NO. 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.*

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 Third and Tenth Circuits**

**BRIEF OF THE CHRISTIAN BOOKSELLERS ASSOCIATION, DESERET BOOK COMPANY, FELDHEIM PUBLISHERS, AND TYNDALE HOUSE PUBLISHERS, INC., AS *AMICI CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA**

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January 28, 2014

## QUESTION PRESENTED

*Amici* will address only the following question of law:

Whether for-profit corporations are categorically excluded from protection for free exercise of religion under the Religious Freedom Restoration Act.

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## INTERESTS OF *AMICI CURIAE*[1]

*Amicus* Christian Booksellers Association (CBA) is the leading trade association for producers, distributors, and marketers of Christian content and of products that align with the Christian faith and lifestyle, in the United States and worldwide. Most of CBA's members are for-profit enterprises that serve expressly religious aims. CBA furthers those twin purposes through its mission "to serve Jesus Christ by equipping those called to share the Good News and make disciples through Christian retail excellence."[2] CBA helps its members pursue their commercial goals and their religious callings by providing business solutions, contacts, industry news and research, and other services.

*Amicus* Deseret Book Company (Deseret Book) is a for-profit Utah corporation that exists primarily to publish books and create and distribute other media that are of specific interest to members of The Church of Jesus Christ of Latter-day Saints (the LDS Church), especially works that explore and reinforce the Church's religious beliefs and doctrines.[3]

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[1] No counsel for a 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. Besides *amici curiae* and their counsel, no party has made a monetary contribution to this brief's preparation and submission. The parties have consented to the filing of this brief.

[2] *See* "About CBA," http://cbaonline.org/about-cba/ (visited Jan. 27, 2014).

[3] *See* "About Deseret Book Company," http://deseretbook.com/about/5110611 (visited Jan. 27, 2014).

Although separately incorporated, Deseret Book is ultimately controlled by the ecclesiastical leadership of the LDS Church. "Deseret Book" is also an established brand name closely associated with the LDS Church in the public mind, and Deseret Book owns retail stores under that name in various states. Deseret Book endeavors to make a profit, and those profits are ultimately used to support and advance the LDS Church's religious mission and purposes.

*Amicus* Feldheim Publishers (Feldheim) is a leading Orthodox Jewish publisher of Torah books and literature.[4] Its extensive catalogue of titles includes books on Jewish Law, Torah, Talmud, Jewish lifestyle, Shabbat and Jewish holidays, Jewish history, biography, and kosher cookbooks. It is headquartered in New York, with publishing and sales divisions in Jerusalem, Israel. Feldheim is incorporated as Philipp Feldheim, Inc., a for-profit corporation.

*Amicus* Tyndale House Publishers, Inc. (Tyndale House) is one of the Nation's foremost publishers of Christian books. Founded in 1962 for the purpose of publishing The Living Bible, a translation of the Bible designed to combine up-to-date scholarship with expression accessible to modern readers, Tyndale House has expanded to include other Bibles as well as devotional literature, nonfiction, fiction, and children's books. Tyndale House's express mission is to "[m]inister to the spiritual needs of people, primarily through literature consistent with

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[4] *See* "About Feldheim," http://www.feldheim.com/about-feldheim (visited Jan. 27, 2014).

biblical principles." Among its stated corporate goals is not only "Honor God," but "Excel in business," and "Operate profitably."[5] Tyndale House is a plaintiff in *Tyndale House Publishers, Inc. v. Sebelius*, No. 1:12-CV-1635 (D.D.C. filed Oct. 2, 2012), a pending case raising substantially the same issue presented to the Court here.

Even as *amici* and their affiliates seek to run profitable businesses, faith pervades their operations, supplies them with purpose, and guides their business decisions—ranging from selection of titles and merchandise, to hiring staff who share their religious convictions, to setting prices and business hours. *Amici*'s religious and business purposes, in other words, inseparably complement each other. *Amici* therefore have an interest in ensuring that they, their affiliates, and similar businesses receive protection of their rights under the Religious Freedom Restoration Act and the Free Exercise Clause of the First Amendment.

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[5] *See* "The Tyndale Purpose," http://www.tyndale.com/50_Company/tyndale_purpose.php (visited Jan. 27, 2014).

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Solicitor General of the United States proposes to categorically exclude for-profit corporations from protection under both the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act (RFRA), legislation designed by Congress to establish broad security for religious practice. That exclusion has no support in the text, history, and traditional understanding of free exercise of religion, and would substantially reduce the protections long accorded to that vital freedom under the Constitution and laws of the United States. This Court should roundly reject the novel argument that closely-held corporations lack the capacity to assert free exercise claims either on their own behalf or as representatives of their owners, and should evaluate their RFRA claims on the merits.

