NO. 12-1380

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM NEWLAND, *et al.*,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado
Case No. 1:12-cv-1123-JLK
The Honorable John L. Kane, presiding

BRIEF OF EAGLE FORUM AMICUS CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae Eagle Forum is a non-profit 501(c)4 corporation under the law of the District of Columbia; it has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Amicus Curiae and Its Interest

Eagle Forum, a non-profit 501(c)4 corporation founded by Phyllis Schlafly, has led the pro-family movement since 1973. Eagle Forum maintains an office in Washington D.C. with full-time staff, as well as state organizations advocating in state legislatures. [1]

Eagle Forum believes that individual citizens of all faiths have the right to freely exercise their religious beliefs with their families, in their businesses, and in the public square. Eagle Forum has a direct interest in the HHS individual mandate and its impact on corporations. Its experience qualifies it to bring a critical viewpoint to this case.

[1] The *amicus* state that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amicus*, made a monetary contribution intended to fund the preparation and submission of this brief.

I. Summary of Argument

A threshold and novel question in this case is whether for-profit corporations have free exercise rights. *See Newland v. Sebelius*, 881 F.Supp.2d 1287, 1296 (D. Col. 2012) ("These arguments [regarding the free exercise rights of for-profit corporations] pose difficult questions of first impression."). Although the Supreme Court has not addressed this specific issue, it has established rules for determining whether corporations can invoke particular constitutional rights. While the district court "decline[d] to address [the Plaintiffs'] challenges under the Free Exercise" Clause, a careful review of these rules confirms that corporations—both non-profit and for-profit—can claim the protection of the free exercise clause. *Newland*, 881 F.Supp.2d at 1295.

In the First Amendment context, the Supreme Court has emphasized that courts must focus on the *nature* of the constitutional right, not the *person*—whether an individual, non-profit, for-profit, or sole-proprietor—who is invoking the right. In particular, when determining whether corporations can invoke First Amendment protections "[t]he proper question … is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Rather, "the question must be whether" the religiously motivated activity falls within an area "the First Amendment was meant to protect." *Id.* In *Bellotti*,

this involved asking whether a statute, which prohibited corporations from spending money to publicize their views on a state-law referendum, abridged expression that the First Amendment was meant to protect. In the present case, the proper question is whether the contraception coverage mandate of the Patient Protection and Affordable Care Act ("ACA") infringes on religious exercise that the First Amendment protects.

In *Newland*, the district court did not reach the threshold question whether for-profit corporations have free exercise rights because "Plaintiffs' RFRA challenge provide[d] adequate grounds for the requested injunctive relief." *Newland*, 881 F.Supp.2d at 1295. The district court properly concluded that for-profit corporations have standing under RFRA to challenge the ACA's contraception coverage mandate. Moreover, contrary to the district court's holding in *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F.Supp.2d 1278 (W.D. Okla. 2012), the Supreme Court's decisions regarding the constitutional rights of corporations demonstrate that corporations—whether for-profit or non-profit—can invoke the protection of the First Amendment's free exercise clause. In *Hobby Lobby*, the district court improperly held that for-profit corporations "do not have constitutional free exercise rights" as a result of two fundamental errors. First, the *Hobby Lobby* court, like the district court in *Bellotti*, asked the wrong question—"whether and to what extent corporations have First Amendment rights." *Bellotti*,

435 U.S. at 776; *Hobby Lobby*, 870 F.Supp.2d at 1287. Instead of focusing on whether an objection to the contraception coverage mandate for religious reasons is covered by the free exercise clause, the district court's two paragraph analysis considered only whether a for-profit corporation has free exercise rights like those of natural persons. *Id.*

Second, because the *Hobby Lobby* court asked the wrong question, its analysis failed to consider relevant Supreme Court case law. In particular, the district court relied almost exclusively on one footnote in *Bellotti* and an isolated sentence in *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963). A more detailed review of *Bellotti* and the Court's decisions regarding the constitutional rights of corporations reveals that free exercise, like the freedom of speech, is not a "purely personal" right. Consequently, the free exercise clause applies to both for-profit and non-profit corporations. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty.*, 450 F.3d 1295, 1305 (11th Cir. 2006). As discussed more fully below, the *Newland* court properly held that Hercules Industries, Inc. ("Hercules") can exercise religion for purposes of RFRA, and, under binding Supreme Court precedent, the same is true with respect to the free exercise clause.

