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, ET AL.,
Respondents.

On Writs of Certiorari to the U.S. Courts of Appeals for the Tenth and Third Circuits

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Brief of Constitutional Accountability Center as *Amicus Curiae* in Support of the Government

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INTEREST OF AMICUS CURIAE[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees.

CAC has published scholarship and filed *amicus* briefs demonstrating the ways in which corporations and living, breathing persons have been treated differently throughout our nation's history when it comes to constitutional rights and liberties, including in *Citizens United v. FEC*, 558 U.S. 310 (2010) and in *FCC v. AT&T*, 131 S. Ct. 1177 (2011). The Center has an interest in ensuring that these rights are protected for "We the People," while preserving the government's legitimate interest in regulating corporations.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that 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. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

INRODUCTION AND SUMMARY OF ARGUMENT

Regulations implementing the Patient Protection and Affordable Care Act ("ACA" or "the Act") provide, among other things, that in order to promote women's health, employers' health insurance plans must cover preventive care and screening for women, including all FDA-approved contraceptives. *See* U.S. Br., No. 13-354, at 3-8; *see also* Pet., No. 13-354, at 5-9. Federal law imposes this obligation directly on corporate employers and, in the event of non-compliance, imposes civil penalties only on those employers; it imposes no obligations on the individual owners of those corporations. It also exempts entirely from this requirement religious employers, such as churches and their affiliates. *See* U.S. Br., No. 13-354, at 3-8.

Respondent Hobby Lobby Stores, Inc. is a for-profit, secular corporation that operates more than 500 arts-and-crafts stores employing approximately 13,000 full-time employees nationwide, and respondent Mardel, Inc. is a secular, for-profit affiliated chain of bookstores that specializes in Christian products and has about 400 full-time employees (collectively, "Hobby Lobby"). Petitioner Conestoga Wood is a for-profit, secular corporation that manufactures wood products and employs more than 900 employees. The individual owners of these secular, for-profit businesses oppose certain forms of Food and Drug Administration-approved contraception that they believe prevent implantation of a fertilized egg,

Hobby Lobby BIO 3-4; Conestoga Wood Br. 5, and they therefore seek to deny insurance coverage for such products to the employees who work in their for-profit businesses. Specifically, Hobby Lobby and Conestoga Wood (collectively, "the corporate plaintiffs") contend that even though they are secular, for-profit companies, they are nonetheless capable of the "free exercise of religion" and are therefore entitled to protection under the First Amendment's Free Exercise Clause and/or the Religious Freedom Restoration Act of 1993 (RFRA), which provides that the government "shall not substantially burden a person's exercise of religion," 42 U.S.C. § 2000bb-1(a), (b). The individual owners of the corporate plaintiffs also argue that the ACA's requirements violate their own free exercise rights, even though the Act imposes no obligations on them.

The corporate plaintiffs' argument that they enjoy free exercise rights under the First Amendment and RFRA is in conflict with the text, history, and purpose of the First Amendment's free exercise guarantee. *Amicus* submits this brief to demonstrate that throughout our nation's history, corporations have been treated differently than individuals when it comes to fundamental, personal rights of conscience and human dignity. The First Amendment's free exercise guarantee has always been viewed as a purely personal liberty, guaranteeing the right of individuals to worship and exercise religion consistent with the dictates of their conscience. It has never been considered a right possessed by secular, for-profit corporations. Indeed, in the more than 200 years since the First

Amendment's ratification, this Court has never held that secular, for-profit corporations may assert rights under the Free Exercise Clause. Because RFRA—as its very name confirms—sought to *restore* the Court's free-exercise jurisprudence as it stood before *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), this history is fatal to the corporate plaintiffs' claims under both the First Amendment and RFRA.

History shows that the First Amendment's explicit protection for "the free exercise" of religion, U.S. CONST. amend. I, was intended to protect a basic right of human dignity and conscience, one of the "characteristic rights of freemen," as George Washington put it. WASHINGTON: WRITINGS 733 (John Rhodehamel ed., 1997) (First Inaugural Address, April 30, 1789). From the Founding until today, the Constitution's protection of religious liberty has been seen as a personal right, inextricably linked to the human capacity to express devotion to a god and act on the basis of reason and conscience. Business corporations, quite properly, have never shared in this fundamental aspect of our constitutional tradition for the obvious reason that a business corporation lacks the basic human capacities—reason, dignity, and conscience—at the core of religious belief and thus the free exercise right.

