Nos. 13-354 & 13-356

IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS, *et al.*,
Petitioners,
v.
HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,
v.
KATHLEEN SEBELIUS, *et al.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* ETHICS AND PUBLIC POLICY CENTER IN SUPPORT OF RESPONDENTS IN NO. 13-354 AND PETITIONERS IN NO. 13-356

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INTEREST OF THE *AMICUS CURIAE*[1]

The Ethics and Public Policy Center ("EPPC") is a nonprofit research institution dedicated to defending American ideals and to applying the Judeo-Christian moral tradition to critical issues of public policy. A strong commitment to a robust understanding of religious liberty pervades EPPC's work. For example: EPPC's American Religious Freedom program is devoted to protecting and strengthening the inherent religious freedoms of Americans of all faiths. EPPC's Faith Angle Forum aims to strengthen reporting and commentary on how religious believers, religious convictions, and religiously grounded moral arguments affect American politics and public life. EPPC scholars, such as EPPC Distinguished Senior Fellow George Weigel, write prolifically in defense of religious freedom. EPPC scholars have extensively criticized the HHS mandate for its intrusions on religious liberty.

SUMMARY OF ARGUMENT

The Government's argument that for-profit corporations are not "persons" capable of the "exercise of religion," *see* U.S. Br. in No. 13-354, at 16 ("U.S. Br."), misconstrues both the text of the Religious Freedom

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The Respondents in No. 13-354 have consented to the filing of this brief in an accompanying letter, and the remaining parties in both cases have filed letters with the Clerk of the Court providing blanket consent to the filing of *amicus curiae* briefs.

Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"), and the scope of the Free Exercise Clause.

1. The Government is wrong in contending that the "exercise of religion" under RFRA must be construed as narrowly limited to the scope of the constitutional concept of the "free exercise" of "religion" that was explicitly recognized in this Court's case law prior to *Employment Div. v. Smith*, 494 U.S. 872 (1990).

a. The Government overlooks the fact that Congress—motivated by its disagreement with some courts' use of a narrow reading of the Free Exercise Clause to limit RFRA's coverage—specifically amended RFRA in 2000 to *decouple* its definition of the "exercise of religion" from the strictures of the Free Exercise Clause. *See* Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, § 7, 114 Stat. 803, 806 (2000). Thus, Congress struck the prior language from RFRA that had equated the "exercise of religion" under RFRA with "the exercise of religion under the First Amendment of the Constitution." 42 U.S.C. § 2000bb-2(4) (1994 ed.). Instead, Congress inserted into RFRA a cross-reference to the definition of "religious exercise" under RLUIPA—a broader definition that explicitly covered "*any* exercise of religion" (without any requirement that it be recognized as triggering the Free Exercise Clause), 42 U.S.C. § 2000cc-5(7)(A). Moreover, Congress further directed that this statutory phrase—which applied both to RLUIPA and to RFRA—was to be broadly construed "to the maximum extent permitted by [its] terms" so as to favor "a broad protection of religious exercise." RLUIPA, Pub. L. No. 106-274, § 5(g), 114 Stat. at 806, *partially codified* at 42 U.S.C. § 2000cc-3(g). This intentional decoupling and broadening of

the *statutory* definition was the only way that Congress could achieve its objective of abrogating a line of cases that had used the Free Exercise Clause to construe RFRA too narrowly.

Moreover, the Government is wrong when it claims that "'any reference to for-profit corporations' is '[e]ntirely absent from the legislative history.'" U.S. Br. 21 (citation omitted). On the contrary, the House Report analyzing the predecessor bill to RLUIPA specifically noted that its provisions were "*equally applicable whether a claimant is a natural person or a corporation*." H.R. REP. NO. 106-219, at 13, n.49 (1999) (emphasis added).

b. Where, as here, those who control the corporation have formally announced the corporation's adherence to a particular religious idea and have sought to conform the corporation's conduct to those enunciated beliefs, the corporation's actions in conformity with those religious views constitute the "exercise of religion" under RFRA's broad definition.

2. Even if the Government were correct that RFRA must be construed as protecting only those exercises of religion that are covered by the Free Exercise Clause, a for-profit corporation's exercise of religion is still covered.

a. Nothing in RFRA's definition of the "exercise of religion" suggests that Congress intended that concept to be artificially truncated as embracing only those specific results that had been recognized in this Court's pre-*Smith* case law. In any event, this Court's decision in *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961), supplies a pre-*Smith* basis for recognizing free exercise rights by a for-profit corporation. The Govern-

ment emphasizes that a *plurality* in *Gallagher* reserved the question whether the for-profit corporation could assert a free exercise claim. U.S. Br. 18. But the Government overlooks the fact that the remaining five Justices *did* accept that the corporate plaintiff's free exercise rights were burdened.

b. The "exercise" of "religion" under the Free Exercise Clause (and RFRA) extends to the exercise of religion by a for-profit corporation.