II. Argument

A. The free exercise clause protects for-profit and non-profit corporations alike because, as *Bellotti* and *White* demonstrate, the

right to free exercise is not a "purely personal" right but "serves significant societal interests."

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. 1. Under the free exercise clause, Congress cannot prohibit the free *exercise* of religion, not merely private "worship" or "freedom of conscience" as Madison had originally proposed. *See* Michael W. McConnell, 103 HARV. L. REV. 1409, 1488 (1990) (noting that "the term 'free exercise' makes clear that the clause protects religiously motivated conduct as well as belief"). Moreover, the First Amendment protects such religious exercise without regard to the "person" who is acting. For many believers, religious exercise cannot be restricted to the private expression of religion in one's home or place of worship. Their faith permeates all aspects of their lives, leading them to form businesses that embody and promote the values that are central to their faith. Not surprisingly, then, given the faith of the founding generation, the First Amendment limits the government's ability to interfere with religious exercise and speech generally, not to restrict these fundamental constitutional protections to natural persons in their individual speech activity or exercise of religion. *See, e.g.*, *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 623 (9th Cir. 1988) (Noonan, J., dissenting) ("The First Amendment does not say that only one kind of corporation enjoys this right [to exercise religion]. The First Amendment does not say that only religious corporations or

only not-for-profit corporations are protected. The First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion.").

That the First Amendment protects speech and the free exercise of religion regardless of *who* is invoking that protection is apparent from *Bellotti*. Instead of focusing on "whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons," *Bellotti* instructs that "the question must be whether" the religiously motivated activity falls within an area "the First Amendment was meant to protect." 435 U.S. at 776. That is, the operative question under the First Amendment is *what* is being done—whether there is an infringement on speech or the exercise of religion—not on *who* is speaking or exercising religion. Hence, the *Bellotti* Court emphasized that "[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." 435 U.S. at 777.

Consistent with *Bellotti*, the Court has recognized that a non-profit corporation can invoke the free exercise clause, even when it is not a pervasively "religious organization" such as a church. In *Bob Jones University v. United States*, the Court held that two religious schools, which were not "churches or other

purely religious institutions," 461 U.S. at 604 n.29, could assert free exercise claims on behalf of the corporations, not merely on behalf of the individuals who comprised them. The Court permitted the schools to pursue their claim that the IRS violated the free exercise clause by rescinding their tax-exempt status as a result of allegedly discriminatory admissions policies. Similarly, last term in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, the Court acknowledged that another religious organization, this time a church and school, could invoke the protection of the free exercise clause. Although the Court noted that "the text of the First Amendment itself … gives special solicitude to the rights of religious organizations," 132 S.Ct. 694, 706 (2012), it did not limit the free exercise clause to such religious organizations or distinguish its prior holding in *Bob Jones University*. Rather, the Court focused on the only issue before it: whether a religious organization has the "freedom to select its own ministers." 132 S.Ct. 694, 706 (2012).

Moreover, because the First Amendment protects speech and religious activity generally, having a profit-seeking motive is not sufficient to defeat a business's speech or free exercise claim. On two separate occasions, the Court has upheld the right of sole proprietorships, which are profit-seeking enterprises, to invoke the protection of the free exercise clause. In *United States v. Lee*, the Court held that an Amish business owner, who ran a farm and carpentry shop, could raise

a free exercise defense to his alleged failure to pay social security taxes for his employees. Because the Old Order Amish "believe it sinful not to provide for their own elderly and needy," the employer "object[ed] on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds." 455 U.S. 252, 255, 254 (1982). Likewise, in *Braunfeld v. Brown*, "merchants" in Philadelphia challenged the city's Sunday-closing laws because the laws allegedly infringed on their free exercise of religion. The merchants were Orthodox Jews who observed the Sabbath on Saturday. As a result of the Sunday-closing laws and their faith, the merchants could not open their stores on the weekends. Given their desire to live out their religious beliefs in their businesses, they argued that the law violated the free exercise clause because it "impair[ed] the ability of all appellants to earn a livelihood." 366 U.S. 599, 601 (1961). The Court addressed their claims on the merits.