In *First National Bank of Boston v. Bellotti*, this Court held that the "proper question" was "not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons." 435 U.S. 765, 776 (1978). "Instead, the question must be whether [the challenged statute] abridges [rights] that the First Amendment was meant to protect." *Id.* The Free Exercise Clause was originally understood to protect acts of religious exercise by institutions as well as individuals. That understanding flows from the words themselves, from the conception of religious practice that prevailed at the time of the founding, and from the drafting history of the First Amendment, in which Congress deliberately replaced protection for

individual "conscience" with the concept of free "exercise" of "religion." Indeed, this Court's first case touching on free exercise squarely rejected the argument—resurrected here by the government—that corporate status is inconsistent with the free exercise of religion. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815) (Story, J.). There is no reason to reverse that longstanding interpretation.

The modern business corporation, true, had not come into being at the time the First Amendment was framed. But from the very founding of the colonies, it had been well understood that a corporate charter can combine religious and profitable purposes. The colonial charters themselves, which the Declaration of Independence referred to as the nation's "most valuable laws," *see* The Declaration of Independence para. 23 (U.S. 1776), created companies intended to combine profitmaking and religious purposes. Some of the earliest cases addressing protections for freedom of conscience and exercise of religion recognized that for-profit businesses were entitled to protection for the exercise of religion. *See Specht v. Commonwealth*, 8 Pa. 312 (1848); *Commonwealth v. Wolf*, 3 Serg. & Rawle 48 (Pa. 1817). There is no evident reason to believe that the institutions capable of exercising religion for purposes of the First Amendment should not include for-profit corporations.

Nor can modern free exercise doctrine under RFRA and the First Amendment be squared with the government's assertion that for-profit corporations are categorically excluded. In recent years this and other courts have applied free exercise protections to non-profit corporations without ever suggesting that

corporate status is of any significance, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and this Court has addressed the religious rights of for-profit businesses without ever suggesting that for-profit status is a disqualifying fact, *see United States v. Lee*, 455 U.S. 252, 257-60 (1982); *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). It is a puzzle why the *combination* of these two constitutionally irrelevant factors—corporate form and profit motive—would strip an entity's exercise of religion of protection. This Court has also recognized that for-profit corporations can engage in other types of expressive or religiously motivated conduct, *see, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713 (1971), and raise religious freedom claims under the Establishment Clause, *see Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985). It is another puzzle why the free exercise of religion should be *uniquely* outside a for-profit corporation's capacity.

The government cites no real authority for its position on the inapplicability of religious exercise protections to for-profit corporations. And the government's position is not only inconsistent with modern doctrine, but it would create serious problems of its own. Most obviously, it would replace modern free exercise doctrine's straightforward focus on religiously motivated acts with a web of theoretically inexplicable distinctions between different types of corporate actors performing essentially identical acts, and among different purposes that might animate a corporation.

For example, two incorporated book publishers with the same religious mission statement, the same religious ownership, and the same religious audience

would be treated differently simply because the profits of one inure to shareholders and those of the other support a foundation or cause. Another anomaly raised by the government's position is that a for-profit corporation could be treated as acting with religious animus, *see Fischer v. Forestwood Co., Inc.*, 525 F.3d 972 (10th Cir. 2008), but not with religious intent. It is late in the day for the government, which regularly prosecutes corporations for intent crimes, to claim that corporations cannot form an intent.

Whether the government has a compelling interest in enforcing the contraceptive coverage regulation may be a matter of debate—though we think the challengers have the better of the argument. It also may well be that the exercise of religion by for-profit corporations is relatively rare (confined, as a practical matter, to closely held corporations and to businesses, like *amici*, with religious purposes), and that proving the sincerity of religious belief is sometimes more difficult in the case of groups (whatever their legal form) than natural persons. But there is no colorable basis for categorically excluding all exercise of religion by for-profit corporations from constitutional or statutory protection.

## ARGUMENT

### THE RELIGIOUS FREEDOM RESTORATION ACT AND THE FIRST AMENDMENT PROTECT THE EXERCISE OF RELIGION WITHOUT REGARD TO CORPORATE FORM OR PROFIT MOTIVE.

#### A. The Text, History, and Traditional Understanding of the First Amendment Confirm That Free Exercise Protects all Exercise of Religion.