The "free exercise" of religion under the First Amendment extends to "acts or abstentions … engaged in for religious reasons." *Smith*, 494 U.S. at 877. The Government is wrong in arguing that for-profit corporations cannot meet this test because they supposedly cannot have *religious* views. U.S. Br. 25.

The Government's concession that *some* corporations exercise religion within the meaning of the Free Exercise Clause confirms that there is nothing intrinsic to the corporate form that precludes for-profit corporations from exercising religion. But it makes no sense to then say that when a nonprofit corporation and a for-profit corporation engage in the same conduct, only the nonprofit corporation has Free Exercise protection. Moreover, this Court has already recognized, in Free Exercise cases involving individuals, that profit-making activities (*e.g.*, carpentry, farming, and shopkeeping) may involve the exercise of religion if the person performing them undertakes to do so in conformity with a sincerely held religious belief. The Government provides no coherent basis for concluding that profit-making conduct is religious exercise when conducted by an individual but not when conducted by a corporation.

3. Upholding the claims in this case will not

result in widespread corporate immunity from federal laws, because the number of for-profit corporations that will be able to demonstrate a corporate adherence to a religious belief that is sincerely held is limited and because various laws, even as applied to such corporations, will survive RFRA's scrutiny. Here, the corporations before the Court do exercise religion and the obligation in question does not survive scrutiny under RFRA or the Free Exercise Clause. It is the Government's misreading of RFRA and the Free Exercise Clause that would raise disturbing implications.

ARGUMENT

RFRA's protections are triggered if the Government "substantially burden[s] a *person's* exercise of religion." 42 U.S.C. § 2000bb-1(a) (emphasis added). The Dictionary Act, in turn, states that, "unless the context indicates otherwise," the term "person" in any Act of Congress "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Here, the context does *not* indicate that "person" includes only "individuals," because even the Government concedes that some corporations (*viz.*, religious non-profit corporations) have rights under RFRA. And because the text of the Dictionary Act does not draw any distinction between types of corporations, it is clear that "person," for purposes of RFRA, includes all corporations.

The Government does not directly dispute that conclusion, but instead argues that, even if for-profit corporations are "persons," they are not "persons" capable of the "exercise of religion" and therefore lack any rights under RFRA. The Government's argu-

ment essentially proceeds in two steps. First, the Government contends that, because RFRA was intended to reinstate the pre-*Smith* "compelling interest test as set forth in prior Federal court rulings" under the Free Exercise Clause, 42 U.S.C. § 2000bb(a)(5), the operative phrase used in RFRA—"a person's exercise of religion"—must be construed as being limited to the pre-*Smith* understanding of the scope of the "free exercise" of religion under the First Amendment. U.S. Br. 22. Second, the Government asserts that, because this Court's pre-*Smith* case law supposedly shows that free exercise rights were "reserved to individuals and religious non-profit institutions," for-profit corporations therefore lack such rights under RFRA. U.S. Br. 18-19. The Government's argument misconstrues both the text of RFRA and the scope of the Free Exercise Clause.

I. By Amending RFRA to Decouple Its Definition of the "Exercise of Religion" From the Free Exercise Clause, and Instead Directing That the Phrase Should be Given the "Maximum" Breadth Permitted by Its Terms, Congress Confirmed That For-Profit Corporations Are Covered

The Government's first assumption—that RFRA extends *only* to those exercises of religion that would qualify as the "free exercise" of religion under the Free Exercise Clause—was correct under the original version of RFRA, but is no longer true. To be sure, the corporate Plaintiffs' actions here qualify as the "exercise of religion" even under the standard of the Free Exercise Clause, as explained below. *See infra* at 25-28. But the Court need not reach the question whether the Free Exercise Clause protects a for-profit corporation's exercise of religion, because RFRA's

language goes beyond the constitutional standard and clearly covers this case.

A. The Government's Arguments Overlook Congress's Explicit Amendment to RFRA's Definition of the "Exercise of Religion"

As originally enacted, RFRA explicitly defined the scope of the "exercise of religion" protected by RFRA as being co-extensive with the identical concept under the Free Exercise Clause. Specifically, Section 5 of RFRA provided that "the term 'exercise of religion' means the exercise of religion under the First Amendment to the Constitution." Pub. L. No. 103-141, § 5(4), 107 Stat. 1488, 1489 (1993), *codified at* 42 U.S.C. § 2000bb-2(4) (1994 ed.).