Taken together, these cases highlight three reasons why all corporations can invoke the protection of the free exercise clause: (i) the free exercise clause is not a "purely personal" right; (ii) just as freedom of speech is not limited to corporations in the "speech business," free exercise applies to for-profit corporations as well as non-profits in the "religion business;" and (iii) limiting free exercise to non-profit religious organizations discriminates against religious groups and individuals who seek to live their faith through their for-profit corporations.

1. Because, as the Supreme Court previously has acknowledged, non-profit corporations can exercise religion, the free exercise clause is not a "purely personal" right, which applies "only to natural individuals."

In *Hobby Lobby*, the district court held that the free exercise clause does not extend to for-profit corporations because it is a "purely personal" right designed "'to secure religious liberty in the *individual*.'" 870 F.Supp.2d at 1287-88 (emphasis in original and internal citation omitted). Drawing on a footnote in *Bellotti*, the court noted that the Supreme Court has refused to extend certain constitutional rights, such as the privilege against self-incrimination, to corporations. It also explained that whether a constitutional provision is purely personal "depends on the nature, history, and purpose of the particular provision." *Bellotti*, 435 U.S. at 778 n. 14. But, instead of analyzing the cases that discuss "purely personal" rights or evaluating "the nature, history, and purpose" of the free exercise clause, the *Hobby Lobby* court relied on one sentence from *Schempp* to establish the individual nature of the free exercise clause: "The purpose of the free exercise clause is 'to secure religious liberty in the *individual* by prohibiting any invasions thereof by civil authority.'" 870 F.Supp.2d at 1288 (*quoting Schempp*, 374 U.S. at 223) (emphasis added by the *Hobby Lobby* court). Presumably, because the district court viewed free exercise as an *individual* right, it concluded that "corporations do not have constitutional free exercise rights." 870 F.Supp.2d at 1288.

Contrary to *Hobby Lobby*, there are at least two reasons why for-profit corporations can exercise religion. First, the fact that the First Amendment protects individuals does not mean that speech and free exercise are "purely personal" rights. The Supreme Court has repeatedly described free speech as an individual right: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("The freedom of speech ... [is] among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State."). The fact that free speech is a "fundamental personal" right, however, did not stop the Court from extending free speech rights to corporations. As the Court confirmed in *Citizens United*, "First Amendment protection extends to corporations … [, and the Court] has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Citizens United*, 130 S.Ct. at 899-900 (*quoting Bellotti*, 435 U.S. at 776). Similarly, even if free exercise protects "the individual's freedom to believe, to worship, and to express himself in

accordance with the dictates of his own conscience," *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985), individuals can avail themselves of the corporate form, and the corporation can engage in speech activity as well as the exercise of religion. *See, e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) (explaining that an "expressive association" is a group of individuals coming together "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."). After all, as the district court acknowledged in *Hobby Lobby*, at a minimum, the free exercise clause protects both an individual's freedom to believe and a non-profit corporation's exercise of religion.

Second, and more importantly, the *Hobby Lobby* court ignored the Supreme Court's discussion of "purely personal" rights in *White* and *Schultz*, which demonstrate why free exercise cannot be such a right. In *Hobby Lobby*, the court invoked footnote 14 in *Bellotti* for the proposition that "[c]ertain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals." 435 U.S. at 778 n.14. To determine "[w]hether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason" one must look at "the nature, history, and purpose of the particular provision." *Id*. Although

Bellotti did not explain why self-incrimination is a purely personal right that is unavailable to corporations, it cited *White*, which does provide a detailed discussion of what makes a right purely personal. In *White*, the district court subpoenaed documents from a union as part of a grand jury investigation into alleged irregularities in the construction of a Navy supply depot. An assistant supervisor of the union refused to produce the documents, invoking the right against self-incrimination because, he argued, the documents might incriminate the union or the assistant supervisor, in his official or individual capacity. On appeal, the Supreme Court rejected the assistant supervisor's claim, holding that "[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals." 322 U.S. 694, 698 (1944).