RFRA, 42 U.S.C. § 2000bb *et seq.*, protects "a person's exercise of religion," but provides no definition of "person." The Tenth Circuit therefore correctly turned to the Dictionary Act, which informs us that the statutory term "person" ordinarily includes corporations, unless "the context indicates otherwise." 1 U.S.C. § 1. The perambulatory clauses of RFRA, 42 U.S.C. § 2000bb, state that its purpose is to restore the full range of protection for free exercise of religion "as an unalienable right, secured … in the First Amendment to the Constitution." To supply the "context" to understand RFRA's protections for "exercise of religion," it is therefore necessary to start with the First Amendment's injunction against any law "prohibiting the free exercise [of religion]." U.S. Const. amend. I. The text, history, and traditional understanding of the First Amendment's language provide no support for the view that for-profit corporations are unable to

exercise religion. There is no call to read RFRA's protection more narrowly.[6]

*1. Constitutional text and drafting history*

In *Bellotti*, this Court held that the "proper question" was "not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons." 435 U.S. at 776. "Instead, the question must be whether [the challenged statute] abridges [rights] that the First Amendment was meant to protect." *Id.* The government's approach in this case is precisely the opposite. Proper analysis requires that we ask whether the challenged regulation is one that abridges "the free exercise of religion." We begin with text, history, and longstanding interpretation.

As originally understood, the phrase "exercise of religion" referred to *action*, without any limitation on the *actor* who might engage in it. Public worship, which is conducted by groups, was at its historic core, no less than individual exercises of conscience. The phrase referred to "public religious action," including "religious publication" and "religious education," which necessarily were a corporate rather than individual activity. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 395 (1996); *see also* Michael W.

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[6] If anything, RFRA's definition of religious exercise is likely to be broader than that of the First Amendment. *See Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1084-85 (9th Cir. 2008) (W. Fletcher, J., dissenting).

McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1459 & n.246 (1990) ("The key word 'exercise' … was defined in dictionaries of the day to mean 'action.'").

It was undoubtedly understood that protections for religious exercise should extend to institutions rather than individual persons alone. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012) (observing that the Free Exercise Clause "protects a religious group's right to shape its own faith and mission"). Documents that provided important philosophical background to the First Amendment, such as John Locke's *Letter Concerning Toleration* and James Madison's *Memorial and Remonstrance Against Religious Assessments*, referred not only to natural persons, but also to "churches," to "religious societies," and even to "Religion" in the abstract. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 5 *The Founders' Constitution* 82 (Philip B. Kurland & Ralph Lerner eds. 2000). According to Madison, the right of religious freedom is "unalienable" precisely because it involves the discharge of the "duty towards the Creator." *Id.* This duty, he wrote, "is precedent, both in order of time and degree of obligation, to the claims of Civil Society." *Id.* Locke similarly considered "religion" as having independent interests on which "civil government" could not properly intrude. John Locke, *A Letter Concerning Toleration*, in *Two Treatises of Government and A Letter Concerning Toleration* 215, 218 (Ian Shapiro ed., 2003). For both Madison and Locke, the focus was not on the nature of the actor—whether natural

person, group, church, society, or other form of association—but on the authority to whom the religious duty is due. Early advocates of disestablishment and free exercise therefore asked whether the civil magistrate was treading into matters touching *religion*, without regard to the identity or juridical status of the person or group involved.

Two provisions of the First Amendment—the rights of petition and assembly—are termed "right[s] of the people," but the freedoms of religion, speech, and press are worded more abstractly, presumably because the framers of the First Amendment were concerned that the government not invade those spheres. It would be contrary to the very text to impose on the Free Exercise Clause a limitation to natural persons.

The history of the First Amendment's drafting supports this interpretation of the text. The Free Exercise Clause, as originally drafted by James Madison, protected "the rights of conscience." *See* 1 *Annals of Congress* 434 (J. Gales ed. 1834). In using that language, Madison followed the free exercise protections enacted by several of the states at the time, which often were directed toward individual religious "profession," "conscience," or "worship." *See* McConnell, 103 Harv. L. Rev. at 1456-58 & n.242 (listing and quoting the applicable state provisions in force in 1789). Protection for "religion," however, appeared early. At one point the House of Representatives voted for a version of the First Amendment that forbade all laws "touching religion," without any hint of limitation based on the identity or legal status of the plaintiff. 1 *Annals of Congress*

731. Without recorded discussion, the House later substituted a version protecting both "rights of conscience" and "free exercise of religion," suggesting the two terms were not regarded as synonymous or redundant. *Id* at 766.

In the Senate, whose Journal recorded only motions and votes, there were votes on a series of versions, some protecting only "the rights of conscience," some protecting only "the free exercise [of religion]," and some protecting both. *See* 1 *Documentary History of the First Federal Congress of the United States of America* 151, 166 (L. De Pauw ed. 1972) (Senate Journal). The Senate ultimately settled on "free exercise [of religion]" alone, *id.* at 166, and a Conference Committee preserved that decision, 3 *id.* at 228.

There are many subtle differences between "conscience" and "religion," *see* McConnell, 103 Harv. L. Rev. at 1489-90; Nathan S. Chapman, *Disentangling Conscience from Religion*, 2013 U. Ill. L. Rev. 1457 (2013), but the most pertinent difference for present purposes is that "conscience" tends to refer to the inward conviction of right and wrong, while "religion" extends as well to "the corporate or institutional aspects of religious belief," McConnell, 103 Harv. L. Rev. at 1489-90.

