Nos. 13-354, 13-356

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *et al.*,

Petitioners,

v.

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

Respondents,

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

Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *et al.*,

Respondents.

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

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS IN NO. 13-354 AND PETITIONERS IN NO. 13-356

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because this Court's decision on who or what qualifies as a "person" or can "exercise" religion for purposes of the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act has implications for the rights of individuals to associate in business as well as other areas of life and to exercise their religious beliefs. It also has implications for the States' prerogative to define the purpose and scope of entities created under the aegis of their laws. The Rutherford Institute urges this Court to affirm the decision below in No. 13-354 and reverse the decision below in No. 13-356.

SUMMARY OF ARGUMENT

Free exercise is an area in which courts traditionally take especial care to tread lightly, but in *Conestoga*, the Court of Appeals for the Third Circuit resorted to absolutes instead. Somewhere along the line, the Court of Appeals formed an image

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[1] This amicus brief is filed with the parties' consent. The parties filed their consents with the Clerk of Court in December 2013. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

of corporations as machines for sole purpose the making of money, and that perception drove its opinion. As a consequence, the Court of Appeals never took into account the fact that corporations are as varied in their forms and their motives as people are. The Court of Appeals for the Tenth Circuit understood that the reasoning that the Court of Appeals for the Third Circuit accepted was fatally flawed. But both failed to recognize that the fifty States have offered and are still experimenting with new ways to offer various means by which entities can have the character (and expectations of character) of natural persons. That role properly belongs to the States, because corporations are a creation of state law—another area in which this Court has taken especial care to tread lightly. Rutherford respectfully urges this Court to explain that both the nature of the right and the genesis of the entity require courts to take especial care.

ARGUMENT

I. THE COURT OF APPEALS IN *CONESTOGA* ASKED THE WRONG QUESTION.

In *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), the Court of Appeals found that neither Conestoga Wood Specialties Corp., a Pennsylvania corporation, nor its owners, the Hahns, who are practicing Mennonites, could secure a preliminary injunction on account of asserted violations of the First Amendment or the Religious Freedom Restoration Act ("RFRA"). The Court of Appeals based this decision on its conclusion that "a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause." 724 F.3d at 388. The court also rejected the suggestion that a

company could assert the Free Exercise rights of its owners. *Id*. at 387-88. In reaching this conclusion, the Court of Appeals observed, but did not give any effect to, the statement of policy of Conestoga's Board of Directors that explained the religious convictions underlying the corporation's position on the Contraceptive Mandate. *See id.* at 382 n.5.

In its brief in this Court seeking to overturn the *en banc* decision of the Tenth Circuit Court of Appeals in *Hobby Lobby*, the Government likewise contends that a for-profit corporation cannot exercise religion, and that corporate law precludes a finding that a corporation can share the values of its shareholders. Gov't Br. at 13 (No. 13-354). The Government goes so far as to say that no case prior to *Employment Division v. Smith*, 494 U.S. 872 (1990), even suggested that for-profit corporations have religious beliefs that could be impermissibly burdened by "general corporate regulation." Gov't Br. at 17 (No. 13-354). Because the principles of corporate law that are at stake here are of tremendous importance to businesses and to the States that regulate them, Rutherford submits this *amicus* brief in support of the free exercise rights of Conestoga and Hobby Lobby and in opposition to the Government's position. Fundamentally, the premise of the Government and the Court of Appeals for the Third Circuit rests upon flawed assumptions about corporations (and other entities) and the States that created them. In fact, States both enable and require corporations to make moral decisions and to engage in practices that result from those decisions. It follows that to the extent the "morality" giving rise to the decisions is "religious," the practices that result are religious practices.

As a preliminary matter, it is worth noting that when the Court of Appeals for the Third Circuit applied this Court's precedent in *First National Bank v. Bellotti,* 435 U.S. 765 (1978), it did so in reverse. Ironically, in *Bellotti* itself, this Court prefaced its opinion with the observation that the court of appeals in that case had "posed the wrong question," which is to say that it had asked "whether and to what extent corporations have First Amendment rights" when, in fact, the proper question was "whether [the challenged provision] abridges expression that the First Amendment was meant to protect." *Id.* at 775-76. The Court of Appeals for the Third Circuit made precisely the same error here, and then compounded that error by assuming that its analysis of the constitutional right in question controlled its analysis of the separate statutory right.