In determining whether a constitutional right is "purely personal," the *White* Court did not rely on the distinction between for-profit and non-profit corporations. Instead, the Court looked to the nature of the right at issue. Even though the labor union was an unincorporated, non-profit organization, it still could not claim the privilege against self-incrimination given the "personal" nature of the right: "[s]ince the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of *any organization*." *Id*. at 699 (emphasis added).

Furthermore, *White* set out a test to determine whether "a particular type of organization" can invoke a personal privilege. *Id*. at 701. According to the Court,

an organization cannot avail itself of a "purely personal" right if it has "a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." *Id.* Unions and corporations—both non-profit and for-profit—cannot invoke purely personal rights, therefore, because they do not represent the personal interests of the individuals who comprise those organizations. Instead, unions and corporations "represent[] organized, institutional activity as contrasted with wholly individual activity," their existence is "perpetual" and does not "depend[] upon the life of any members," their various activities cannot "be said to be the private undertakings of the members," they have no "authority to act for the members in matters affecting only the individual rights of such members," they "own[] separate real and personal property," and "the official … books and records are distinct from the personal books and records of the individuals." *Id*. at 701-02.

Similarly, in *California Bankers Association v. Schultz*, the Court once again focused on the personal nature of the constitutional right, not the corporate form. The right to privacy applies only to information about which the public does not have a right to know. Because "'law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest,'" "corporations can claim no equality with individuals in the enjoyment of

a right to privacy." *Schultz*, 416 U.S. 21, 66 (1974) (internal citation omitted). The same holds true for the right against self-incrimination. Corporations cannot invoke that privilege because of "the reservation of the visitatorial power of the state, and in the authority of the national government where the corporate activities are in the domain subject to the powers of Congress." *Wilson v. United States*, 221 U.S. 361, 382 (1911).

Schultz, *Wilson*, and *White* highlight two important differences between purely personal rights and the right to free exercise. First, unlike the privacy and self-incrimination contexts, the government has no right to satisfy itself that "corporate behavior is consistent with" certain state approved religious beliefs or practices. *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."). The exercise of religion, unlike the production of business documents in *Wilson*, is not "in the domain subject to the powers of Congress." *See, e.g., Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith or the validity of particular litigants' interpretations of [their] creeds."). Second, *Schultz* acknowledges that corporations are endowed with "public attributes" and "have a collective impact on society." *Schultz*, 416 U.S. at 65. Under *Bellotti*, this

societal impact is one of the things the First Amendment was meant to protect through the speech and religion clauses: "The First Amendment in particular, serves significant societal interests." 435 U.S. at 776.

As a result, *Hobby Lobby*'s conclusion—that for-profit corporations cannot exercise religion because free exercise is a "purely personal" right—is inconsistent with *White*, *Schultz*, and *Bellotti*. Under these precedents, neither non-profits nor for-profits can exercise purely personal rights. *White*, 322 U.S. at 699 (stating that purely personal rights "cannot be utilized by or on behalf of any organization"). But as *Hobby Lobby* properly recognizes, religious non-profits *can* claim the protection of the free exercise clause. *See Bob Jones University*, 461 U.S. 574; *Hosanna-Tabor*, 132 S.Ct. 694. Thus, free exercise cannot be a purely personal right, and for-profit corporations such as Hercules can invoke the free exercise clause.

2. The First Amendment protects speech and religious activity generally and is not limited to corporations that are in the "speech business" or the "religious business," respectively.