To be sure, the owners of the corporate employers have their own personal free exercise rights, but those rights are not implicated by the contraception coverage requirement because

federal law does not require the individuals who own a company to *personally* provide health care coverage or to satisfy any other legal obligation of the corporation. The law places requirements only on the corporate entities. As the Court has held in the Fifth Amendment context, when individuals act in their official capacity as corporate agents, they "cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges." *Braswell v. United States*, 487 U.S. 99, 110 (1988). Instead, "they assume the rights, duties, and privileges of the artificial entity." *Id*. Plaintiffs here should not be permitted to "move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms." *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 389 (3d Cir. 2013).

The fact that the Free Exercise Clause has been recognized to protect churches and other explicitly religious organizations does not help the corporate plaintiffs here. Since the Founding, churches and business corporations have been treated as fundamentally different. Churches, created for the purpose of ensuring the flourishing of religious exercise, have received protection under our constitutional tradition, in federal statutes, and Court precedent. These protections have never been extended to secular, for-profit corporations like Hobby Lobby and Conestoga Wood. To do so now would represent an unprecedented extension of what it means to engage in the free exercise of religion.

Far from vindicating the Constitution's promise of religious liberty, a ruling granting an exemption to secular, for-profit business corporations from the ACA's contraceptive coverage requirement would allow business owners to impose their personal religious beliefs on their employees, many of whom have different religious views and want and need access to the full range of FDA-approved contraceptives. Such a ruling would turn the First Amendment on its head, allowing secular, for-profit businesses to enforce a religious orthodoxy in the workplace. This Court should deny the plaintiffs' free exercise and RFRA claims and uphold the ACA's contraceptive coverage requirement as it applies to secular, for-profit corporations.

ARGUMENT

I. SECULAR, FOR-PROFIT CORPORATIONS DO NOT HAVE RELIGIOUS FREE EXERCISE RIGHTS UNDER EITHER THE FIRST AMENDMENT OR RFRA.

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I. Enacted to declare one of the "great rights of mankind," 1 ANNALS OF CONG. 449 (1789), the First Amendment's Free Exercise Clause protects a purely personal right to worship and exercise religion according to the dictates of one's conscience, a right that does not extend to

business corporations, who cannot pray and do not have a religious conscience. In the more than 200 years since the First Amendment's ratification, this Court has never held that secular, for-profit business corporations may assert rights under the Free Exercise Clause. Whatever other rights such corporations may enjoy under the Constitution, it would be inconsistent with the text, history, and purpose of the Free Exercise Clause to accord them free exercise rights.

The Religious Freedom Restoration Act provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). Although use of the word "person" in federal law often "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," that is not true when "the context indicates otherwise." 1 U.S.C. § 1. RFRA was enacted in 1993 to restore and enforce the First Amendment's Free Exercise guarantee, and thus the history, nature, and purpose of the First Amendment's free exercise guarantee provide the appropriate "context" for determining whether secular, for-profit corporations can claim its protection.[2] As just noted, the history, nature, and

[2] Conestoga Wood places great emphasis on the fact that RFRA "protects '*any*' exercise of religion," Conestoga Br. 18 (emphasis added), but of course, that language does nothing to address the critical question of whether secular, for-profit corporations can engage in the "exercise of religion" at all. As *amicus* demonstrates, they plainly cannot.

purpose of the Free Exercise Clause, consistent with this Court's case law, all make clear that such corporations cannot claim a free exercise right under RFRA.

A. Throughout Our Nation's History, Corporations Have Been Treated Differently Than Individuals When It Comes To Fundamental, Personal Rights.

The Constitution does not give corporations the same protection of rights and liberties as it gives to individual persons.[3] As its opening words reflect, the Constitution was written for the benefit of "We the People of the United States," U.S. CONST. pmbl., and when the Framers added the Bill of Rights shortly after the Constitution's ratification, they did so to protect the fundamental rights of "We the People." These amendments reflected the promise of the Declaration of Independence that all Americans "are endowed by their Creator with certain unalienable rights, [and] that among these are life, liberty, and the pursuit of happiness." President George Washington described the amendments as exhibiting "a reverence for the characteristic rights of freemen." WASHINGTON: WRITINGS 733. At its core, the Bill of Rights "declare[d] the great rights of mankind." 1 ANNALS OF CONG. 449 (1789).