Certainly, the statement by Conestoga's Board is not "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981). Indeed, the Government clearly understood that beliefs and practices concerning contraception could be religious, because it incorporated a regulation and exemption into the Affordable Care Act to carve out accommodations for certain organizations: first, it exempted churches and houses of worship from the requirement entirely; and, second, it allowed self-certification by companies that are both (1) non-profit organizations as that term is used by the Internal Revenue Service, and (2) organizations that hold themselves out as religious and as having religious objections to providing coverage for contraceptive services. Businesses that meet these

criteria may provide a self-certification to the third-party administrator of their self-insured group health plan, at which point the outside insurer picks up the cost of providing the objected-to services.

The Court of Appeals transformed the certification standards into a bright-line test to determine what entities could come within the scope of Free Exercise protection under the First Amendment, holding that because Conestoga was "for-profit" and had not been organized for religious purposes, it was a corporation that could not exercise religion. *Conestoga*, 724 F.3d at 388. Indeed, the Court of Appeals went further, characterizing such a corporation in essence as a conscienceless entity that *could not* be religiously motivated or act for religious reasons. *Id.* at 385-86. *Compare Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 525, 547 (1993) (enforcing Free Exercise claim brought by an entity).

It is factually erroneous—and dangerous—to view federal non-profit status as a threshold for moral action, because (a) the measure of moral action is motivation; (b) this Court has regularly recognized that religious and secular conduct can co-exist in the same person; and (c) there are many different corporate forms—both for-profit and non-profit—that engage in religious conduct.

II. The Measure of Moral Action is Motivation.

The Court in *Bellotti* recognized that even if an *action* is protected, the *actor* might not be. But the presumption in such a case favors the actor. By asking only whether corporations were historically persons protected by the Free Exercise clause, the Court of Appeals for the Third Circuit placed a

burden on Conestoga that Conestoga should not have borne; Conestoga was entitled to the presumption that because it was engaging in protected conduct, it was protected.

No one doubts that at least some organizations can exercise religion and seek to protect the right to do so. *See, e.g.*, *Babalu Aye*, 508 U.S. at 525, 547; *Corp. of Presiding Bishop of the Chuch of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.29 (1983). Indeed, in the Judeo-Christian tradition, it was widely understood that not only individuals but households, cities, tribes, and nations were called to serve God in everything that they undertook. Joshua did not speak for himself alone when he said: "[B]ut as for me and my house, we will serve the Lord." Joshua 24:15. And Moses began the injunctions contained in Deuteronomy 5 with "Hear, O Israel" – and among the commandments to that people was: "Ye shall walk in all the ways which the Lord your God hath commanded you." Deuteronomy 5:33. Part of the message of the New Testament is that the literal nation of the Old Testament became a people sharing a common bond of faith, associating in fellowship. *See, e.g.*, Galatians 3:28 ("There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Christ Jesus").

As Justice Brennan explained in the concurrence in *Amos*:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community.

> Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

483 U.S. at 342 (Brennan, J., concurring). Accordingly, the right to practice one's religion is linked to the right to associate, another First Amendment right:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) (citations omitted). It follows that an entity that is a composite of associated persons does not lose the

capacity to believe or to act any more than the individuals who comprise it do. Indeed, States have worried about the opposite question: whether an entity formed from persons exercising their religion could be non-religious. Thus in *Collins v. Kephart*, 117 A. 440 (Pa. 1921)—particularly relevant here because Conestoga is a Pennsylvania corporation—the Pennsylvania Supreme Court found that five variously constituted and purportedly secular institutions, including schools and hospitals, were in fact sectarian, based upon that court's analysis of various entity-specific characteristics. In so finding, the Pennsylvania Supreme Court expressly distinguished *Bradfield v. Roberts*, 175 U.S. 291, 297-99 (1899), which had characterized as secular a hospital comprised solely of members of a church. Because the identification of a person's status—essential for addressing the scope of the free exercise right at issue—is a question of state law, the starting point for the analysis in *Conestoga* should have been how Pennsylvania views companies such as Conestoga. *McDaniel v. Paty*, 435 U.S. 618, 627 & n.5 (1978); *see also Bellotti*, 435 U.S. at 777 (presuming within scope of protected actors).