It would have been clear to the framers, furthermore, that institutional religion implied corporations specifically. Blackstone's *Commentaries on the Laws of England* listed "the advancement of religion" as the first of several purposes for which a corporation might be formed. *See* William Blackstone, 2 *Commentaries* *455. Religious bodies formed corporations in the early Republic as well,

*See, e.g., Barnes v. First Parish in Falmouth*, 6 Mass. 400 (1810) (interpreting Massachusetts law as authorizing payments to ministers only of incorporated churches).

As it happens, the first question ever addressed by this Court regarding free exercise was whether corporate status was disqualifying. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815). Justice Story's Opinion for the Court in *Terrett* rejected the view that corporate status was inconsistent with the exercise of religion protected by Virginia state law. On the contrary, the Court observed that the legislature may "enact laws more effectually to enable all sects to accomplish the great objects of religion by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns." *Id.* at 49. The Court said that "any person who has attended to the difficulties which surround all voluntary associations" would appreciate that "the free exercise of religion" and other religious purposes would "be *better secured and cherished by corporate powers*." *Id.* (emphasis added). In short, the Court concluded that "in our judgment it *would make no difference* whether the Episcopal church were a voluntary society, *or clothed with corporate powers*; for in equity, as to objects which the laws cannot but recognize as useful and meritorious, the same reason would exist for relief in the one case as in the other." *Id.* at 45-46 (emphasis added). The free exercise not only protects corporations as well as individuals, in other words, but its corporate protections *complement* the right of individuals.

*2. Traditional understanding*

The government and its *amicus* supporters profess to think that there is something incongruous or even oxymoronic about the idea that a profit-making corporation might also pursue "a religious values-based mission." U.S. Br. at 19 (quotation marks omitted). Without any actual historical evidence, they project their narrow vision of religious exercise onto the framers, and so into the protections of RFRA. But the framers were intimately familiar with corporations and other business forms that combined religious with profit-making purposes.

Most conspicuously, religion and profit were enshrined together in charters of the American colonies. The 1606 Charter of the Colony of Virginia issued by King James I incorporated a joint stock company, called the Virginia Company,[7] granting it the right "to dig, mine, and search for all Manner of Mines of Gold, Silver, and Copper, as well within any Part of their said several Colonies … And to HAVE and enjoy the Gold, Silver, and Copper, to be gotten

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[7] Joint stock companies were early antecedents of the modern business corporation, and used cognates of the term. The 1609 Charter of Virginia stated that the members of the Virginia company "shall be known, called and *incorporated by* the name of The Treasurer and Company of Adventurers and Planters of the City of London for the first Colony in Virginia." Charter of Virginia (1609), *reprinted in* 7 Francis Newton Thorpe, *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America Compiled and Edited Under the Act of Congress of June 30, 1906* 3795 (1909) (hereafter "Thorpe") (emphasis added).

thereof[.]" Charter of Virginia (1606), Thorpe at 3786. But the primary stated purpose of the enterprise was the "propagat[ion] of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God[.]" *Id*. at 3784. Subsequent charters retained the corporate form and the religious purpose, while expanding the territory. *See* Charter of Virginia (1609) *in* Thorpe at 3790; Charter of Virginia (1611) *in* Thorpe at 3802. The 1609 Charter congratulated the first settlers for "accomplishing so excellent a Work, much pleasing to God and profitable to our Kingdom." *Id*. at 3790. Pleasing God and making a profit obviously were not considered incompatible purposes.

The 1629 Massachusetts Bay Charter likewise incorporated a joint stock company, the Massachusetts Bay Company, to which it granted rights to "all Mynes and Myneralls as well Royall Mynes of Gould and Silver and other Mynes and Myneralls whatsoever, in the saide Landes and Premisses[.]" Charter of Massachusetts Bay (1629) *in* Thorpe at 1847-48. The Charter also stated that the colony was to be governed such that the "good Life and orderlie Conversacon" of the colonists "maie wynn and incite the Natives of Country, to the Knowledg and Obedience of the onlie true God and Sauior of Mankinde, and the Christian Fayth[.]" *Id.* at 1857. Again, the goals of profit and evangelization went hand in hand.

The framing generation revered these early charters: The Declaration of Independence itself cited King George III, among other acts, with "taking away our Charters," which the colonists considered

"our most valuable Laws[.]" *See* The Declaration of Independence para. 23 (U.S. 1776). In light of the significance the charters held for the framers, it is inconceivable that the framers would have shared the government's view that combining pursuit of profit and a religious purpose created inconsistency.

