Nos. 13-354, 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS,
Secretary of Health and Human Services, *et al.*,
Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,

v.

KATHLEEN SEBELIUS,
Secretary of Health and Human Services, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF *AMICUS CURIAE* LIBERTY INSTITUTE IN SUPPORT OF RESPONDENTS HOBBY LOBBY STORES, INC., *ET AL.* AND PETITIONERS CONESTOGA WOOD SPECIALTIES CORP., *ET AL.*

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae Liberty Institute is a non-profit, public interest law firm dedicated to the preservation of America's religious liberty. Liberty Institute provides pro bono legal advice and representation to churches, religious schools, ministries, and faith-based businesses that desire to operate autonomously, without governmental intrusion into their religious practices.

The outcome of this case and its determination of the extent to which for-profit and non-profit corporations may assert rights under the Religion Clauses of the First Amendment and under the Religious Freedom Restoration Act will determine whether faith-based organizations, both for-profit and non-profit, that Liberty Institute advises may operate without fear of governmental control and oversight of their religious exercise.

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[1] Pursuant to this Court's Rule 37, letters of consent from all parties for the filing of this brief either have been submitted to the Clerk or are attached hereto. *Amicus* states that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *Amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

For nearly 200 years, corporations have been treated as persons able to assert rights under the Constitution and statutory law. These rights have frequently included First Amendment rights such as the freedom of speech and freedom of religion and have been asserted by both for-profit and non-profit corporations.

In both cases currently before the Court, however, the government is asserting that for-profit corporations cannot share in the rights guaranteed by the Religion Clauses of the First Amendment and the Religious Freedom Restoration Act. This assertion ignores the texts of the First Amendment and the Religious Freedom Restoration Act and establishes an unconstitutional hierarchy in which non-profit faith-based organizations are given preferential treatment over for-profit faith-based organizations. Such a blanket determination by the government of the "orthodox" form a faith-based organization must take violates the Establishment Clause, improperly manipulates faith-based organizations into structuring themselves in a particular manner that the state approves and forces many into choosing between their religious liberty rights and their free speech rights.

ARGUMENT

I. Corporations have First Amendment rights.

A. Corporations have long availed themselves of protections for individual rights, including religious liberty rights.

In 1830, Justice Story stated that "[t]he great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body." *Providence Bank v. Billings,* 29 U.S. 514, 562 (1830); *see also Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 687 (1978) ("[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."). As the fundamental purpose of the corporation is to grant "the character and properties of individuality"—personhood—upon a collective, it is not surprising that in the almost 200 years since Justice Story's statement, individual rights have frequently and with little question been bestowed upon corporations.

Individual religious rights are no different in their application to corporations. In *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah,* 508 U.S. 520 (1993), this Court acknowledged without controversy that an incorporated church can assert claims under the Free Exercise Clause against a governmental entity that is burdening the free exercise of that church. Indeed, despite a corporation's want of sentience, it would be unimaginable to assert that a church cannot exercise religion. This Court again acknowledged that corporations are entitled to the free exercise of religion

in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006), wherein a church was permitted to challenge a federal statute under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*. ("RFRA"). In 2012, this Court acknowledged that both the Free Exercise Clause and the Establishment Clause protect churches and not just individuals in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,* 132 S. Ct. 694 (2012) (holding that the ministerial exception prohibits governmental regulation of hiring or firing of ministers). Again, the application of these rights to a corporate entity's religious exercise was not controversial.

More generally, in *Citizens United v. FEC,* 558 U.S. 310, 342 (2010), this Court listed over twenty Supreme Court cases in which First Amendment protections have been extended to corporations.[2] These cases were

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[2] The non-exhaustive list includes *First Nat'l Bank v. Bellotti,* 435 U.S. 765 (1978)*; Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85 (1977); *Time, Inc. v. Firestone,* 424 U.S. 448 (1976); *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *New York Times Co. v. United States,* 403 U.S. 713 (1971) (per curiam); *Time, Inc. v. Hill,* 385 U.S. 374 (1967); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Kingsley International Pictures Corp. v. Regents of University of New York,* 360 U.S. 684 (1959); *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952); *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180 (1997); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727 (1996); *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622 (1994); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board,* 502 U.S. 105 (1991); *Sable Communications of California, Inc. v. FCC,* 492 U.S. 115 (1989); *Florida Star v. B.J.F.,* 491 U.S. 524 (1989);

in addition to *Citizens United* itself, which reiterated that corporations have First Amendment rights. In each, the protections of the corporate form coexisted with the corporation's assertion of First Amendment rights without conflict and with little regard for the sentience of the corporate entity.

In *Roberts v. U.S. Jaycees,* 468 U.S. 609 (1984), this Court, in affirming the right to associate, even warned that individual free speech and religious liberty rights cannot be fully protected unless corresponding "group" rights are also guaranteed:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in

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Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974); and *Greenbelt Cooperative Publishing Association, Inc. v. Bresler,* 398 U.S. 6 (1970).

> pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts, 468 U.S. at 622 (internal cites omitted). Implicit in this warning is the idea that the group organized for religious activity actually be free to engage in religious activity. Unlike the "purely personal" right against self-incrimination refused to corporations in *First Nat'l Bank v. Bellotti,* 435 U.S. 765 (1978), an individual's right to the free exercise of religion is not protected unless faith-based corporations are also entitled to the free exercise of religion. If the government could tell a faith-based corporation, such as a church, that it does not have the right to the free exercise of religion, then the associational right would be meaningless.

Consequently, it is clear that First Amendment rights, including rights derived from the Religion Clauses, can be and are asserted by corporations.

B. "For-profit" status does not abridge First Amendment protections.

This Court has repeatedly granted First Amendment protections to for-profit corporations under the Free Speech Clause, and has gone so far as to warn of dire First Amendment consequences should such protections be denied on the basis of financial considerations. In *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), this Court held that the First Amendment's free speech protections extend to paid-for advertisements placed in a for-profit newspaper. As this Court said,

> That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. *Smith v. California,* 361 U.S. 147, 150; *cf. Bantam Books, Inc., v. Sullivan,* 372 U.S. 58, 64 n. 6. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. Cf. *Lovell v. Griffin,* 303 U.S. 444, 452; *Schneider v. State,* 308 U.S. 147, 164. The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States,* 326 U.S. 1, 20.

New York Times Co., 376 U.S. at 266; *see also United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803 (2000) (holding that the First Amendment protects a corporation's for-profit distribution of pornography); *cf. Citizens United,* 558 U.S. at 365 ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

Restricting corporate assertion of First Amendment rights to non-profit entities ignores the text and intention of the First Amendment and, in the free speech context, would permit non-profit advocacy groups like Citizens United to speak while denying for-profit media the same right merely because they seek

monetary gain. A similar restriction in the religious liberty context would yield similar inequalities by granting non-profit ministries rights that are denied to ministries that operate for-profit because of religious belief or for any other reason, such as to encourage investment in the furtherance of their mission. And if the First Amendment protects a for-profit corporation's right to distribute pornography, surely it protects a for-profit corporation's right to exercise religion.

C. The "for-profit / non-profit" distinction cannot be used constitutionally to discriminate in the application of the Religion Clauses of the First Amendment.

i. The structure of the First Amendment prohibits the "for-profit / non-profit" distinction.

The First Amendment makes no structural distinction between those entities protected by the Religion Clauses and the Free Speech Clause. Indeed, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press…" places the clauses on equal footing in that each clause limits Congress (and now, via the Fourteenth Amendment, other governmental entities) but makes no reference to the beneficiary of its protection. U.S. Const. amend. I. As this Court noted in *Bellotti,* 435 U.S. at 776, "[t]he First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the challenged law]

abridges expression that the First Amendment was meant to protect." The very structure of the First Amendment belies any argument that both for-profit and non-profit corporations may enjoy the protection of "Congress shall make no law … abridging the freedom of speech, or of the press," but only *non-profit* corporations may enjoy the protection of "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." *Id.*

Granting the protections of the Free Speech Clause to both for-profit and non-profit corporations while denying the protections of the Religion Clauses to for-profit corporations is an arbitrary and capricious distinction that cannot be grounded in reason or the text of the First Amendment.

ii. Applying the "for-profit / non-profit" distinction would violate the Establishment Clause.

In keeping with its incongruity with the First Amendment generally, the government's "for-profit / non-profit" distinction is a blatant violation of the Establishment Clause.

Under the ecclesiastical abstention doctrine defined by this Court in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America,* 344 U.S. 94, 116 (1952), the First Amendment's restraint on civil authority acknowledges "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." As Justice Brennan asserted, churches must

be free to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 341 (1987) (Brennan, J., concurring) (*quoting* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981)).

Under a "for-profit / non-profit" distinction, however, faith-based organizations, including churches and ministries, are not free to "define their own doctrines" or "run their own institutions" "free from state interference." Instead, the proposed "for-profit / non-profit" rule forces faith-based organizations to either elect non-profit status or surrender their rights under the Religion Clauses. Faith-based organizations that choose to be "for-profit" so they can speak to a wider array of issues, influence legislation, and endorse candidates without the speech limitations of 501(c)(3) status will have to choose between their free speech rights or their religious liberty rights. Other faith-based organizations that may believe "non-profit" status is wrong or immoral will be forced to choose between sacrificing their religious beliefs and sacrificing their religious liberties.[3] That is a Hobson's

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[3] *See, e.g.,* Dave Hodges, *No 501-C-3 Church Can Be a Church of God,* The Common Sense Show, (January 2, 2014), http://thecommonsenseshow.com/2014/01/02/no-501-c-3-church-can-be-a-church-of-god/; Christopher J.E. Johnson, *501c3: The Devil's Church,* Creation Liberty Evangelism, (Aug. 13, 2012), http://www.creationliberty.com/articles/501c3.php; Kevin A. Lehmann, *The Hypocritical 501c3 Babylonian Church System and*

choice the Establishment Clause does not tolerate and was designed to prevent.