In *Hobby Lobby*, the district court suggested that the profit-making nature of secular corporations somehow disqualifies them from seeking the protections of the free exercise clause. The Supreme Court has never made such a distinction. The sole proprietors in *Lee* and *Braunfeld* were engaged in for-profit businesses and sought to protect the exercise of their religious beliefs through their business

operations. The schools in *Bob Jones University* and *Hosanna Tabor* were non-profits and sought to generate revenue just like for-profit corporations do. Instead of distributing any surplus revenue to shareholders, these non-profits simply funnel any surplus moneys back into the institutions. Under *Bellotti*, though, the way in which surplus revenue is distributed has no bearing on whether the underlying activity implicates the free exercise clause. In the First Amendment context, the focus is on what was done—the particular speech or religious activity—not on whether the actor is a non-profit corporation.

Stated differently, the district court in *Hobby Lobby* made the same mistake that the lower court made in *Bellotti* when it held "that corporate speech is protected by the First Amendment only when it pertains directly to the corporation's business interests." 435 U.S. at 777. In *Bellotti*, the district court improperly held that only corporations in the "speech business"—media corporations and the press—could claim the protection of the free speech clause. The *Hobby Lobby* court did the same thing—limiting religious exercise to non-profit corporations that are in the *religion* business: "Churches and other religious organizations or religious corporations have been accorded protection under the free exercise clause … because believers 'exercise their religion through religious organizations.'" 870 F.Supp.2d at 1288 (*quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 583 U.S. 327, 341 (1987)

(Brennan, J., concurring)). In so doing, the *Hobby Lobby* court, like the district court in *Bellotti*, imposed a "novel and restrictive gloss on the First Amendment" by impermissibly restricting the free exercise clause to religious non-profits. *Bellotti*, 435 U.S. at 777.

The problem is that the Supreme Court's precedents do not support such a "novel and restrictive" interpretation of the free exercise clause. *Bellotti* and *Citizens United* preclude the government's limiting free speech to businesses in the "speech business." The Court's reasoning in these cases also prohibits the government's restricting free exercise to businesses that are in the "religion business" (churches and, under the newly proposed HHS regulations, religious schools and hospitals): "[i]f a legislature may direct business corporations to 'stick to business,' it also may limit other corporations—religious, charitable, or civic—to their respective 'business' when addressing the public." *Bellotti*, 435 U.S. at 785. If the government may require corporations to "stick to business," *i.e.*, profit maximization, then it also may limit civic-minded or environmentally aware corporations to stick to that same business—profit maximization—precluding individuals from using the corporate form to advance religious, ethical, environmental, or other social values.

Yet there is nothing about the corporate form or the free exercise clause that requires individuals to so limit their activities. Although pursuing profits is one

purpose of a corporation, the officers, directors, and shareholders may decide to advance other ends as well—religious, environmental, civic, or political. Two well-known examples of corporations that advance goals other than profit maximization illustrate the importance of protecting the right of corporations to pursue civic or religious values. According to its website, Ben & Jerry's corporate mission involves three goals:

> Social Mission: To operate the Company in a way that actively recognizes the central role that business plays in society by initiating innovative ways to improve the quality of life locally, nationally and internationally.
>
> Product Mission: To make, distribute and sell the finest quality all natural ice cream and euphoric concoctions with a continued commitment to incorporating wholesome, natural ingredients and promoting business practices that respect the Earth and the Environment.
>
> Economic Mission: To operate the Company on a sustainable financial basis of profitable growth, increasing value for our stakeholders and expanding opportunities for development and career growth for our employees.

Ben & Jerry's Mission Statement (available at http://www.benjerry.com/activism/mission-statement/). Although Ben & Jerry's is a for-profit corporation, only its economic mission focuses narrowly on profits. The company also seeks to improve "the quality of life" generally and to "promot[e] business practices that respect the Earth and the Environment." *Id.*