However, in enacting RLUIPA, Congress amended the definition of "exercise of religion" in RFRA to match the broader formulation used in RLUIPA. Thus, Congress struck the phrase "the exercise of religion under the First Amendment of the Constitution" from RFRA's definition of "exercise of religion" and instead inserted the phrase "religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. § 2000cc-5]." RLUIPA, § 7(a)(3), 114 Stat. at 806; *see* 42 U.S.C. § 2000bb-2(4) (2006 ed.) (current Section 5 of RFRA). The definition of "religious exercise" in Section 8 of RLUIPA—which thus also defines the meaning of "exercise of religion" in RFRA—likewise lacks any language restricting that concept to the constitutional scope of the "free exercise" of religion under the Free Exercise Clause. Instead, RLUIPA defines religious exercise to "include[] *any* exercise of religion," without regard to whether it is, strictly

speaking, within the scope of the constitutional meaning of "free exercise" under the First Amendment. 42 U.S.C. § 2000cc-5(7)(A) (emphasis added).

The decoupling of RFRA's statutory definition from the constitutional understanding was no accident, as is confirmed by two additional aspects of RLUIPA's broader definition. RLUIPA's definition of "religious exercise" specifically provides that (1) it includes any exercise of religion regardless of "whether or not [it is] compelled by, or central to, a system of religious belief"; and (2) it specifically defines the "use, building, or conversion of real property for the purpose of religious exercise" as an exercise of religion. *Id*., § 2000cc-5(7)(A), (B). The unmistakable import of this language is that Congress intended RFRA to employ these two rules without regard to whether they correspond to the constitutional lines that would apply under the Free Exercise Clause.

In particular, by enacting the first of these rules, Congress statutorily abrogated cases that had (wrongly) held that, because the Free Exercise Clause supposedly requires a showing of interference with a belief that is "central" to and "mandated" by religious belief, such requirements also apply to limit RFRA. *See*, *e.g.*, *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995). Other cases had (correctly) rejected that reading of the Free Exercise Clause and of RFRA. *See*, *e.g.*, *Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997). Congress lacks the authority to decide which of these readings of the Free Exercise Clause was correct, *see City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (Congress lacks the power to "alter[] the meaning of the Free Exercise Clause"), but it certainly had the authority to do what it did in

RLUIPA—namely, to amend RFRA to specifically *decouple* RFRA's definition from the Free Exercise Clause and then to mandate which rule it wanted to apply as a statutory matter. *See* H.R. REP. NO. 106-219, at 30 (1999) (discussing H.R. 1691, a predecessor bill to RLUIPA) (amended definition of "religious exercise" was intended to "clarify[] issues that had generated litigation under RFRA").[2]

Moreover, Congress included in RLUIPA a rule of construction that specifically requires that "[t]his Act shall be construed in favor of a broad protection of *religious exercise*, to the maximum extent permitted by the terms of this Act and the Constitution." Pub. L. No. 106-274, § 5(g), 114 Stat. at 806 (emphasis added). RLUIPA's definition of that term must therefore be broadly construed, and that broad construction would likewise apply to RFRA, which incorporates RLUIPA's definition by cross-reference. *See* 42 U.S.C. § 2000bb-2(4). Moreover, the provision of law that amended RFRA to include a cross-reference to RLUIPA's broad definition of "religious exercise"—Section 7(a)(3) of RLUIPA—is *itself* part of "[t]his Act," Pub. L. No. 106-274, § 5(g), 114 Stat. at 806, thereby further confirming that RLUIPA's rule of

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[2] After the predecessor bill (which applied to a wide range of state and local laws beyond those concerning land use and institutionalized persons) failed to pass the Senate, a new bill containing the final version of RLUIPA (which was changed to be largely limited to those two topics) was introduced, brought immediately to the floor of each house, and passed with almost no debate. *See Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827 (S.D. Ohio 2002). The final definition of "religious exercise" in RLUIPA (and, by amendment, in RFRA) largely tracked that of the predecessor bill, whose legislative history thus remains pertinent on that point. *See*, *e.g.*, *Begier v. I.R.S.*, 496 U.S. 53, 59 n.3 (1990) (consulting legislative history of predecessor bill).

broad construction applies to RFRA's definition of "exercise of religion."[3]

Given that (1) Congress specifically struck from RFRA the prior reference to the constitutional understanding of the "exercise" of "religion"; (2) Congress instead adopted a purposely sweeping statutory definition; and (3) Congress further provided that this sweeping definition must be construed "in favor of a broad protection of religious exercise, *to the maximum extent permitted by the terms of this Act* and the Constitution,"[4] Pub. L. No. 106-274, § 5(g), 114 Stat. at 806, the text of RFRA refutes the Government's core presumption that a "person's exercise of religion" under RFRA must be construed as being limited only to those situations in which the Free Exercise Clause would protect the particular activities in question by the particular persons before the court. And, for the

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[3] In classifying RLUIPA to the unenacted Title 42 of the U.S. Code, the codifier replaced "[t]his Act" with "[t]his chapter," a wording that could be misread to suggest that RLUIPA's broad rule of construction applies only to "Chapter 21C" (where most of RLUIPA is classified) and not to "Chapter 21B" (where RFRA is classified). The codifier, however, flagged this issue, pointing out in a note that parts of RLUIPA were classified elsewhere and that this provision would therefore apply to them as well. *See* 42 U.S.C. § 2000cc-3, *note*. In any event, the text of the public law controls. *See* 1 U.S.C. §§ 112, 204.