Because the "for-profit / non-profit" distinction is grounded solely in the tax code, the government may modify the requirements or limitations of non-profit status at any time to manipulate and control faith-based organizations. The threat of revoking an organization's non-profit status would then mean the threat of revoking the organization's religious free exercise rights—a much greater threat and a much more effective form of control. Ultimately, granting free exercise rights to non-profit corporations while denying free exercise rights to for-profit corporations would give the government a tool to deny religious constitutional protections to any organization by an amendment to the tax code, rendering the protections illusory.

Additionally, as Judge O'Scannlain's concurring opinion in *Spencer v. World Vision, Inc.,* 633 F.3d 723 (9th Cir. 2011), noted in considering whether Title VII applies to non-church ministries,

> interpreting the statute such that it requires an organization to be a "church" to qualify for the exemption would discriminate against religious institutions which "are organized for a religious purpose and have sincerely held religious tenets, but are not houses of worship." … It would also raise the specter of constitutionally impermissible discrimination between

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its Unholy Alliance with the Federal Government, Secularism, and America's Greatest Enemies, CatchKevin.com, http://catchkevin.com/babylonian-church-system/ (accessed Jan. 22, 2014).

> institutions on the basis of the "pervasiveness or intensity" of their religious beliefs.

Spencer, 633 F.3d at 728-29 (O'Scannlain, J., concurring) (internal cites and quotes omitted); *see also Colorado Christian University v. Weaver,* 534 F.3d 1245, 1259 (10th Cir. 2008) (refusing to discriminate between "types" of religious institutions). Analogously, the government's proposed "for-profit / non-profit" rule would discriminate against faith-based organizations that "are organized for a religious purpose and have sincerely held religious tenets, but are not" tax exempt.[4] Such a distinction is even more insubstantial than the distinction between church and para-church ministries at issue in *Spencer* and would lead to discrimination even among corporations that are all clearly churches.

II. RFRA follows the Free Exercise Clause in determining its applicability.

The stated purpose of the Religious Freedom Restoration Act is to "restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). In other words, where the Court's pre-*Employment Division v. Smith*

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[4] As Judge Kleinfeld noted in his concurring opinion in *Spencer,* "'[f]or profit' and 'nonprofit' have nothing to do with making money. As the CEO of National Geographic said, '[n]onprofit means non-taxable—it doesn't mean you don't make a profit.'" *Spencer,* 633 F.3d at 746 (Kleinfeld, J., concurring).

Free Exercise Clause analysis applies, so does RFRA. As the post-*Employment Division* analysis is narrower than the pre-*Employment Division* analysis, the Court's willingness to allow corporations to assert the Free Exercise Clause indicates that a corporation likewise may properly assert RFRA.

The government argues that RFRA incorporates limitations on its applicability to non-profit corporations from Title VII and the Americans with Disabilities Act, which exempt a "religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1(a); *id.* § 12113(d)(1). This argument fails, however, because RFRA, clear in its broad application, "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3. RFRA protects "any exercise of religion," 42 U.S.C. § 2000cc-5(7), by any "person," *id.* § 2000bb-1(a), under one legal standard: strict scrutiny. *Id.* § 2000bb-1(b). *See* Douglas Laycock, *The Religious Freedom Restoration Act,* 1993 B.Y.U. L. Rev. 221, 235 (1993) ("Like the Free Exercise Clause itself, RFRA is universal in its scope. RFRA singles out no claims for special advantage or disadvantage."). As the Tenth Circuit noted, "[i]f the statutory language is clear, [the] analysis ends and [the court] must apply [the statute's] plain meaning." *Thomas v. Metro. Life Ins. Co.,* 631 F.3d 1153, 1161 (10th Cir. 2011).

Additionally, adopting the government's "for-profit / non-profit" analysis for a corporation's right to assert RFRA would pose the same Establishment Clause problems set forth in Section I(C)(ii), *supra.*

CONCLUSION

For the foregoing reasons, the Court should hold that both for-profit and non-profit corporations are entitled to assert both the Religion Clauses of the First Amendment as well as the Religious Freedom Restoration Act in opposing regulations enacted pursuant to the Patient Protection and Affordable Care Act, should reverse the judgment of the Third Circuit, and should affirm the judgment of the Tenth Circuit.

Respectfully submitted,

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January 28, 2014