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[3] *See generally* David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. MARSHALL L. REV. 643 (2011).

At the Founding, corporations stood on an entirely different footing than living persons. Unlike people who inherently enjoyed "certain unalienable rights," a corporation, in the words of Chief Justice John Marshall, was "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). As early as the First Congress, James Madison summed up the Founding-era vision of corporations: "[A] charter of incorporation . . . creates an artificial person not existing in law. It confers important civil rights and attributes, which could not otherwise be claimed." 2 ANNALS OF CONG. 1949 (1791). In short, corporations, unlike the individual citizens that made up the nation, did not have fundamental and inalienable rights by virtue of their inherent dignity.

To be sure, corporate entities can assert certain constitutional rights, chiefly related to their right to enter into contracts, own and possess property, and manage their affairs, but they have never been accorded all the rights that individuals possess. *Compare Dartmouth College*, 17 U.S. (4 Wheat.) at 518 (protection under Contracts Clause); *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844) (right to sue

under Article III); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885) (protection under Dormant Commerce Clause); *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150 (1897) (protection under Equal Protection Clause); *Hale v. Henkel*, 201 U.S. 43 (1906) (protection under Fourth Amendment) *with Bank of Augusta v. Earle,* 38 U.S. (13 Pet.) 519 (1839) (no protection under Article IV's Privileges and Immunities Clause); *Hale*, 201 U.S. 43 (no protection under Fifth Amendment's Self-Incrimination Clause); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359 (1907) (no protection under Fourteenth Amendment's Privileges or Immunities Clause); *United States v. Morton Salt*, 338 U.S. 632, 652 (1950) (observing that "corporations can claim no equality with individuals in the enjoyment of a right to privacy").

Many of the constitutional rights possessed by business corporations are grounded in matters of property and commerce, because, as this Court has explained, "[c]orporations are a necessary feature of modern business activity" and, "[i]n organizing itself as a collective body, [a corporation] waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the 14th Amendment, against unlawful discrimination." *Hale*, 201 U.S. at 76. Business corporations enjoy other constitutional rights, but these rights do not vindicate a corporation's own claim to what is essentially human autonomy or dignity. For example, corporations enjoy the right to speech not because they enjoy personal dignity or freedom of

conscience like people do, but because of the fundamental role that free speech plays in our democracy. As this Court explained in *Citizens United v. FEC*, 558 U.S. 310 (2010), business corporations have a protected constitutional right to speak—whatever the purpose of that speech—because speech paid for by corporations helps to inform the general public and provide a robust debate for individual listeners. *See id.* at 349 (stating that "[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual") (quoting *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978)).

Because corporations do not possess the same dignity and conscience as individuals, it is well settled that "[c]ertain 'purely personal' guarantees" are available only to natural persons, not to corporations. *Bellotti*, 435 U.S. at 778 n.14. For example, the Fifth Amendment, which provides that no person shall be "compelled in any criminal case to be a witness against himself," does not apply to corporations because it "is an explicit right of a *natural person*." *Braswell*, 487 U.S. at 119 (Kennedy, J., dissenting) (emphasis added); *see Bellotti*, 435 U.S. at 778 n.14 (right against self-incrimination is "unavailable to corporations . . . because the 'historic function' of the particular guarantee has been limited to the protection of individuals"). As this Court has affirmed for more than a century, the constitutional privilege against self-incrimination cannot be invoked by corporations because it is a personal one that

"grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." *United States v. White*, 322 U.S. 694, 698 (1944). In other words, the right cannot be invoked by corporations because it was enacted to "protect[] the realm of human thought and expression." *Braswell*, 487 U.S. at 119 (Kennedy, J., dissenting). Accordingly, "there is a clear distinction . . . between an individual and a corporation . . . . While an individual may lawfully refuse to answer incriminating questions . . . , it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges." *Hale*, 201 U.S. at 74, 75.

The *Braswell* case illustrates the different way fundamental rights apply to corporations as opposed to the individual persons who may operate or own them. Randy Braswell, the president and sole shareholder of a corporation, argued that he was entitled to resist a subpoena for corporate records because the act of producing those records would tend to incriminate him. In rejecting his contention, the Court found dispositive the fact that the subpoena was directed to corporate records: "[P]etitioner has operated his business through the corporate form, and we have long recognized that,

for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals." *Braswell*, 487 U.S. at 104. Proceeding from this basic principle, the Court held that "the custodian of corporate records may not interpose a Fifth Amendment objection to the compelled production of corporate records, even though the act of production may prove personally incriminating." *Id.* at 111-12.