Pennsylvania law recognizes expressly that corporations are persons with the "legal capacity of natural persons to act." 15 Pa. Cons. Stat. § 1501; 1 Pa. Cons. Stat. § 1991 ("person"). As such, they may "sue and be sued, complain and defend and participate as a party or otherwise in any judicial, administrative, arbitrative or other proceeding in [their] corporate name." 15 Pa. Cons. Stat. § 1502(a)(2). In other words, they may enforce their rights in the same way and to the same extent as individuals. Moreover—and contrary to the

implication of the Court of Appeals—absent a restriction in the articles of incorporation, "*every* business corporation has as its corporate purpose the engaging in *all* lawful business for which corporations may be incorporated under this subpart." 15 Pa. Cons. Stat. § 1301 (emphasis added). As the Court of Appeals recognized, a Pennsylvania business may lawfully incorporate for the purpose of religious outreach or ministry; the court should have also recognized the corollary – that because religious activity is a lawful purpose for incorporation, it is a lawful activity for every other Pennsylvania business, even secular ones (unless otherwise restricted).

In short, taking on a corporate form does not undermine the straightforward principle that persons associated together act—and are both authorized and accountable to act—as an entity. Corporately as well as individually, there are persons who consider their actions to be motivated by and subject to the constraints imposed by God or other religious beliefs—and that is the quintessential definition of the *exercise* of religion. *See* 42 U.S.C. § 2000bb-2(4) (adopting definition of "exercise of religion" from 42 U.S.C. § 2000cc-5(7)(A): "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief" (emphasis added)).[2]

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[2] It is this broadened definition of "religious exercise" under the RFRA that reveals a key flaw in the analysis by the Court of Appeals for the Third Circuit. In its decision, the Court of Appeals opined that because Conestoga cannot "exercise" religion under the Free Exercise Clause, it necessarily cannot "exercise" religion under the RFRA. But that presupposes that the constitutional and statutory

It is no accident that this Court has applied a similar threshold for the Free Exercise Clause, protecting persons (including, in that case, Native Americans, nature organizations, and the State of California) from "be[ing] coerced by the Government's action into violating their religious beliefs, [or] governmental action [that] penalize[s] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988); *see also Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) (recognizing "that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"); *Torcaso v. Watkins*, 367 U.S. 488, 495-96 & n.11 (1961) (affirming that the Government cannot force a person to profess belief in a religion and cannot prefer believers against non-believers).

Inherent in the decision of the Court of Appeals in this case, however, is a perception that corporations are insentient entities that cannot exercise judgment or morality. But the States would disagree. In many different areas, States expect—and require—corporations to exercise moral decisionmaking. A corporation in Pennsylvania is subject to tort liability—which itself is a reflection of the "primary social duty . . . to take thought and have a care lest his action result in injuries to others." *Bisson v. John B. Kelly, Inc.,* 170 A. 139, 143 (Pa. 1934). If the tort is committed not just negligently but with "evil motive" a corporation can be subject to punitive

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protections are coterminous. Quite the contrary, the RFRA both incorporated a broader definition of free exercise and established a strict scrutiny standard of review.

damages. *Daniel v. Wyeth Pharm., Inc.*, 15 A.3d 909, 933 (Pa. Super. Ct. 2011). A corporation can directly owe enforceable duties of care to its customers. *E.g.*, *Scampone v. Highland Park Care Ctr., LLC,* 57 A.3d 582, 598 (Pa. 2012). Indeed, it can be criminally prosecuted for deception, which requires a finding that a corporation acted with intent. *E.g.*, *Pennsylvania v. J.P. Mascaro & Sons, Inc.*, 402 A.2d 1050, 1051 (Pa. Super. Ct. 1979); *see also* 18 Pa. Cons. Stat. § 3922.

These expectations are not limited to Pennsylvania law or to the "modern" era. *See Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) (characterizing a company as not only "know[ing] and acquiesc[ing], but join[ing] both mind and hand" with another, justifying the "step from knowledge to intent and agreement"); *Tiller v. Atl. C.L.R. Co.*, 318 U.S. 54, 61 n.8 (1943) ("Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible, as I certainly think the company were in the present instance.") (quoting *Woodley v. Metro. Dist. Ry. Co.*, L.R. 2 Ex. Div. 384 (1887)); *Home Indem. Co. v. Williamson*, 183 F.2d 572, 577 (5th Cir. 1950) (finding a jury question as to whether a company was serving two masters).