Similarly, many of the founders attended such colleges as Harvard, Yale, or William & Mary, which were chartered as corporations with purposes that were both secular and religious. M.G. Robertson, *Religion in the Classroom*, 4 Wm. & Mary Bill Rts. J. 595, 600 (1995).

The government's cramped view of the purposes of for-profit corporations also flies in the face of the ordinary practice of the Christian and Jewish religions, the faiths most familiar to the framers of the First Amendment. Contrary to the government's anachronistic assumptions, these religions do not concern themselves only with worship on specified occasions, but encourage or require their members to adhere to the commands of God in their daily lives, including in the conduct of their businesses. Within those traditions, business is ideally a vocation, to be conducted to the glory of God and in conformity to His commandments.

The framers likely would have been aware of Solomon's maxim that "[a] false balance is abomination to the LORD: but a just weight is his delight," *Proverbs* 11:1 (King James), and of St. Paul's admonition that "whatsoever ye do, do it heartily, as to the Lord, and not unto men," *Colossians* 3:23. Revealingly, the Puritans in New England often headed their business ledgers with the phrase "In the name of God and profit"—and did not

see those purposes as a contradiction. John Steele Gordon, *An Empire Of Wealth: The Epic History Of American Economic Power* 27 (2004). The framers may also have known that dozens of commandments of Judaism involve business and employment practices ranging from avoidance of work on the Sabbath, *Exodus* 20:10, to security for debts, *see Deuteronomy* 24:10, to timely payment of workers, *see Leviticus* 19:13. Jews are required, moreover, to ensure that their businesses are conducted in accordance with Jewish law, and in fact "[e]conomic activities" are regarded as "a means toward building a just and caring society in which the best of human and spiritual values might flourish." *See* Moses L. Pava, *Developing a Religiously Grounded Business Ethics: A Jewish Perspective*, 8 Business Ethics Quarterly 65, 81 (1998). The notion that religion and business conduct are separable, in contrast, is a modern notion entailing questionable preconceptions about the role of religion, which the framers would not likely have found plausible.

Although these *amici* are not aware of any free exercise litigation in the early decades of the Republic specifically involving a for-profit corporation, there is an obvious reason for that: The business corporation as we know it did not exist at the time. Before independence and in the Nation's first half-century, there were relatively few business corporations at all, and most corporations that did exist were quasi-public entities such as universities, state banks, canals, turnpikes, and the like, which were specially chartered by the legislature for a public (not an exclusively private) purpose. *See* John Micklethwaite & Adrian Wooldridge, *The Company: A Short History of a Revolutionary Idea* 43-44 (2003).

It was only in the early 19th Century, partly as a result of the Supreme Court's decision in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), that the corporate form was increasingly adopted for private business and associational purposes. Only with the advent of general incorporation laws did the corporation become a genuinely private form of association. *See* Micklethwaite & Wooldridge at 45-46. Today, in contrast, it is commonplace for corporations of all stripes to invoke all common law, statutory, and constitutional rights that they are capable of exercising—which would have included religion all along.

Nonetheless, some of the earliest free exercise cases under state constitutions *did* involve for-profit businesses. If the government were correct, one would expect some indication that such enterprises enjoyed lesser free exercise protections, but the historical record shows no such thing. In *Specht v. Commonwealth*, 8 Pa. 312 (1848), and *Commonwealth v. Wolf*, 3 Serg. & Rawle 48 (Pa. 1817), Seventh Day Baptist and Jewish business owners challenged Sunday closing laws on the ground that the requirement of closing on Sunday imposed an indirect economic burden on their ability to remain closed on Saturday, which is the Sabbath of their faiths. The court concluded that the requirement of being closed on Sunday did not prevent sabbatarians from remaining closed on Saturday, and so did not burden religious conscience. *See Wolf*, 3 Serg. & Rawle at 50; *Specht*, 8 Pa. at 325-326. Yet the courts did not question the right of for-profit businessowners to seek protection for their business activities. The fact that the individuals

involved were engaged in profitable enterprises was not treated as disqualifying, or even relevant to the legitimacy of the free exercise issues they presented.

Indeed, the court suggested in dictum that if state law *had* compelled the businessowners to engage in business conduct that violated their religious consciences—*i.e.*, if the law required their businesses to stay open on Saturdays, or if their religious observance required six days of work per week—they would have been entitled to relief. "[The Sunday closing law] says not to the Jew or Sabbatarian, You shall desecrate the day you esteem as holy, and keep sacred to religion that *we* deem to be so. … It detracts not one hour from any period of time they may feel bound to devote to [Sabbath observance]." *Specht*, 8 Pa. at 325. Likewise, if the businessowners were "as fully bound to attend to [their] secular affairs upon the first six days of the week, as to cease from labour on the seventh," the court noted, "the law … might well be regarded as an invasion of his conscientious convictions[.]" *Id.* at 326. Although the businesses involved in these early cases appear to have been proprietorships rather than corporations, they contradict the government's view that business activities enjoy lesser free exercise protections. This Court followed the same line of logic in *United States v. Lee*, 455 U.S. 252, 257-60 (1982), and *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

Early practice, both before and after independence, thus shows (1) that religious and profitable motives were combined without contradiction, both by chartered organizations and by individuals, and (2) that religious activities were

treated as protected even when performed by profitable enterprises. The government's distinction between religious and profit-making activity for purposes of the modern business corporation would appear to be of recent vintage and should not be imposed on the First Amendment or on RFRA.

