Freedom Rights

The rights of corporations are obviously not identical to those of natural persons. They can only exercise rights that the individuals comprising it possess, and which they can and do authorize the corporation to exercise. Pilon, *supra*, at 1322. Corporations cannot marry or exercise other rights that are non-delegable. But they can exercise various "intangible" rights, Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L.J. 577, 662 (1990), including speech, petition, or freedom from unreasonable searches.

As the Tenth Circuit recognized, the free exercise of religion is not a "purely personal" right. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1133-34 (10th Cir. 2013). On the contrary, people frequently exercise religion by using the corporate form to express their moral values, or to seek to influence the moral conduct of others. In the early nineteenth century, for example, the Tappan brothers founded a for-profit credit reporting agency called The Mercantile Agency,

now Dun & Bradstreet, partly to promote their religious values of frugality and honesty, and partly to subsidize their wide-ranging anti-slavery activities. Bertram Wyatt-Brown, *Lewis Tappan and the Evangelical War Against Slavery* ch. 12 (1969).

The collective exercise of religious freedom is not only a practice dating from time immemorial, but is mandatory in some religious traditions.[4] The exercise of religious freedom in the corporate form may be the oldest of all corporate rights. Edmund Bayly Seymour, Jr., *Historical Development of the Common-Law Conception of a Corporation*, 51 Am. L. Reg. 529, 531 (1903) ("religious corporations existed in Athens as early as the time of Solon"). Today, corporate officers and shareholders regularly seek to exercise their moral values by influencing corporate behavior. The *2013 Global Responsibility Report* of the Wal-Mart Corporation, for example, devoted some 174 pages to describing its "corporate social, environmental and company responsibility efforts."[5] Sociologists have argued that the past quarter century has seen a dramatic increase in the religious service ethos of corporations such as Wal-Mart, which—ever since its founding by the devout Christian Sam Walton—has expressed an "animating spirit of Christian free enterprise" which sees "[f]amily values" as "an indispensable element in the global service economy."

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[4] Certain Jewish rituals, for example, including the reading of the Torah, require a minyan—a quorum of at least 10 Jewish male adults. 1 Gersion Appel, *The Concise Code of Jewish Law* 62 (2d ed. 1991).

[5] *Available at* http://cdn.corporate.walmart.com/39/97/81c4b26546b3913979b260ea0a74/updated-2013-global-responsibility-report_130113953638624649.pdf (last visited Jan. 14, 2014).

Bethany Moreton, *To Serve God and Wal-Mart: The Making of Christian Free Enterprise* 5 (2009); *see also* Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 Tul. L. Rev. 337 (2009) ("Social entrepreneurs . . . reject the traditional boundaries between the non profit and for-profit sectors and carry out their plans through so-called hybrid social enterprises, which combine the soul of nonprofit organizations with the discipline and business savvy of for-profits.").

Shareholders often use shareholder meetings as forums for debates over moral and social values. Elizabeth Glass Geltman & Andrew E. Skroback, *Environmental Activism and the Ethical Investor*, 22 J. Corp. L. 465, 475-80 (1997). The Interfaith Center on Corporate Responsibility (ICCR) is particularly active in coordinating and encouraging religious corporate shareholders in their efforts to influence corporations' activities in directions they believe express religious values. "ICCR members believe that as responsible stewards they must invest their saved resources . . . in ways that are consistent with their faith values."[6] The ICCR reports that more than $2 trillion in corporate assets—"one out of every nine dollars under professional management in the United States today"—are dedicated to what the ICCR considers "socially responsible investing." These investors view their participation in for-profit corporate enterprises as expressing their religious beliefs.

The Third Circuit acknowledged that individual shareholders could exercise religious freedoms, but found it difficult to see how corporations *qua*

[6] *Available at* http://www.iccr.org/about/faq.php (last visited Jan. 14, 2014).

corporations could do so, given that corporations do not pray, observe sacraments, or otherwise act apart from the individuals who comprise them. *Conestoga*, 724 F.3d at 385. But this argument proves too much: non-profit corporations, such as churches, also do not pray, observe sacraments, or act apart from their individual members, yet they are undeniably covered by the Free Exercise Clause. This is because the members of these institutions see value in having organizations take a stand as an institution, over and above their own personal acts. The same is true of the for-profit business corporation. It "is not merely an economic institution. It is also a moral institution and a political institution." Michael Novak, *Toward a Theology of the Corporation* 56 (rev. ed. 1990). Corporate shareholders and directors consider it important for the corporation to as an institution act in accordance with their moral values, just as they find a value in the institution expressing an opinion or owning property in its own name. This concept—sometimes called "institutional conscience"—explains why most major corporations express some form of moral value in their institutional mission statements. Edmund D. Pellegrino, *The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective*, 30 Fordham Urb. L.J. 221, 235 (2002).