James Madison urged that religion be left "to the conviction and conscience of every man . . . to exercise it as these may dictate." James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* Founding the Republic: A Documentary History 90 (John J. Patrick ed., 1995). [3]

[3] Madison kept in clear view the dangers of religious persecution.

Because society rightly expects corporations to be held accountable for acting according to "conviction and conscience" and to conform their actions to the public policy—even evolving public policy—of States and the Federal Government, it is sophistry to presume that such decisionmaking must occur in a vacuum that is uninformed by judgment, discretion, and, for many, faith and the teachings of one's religion. How can a corporation be condemned for acting immorally if it is incapable of acting morally? After all, "A good man out of the good treasure of his heart bringeth forth that which is good; and an evil man out of the evil treasure of his heart bringeth forth that which is evil. For of the abundance of the heart his mouth speaketh." Luke 6:45. This principle led John Wesley in the middle of the 18th century to preach against many of the ills that have come to be known as business torts:

> We cannot, consistent with brotherly love, sell our goods below the market price; we cannot study to ruin our neighbour's trade, in order to advance our own; much less can we entice away or receive any of his servants or workmen whom he has need of. None can gain by swallowing up his neighbour's substance, without gaining the damnation of hell!

John Wesley, Sermon 50.

All of which is to say that individuals walk according to their faith—or their lack thereof—and corporations do the same. *Cf.* James 2:18 ("Yea, a man may say, Thou hast faith, and I have works: shew me thy faith without thy works, and I will shew thee my faith by my works.").

III. This Court and Others Have Regularly Recognized that Religious and Secular Conduct Can Co-Exist.

In *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011), the Court of Appeals for the Ninth Circuit asked whether a humanitarian service organization that had expressly conditioned employment on a statement of faith could claim to be a religious corporation within the meaning of 42 U.S.C. § 2000e-2(a). That question—which characterizes an organization rather than evaluating conduct—prompted three different answers, although two of the judges agreed as to the result and as to most of the core principles underlying the analysis. In the portion of the opinion on which two judges agreed, the panel looked closely at this Court's admonition in *Amos*, in which the Court warned that it would be burdensome to ask organizations to "predict which of its activities a secular court will consider religious." 483 U.S. at 336.

In *Amos*, of course, the question was whether a building engineer at a gymnasium was performing a religious or a secular activity. In his concurrence, Justice Brennan was even more cautious than the majority, expressing doubt that a court was even competent to answer such a question. As the *Spencer* panel recognized in the case before it, the work that World Vision did was "relief, development, advocacy and public awareness" and not what the court called "hardnosed proselytizing"—good deeds accompanied by "preaching" only when someone initiated the conversation with a World Vision employee. 633 F.3d at 737-38. As the concurrence recognized, "[h]umanitarian work may be a secular

or a religious activity, depending on motivation and meaning among those who perform it." *Id.* at 745 (Kleinfeld, J., concurring). This is certainly because there is no "sharp distinction" between religious belief and religiously motivated action. *Paty*, 435 U.S. at 631 n.2 (Brennan, J., concurring). The Iowa Supreme Court recognized that corporate action is religious when it is "in pursuance of and in conformity with an essential article of religious faith." *Iowa v. Amana Soc'y*, 109 N.W. 894, 899 (Iowa 1906).

As a result, secular and religious activity may be one and the same. *See Bd. of Educ. v. Allen*, 392 U.S. 236, 245 (1968) (recognizing that a State's interest in education is served by a religious school because of the "secular teaching that accompanied religious training in the schools maintained by the Society of Sisters"); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 12 n.2 (1989) (distinguishing earlier precedent that analyzed *secular* benefits provided by *religious* organizations). This is the same reason this Court found that an individual's religious vocation was not compromised by the fact that he held a secular commercial job as well. *Dickinson v. United States*, 346 U.S. 389, 395-96 (1953). The fact that secular and religious may not be readily categorized by an outside observer—and, indeed, may not only be indistinguishable but even indistinct—has prompted the Court to conclude: "the inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's *or institution's* religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (emphasis

added). Indeed, the very question whether an entity is *pervasively* religious necessarily presupposes that the entity is in some part religious—a part that is exercising religion as it is acting in accordance with that religious nature.