Similarly, Chick-fil-A predicates its business on biblical values and closes its stores on Sundays in observance of the Christian Sabbath. *See* http://www.chick-fil-a.com/Company/Highlights-Fact-Sheets. It states that its Corporate purpose is "[t]o glorify God by being a faithful steward of all that is entrusted to us. To have a positive influence on all who come in contact with Chick-fil-A." S*ee* Chick-fil-A's website (available at http://www.chick-fil-a.com/Pressroom/Fact-Sheets/sunday_2012). Following its religious values, the company has given money to certain advocacy groups that promote what Chick-fil-A believes is a Christian view on various issues, including marriage. Some of these donations caused national controversy in the summer of 2012, leading political leaders in Boston and Chicago to threaten to block Chick-fil-A's bid to open franchises in those cities. The fact that Chick-fil-A is a for-profit corporation, though, should make no difference to the free exercise analysis. Because Chick-fil-A is the entity that made the donations and sought to open the stores, Chick-fil-A is the "person" that would be injured if retaliated against for the exercise of its religious beliefs.

Given that the free exercise clause would protect a non-profit religious organization in such circumstances, under *Bellotti*, free exercise also should protect Chick-fil-A. Just as the government's attempt "to channel the expression of views is unacceptable under the First Amendment," *Bellotti*, 435 U.S. at 785, the effort to

channel the free exercise of religion to individual worship or religious non-profits is likewise unacceptable under the free exercise clause. *See Citizens United*, 130 S.Ct. at 899 (noting that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content"). Yet this is exactly what will happen if for-profit corporations are denied free exercise rights because companies such as Hercules and Chick-fil-A will be unable to challenge the HHS mandate or public officials who deny permits based on a company's religious beliefs.

Extending free exercise protections to all corporations that exercise religion (as opposed to only those in the "religion business") not only is required by the Constitution, but also makes good sense. Corporations, whether for-profit or non-profit, do not engage in exclusively religious or secular activity. As the Court observed in *Hosanna-Tabor*, even in "purely religious" organizations, there may not be any "employees who perform exclusively religious functions:" "The heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities." 132 S.Ct. at 709. In the same way, not all for-profit organizations perform exclusively secular functions. Many religions direct the faithful to implement their faith and religious beliefs in their businesses. For example, in "Vocation of the Business Leader: A Reflection," the Vatican's Pontifical Counsel for Justice and Peace explains that for Catholics

"[t]he vocation of the businessperson is a genuine human and Christian calling." *See* Vocation of the Business Leader: A Reflection at ¶ 6 (available at http://www.stthomas.edu/cathstudies/cst/conferences/Logic%20of%20Gift%20Semina/Logicofgiftdoc/FinalsoftproofVocati.pdf). According to the Counsel, one of the greatest obstacles to fulfilling this Christian calling "at a personal level is a 'divided life,' or what Vatican II described as 'the split between the faith which many profess and their daily lives.'… Dividing the demands of one's faith from one's work in business is a fundamental error which contributes to much of the damage done by businesses in our world today…. The divided life is not unified or integrated; it is fundamentally disordered, and thus fails to live up to God's call." *Id*. at ¶ 10. As in this case, many business owners may expressly seek to do just that—live their religious calling in and through their businesses. *See* Plaintiffs' Amended Compl. at ¶ 2 (stating that the Newlands "seek to run Hercules in a manner that reflects their sincerely held religious beliefs.").

Under the district court's decision in *Hobby Lobby*, however, businesses that desire to "live up to God's call" and implement the values of a particular faith must choose between living a "divided life" in a corporation that pays for services deemed immoral, forgoing the corporate form altogether, or adhering to their religious beliefs and paying penalties and fines. Yet, as the Court has stated in other contexts, the government cannot condition a benefit—such as the limited

liability that attaches to the corporate form—on the relinquishment of one's free speech or free exercise rights: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege…. [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994) ("It is true that religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise."). But this is exactly what the district court's decision in *Hobby Lobby* does. It makes the for-profit corporate form generally available unless one seeks to live her faith through the corporate form. Religiously motivated business owners now must commit their companies to conduct that violates their faith or conduct their businesses in a manner consistent with their religion and pay large fines and penalties." *See, e.g.*, 26 U.S.C. § 4980D (providing for a tax of $100 per day per employee if a company fails to comply with ACA's coverage provisions, subject to caps for certain failures); 26 U.S.C. § 4980H (setting forth an annual tax assessment if a company fails to comply with the ACA's coverage requirements). The free exercise clause

protects non-profits and for-profits from having to make this choice between civic benefits and their religious beliefs.