This Court has frequently acknowledged that businesses that engage in expressive activity as part of their profit-making enterprise are protected under the First Amendment. In *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), a for-profit publisher was allowed to assert a First Amendment challenge to the censorship of a book. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), an unincorporated group of 36 persons bought an advertisement from the New York Times—a

for-profit corporation engaged in commercial publishing. The Court never doubted that the *Times* could assert its own First Amendment rights. *See id.* at 266-67. Yet the expressive rights of these corporations really consist of the aggregated expressive rights of the people who make up the corporations; censoring the corporations would be censoring them.

In precisely the same way, people can exercise their First Amendment religious freedom in concert with others in the corporate form. In *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002), corporate plaintiffs who published and distributed Bibles and tracts challenged the constitutionality of an ordinance requiring permits for door-to-door canvassers. The Court had no difficulty concluding that the ordinance violated the First Amendment. *Id.* at 164-69. Although the Court regarded these corporate entities as units exercising religious liberty and expression rights, they were in reality large groups of people acting in concert—*i.e.*, acting through their corporations in accordance with their First Amendment rights, just as the owners of publishing companies do.

The Tenth Circuit was correct: free exercise is not a "purely personal" right, and it can be vested in a corporation.

B. There Is No Principled Basis for Creating a First Amendment Distinction Between "For-Profit" and "Non-Profit" Corporations

The "non-profit"/"for-profit" distinction is not a legitimate ground for distinguishing between entities that can and that cannot assert Free Exercise rights.

That distinction is rooted in government tax policy, and it confers only a privilege of tax-exemption, not any rights of constitutional standing. *Nationalist Movement v. C.I.R.*, 102 T.C. 558, 584 (1994), *aff'd*, 37 F.3d 216 (5th Cir. 1994). Moreover, as this Court has repeatedly recognized, it is not possible cleanly to distinguish between the for-profit and non-profit operations of religiously affiliated entities.

Although "eleemosynary corporations" were well known in early America, their legal status was "ambiguous," because they were considered quasi-public institutions until well after the Civil War. Peter Dobkin Hall, *Inventing the Nonprofit Sector* 24, 38 (2001). Many such corporations, particularly religiously affiliated ones, enjoyed exemptions from taxation—exemptions that long antedate the Constitution. Erika King, *Tax Exemptions and the Establishment Clause*, 49 Syracuse L. Rev. 971, 973-75 (1999). But these exemptions were based on policies of limiting state interference in religion and fostering charitable activities. *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 687-89 (1970). They were not meant to differentiate between the types of constitutional rights exercised by for-profit as opposed to non-profit institutions.

Nor could any such difference be maintained. Corporations often intertwine for-profit and non-profit activities. Non-profit entities often make substantial income, for instance, by licensing their names for use on products, which raise money for non-profit activities. *See*, *e.g.*, *Sierra Club Inc. v. C.I.R.*, 86 F.3d 1526 (9th Cir. 1996). For-profit entities often engage in humanitarian, expressive, and religious activities on their own, not always through non-profit subsidiaries.

Design firm IDEO, for example, participated for years in charitable activities before it even started a non-profit adjunct. Linda Tischler, *Looking to Do More Social Good, IDEO Launches a Non-Profit Arm*, Fast Company & Inc., Mar. 4, 2011.[7] And for-profit corporations can be operated solely for non-profit purposes. *Kirtland Country Club Co. v. Bowers*, 186 N.E.2d 851, 852 (Ohio 1962).

Religious societies have frequently operated as corporations combining commercial and charitable activities. Massachusetts Bay Colony, Plymouth Colony, Rhode Island and Providence Plantations, and other colonial enterprises, which brought religious "pilgrims" to the New World, were organized as for-profit joint-stock companies (predecessor to the modern corporation) that combined religious and profit-making missions. William Pencak, *Historical Dictionary of Colonial America* 116 (2011). The nineteenth century Amana Colonies were founded as a business corporation in 1859 in Iowa, operating initially as agricultural companies but expanding into a variety of profitable industrial pursuits. *See* Charles Nordhoff, *The Communistic Societies of the United States* 29-41 (Dover Publ'ns, Inc. 1966) (1875). Only in 1932 did they separate into for-profit and non-profit branches. The Shaker church likewise operated as a corporation "not solely organized for purposes of religion," but also for commercial purposes. *White v. Miller*, 71 N.Y. 118, 123 (N.Y. 1877); *see also United Soc'y of Shakers v. Underwood*, 72 Ky. (9 Bush) 609 (Ky. 1873).