Thus, since the Founding, corporations have been treated differently than individuals when it comes to certain fundamental, personal rights, and the Constitution's guarantees cannot be applied wholesale to corporations. Rather, "[w]hether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." *Bellotti*, 435 U.S. at 778 n.14. As the next two sections demonstrate, the free exercise right is a "purely personal" one unavailable to secular, for-profit corporations.

B. The Free Exercise Of Religion Is A Fundamentally Personal Liberty That Does Not Apply To For-Profit, Secular Corporations.

The history of the free exercise guarantee demonstrates that this right is a "purely personal" one that may not be invoked by secular, for-profit corporations. Much like the Self-Incrimination Clause, which protects a purely personal "realm of human thought and expression," *Braswell*, 487 U.S. at 119 (Kennedy, J., dissenting), and guarantees

"dignity, humanity and impartiality," *White*, 322 U.S. at 698, by preventing the government from compelling an individual's own testimony, the right to freely exercise religion simply cannot be exercised by a business corporation. A secular, for-profit business corporation may be able to pay to disseminate an advertisement, *see* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627, 632 (1990) (noting long history of businesses running advertisements), or a film in support of a political candidate, *see Citizens United*, 558 U.S. at 349, but it cannot, in any meaningful sense, pray, express pious devotion, or act on the basis of a religious conscience. The fundamental values behind the Free Exercise Clause, like those that underlie the Fifth Amendment's constitutional privilege against self-incrimination, simply make no sense as applied to a secular, for-profit business corporation. For good reason, this Court has never invested business corporations with the basic rights of human dignity and conscience.

The Founding generation well understood that the First Amendment's guarantee of free exercise was an inalienable individual right, inextricably linked to the human capacity to express devotion to a god and act on the basis of reason and conscience. Indeed, the proposed amendment that would eventually become our First Amendment started out in the Select Committee as a proposal to ensure that "the equal rights of conscience" shall not be infringed. 1 ANNALS OF CONG. 766 (1789). While debates in the First Congress over what ultimately became the Free Exercise Clause were sparse, the protections

for religious liberty contained in Founding-era state constitutions provide powerful evidence that the free exercise guarantee was understood to be a purely personal right. "These state constitutions provide the most direct evidence of the original understanding, for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1456 (1990); *see also City of Boerne v. Flores*, 521 U.S. 507, 553 (1997) (O'Connor, J., dissenting) ("These state provisions . . . are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty.").

New York's 1777 Constitution, for example, provided that "the free exercise of religion and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind." N.Y. CONST. of 1777, art. XXXVIII. Likewise, New Hampshire's Free Exercise Clause described religious liberty specifically as a right of individuals: "Every individual has a natural and inalienable right to worship GOD according to the dictates of his own conscience, and reason . . . ." N.H. CONST. of 1784, pt. I, art. V. The Virginia Declaration of Rights of 1776 provided that "religion . . . can be directed only by reason and conviction . . . ; therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . ." Va. Declaration of

Rights of 1776, § 16. Many other state constitutions used similar language, *see* McConnell, 103 HARV. L. REV. at 1456-58 & nn. 239-42, confirming that the right to the free exercise of religion was understood to be a purely personal, inalienable human right. These provisions "defined the scope of the free exercise right in terms of the conscience of the individual believer and the actions that flow from that conscience," an affirmative understanding of free exercise "based on the scope of duties to God perceived by the believer." *Id.* at 1458-59.

Likewise, the Memorial and Remonstrance Against Religious Assessments, authored by James Madison, "'the leading architect of the religion clauses of the First Amendment,'" *Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1446 (2011) (quoting *Flast v. Cohen*, 392 U.S. 83, 103 (1968)), viewed the guarantee of the free exercise of religion in similar, wholly personal terms. Invoking the "fundamental and undeniable truth" that "'Religion . . . can be directed only by reason and conviction,'" Madison explained that "[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 184 (G. Hunt ed., 1901) (quoting Va. Declaration of Rights of 1776, § 16). Noting that "equality . . . ought to be the basis of every law," Madison argued that "[w]hilst we assert for ourselves a freedom to embrace, to profess, or to observe the Religion

which we believe to be divine in origin, we cannot deny an equal freedom to those whose minds have not yielded to the evidence which has convinced us." *Id.* at 186.