3. Restricting the free exercise clause to pervasively religious organizations impermissibly discriminates against for-profit corporations that promote religious views and those business owners who seek to live their faiths through their businesses.

Precluding for-profit corporations from invoking the free exercise clause because religious exercise is a "purely personal" right, *i.e.*, a right "applying only to natural individuals," *White*¸ 322 U.S. at 698, leads to another problem. While denying that for-profit corporations can exercise religion, the *Hobby Lobby* court contends that religious non-profits, which are not "natural individuals," are covered by the free exercise clause because of the "religious" nature of the organizations. On this view, religious non-profits are fundamentally different from for-profit corporations when it comes to exercising religion: "[g]eneral business corporations" cannot exercise religion because they "do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." 870 F.Supp.2d at 1291.

What the *Hobby Lobby* court apparently fails to recognize is that non-profit religious organizations also "do not pray, worship, observe sacraments or take other religiously-motivated actions" independently of the individuals who comprise the organization. The not-for-profit corporation that is the Diocese of

Denver, Colorado does not itself pray, worship, observe sacraments, or take other religious actions. All such activities are conducted by the individuals who are part of that non-profit organization—the priests, religious, and lay members of the faith. The same holds true with respect to for-profit corporations. Whether exercising their speech rights or implementing their religious beliefs in their business operations, for-profit corporations act through the individual owners/members of the organization. This is not surprising given that the distinction between for-profit and non-profit corporations does not consist in the latter's ability to conduct religious activities independently of their members. Both types of corporations are creatures of the State that depend on individuals to carry out all of their activities—from engaging in speech to exercising religion.

Consequently, the *Hobby Lobby* court's reasoning impermissibly discriminates among religions by giving certain religions (those that operate through non-profit corporations) the ability to exercise religion as a group while denying that opportunity to individuals who sincerely try to live their beliefs through all aspects of their lives, including their for-profit businesses. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Wilson v. NLRB*, 920 F.2d 1282, 1285-88 (6th Cir. 1990) (holding that a statutory exemption limited to individuals who are "member[s] of and adhere[] to

established and traditional tenets … of a bona fide religion, body, or sect which has historically held conscientious objections to [a certain practice]" are unconstitutional because they prefer members of established denominations over those with more idiosyncratic religious beliefs).

In *Larson*, the Court struck down a rule that exempted certain organizations from Minnesota's reporting requirements because the so-called fifty per cent rule "makes explicit and deliberate distinctions between different religious organizations…. [T]he provision effectively distinguishes between 'well-established churches' that have 'achieved strong but not total financial support from their members' … and 'churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members.'" 456 U.S. at 246 n.28. Limiting free exercise to religious non-profits also discriminates in favor of preferred or established religious organizations, denying free exercise protection to for-profit corporations that are directed at advancing the religious beliefs of their owners.

Yet not all religiously motivated people are called to be priests, ministers, religious, or lay persons who work for a religious non-profit. Some individuals, such as the Newlands, sincerely believe that they are called to live their faith through their for-profit business endeavors. As Pope John Paul II instructed the

Catholic faithful in *Centesimus Annus*: "In fact, the purpose of a business firm is not simply to make a profit, but is also to be found in its very existence as a community of persons who in various ways are endeavoring to satisfy their basic needs, and who form a particular group at the service of the whole society. Profit is a regulator of the life of a business, but it is not the only one; other human and moral factors must also be considered which, in the long term, are at least equally important for the life of a business." *Centesimus Annus* at ¶ 35 (1991).