[4] The reference to constitutional limitations obviously refers to the limitations imposed by *Boerne*, because parts of RLUIPA apply to state and local governments. *See*, *e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709 (2005). With respect to burdens imposed by *federal* law, Congress in RFRA had the authority to require accommodation of religion to a degree beyond what the Free Exercise Clause would require, *see*, *e.g.*, *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 424 & n.1 (2006), and RFRA's broader accommodation does not violate the Establishment Clause, *id*. at 436 (citing *Cutter*).

same reasons, there is no textual justification whatsoever for narrowly construing RFRA as limited only to those exercises of religion that were expressly recognized in this Court's pre-*Smith* case law. *See also infra* at 15.

B. The Corporate Plaintiffs Here Are Clearly Protected by RFRA's Amended Language

RFRA's sweeping definition of "exercise of religion" amply covers the actions at issue here. Because RFRA's definition of the "exercise of religion" must be broadly construed "to the maximum extent permitted" by the statutory language, so as to give "a broad protection of religious exercise," 42 U.S.C. § 2000cc-3(g), RFRA extends to any action or inaction by a person that "bring[s] into play" or "realize[s] in action" that person's religious beliefs. *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 795 (1966) (defining the "exercise of" something). Of course, to count as a *religious* belief, and not simply an opportunistic preference about how to act, the view must be both a religious one (as opposed to a philosophical one) and it must be sincerely held. *See id*. at 1918 (defining "religion" as, *inter alia*, "conduct in accord with divine commands"; "a way of life recognized as incumbent on true believers"; and "the profession or practice of religious beliefs"). Where, as here, those with authority under state law to control the corporation's actions and to set its overall policy have taken formal steps to announce the corporation's adherence to a particular religious idea and to conform the corporation's conduct to those enunciated beliefs (thus confirming the sincerity of those beliefs), the corporation's actions in conformity with those religious views constitute the "exercise of religion." *See infra* at 29-31 (explaining

the various prerequisites that must be satisfied before a corporation may be said to exercise religion). Indeed, as explained below, the corporate Plaintiffs' actions here would qualify as the "exercise" of "religion" even under the Free Exercise Clause's standards, and they therefore necessarily satisfy RFRA's *broader* definition. *See infra* at 25-28.

What is more, the legislative history of RLUIPA confirms the intended breadth of Congress's rewriting of RFRA's definition of "exercise of religion," and it also confirms RFRA's applicability to for-profit corporations. In its Report discussing the predecessor bill to RLUIPA (H.R. 1691), *see* note 2 *supra*, the House Judiciary Committee noted that the bill broadened RFRA by clarifying that the "burdened religious activity need not be compulsory or central to a religious belief system as a condition" for a claim under either Act. *See* H.R. REP. NO. 106-219, at 13. The Committee then made the following observation in a footnote attached to that comment:

> One issue raised during the Subcommittee Markup was *whether a business corporation could make a claim* under H.R. 1691. The requirement of H.R. 1691 that the claimant demonstrate a substantial burden on religious exercise *is equally applicable whether a claimant is a natural person or a corporation*. Most corporations are not engaged in the exercise of religion, but religious believers, such as people in the Kosher slaughter business, should not be precluded from bringing a claim under H.R. 1691 simply because they incorporated their activities pursuant to existing law.

Id. at 13 n.49 (emphasis added).[5] The Government is thus simply wrong when it says that "'nowhere' in RFRA's legislative history 'is there any suggestion that Congress foresaw, let alone intended that, RFRA would cover for-profit corporations.'" U.S. Br. 21 (citation omitted). The legislative history shows that, in amending RFRA's definition of "exercise of religion," Congress foresaw and intended what the text plainly indicates—that RFRA applies to an exercise of religion by a for-profit corporation.

II. Even If RFRA's Definition of the "Exercise of Religion" Is Co-Extensive With the First Amendment, It Still Covers a For-Profit Corporation's Exercise of Religion

Even if the Government were correct that RFRA

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[5] This issue was raised again when H.R. 1691 was considered on the House floor. That bill had sought, *inter alia*, to create a new post-*Boerne* remedy against a wide array of state and local laws. H.R. REP. NO. 106-219, at 9-12. A floor amendment was offered to provide that, in certain civil rights cases, the *new* remedy created by the bill—but *not* RFRA's existing remedies—would have applied only to very small employers and to any "religious corporation, association, educational institution …, or society." 145 CONG. REC. H5597 (July 15, 1999). Supporters of the amendment argued that it was necessary to prevent corporations such as "General Motors" from using the bill to defeat the application of state and local civil rights laws. *Id*. at H5598. Notably, however, even the amendment's sponsor conceded that, *except* for the amendment's specific carve-outs, "[a]ny person would have standing" to assert a claim, so that "*businesses of any size could bring any free exercise claims*." *Id*. (emphasis added). The amendment was defeated in the House, *id*. at H5607, but the House bill then failed in the Senate. Subsequently, in 2000, the prior bill's new remedy was narrowed in RLUIPA to generally apply only to state and local laws concerning land use and institutionalized persons, but thus-narrowed, RLUIPA contains *no* carve-out of corporations and imposes none on RFRA.

must be construed as protecting only those exercises of religion that are covered by the Free Exercise Clause, the result would be the same—a for-profit corporation's exercise of religion is covered.