This is not to say that a court ought never to inquire whether a corporation is exercising religion. Courts looking to the Court of Appeals for the Ninth Circuit have focused on close corporations and the views of their owners. As both the Government and the Court of Appeals recognized, ownership is not a proper measure of a corporation's beliefs. *Conestoga*, 724 F.3d at 388; Gov't Br. at 23-26 (No. 13-354). Nonetheless, the conclusion that there is no measure of corporate belief—or, worse, that corporations have no beliefs—is inconsistent both with this Court's precedents and with State corporate law, which provides a straightforward test to determine the beliefs and motivation of a corporation: it is the *Board* that is entrusted with the exercise of the powers of the corporation. *E.g.*, 15 Pa. Cons. Stat. § 1715. The proper inquiry is thus what the Board of Directors has articulated. In *Conestoga*, for example, the Board of Directors had adopted the following, on behalf of the corporation:

> The Hahn Family believes that human life begins at conception (at the point where an egg and sperm unite) and that it is a sacred gift from God and only God has the right to terminate human life. Therefore, it is against our moral conviction to be involved in the termination of human life through abortion, suicide, euthanasia, murder, or any other acts that involve the taking of human life.

724 F.3d at 382 n.5 (citation omitted). The Court of Appeals recognized that the religious values of the *owners* were sincerely held, but it ignored the fact that the religious values of the *Board* were as well. The Court's discrediting of Conestoga's exercise of its religious beliefs is based on a fundamentally flawed view of corporate law.

IV. There are Multiple Corporate Forms That Engage in Religious Conduct.

Asking whether an organization is sufficiently religious for the purpose at hand cannot answer the question whether a particular action or choice made by a corporation is religiously motivated. Short-circuiting the proper question, the Court of Appeals for the Third Circuit imposed a requirement (presumably derived from Justice Brennan's concurrence in *Amos*, in which he advocated a *carte blanche* characterization of non-profit as religious) that a company be not only religious but also registered with the Internal Revenue Service as a non-profit. 724 F.3d at 385 ("We do not see how a for-profit 'artificial being, invisible, intangible, and existing only in contemplation of law,' that was created to make money could exercise such an inherently 'human' right." (citations omitted)).

The label "for-profit" does not preclude anyone or any entity from acting in accordance with an underlying religious motivation or in pursuit of a religious aim. Neither does being a non-profit guarantee conduct that is religiously motivated. In its brief, the Government contends that for-profit corporations "enter the commercial world" and "submit themselves to legislation." Gov't Br. at 19 (No. 13-354). That is no less true of non-profits, and

this Court has refused to draw such a simplistic distinction:

> Our cases have frequently applied laws regulating commerce to not-for-profit institutions. In *Associated Press v. NLRB*, 301 U.S. 103, 81 L. Ed. 953, 57 S. Ct. 650 (1937), for example, we held the National Labor Relations Act as applied to the Associated Press' newsgathering activities to be an enactment entirely within Congress' Commerce Clause power, despite the fact that the A. P. does not sell news and does not operate for a profit. Noting that the A. P.'s activities involved the constant use of channels of interstate and foreign communication, we concluded that its operations amounted to commercial intercourse, and such intercourse is commerce within the meaning of the Constitution.
>
> We have similarly held that federal antitrust laws are applicable to the anticompetitive activities of nonprofit organizations. The nonprofit character of an enterprise does not place it beyond the purview of federal laws regulating commerce.
>
> We have already held that the dormant Commerce Clause is applicable to activities undertaken without the intention of earning a profit.

Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520 U.S. 564, 583-84 (1997) (quotations and citations omitted); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 294-95

(1985) (affirming the district court's conclusion that "[b]y entering the economic arena and trafficking in the marketplace, the foundation has subjected itself to the standards Congress has prescribed for the benefit of employees. The requirements of the Fair Labor Standards Act apply to its laborers."); *Am. Med. Ass'n v. United States*, 317 U.S. 519, 528 (1943) (recognizing that "the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health").

The Court of Appeals for the Third Circuit and the Government prefer instead to invoke the label "non-profit" as a proxy for "religious" as a means of determining which entities can "exercise" religion. But there are only two possible reasons for adopting that proxy. The first—and one that admittedly has historical antecedents—is an assumption that acts of unselfishness have to be divinely inspired because, left to their own devices, humans are selfish. Indeed, Pennsylvania itself has a long tradition of recognizing that charity is by its nature a religious expression. *See, e.g.*, *Miller v. Porter*, 53 Pa. 292, 298-99 (1867) ("'Whatever . . . is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private or selfish,' is a gift for charitable uses. 'The love of God is the basis of all that is bestowed for His honor, the building up of His Church, the support of His ministers, the religious instruction of mankind. The love of his neighbor is the principle that prompts and consecrates all the rest. The current of these two

great affections finally run together, and they are at all times so near that they can hardly be said to be separated.'" (citation omitted)).