### B. This Court has Likewise Recognized that Corporations Can Invoke the Free Exercise of Religion.

As this Court has noted, "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *See Monell v. Department of Soc. Servs. of City of New York*, 436 U.S. 658, 687-688 (1978). The only exception is for "'purely personal' guarantees, such as the privilege against compulsory self-incrimination[.]" *Bellotti*, 435 U.S. at 778 n.14 (1978). As discussed below, and consistent with early practice, exercise of religion is plainly not such an exception. Under modern legal doctrine, it would be anomalous to hold that corporations cannot "exercise" religion for purposes of RFRA or the First Amendment.

The term "exercise of religion" as used in RFRA, *see* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7), and in free exercise caselaw both before and since RFRA's enactment, has been held to extend to the conduct of corporations. Religious congregations and denominations routinely incorporate—as they have a constitutional right to do, *see Falwell v. Miller*, 203 F. Supp. 2d 624 (W.D. Va. 2002)—and this Court has repeatedly recognized their free exercise rights. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.,* 132 S. Ct. 694 (2012); *Church of the*

*Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).[8] A number of cases from the lower courts likewise appear to have treated incorporated churches themselves, and not merely their members, as exercising religion. *See Paul v. Watchtower Bible & Tract Soc. of New York, Inc.*, 819 F.2d 875, 883 (9th Cir. 1987) (discussing religious conduct by defendant corporations); *Peyote Way Church of God, Inc. v. Smith*, 742 F.2d 193, 201 (5th Cir. 1984) (referring to "ritual use of peyote by the Peyote Way Church").

It matters little whether corporations that exercise religion can sue in their own name or on behalf of their constituents. *Compare Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *with Gilardi v. United States Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013) (en banc); *see Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009). The government is contending that *no one* has the capacity to sue to vindicate the free exercise right of corporate employers not to be forced to provide coverage for abortion-inducing drugs, which is at issue in this case. It is beyond the scope of this brief to address whether the government has a sufficiently compelling rationale for insisting upon such coverage, but the notion that

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[8] The corporate status of the plaintiff in *Lukumi*, is evident from its name. The religious groups involved in *Hosanna-Tabor* and *O Centro* were both corporations. *See E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1238 (D.N.M. 2002).

this exercise of religious scruple may be raised by *no one* is plainly untenable.

Protections for the exercise of religion by corporations are not limited to religious bodies that are engaged in prayer and worship. Rather, this Court has held that corporations can also exercise religion even when engaging in other kinds of functions. In *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), the Court presupposed that a church-owned gymnasium could suffer a "burden[] [on] the exercise of religion," even when it was hiring for "nonreligious jobs" and engaging in a "secular" activity with little or no intrinsic religious significance. *Id.* at 336, 338; *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 604 (1983) (addressing free exercise arguments of a college); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985) (addressing free exercise arguments involving for-profit businesses run by a religious entity). To be sure, in both *Bob Jones* and *Alamo Foundation*, the Court concluded that a compelling governmental justification overrode the entities' free exercise right, but not because of their corporate status or profit-making purpose.

Lower courts have routinely entertained and often upheld Free Exercise Clause challenges by corporations providing religious services. In *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), the Third Circuit granted preliminary injunctive relief on a Free Exercise claim alleging discrimination against a corporation's "religiously motivated conduct"—specifically, maintaining an *eruv*, a physical boundary with "religious significance," around the homes of

Orthodox Jews. *Id.* at 152, 168. That protection extends to activities that could be performed in a secular fashion as well. In *Sherwin Manor Nursing Ctr., Inc. v. McAuliffe*, 37 F.3d 1216, 1222 (7th Cir. 1994), the Seventh Circuit reversed dismissal of a free exercise claim by "a licensed long-term nursing care facility, owned and operated by orthodox Jews and serving a primarily Jewish clientele," and preparing kosher food, without any hint that its corporate or profitmaking status could be relevant.

These treatments of the exercise of religion by corporations are not aberrations. As the Court explained in *Smith*—consistently with the original meaning of "exercise" discussed above—"the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). In other words, the essence of religious *exercise*—consistent with the original meaning of the term—is not just subjective belief, but *religiously motivated conduct*. *See Lukumi*, 508 U.S. at 524 (Free Exercise Clause protects "conduct motivated by religious beliefs"). Corporations as well as individuals engage in religious conduct.