A. The Government Wrongly Limits the Constitutional Inquiry to Pre-*Smith* Case Law, But Fails Even Under That Test

As an initial matter, the Government wrongly contends that the only way that RFRA can be construed to embrace a for-profit corporation's exercise of religion is to identify a pre-*Smith* decision of this Court affirmatively upholding that. U.S. Br. 16-18. The extraordinary implication of the Government's constricted focus is that, even if the Court were to conclude *today* that the Free Exercise Clause applies to for-profit corporations, RFRA would still not apply because the Government claims that the Court had not said that before *Smith*. In effect, the Government seeks to engraft onto RFRA a temporal limitation that is reminiscent of that imposed on habeas corpus relief by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which in many cases restricts a habeas petitioner to relying only on "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also Williams v. Taylor*, 529 U.S. 362, 412 (2000) (AEDPA limits reliance to "the holdings, as opposed to the dicta, of *this* Court's decisions *as of the time* of the relevant state-court decision") (emphasis added). But in contrast to AEDPA, nothing in the text of RFRA suggests that Congress sought to limit RFRA in such a way.

Both as originally enacted and as broadened by

RLUIPA's amendments, RFRA *at least* extends to any exercise of religion within the meaning of the Free Exercise Clause. As noted above, the original version of RFRA made its definition co-extensive with the "exercise" of "religion" under the Free Exercise Clause. *See* 42 U.S.C. § 2000bb-2(4) (1994 ed.); *see also supra* at 7. Under the amended and broader version of RFRA's definition, the Act extends to "*any* exercise of religion"—a phrase that at the very least sweeps in *anything* that would qualify as the exercise of religion under the Free Exercise Clause. 42 U.S.C. § 2000cc-5(7)(A) (emphasis added); *see also* 42 U.S.C. §§ 2000bb-2(4) (2006 ed.).

Accordingly, nothing in either version remotely suggests that Congress intended that concept to be artificially truncated as embracing only those specific results that had been recognized in this Court's pre-1990 case law. On the contrary, both versions lack any temporal language whatsoever. And by directing that the "exercise of religion" is to be given the broadest reading that the terms will bear, *see* Pub. L. No. 106-274, § 5(g), 114 Stat. at 806, Congress adopted an interpretive rule that is inconsistent with the Government's constricted approach.

The Government claims that RFRA's declaration of purpose supports the Government's narrow temporal approach, noting that Congress expressly sought "'to restore the compelling interest test'" applied in this Court's pre-*Smith* decisions. U.S. Br. 15-16 (quoting 42 U.S.C. § 2000bb(b)(1)). This argument fails. Even as to its restoration of the compelling-interest test, Congress did not seek to confine RFRA to only those results that had been recognized in this Court's pre-1990 decisions. Rather, Congress enacted general statutory language embodying the compelling-

interest test and left the future elaboration and application of that language to case-by-case analysis. 42 U.S.C. § 2000bb-1(b); *see also* S. REP. NO. 103-111, at 9 (1993) (RFRA "is not a codification of the result reached in any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions"). But even if (contrary to the reality) Congress had intended to freeze the explication of the compelling-interest test to that reflected in pre-1990 decisions, that would not establish that Congress similarly sought to constrain *all other* elements of a RFRA claim, such as what counts as an "exercise of religion."

Accordingly, to the extent that the "exercise of religion" is construed as co-extensive with the constitutional understanding of the "free exercise" of religion, the question is simply whether the Free Exercise Clause does in fact protect a corporation's exercise of religion, *regardless* of whether the Court had occasion to decide that specific issue prior to 1990. As explained below, the answer to that question is "yes." *See infra* at 20-29.

In any event, even if it were necessary to identify a basis in this Court's pre-1990 case law for concluding that a for-profit corporation can engage in the exercise of religion, this Court's decision in *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961), supplies that basis.