The second possible reason appears to arise from Justice Brennan's rationale in *Amos*, 483 U.S. at 343-44, that a way to overcome the fact that "the character of an activity is not self-evident" is to ask instead whether the activity is profitable:

> The risk of chilling religious organizations is most likely to arise with respect to nonprofit activities. The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation. In contrast to a for-profit corporation, a nonprofit organization must utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus to the owners. This makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose. Furthermore, unlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce. Churches often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster.

Id. at 344 (citation omitted).

But the mere fact that a non-profit can, for example, violate antitrust laws, is evidence that whether an entity earns "profits" does not fully measure the moral character of its conduct. This Court has also recognized the converse; that a religiously motivated institution may maintain its religious beliefs and conduct—but forfeit non-profit status. *Bob Jones Univ.*, 461 U.S. at 603-04. Indeed, in that case, the Court provided an assurance that what the Court of Appeals has done here would not happen: "Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, *but will not prevent those schools from observing their religious tenets*." *Id.* (emphasis added).

More to the point, there is nothing irreligious about a Board that pursues both profits and religiously (or otherwise) motivated social good. Pursuing profit is not inconsistent with religion. Indeed, there is a long historical precedent for recognizing that profits can be a tool of religious decisionmaking. At the time of our nation's founding, John Wesley preached on money, saying:

> You see the nature and extent of truly Christian prudence so far as it relates to the use of that great talent, money. Gain all you can, without hurting either yourself or your neighbour, in soul or body, by applying hereto with unintermitted diligence, and with all the understanding which God has given you;—save all you can, by cutting off every expense which serves only to indulge foolish desire; to gratify either the desire of flesh, the desire of the eye, or the pride of life; waste nothing, living or dying, on sin or folly, whether for

> yourself or your children;—and then, give all you can, or, in other words, give all you have to God.

John Wesley, Sermon 50.

John Calvin likewise did not condemn the making of money, but only the making of money that was unjust:

> I think that their declarations ought to be judged of by the rule of charity [*normam caritatis*]; and therefore that only those unjust exactions are condemned whereby the creditor, losing sight of equity [*aequitate*], burdens and oppresses his debtor . . . . Hence it follows, that usury is not now unlawful, except in so far as it contravenes equity [*aequitate*] and brotherly union.

Guenther H. Haas, *Concept of Equity in Calvin's Ethics* 120 (Wilfrid Laurier Univ. Press 1997) (citation omitted).

John D. Rockefeller famously taught his Sunday School class: "The growth of a large business is merely the survival of the fittest . . . . The American Beauty rose can be produced in the splendor and fragrance which bring cheer to its beholder only by sacrificing the early buds which grow up around it. This is not an evil tendency in business. It is merely the working-out of a law of nature and a law of God." John Kenneth Galbraith, *Affluent Society* 51 Mariner Books 1998) (quotations and citations omitted).

Now, of course, there were those—including the Department of Justice—who questioned the *content*

and fundamentally uncharitable and anticompetitive nature of Rockefeller's Standard Oil Trusts, but if the test of free exercise is action in accordance with sincerely held religious convictions – and this Court has said that it is—the corporate actions were carrying Rockefeller's theology into practice. *See United States v. Ballard*, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.").

Interestingly, part of Rockefeller's legacy broke ground in a different way a half century later, when Frank W. Abrams, the chairman of the Board of what was then Standard Oil Company of New Jersey (later to become Exxon), succeeded in convincing the New Jersey Supreme Court that a for-profit corporation can make charitable donations even in a state that—like the Court of Appeals improperly surmised here—prized shareholder value over all. He explained:

> [C]orporations are expected to acknowledge their public responsibilities in support of the essential elements of our free enterprise system. He indicated that it was not "good business" to disappoint "this reasonable and justified public expectation," nor was it good business for corporations "to take substantial benefits from their membership in the economic community while avoiding the normally accepted obligations of citizenship in the social community."