There is little doubt as a matter of law that religion can in principle be one of the many factors that "motivate" corporate action. In the context of associational protections under the First Amendment, a corporation is protected when it

engages in "private" expressive conduct to promote sincerely held "private viewpoints" based on moral principle. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). In the employment context, corporations can be motivated by religious animus. *See Fischer v. Forestwood Co., Inc.*, 525 F.3d 972 (10th Cir. 2008); *Ollis v. Hearthstone Homes, Inc.*, 495 F.3d 570 (8th Cir. 2007). In criminal law, it is well understood that corporations and similar entities can act with criminal intent. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 706-07 (2005) (reversing criminal conviction for failure to instruct jury in element of intent); *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1059 n.2 (9th Cir. 2004) ("[W]e have long allowed criminal intent to be imputed to corporations."). Given that corporations can engage in expression of moral principles, take religiously motivated action, and act with morally evaluable intent, it is almost inescapable that they can exercise religion as well under at least some circumstances.

### C. There Is no Basis to Exclude For-Profit Corporations From RFRA's Protection.

Because *corporations* can exercise religion for purposes of RFRA and the Free Exercise Clause, the only question is whether *for-profit* corporations can do so as well, or whether this Court should categorically exclude such corporations from RFRA's protections.

The government has offered no principled reason for treating for-profit corporations differently from non-profit corporations (or other for-profit businesses, *see Lee*, 455 U.S. 252; *Braunfeld*, 366 U.S. 599). The historical evidence discussed above

does not support either distinction, and the government itself cites no binding authority for it. The government's *only* authority arising outside the context of the specific issue presented here is Justice Brennan's concurrence in *Amos*, and even Justice Brennan noted that "some for-profit activities could have a religious character[.]" 483 U.S. at 345 n. 6 (Brennan, J., concurring in the judgment). He simply said that "nonprofit organization[s]" are an easier case. *Id.*[9] The government's omission bears out Judge Jordan's apt observation in his dissent in *Conestoga Wood Specialties Corp. v. DHS* that "the Constitution nowhere makes the 'for-profit versus non-profit' distinction invented by the government[.]" 724 F.3d 377, 398 (3d Cir. 2013).

It may well be that *few* for-profit businesses exercise religion, but far greater incongruities arise from the government's categorical exclusion. Free exercise protections apply to acts, *see Smith*, 494 U.S. at 877, yet the government's theory would lead to seemingly arbitrary distinctions such that the very *same* act, conducted in accordance with the very same religious rules and for the benefit of the same people, counts as religious exercise in some cases but not others. For example, the government's position implies that preparation of kosher food by a nonprofit nursing home would qualify as religious observance, while that performed by an otherwise

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[9] It also bears emphasis that the issue in *Amos* was whether the Establishment Clause forbids statutory protection for activities that go beyond the scope of free exercise protection, by virtue of the religious status of the claimant. There was no occasion to consider the reach of the Free Exercise Clause itself.

identical for-profit nursing home, operated in the same way by a closely-held family corporation, or a kosher restaurant, would not. The Seventh Circuit rightly did not draw any such artificial distinction. *See Sherwin Manor Nursing Ctr.*, 37 F.3d 1216.[10]

Applying the government's theory to the activities of these *amici*, religious publishing, it would imply that book publishing by the LDS Church itself qualifies as religious exercise, but the same publishing by Deseret Book, its for-profit publishing organ, might not; nor would publishing by Feldheim, a for-profit publisher that serves the needs of the Jewish public. The government has not explained how these technical distinctions have any bearing on the purpose of the First Amendment and RFRA to prevent the government from interfering unnecessarily in the practice of religion. For the government to court that result at all is peculiar; for it to do so without any citation to precedent is simply astonishing.

The government may find "strange" the notion that faithful business owners might obey the dictates of their religion even when they operate their business in corporate form, but that is nothing unusual. Not only can some acts that obviously count as religious exercise be performed *either* by non-

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[10] A search of public records indicates that the Sherwin Manor Nursing Center *is* a for-profit entity. *See* Sherwin Manor Nursing Center Financial and Statistical Report (Fiscal Year 2010) (available at http://www2.illinois.gov/hfs/medicalprovider/costreports/2010longtermcarecostreports/documents/sherwin_manor_nursing_center_2010_0046102.pdf) (visited Jan. 27, 2014).

profit or for-profit entities, but it is easy to identify kinds of religious exercise that are performed routinely—and perhaps even most effectively—on a for-profit basis. *Amici* provide ready examples of for-profit corporations intended to serve religious communities: Deseret Book is both a for-profit corporation intended to generate a return for the LDS Church and an instrument of the Church itself. Religious publishers and booksellers such as Feldheim, Tyndale House, and CBA's members are for-profit businesses, but they also must select which books and other items are consistent with their religious persuasions, and a retailer typically needs to hire sales staff with compatible religious views. Other for-profit corporations exist precisely to serve religious communities with specific religious needs—such as kosher butchering, Islamic finance, or pagan supply stores. For these corporations, following religious practices dictated by religious law is essential. At a minimum, corporations can refrain from engaging in activities that their owners and officers consider religiously prohibited.