In *Gallagher* and three companion cases, a variety of plaintiffs asserted free exercise challenges to so-called "Blue laws" requiring most shops to be closed on Sundays. Specifically, in *Gallagher*, a for-profit kosher supermarket, several of its customers, and a local rabbi contended that, because their religious obligations required the market to be closed from

sundown Friday until sundown Saturday, Massachusetts' Blue laws requiring the market to also be closed on Sunday imposed an "extreme economic disadvantage" on the market on account of religion. 366 U.S. at 630. On appeal in this Court, Massachusetts argued, *inter alia*, that a "soulless corporation," which cannot "be baptized," lacks any "religious commitment in its artificial person which permits it to assert religious freedom as if it were one of the schoolchildren in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)." *See* Appellants' Br. 29, 31, *Gallagher* (No. 11). The plaintiffs responded, *inter alia*, that this Court had already recognized that corporations may directly challenge state statutes under the Fourteenth Amendment's due process clause "because of violations of freedoms of the First Amendment," and that there was no basis for treating the Free Exercise Clause differently. *See* Appellees' Br. 17, *Gallagher* (No. 11).

The Government emphasizes that a *plurality* of the Court in *Gallagher* expressly reserved the question whether the for-profit corporation could assert a free exercise claim. U.S. Br. 18. Instead, as the Government notes, the plurality summarily concluded that the result was controlled by the Court's rejection of an identical claim on the merits in the companion case of *Braunfeld v. Brown*, 366 U.S. 599 (1961), in which the plaintiffs were individual shopkeepers. *Gallagher*, 366 U.S. at 631. But the Government overlooks the fact that the remaining five Justices *did* accept that the corporate plaintiff's free exercise rights were burdened, although they differed as to whether that claim was meritorious.

The three dissenting Justices in *Gallagher* obviously agreed that the plaintiff for-profit corporation

could assert what they concluded was a meritorious free exercise claim. 366 U.S. at 642 (Brennan, J., joined by Stewart, J., dissenting) (concluding that the statute, "*as applied to the appellees in this case*, prohibits the free exercise of religion") (emphasis added); *see also McGowan v. Maryland*, 366 U.S. 420, 578-79 (1961) (Douglas, J., dissenting as to four related cases, including *Gallagher*) (concluding that the burdens imposed by the Blue laws constituted "state interference with the 'free exercise' of religion" and that he therefore "dissent[ed] from applying criminal sanctions against *any* of these complainants") (emphasis added).

In an 85-page separate opinion that exhaustively examined the claims presented in the four related cases (including *Gallagher*), Justice Frankfurter, joined by Justice Harlan, did not follow the *Gallagher* plurality in relying on *Braunfeld* as the sole vehicle for analyzing the merits of the free exercise claims presented. Instead, Justice Frankfurter analyzed the claims of both "the *Gallagher* appellees and *Braunfeld* appellants," without in any way suggesting that he was following the plurality's approach of *omitting* from his analysis the closely held for-profit corporation that was the *only* retailer plaintiff in *Gallagher*. *McGowan*, 366 U.S. at 514 (op. of Frankfurter, J.).

In examining those claims on the merits, Justice Frankfurter concluded that any burden that the Blue laws placed on the "*customers* of the Crown Kosher Super Market in the *Gallagher* case" consisted of only a minor "inconvenienc[e] in their shopping" and was "not considerable." *Id*. at 521 (emphasis added). By contrast, the "burden on retail sellers"—which would include *both* the closely held corporate plaintiff in *Gallagher* and the individual merchants in *Braun-*

feld—"is considerably greater." *Id*. Nonetheless, Justice Frankfurter concluded that the free exercise challenge failed on the merits. *Id*. at 521-22. He acknowledged that, to offset the competitive disadvantage resulting from being closed two days a week (*i.e.*, both Saturday and Sunday), there would be a need for greater industry and initiative by the various individuals who ran the small shops in *Gallagher* and *Braunfeld*. *Id*. But he concluded that this "disadvantage," and the law's "imposition on the Sabbatarian's religious freedom" was outweighed by the countervailing "community interests which must be weighed in the balance." *Id*.

Justice Frankfurter's treatment of the corporate retailer in *Gallagher* stands in sharp contrast to his agreement that a *different* corporate plaintiff in another companion case *did* lack standing to assert a free exercise claim. *Id*. at 468 n.6. In *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961), the Court held that the particular corporate plaintiff in that case lacked standing to raise a free exercise challenge. The Court reached that conclusion, not because the plaintiff was a corporation, but rather "[f]or the same reasons stated in *McGowan v. Maryland*" with respect to the *individual* plaintiffs in the latter case. *Id*. at 592. In the cited discussion in *McGowan*, the Court held that the plaintiffs could not raise a Free Exercise Clause claim because "the record is silent as to what appellants' religious beliefs are" and therefore they failed to "allege any infringement of their own religious freedom due to Sunday closing." 366 U.S. at 429. Justice Frankfurter agreed with this conclusion, and in doing so contrasted the corporate plaintiff in *McGinley* with the corporate plaintiff in *Gallagher*:

> As appellant retailers and retail employees in the *McGowan* and *McGinley* cases have urged neither here nor below any question of infringement of their own rights of conscience, I agree with THE CHIEF JUSTICE that they have no standing to raise the 'free exercise' issue. … Unlike appellants in *Braunfeld* and appellees in *Gallagher*, they have not urged that their remaining shut on *any* day of the week for *any* reason causes Sunday closing to disadvantage them peculiarly. They assert a right to operate seven days a week—a right in which they claim an economic, not a conscientious interest.