A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 583 (N.J. 1953) (citation omitted).

Others—including other Pennsylvania Mennonites—combined for-profit companies with trusts or foundations dedicated to enhancing their communities. Milton Hershey, for example, established his chocolate company and then, in 1918 a trust, funding the trust with stock from the chocolate company. *In re Milton Hershey Sch. Trust (Appeal of Milton Hershey Sch.),* 807 A.2d 324 (Pa. Commw. Ct. 2002). He is reported to have said: "If the wrong people or organization get control, they can spend or give away more money in a short time than I have made in my life, to build monuments unto themselves, for their own financial gains, ego and recognition—whose heads would swell and hearts would shrink, who would give to those who had plenty and take away from those who had little or none." Herman H. Hostetter, *The Body, Mind and Soul of Milton Snavely Hershey* ## (1971). And at Gettysburg College there is a tribute to the longstanding philanthropy of the Musselman Foundation—funded from the sales of applesauce and other foods by another Pennsylvania business started by a Mennonite family, this one in 1907.

Today, in most states, the profits would not need to be invested in a trust to carry out those deeds. Thirty-two of the fifty States statutorily empower (or obligate) corporations to make decisions that honor the interests of various stakeholders, such as communities, employees, or others, in some instances even *demoting* shareholders' interests. *See* Ariz. Rev. Stat. § 10-830; Cal. Corp. Code § 2700; Conn. Gen. Stat. § 33-756(d); Fla. Stat. § 607.0830(3) (2013); Ga. Code Ann. § 14-2-202(5); Haw. Rev. Stat. §§ 414-221(b), (e); Idaho Code Ann. §§ 30-1602, 30-1702; 805 Ill. Comp. Stat. 5/8.85; Ind. Code Ann. §§

23-1-35-1(d)-(g); Iowa Code § 491.101B; Ky. Rev. Stat. Ann. § 271B.12-210(4); La. Rev. Stat. Ann. § 12:92(G); 13-C Me. Rev. Stat. § 831(6); Md. Corps. & Assoc. § 2-104(b)(9); Mass. Gen. Laws ch. 156D, § 8.30(a)(3); Minn. Stat. § 302A.251 subd. 5; Miss. Code Ann. § 79-4-8.30(f); Mo. Rev. Stat. § 351.347; Nev. Rev. Stat. § 78.138(4); N.J. Stat. Ann. § 14A:6-1(2); N.M. Stat. § 53-11-35(D); N.Y. Bus. Corps. Stat. § 717; N.D. Cent. Code § 10-19.1-50(6); Ohio Rev. Code Ann. § 1701.59(E); Or. Rev. Stat. § 60.357(5); 15 Pa. Cons. Stat. § 1715(a)-(b); 15 Pa. Cons. Stat. § 516(a); R.I. Gen. Laws § 7-5.2-8(a); S.D. Codified Laws § 47-33-4(1); Tenn. Code Ann. 48-103-202; Vt. Stat. Ann. tit. 11A, § 8.30(a)(3); Wash. Rev. Code § 23B.25.050; Wis. Stat. § 180.0827; Wyo. Stat. § 17-16-830(g).

Pennsylvania was the first to enact such a "constituency statute" in 1983. 15 Pa. Cons. Stat. § 1715(a)(1) (empowering corporations, through their boards and through individual directors, to consider "to the extent they deem appropriate: (1) The effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers, and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located. (2) The short-term and long-term interests of the corporation . . . ."). If a corporation is expected to—and held accountable to—make decisions as to the course of action to take in the short run and the long run and how to enhance the lives of those around them (and which lives), it is making value judgments.

And in recent years, over half of the States—Pennsylvania among them—have gone even further

and have enacted legislation permitting for-profit corporations to subject themselves to added accountability and transparency as an adjunct to an overt commitment to the benefit of either the public in general or a specific sector of the public. Such corporations are denominated benefit corporations or flexible purpose corporations. Examples of companies that have made such a commitment are Patagonia and Plum Organics. The parameters of Pennsylvania's benefit corporation provision are found in 15 Pa. Cons. Stat. § 3302, which defines both "general public benefit" and "specific public benefit" – with the latter including:

> (1) providing low-income or underserved individuals or communities with beneficial products or services;
>
> (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
>
> (3) preserving the environment;
>
> (4) improving human health;
>
> (5) promoting the arts, sciences or advancement of knowledge;
>
> (6) promoting economic development through support of initiatives that increase access to capital for emerging and growing technology enterprises, facilitate the transfer and commercial adoption of new technologies, provide technical and business support to emerging and

> growing technology enterprises or form support partnerships that support those objectives;
>
> (7) increasing the flow of capital to entities with a public benefit purpose; and
>
> (8) the accomplishment of any other particular benefit for society or the environment.