For Madison, the free exercise of religion was fundamentally a personal right, closely linked to the human capacity of reason, conviction, and conscience. As with the right against self-incrimination, a business corporation simply lacks these basic human capacities. Indeed, the Founding-era protection for religious conscience overlaps with the concern for compelled testimony. The most common "free exercise controversies in the preconstitutional period" related to oaths. Michael W. McConnell, "Free Exercise As The Framers Understood It," *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 59 (Eugene Hickok, Jr., ed., 1991). Article VI ensured that conscientious objectors could "Affirm[]," rather than swear their support for the Constitution, in addition to forbidding the use of religious tests for officeholders. U.S. CONST. art. VI. The origins of the right against compelled self-incrimination and the right to religious free exercise are closely linked. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 82-83 (1998); William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 363, 411-12 (1995) (explaining that "the privilege entered the law in response to practices that were troubling . . . because of the crimes being prosecuted" including "crimes of religious belief"); *id.* at 413 (noting that cases in which oaths were compelled "involved the punishment of religious

expression—expression that the suspects saw as compelled by God".) Critics of compelled oaths viewed them as a violation of freedom of conscience: "put[ting] the conscience uppon [sic] the racke." *Id.* at 412. With this backdrop, the Founding generation would never have imagined that a business corporation could claim for itself such quintessentially personal rights.

This Court's case law is in line with the historical understanding of the free exercise guarantee. In the more than 225 years since the ratification of the First Amendment, this Court has never held that secular, for-profit business corporations are capable of exercising religion and has never held that the Free Exercise Clause applies to such corporations. As the Government's brief in *Hobby Lobby* explains, "no pre-*Smith* case held, or even suggested, that for-profit corporations have religious beliefs that could . . . be impermissibly burdened under the First Amendment by general corporate regulation." U.S. Br., No. 13-354, at 17; *see Conestoga Wood*, 724 F.3d at 384 ("we are not aware of any case preceding the commencement of litigation about the Mandate, in which a for-profit, secular corporation was itself found to have free exercise rights").

And no wonder. Such a ruling would turn the First Amendment on its head, allowing business owners to impose their personal beliefs on their employees and deny them important federal rights. Indeed, if business owners can deny their employees contraceptive coverage because

contraceptive use violates the owners' religious beliefs, they might also be able to fire employees (or not hire them in the first place) for engaging in all manner of activities that do not conform to the religious code of the company's owners. Individuals who take a job do not surrender their right to exercise the religion of their choice at their bosses' door.

Conestoga Wood argues that "this Court has repeatedly recognized" that "people may exercise religion through their closely-held businesses," Conestoga Br. 18, but the cases on which it relies exclusively involve free exercise claims brought by individual business owners, not by business corporations. *See, e.g.*, *United States v. Lee*, 455 U.S. 252 (1982); *Braunfeld v. Brown,* 366 U.S. 599 (1961). Individuals who run a business are entitled to invoke the privilege of self-incrimination, but corporations are not. *See Braswell*, 487 U.S. at 104. The same holds true here with respect to religious free exercise.

Moreover, these cases make clear that "when followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others." *Lee*, 455 U.S. at 261. Accordingly, the free exercise right does not require a religious exemption that would "operate to impose the employer's faith on the employees." *Id.* Far from supporting the corporate plaintiffs' free exercise and RFRA claims, these fundamental precepts are fatal to them. *See* U.S.

Br., No. 13-354, at 39-42, 45-46.

Thus, in light of the text, history, and purpose of the Free Exercise Clause, secular, for-profit corporations are not "person[s] exercis[ing] religion" within the meaning of RFRA, 42 U.S.C. § 2000bb-1(a), and the First Amendment.

C. While Explicitly Religious Organizations, Such As Churches, Have Been Protected Under The First Amendment, They Have Historically Been Distinguished From Secular, For-Profit Corporations Like Hobby Lobby And Conestoga Wood.