366 U.S. at 468 n.6 (op. of Frankfurter, J.).

A majority of the Justices in *Gallagher* thus concluded that the corporate plaintiff in that case *had* asserted a cognizable burden on free exercise rights, but differed as to the merits of that claim. Accordingly, the Government's construction of RFRA must still be rejected even if the Government were correct in insisting that there must be a pre-*Smith* decision from this Court recognizing that a corporate plaintiff may assert a free exercise claim.

B. The Protections of the Free Exercise Clause Extend to a For-Profit Corporation's Exercise of Religion

In addressing the question of whether corporations may exercise religion within the meaning of the Free Exercise Clause, the proper analysis, and the one indicated by the text of the clause, is the same one that the Court took in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), with respect to the Free Speech Clause. Like the Free Speech Clause, the Free Exercise Clause protects an *activity* without

specifying or limiting *whose* activity is protected. *See* U.S. CONST. amend. I ("Congress shall make no law … prohibiting the free exercise [of religion]; or abridging the freedom of speech, or of the press…."). Accordingly, the appropriate inquiry is (1) to identify the *behavior* that is embraced within the scope of the clause's language, (2) to determine whether corporations are capable of performing that behavior, and (3) to examine whether there is any reason why the performance of that behavior by a corporation should remove those instances of such behavior from the scope of the clause. *See Bellotti*, 435 U.S. at 784 (rejecting the view that, under the Free Speech Clause, "speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation"); *see also Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 342 (2010) (same). That analysis confirms that the Free Exercise Clause protects the exercise of religion by a for-profit corporation.

1. The Free Exercise Clause Protects Action or Inaction Motivated by Religious Belief

The "free exercise of religion" includes the expression of adherence to religious doctrine, *Smith*, 494 U.S. at 877, but that aspect of free exercise is also (and perhaps more amply) protected by the Free Speech Clause, which fully protects the expression of a wide variety of ideas, including religious ones. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (both "'the Free Speech and Free Exercise Clauses protect'" any "'private speech endorsing religion'") (citation omitted). The distinctive aspect of the Free Exercise Clause, and the aspect at issue here, is the protection it extends to the "*exer-*

cise" of religious beliefs in one's *conduct*. *See* U.S. CONST. amend. I (emphasis added).

This Court has repeatedly recognized that, in addition to protecting adherence to religious ideas and doctrines, the exercise of religion also includes "acts or abstentions" that "are engaged in for religious reasons." *Smith*, 494 U.S. at 877; *see also Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981) (Free Exercise Clause's protection extends to abstention from "conduct proscribed by a religious faith" and to "conduct mandated by religious belief"); *Braunfeld*, 366 U.S. at 603 (plurality) ("action … in accord with one's religious convictions"). Moreover, the religiously motivated conduct protected is *not* limited to participation in acts of worship, but extends to any conduct that is engaged in, or avoided, because of a sincerely held religious belief. *See*, *e.g.*, *United States v. Lee*, 455 U.S. 252, 257 (1982) (operation of carpentry business in conformity with Amish religious principles); *Braunfeld*, 366 U.S. at 603-07 (analyzing burden of Sunday closing laws on retailers whose religious beliefs also required closing stores on Saturday). That is, of course, not to say that the Free Exercise Clause precludes all burdens on religiously motivated conduct; rather, the point is that a restriction on religiously motivated conduct is sufficient to *trigger* the Free Exercise Clause and to require application of the proper constitutional standards for determining whether that restriction is valid. *Lee*, 455 U.S. at 257 (burden on religiously motivated conduct "is only the beginning, however, and not the end of the inquiry"); *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Thomas*, 450 U.S. at 718-19.

Accordingly, the irreducible elements of the conduct

that qualifies as the "free exercise" of religion under the First Amendment are (1) action or abstention from action (2) motivated by (3) adherence to a religious belief. *See Smith*, 494 U.S. at 877 ("acts or abstentions … engaged in for religious reasons"). Consideration of these elements confirms that the Government is wrong in contending that a for-profit corporation can *never* engage in the "free exercise" of religion.

2. There Is No Basis to Deny Protection to an Exercise of Religion Merely Because It Is Done by a For-Profit Corporation

The Government does not really contest that for-profit corporations can take actions and that they can have motivations, nor could it. Corporations obviously are capable of taking or refraining from actions; indeed, the whole point of the mandate at issue in this case is to coerce corporations to take the *action* of providing insurance coverage that includes contraceptives. And in making decisions as to what actions to take or not to take, corporations (through those who act for them) are capable of forming intention and of acting *because of* a particular motivation or purpose. *Cf.*, *e.g.*, W. FLETCHER, ET AL., CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4944 (2013) ("a corporation acts with a given mental state in a criminal context only if at least one employee who acts (or fails to act) possesses the requisite mental state at the time of the act (or failure to act)").