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[7] *Available at* http://www.fastcodesign.com/1663355/looking-to-do-more-social-good-ideo-launches-a-non-profit-arm (last visited Jan. 15, 2014).

In some theologies, commercial activity cannot be separated from religious obligation. Scientologists, for example, adhere to a "doctrine of exchange" according to which church members must pay for certain obligatory religious services. *Hernandez v. C.I.R.*, 490 U.S. 680, 685 (1989). Other religious traditions, such as Mormonism, draw no rigid distinction between profitable and charitable pursuits. Corporate entities owned by the LDS church, such as AgReserves, Inc., Utah Property Management Associates, and Deseret Management Corporation and its subsidiary corporations, serve as commercial components of the LDS Church's broader religious mission. One of the petitioners in this case, Mardel, is a Christian bookstore chain with 35 locations, which includes among its corporate objectives "[t]o be a profitable organization, thus allowing the continuation of the ministry we perform."[8]

One common form of for-profit free-exercise is the production of kosher meats, an activity often undertaken by for-profit corporations. Hebrew National, a brand of ConAgra Foods, Inc., has for a century produced kosher meats to the specifications of Orthodox Jewish law. Courts have specifically held that Hebrew National's for-profit kosher operations are protected by the Free Exercise Clause. *See*, *e.g.*, *Wallace v. ConAgra Foods, Inc.*, 920 F. Supp. 2d 995, 997-99 (D. Minn. 2013). Likewise, in *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405, 407 (E.D.N.Y. 2011), *aff'd*, 680 F.3d 194 (2d Cir. 2012), and *Ran-Dav's County Kosher, Inc. v. New*

[8] Mardel Christian & Education Stores, Inc., *Mission Statement*, http://www.mardel.com/about/mission.aspx (last visited Jan. 15, 2014).

Jersey, 608 A.2d 1353 (N.J. 1992), *cert. denied sub nom. Nat'l Jewish Comm'n on Law & Pub. Affairs v. Ran-Dav's County Kosher, Inc.*, 507 U.S. 952 (1993), for-profit corporations were allowed to raise Free Exercise challenges to state regulations of kosher meats. Given this inextricable connection between the religious activities and profit-making activities of many corporations, any attempt to distinguish between for-profit and non-profit entities for Free Exercise purposes would cause confusion and chill the exercise of rights such as speech, which for-profit corporations incontrovertibly possess.

Corporations—whether eleemosynary or commercial—can and do engage in religious expression. For example, the hamburger chain In-N-Out Burger prints Biblical citations on all of its hamburger wrappers and soda cups. Mark Oppenheimer, *At Christian Companies, Religious Principles Complement Business Practices*, N.Y. Times, Aug. 2, 2013.[9] The clothier Forever 21 prints "John 3:16" on its shopping bags. Jena McGregor, *Forever 21's Leaked Memo: Faith At Work?*, Wash. Post, Aug. 19, 2013.[10] This Court has already recognized that corporations have the right of free expression, and may therefore print "Vote for Candidate X" on their receipts. *Cf. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986). Thus, a decision holding that for-profit corporations

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[9] *Available at* http://www.nytimes.com/2013/08/03/us/at-christian-companies-religious-principles-complement-business-practices.html?_r=0 (last visited Jan. 15, 2014).

[10] *Available at* http://www.washingtonpost.com/blogs/on-leadership/wp/2013/08/19/forever-21s-leaked-memo-faith-at-work/ (last visited Jan. 15, 2014).

cannot assert Free Exercise rights would make it unclear whether these same companies had a constitutional right to print "John 3:16" on their receipts or shopping bags. And while a kosher butcher would have the right to advertise that its products meet religious standards, *see*, *e.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-73 (1976), that same butcher would have no right to challenge the constitutionality of a law requiring the inclusion of non-kosher ingredients or otherwise interfering with kosher observance.

Any effort to distinguish between those corporations that can and those that cannot assert Free Exercise rights is unsupportable. The better conclusion is that for-profit corporations, like non-profit corporations, consist of individuals who can and do vest their constitutionally protected rights in the businesses in which they take part. As the Tenth Circuit observed, there is no reason "why an individual operating for-profit retains Free Exercise protections but an individual who incorporates . . . does not, even though he engages in the exact same activities as before." *Hobby Lobby*, 723 F.3d at 1135. Individuals who participate in a corporation often direct their business conduct—or seek to influence corporate conduct—in accordance with their religious values. In doing so, they and their corporations exercise First Amendment rights.

CONCLUSION

For-profit business corporations can and often do exercise freedom of religion. The decision of the Third Circuit should be *reversed*, the decision of the Tenth Circuit should be *affirmed*.

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Respectfully Submitted,

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