Including protections for for-profit corporations is also a better fit with religious protections in other contexts. Courts do not hesitate to protect the right of individuals to adhere to religious principles even when they are engaged in secular or professional conduct. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 (10th Cir. 2004) (addressing a refusal by a Mormon actress to perform roles involving the speaking of obscenities); *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245 (W.D. Wash. 2007) (addressing pharmacy's practice of refusing to fill prescriptions for emergency contraceptives; being held on appeal for this Court's decision). There is no reason that the

parties in these cases, Hobby Lobby Stores and Conestoga Wood Specialties, should not be able to do the same. The government's view that the conduct of business cannot be governed by religious principle is contrary not only to legal precedent but to the common experience of many Americans.

*Amici*'s position is similarly consistent with how for-profit corporations are treated under the rest of the First Amendment. The government's theory that corporations lack expressive rights or give them up when they enter commerce is obviously not true as a general matter. U.S. Br. at 19. For-profit corporations can engage in protected speech. *See Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 8 (1986); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010) (citing cases involving both non-profit and for-profit corporations). They can exercise freedom of the press. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *New York Times Co. v. United States*, 403 U.S. 713 (1971). They can petition the government. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). They even have rights protected under the Establishment Clause. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). If for-profit businesses are protected from the imposition of religious requirements that they do not share, why should they not be protected symmetrically from burdens on religious practices that they would otherwise engage in?

The government professes to think that it is impossible to discern religious motives, intentions, or

beliefs of for-profit corporations, U.S. Br. at 17-19, 23—but it has no difficulty attributing intentions and other states of mind to corporations in criminal cases, *see Thinket Ink Info. Res.*, 368 F.3d at 1059 n.2, or in cases involving the intent to discriminate on the basis of religion or other invidious characteristics, *see Fischer*, 525 F.3d 972; *Ollis*, 495 F.3d 570. If a for-profit corporation can be motivated *against* religion, it would be incongruous to hold that a for-profit corporation cannot also be motivated *by* religion. By the same token, only natural persons belong to a race, but we are not aware of the government objecting to attribution of the race of the owners to a corporation for purposes of enforcing the Equal Protection Clause. *See Thinket Ink*, 368 F.3d at 1058-59 (discussing attribution of "imputed racial identity" to corporations).

It may be that a for-profit corporation does not "pray," as the district courts below repeatedly intoned, *see Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012); *Conestoga Wood Specialities Corp. v. Sebelius*, 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013), but it most assuredly may close its doors on the Sabbath, publish and disseminate materials spreading the gospel, conform its conduct to religious commandments, and refrain from facilitating what it regards as the taking of human life.

If, on the government's reasoning, those activities do not count as religious exercise, it is not at all clear on what theory religious exercise can be ascribed even to an incorporated congregation or other religious body. *See Lukumi*, 508 U.S. at 525 ("The Church and its congregants practice the

Santeria religion"). The government's only evident basis for treating incorporated religious bodies differently, the arbitrary presumption that for-profit businesses necessarily lack religious missions, U.S. Br. at 19, is blatantly contrary to fact, as every one of these *amici* can attest. The membership of churches have been known to disagree about the content of beliefs. *E.g., Watson v. Jones*, 80 U.S. 679 (1871). This may present difficulties of determining which beliefs control, but it is no reason to deny them the right to determine their beliefs and act on them. The government's argument thus threatens not only to strip for-profit activities of free exercise protection, but to undermine the doctrinal basis of free exercise protections for religious bodies themselves.

The government and its *amicus* allies have offered no principled basis for excluding the otherwise protected exercise of religion by for-profit corporations from constitutional or statutory protection. The American colonies were founded by joint stock companies expressly dedicated to pursuing *both* profit and religion. And the pursuit of profit and religion has gone hand in hand ever since. This is the nature of the human enterprise: we need to support ourselves materially, but at the same time to obey the moral and religious precepts that we recognize as authoritative. It is not *amici*'s position that corporations enjoy free exercise (or any other) rights in every case and every context. But if an entity is seeking to exercise religion in a way that would otherwise be protected, we submit that corporate form or a profit motive does not categorically nullify the constitutional protection.

## CONCLUSION

The Court should affirm the judgment of the United States Court of Appeals for the Tenth Circuit and reverse the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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January 28, 2014