15 Pa. Cons. Stat. § 3302.

Similarly, Texas, in S.B. 849, refused to restrict a director or officer from "considering, approving, or taking an action that promotes or has the effect of promoting a social, charitable, or environmental purpose"—even if the corporation has not specified a social purpose in the corporation's certificate of formation. And Arizona, which already permits all corporations to "[m]ake donations for the public welfare or for charitable, scientific or educational purposes," is considering amending its statute to permit corporations to promote the interests of the employees and the workforce, subsidiaries or suppliers; the corporation's customers, the community or society, local or global environment,

> providing low-income or underserved individuals or communities with beneficial products or services; promoting economic opportunities for individuals or communities beyond the creation of jobs in the normal course of business; protecting or restoring the environment; improving human health; promoting the arts, sciences or advancement of knowledge; increasing the flow of capital to

> entities with a purpose to benefit society or the environment; conferring any other particular benefit on society or the environment.

Corporations: Purposes: Directors and Officers, Ariz. H.R. Rough Draft (Dec. 24, 2013).

It is not an accident that the foregoing lists of factors are largely the same that the Internal Revenue Service considers when deciding whether an organization qualifies for 501(c)(3) status. Support of such causes and entities is to be encouraged. But, as the States have recognized, seeking a status from the Internal Revenue Service is only one way of doing so. Corporations operating pursuant to constituency statutes, or statutes that authorize benefit corporations, flexible purpose corporations, and other such entities, are recognized by the States as making decisions that take into account these pro-public priorities without needing a non-profit platform for doing so.

The rule that the Court of Appeals for the Third Circuit set down has implications for other entities as well, including in particular Limited Liability Companies, which vary by State and contract as to how entity-level decisions are made, but which in many instances vest that decisionmaking authority in a Manager. In fact, one of the cases stayed pending this Court's decision concerns a Limited Liability Company owned and managed by two Franciscan organizations. *See Tonn & Blank Constr., LLC v. Sebelius*, No. 12-325 (N.D. Ind.). In only a few States can a Limited Liability Company also be a non-profit entity, let alone be one for federal tax purposes. How can a court justify a categorical rejection of the beliefs, motivation, and conduct of

such an entity based solely on whether it has sought and received non-profit status from the Internal Revenue Service (which may be largely unavailable solely because of the form the entity elects)?

This Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems. This Court should not diminish that role absent impelling reason to do so." *Oregon v. Ice*, 555 U.S. 160, 170-71 (2009) (citing *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). At a time when the States are experimenting with new forms of corporate governance and accountability, it is critical that the Court use caution and avoid wholesale condemnation of for-profit entities as incapable of exercising religion, lest it stifle the very conduct the Court of Appeals thought it was affirming—and, worse, stifle it in the guise of policing the free exercise of religion.

Justice Brennan was careful to explain in *School District of Abington v. Schempp*, that "the line which separates the secular from the sectarian in American life is elusive." 374 U.S. 203, 231 (1963) (Brennan, J., concurring). He went on to say:

> The constitutional mandate expresses a deliberate and considered judgment that such matters are to be left to the conscience of the citizen, and declares as a basic postulate of the relation between the citizen and his government that the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . .

Id. (quotations omitted).

CONCLUSION

Drawing artificial lines between "secular" and "religious" and between "tax-exempt" and "for-profit" undermines the very purpose of the Free Exercise Clause, which is to embrace the conduct that flows from moral decision-making, without judging the content itself. The Court of Appeals for the Tenth Circuit saw through these false dichotomies, although even that Court ascribed unwarranted significance to whether a corporation was closely held. Accordingly, Rutherford respectfully asks this Court to reverse the decision of the Court of Appeals for the Third Circuit in its entirety, and to affirm the result of the Court of Appeals for the Tenth Circuit, but to make clear that the definition of corporate entities is—as it should be—in the hands of the States and the exercise of religious convictions is in the hands of those who govern those entities in accordance with the States' laws.

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