As just discussed, the free exercise guarantee has never been understood to apply to secular, for-profit corporations. To the contrary, the only corporations that have been permitted to invoke the protections of the Free Exercise Clause are, as makes sense, those corporations, such as churches and other religious bodies, that were explicitly established to further the exercise of religion. Plaintiffs here argue that because churches and other religious organizations can claim a free exercise right, so, too, can for-profit, secular corporations. *See* Conestoga Wood Br. 25-26. This argument is inconsistent with the text and history of the First Amendment, as well as contrary to settled law.

The text and history of the First Amendment show a "special solicitude to the rights of religious organizations." *Hosanna-Tabor*

Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694, 706 (2012). This solicitude for churches, synagogues, and other religious entities reflects the basic fact that "[r]eligion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] Clause." 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); *see also* McConnell, 103 HARV. L. REV. at 1490 ("'Religion' . . . connotes a community of believers."). Going back to the writings of John Locke, a church was considered "a voluntary society of men, joining together of their own accord, in order to the public worshipping of God, in such manner as they judge acceptable to him, and effectual to the salvation of their souls." JOHN LOCKE, A LETTER CONCERNING TOLERATION 28 (1689) (James H. Tully ed., 1983).

The legal traditions that the Founders brought from England included a sharp distinction between religious and other private corporations. Blackstone observed the "division of corporations . . . into ecclesiastical and lay. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons . . . These are erected for the furtherance of religion, and perpetuating the rights of the church." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *470 (1768). Founding-era treatises on corporate law, following Blackstone, explained that "[t]here is one *general* division of corporations into

ecclesiastical, and *lay*. Ecclesiastical corporations are those of which not only the members are spiritual persons, but of which the object of the institution is also spiritual . . . ." STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 22 (1793).

Consistent with this history, the law has long protected the ability of individuals to band together to form churches and other religious institutions, to choose their leaders, define their doctrines, and run those institutions as they see fit. Early in our nation's history, this Court recognized the power of state legislatures to "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." *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815). Given "the difficulties which surround all voluntary associations," Justice Story remarked that the free exercise of religion "could be better secured and cherished by corporate powers." *Id.* In other words, without the ability to incorporate, churches would have grave difficulty maintaining ownership of their own property.

Since the Founding, this Court has consistently accorded special constitutional protection for the free exercise of religion that applies to religious, but not other, corporations. For example, in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), the Court held that "[f]reedom to select the clergy" has "federal constitutional protection as a part of the free exercise of religion

against state interference," observing that the First Amendment specifically ensures "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." *Id.* at 154-55; *see Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1872).

Recently, in *Hosanna-Tabor*, the Court reaffirmed these principles, holding that a religious employer could not be sued under Title VII of the Civil Rights Act of 1964 for firing a minister. "Requiring a church to accept or retain an unwanted minister . . . interferes with the internal governance of the church . . . . By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Hosanna-Tabor*, 132 S. Ct. at 706; *see id.* at 712 (Alito, J., concurring) ("[T]he Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs."). Under *Hosanna-Tabor*, incorporated churches and other religious employers are free from the strictures of federal anti-discrimination law in choosing their ministers. No secular, for-profit business corporation can claim a similar right to make employment decisions free from Title VII's mandate of equality of opportunity. *See* U.S. Br., No. 13-354, at 19-20 (emphasizing that Title VII's religious-employer exemption has been applied only to the non-profit activities of religious employers).

Congress, too, has provided exemptions that apply to religious corporations, but not other kinds of corporations. For example, Title VII's prohibition of employment discrimination on the basis of religion does not apply to a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1. A Christian church, organized as a corporation, can insist that its employees be members of the church, but a business corporation, even one that claims to be run on the basis of religious values, cannot limit employment to members of a certain religion. This Court has upheld the constitutionality of this legislative accommodation of religion, finding that it serves the permissible purpose of "alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987). The Court rejected the argument that Congress lacked the authority to "single[] out religious entities for a benefit," concluding that Congress could make special legislative accommodations for religious, but not other, corporations. *Id.* As Justice Brennan explained in an important concurring opinion, special religious accommodations given to churches and other religious entities reflect the twin facts that "religious activity derives meaning in large measure from participation in a larger religious

community," and that "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well." *Id.* at 342 (Brennan, J., concurring). Under the view of the corporate plaintiffs, however, this distinction between religious and business corporations would be unconstitutional.