The problem under *Hobby Lobby* is that two organizations—both corporations—that are comprised of members of the same faith may object to the HHS mandate for exactly the same reasons but only one—the religious non-profit corporation—may claim the protection of the free exercise clause. This result flies in the face of *Bellotti*, which expressly holds that the proper "question must be whether [the government regulation] abridges [activity] that the First Amendment was meant to protect." 435 U.S. at 776. Because, as *Hobby Lobby* and the Supreme Court acknowledge, religious non-profits are protected by the free exercise clause, the First Amendment *is* meant to protect this type of activity—objecting to the contraception coverage mandate on religious grounds. The fact that the person conducting the religious activity is a "for-profit corporate person" instead of a "natural person" or a "non-profit corporate person" is irrelevant. *Bellotti*, 435 U.S. at 776 ("The proper question therefore is not whether

corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons.").

In *Bellotti*, the Court struck down a state-law ban on corporate expenditures related to a referendum because the legislation "amounts to an impermissible … requirement that the speaker have a sufficiently great interest in the subject to justify communication." *Id.* at 784. The same can be said of the court's decision in *Hobby Lobby*—it requires a corporation to have a sufficiently great religious interest in the subject to justify objecting on religious grounds. But courts are constitutionally prohibited from weighing the nature or importance of a person's or group's religious beliefs: "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith." *Thomas*, 450 U.S. at 715-16. Because courts cannot determine whether a corporation is sufficiently religious to invoke the free exercise clause, any corporation that sincerely seeks to implement religious beliefs in its corporate activities may claim the protection of that clause. Thus, the free exercise clause protects the right of corporations—whether for-profit or non-profit—to advance the religious values of their owners, just as the free speech clause protects their right to engage in speech as individuals and through the

corporate form. *See Citizens United*, 558 U.S. at 900 ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'").

B. Although the free exercise clause applies to for-profit corporations, such corporations can invoke its protection only where, as here, they are exercising religion.

To recognize that corporations, such as Hercules or Chick-fil-A, can raise a free exercise claim is not to determine that a particular corporation's free exercise claim has merit. Rather, acknowledging that corporations can invoke the free exercise clause simply permits corporations to litigate their claims and to have a neutral court apply (whatever it decides is) the appropriate standard under the circumstances. Many corporations—perhaps most—will not engage in religious activities or attempt to implement the religious convictions of their owners. In particular, large, publicly traded corporations may decline to adopt, maintain, or implement a set of religious beliefs as part of their business model. A publicly traded company could adopt such a business plan if its management and shareholders decide to do so, but such cases are apt to be rare.

The key is that there is no constitutional basis for courts to preclude such an association *a priori*. The decision as to what type of business model to pursue is left to the corporation—whether publicly or privately owned—not the courts. As

the Court has acknowledged in the free speech context, "[u]ltimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues. Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management." *Bellotti*, 435 U.S. at 794.

The same holds true with respect to corporate decisions to pursue religious, environmental, or other civic activities. If a corporation, such as Hercules, is owned and operated by individuals who are deeply committed to a particular faith, then it is unsurprising that the company reflects the religious principles of its owners. As the amended complaint demonstrates, Hercules sought to implement religious principles regarding corporate responsibility, attempting to promote the well-being of its employees in a financial and moral sense. Amended Compl. at ¶¶ 36, 112. According to the company, the ACA requires it to provide insurance coverage for medical services, such as abortifacients, contraceptives, and sterilization, which violate the religious values that underscore the company's

operations. As such, the ACA infringes on the religious activities of the corporation and requires the company to take specific actions that are inconsistent with its ethical guidelines. Consequently, Hercules can invoke the free exercise clause to protect its religious activities, and the courts are left to determine whether that claim is meritorious under the appropriate standard.

III. Conclusion

For the reasons set forth above, this Court should affirm the district court ruling and hold that Hercules has standing to bring its claim under RFRA and the free exercise clause.

Respectfully submitted this 1st day of March, 2013,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,816 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point Times New Roman.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on March 1, 2013.

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FILING AND MAILING CERTIFICATE

I hereby certify that on this 1st day of March 2013, I mailed to the Clerk's Office of the United States Court of Appeals for the Tenth Circuit the required copies of this Brief of Amicus Curiae **EAGLE FORUM**, and further certify that I electronically served the required copies to counsel for the parties through the CM/ECF system on the 1st of March, 2013.

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