As the foregoing makes clear, far from treating business and religious corporations as one and the same, constitutional text and history, as well as settled law, give a special status to churches and other religious institutions in recognition of the fact that individuals often exercise religion as part of a community of believers. At the Founding, churches and business corporations were seen as fundamentally different, the former created for the purpose of ensuring the flourishing of communal religious exercise, the latter to make running a business more profitable. Consistent with this history, religious institutions receive many types of legal protections for religious exercise rightly considered inapplicable to secular, for-profit corporations like Hobby Lobby and Conestoga Wood. Thus, far from violating the free exercise right, the ACA is very much in accord with our constitutional traditions in making accommodations for religious entities, but not business corporations.

II. THE FREE EXERCISE RIGHTS OF THE INDIVIDUAL OWNERS OF SECULAR, FOR-PROFIT CORPORATIONS ARE NOT IMPLICATED BY OBLIGATIONS IMPOSED ON THE CORPORATIONS.

As just discussed, secular, for-profit corporations do not enjoy free exercise rights under either the First Amendment or RFRA, and thus the corporate plaintiffs' claims under the First Amendment and RFRA must be rejected. Because the ACA imposes obligations *only* on the corporate plaintiffs, that should be the end of this case. But the individual owners of the corporate plaintiffs argue that the ACA contraception coverage requirement violates their own free exercise rights, *see* Hobby Lobby BIO 27; Conestoga Wood Br. 16, even though ACA imposes *no* obligations on them. These arguments are wrong. The free exercise rights of the individual owners of secular, for-profit corporations are simply not implicated by laws that place burdens only on the corporate entities. *See Conestoga Wood*, 72 F.3d at 388 ("Since Conestoga is distinct from the Hahns, the Mandate does not actually require *the Hahns* to do anything.").

As this Court has long recognized, corporate owners do not act as individuals when acting on behalf of the businesses they own. Even in the case of a corporation owned by a single shareholder, "[i]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions,*

Ltd. v. King, 533 U.S. 158, 163 (2001). Indeed, the "whole purpose" of corporate law is to ensure that "the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006).

This Court's Self-Incrimination Clause cases make clear that corporate owners cannot invoke their own individual rights when acting on behalf of the corporation. *Braswell* is illustrative. Obviously, the sole owner of the corporation in that case, Mr. Braswell, retained his personal right against compelled self-incrimination. However, because he was acting for the corporation, he could not "be said to be exercising [his] personal rights and duties nor to be entitled to [his] purely personal privileges." *Braswell*, 487 U.S. at 110. Instead, he "assume[d] the rights, duties and privileges of the artificial entity." *Id.* And in that official capacity, he had no "personal privilege against self-incrimination" to assert. *Id.*[4]

[4] A similar logic underlies the Court's holding that business corporations cannot invoke the protections of citizens secured by the Privileges and Immunities Clause. "If . . . members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens . . . they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. . . . Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members." *Bank of Augusta*, 38 U.S. at 586-87.

Importantly, in *Braswell* the Court did not, as the Tenth Circuit did below, conflate the rights of the individual owner of a corporation with the rights of the corporation itself.

In this case, the individual owners of the corporate plaintiffs made the choice to operate their respective businesses through the corporate form and to create a new and independent legal entity to obtain limited liability and other special privileges to which they would not be entitled had they decided to operate their businesses as individuals. Having done so, having chosen the benefits of operating through the corporate form, they cannot now turn around and invoke their own private religious beliefs to justify overriding the ACA's requirement that the corporations provide contraceptive health care coverage to the women they employ. As the Third Circuit properly held, corporate owners cannot "move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms." *Conestoga*, 724 F.3d at 389; *see* Pet. 23-26.

* * *

Our constitutional tradition recognizes a basic, common-sense difference between living, breathing individuals—who think, possess a conscience, and hold a claim to human dignity—and artificial corporate entities, which are created by the law for a specific purpose, such as to make running a business more efficient and lucrative by limiting the liability of their individual owners.

This is especially true in contexts related to matters of conscience, individual autonomy, and basic human dignity. Corporations are accountable to their shareholders for their business operations; a spiritual individual, in Washington's words, is "accountable to God alone for his religious opinions." WASHINGTON 739 (Letter to the United Baptist Churches of Virginia, May 1789).

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to affirm the decision of the Third Circuit and reverse the decision of the Tenth Circuit.

Respectfully submitted,

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January 28, 2014