The Government instead disputes only the third element, arguing that for-profit corporations are incapable of having *religious* beliefs. U.S. Br. 25. This is so, the Government contends, because in light of the

distinction between a corporation and its owners, there is "no basis on which to impute the individual-respondents' religious beliefs to the corporate-respondents." *Id*. This contention fails.

As an initial matter, it is difficult to fathom how the Government's argument could support its proffered distinction between "religious non-profit institutions" (which it concedes have free exercise rights, despite their corporate form, *see* U.S. Br. 18-19) and "for-profit corporations" (which it claims lack such rights, because of their corporate form, *id*.). If the problem is that the religious views of the founders and owners of a corporation cannot be imputed to a corporation, then that point would equally apply to religious non-profits. But as the Government concedes (U.S. Br. 17), this Court has repeatedly and explicitly recognized the free exercise rights of corporate plaintiffs who happened to be religious non-profits, *see*, *e.g.*, *Gonzales*, 546 U.S. at 425; *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 525. That the Government's argument—taken to its logical conclusion—would conflict with established precedent confirms that it is wrong.

Moreover, the Government's concession that *some* corporations exercise religion within the meaning of the Free Exercise Clause confirms that there is nothing intrinsic to the corporate form that precludes for-profit corporations from exercising religion. Yet under the Government's view, while a religious non-profit would be engaged in the corporate exercise of religion by running a religious bookstore propagating its views, there would be no corporate exercise of religion if that very same bookstore instead were owned by a closely-held for-profit corporation whose devout owners had committed the corporation to the same

mission. It makes no sense to say that the first corporation would have RFRA and free exercise rights, but that the second corporation—even though it is engaged in the same activities—would not.

The Government's categorical position that for-profit corporations are incapable of having religious beliefs is illogical in a further respect. The distinction between a corporation and its owners, directors, or officers means that, without more, the views of such persons are not *automatically* attributable to the corporation. But it does no violence to the distinction between a corporation and its owners, directors, or officers to recognize that those who under the applicable state law have the power to control the corporation's activities can take affirmative steps to commit *the corporation* to a particular idea (such as a clean environment, support for particular legislation, etc.). *See*, *e.g.*, *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 534 n.1 (1980) (recognizing right of a *corporation* to express "opinions on critical public matters"). The Government's premise that corporations can ascribe to beliefs on all subjects *other* than religious ones makes no sense.

More fundamentally, the Government's contention that there is "no basis on which to impute the individual-respondents' religious beliefs to the corporate-respondents" (U.S. Br. 25) ignores basic principles of corporate law. The applicable state corporate law will identify the specific group of persons who possess the ultimate ability to control the overall actions of the corporation and to set policies for it; exactly who those persons are will depend upon the specific manner in which the corporation is structured. Here, those persons have in fact exercised their authority over the corporations before the

Court, by formally announcing the corporation's adherence to a religious view and by taking steps to ensure that the corporation's actions are to be carried out in conformity with those religious principles. As a result, *these* corporations do have religious beliefs and their actions in conformity with those beliefs are an exercise of religion.

Thus, for example, the terms of the management trust that controls the voting stock of Hobby Lobby and Mardel require that the trust assets be used "to create, support, and leverage the efforts of Christian ministries," and trustees are required to sign a "Trust Commitment" affirming a statement of faith and "to maintain a close intimate walk with the Lord Jesus Christ." Joint App. in No. 13-354, at 134. Hobby Lobby's "statement of purpose" further affirms that its Board of Directors "is committed" to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." *Id*. at 135. Mardel, whose activities are specifically focused on "Christian materials, such as Bibles, books, movies, apparel, church and educational supplies," has described itself as "a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support." *Id*. at 138. Conestoga, which is a closely held company owned by "practicing and believing Mennonite Christians" (Pet. App. in No. 13-356, at 9g), likewise has adopted a formal statement of its "Vision and Values" that commits the corporation to conducting its profit-making activities "in a manner that reflects our Christian heritage." Joint App. in No. 13-356, at 94. And Conestoga's Board of Directors adopted a formal statement endorsing a Biblically-based view of the sanctity of human-life from the moment of con-

ception. Pet. App. in No. 13-356, at 22g-23g; Joint App. in No. 13-356, at 100.

Despite these corporations' public commitment to conducting their operations in accordance with particular tenets of Christian belief, the Government argues that their pursuit of profit is inconsistent with the promotion of religious values and that the corporations therefore are not protected by the Free Exercise Clause. U.S. Br. 19. But as noted above, this Court has already recognized, in cases involving individuals, that activities that are commercial in nature (*e.g.*, carpentry and farming (*Lee*); shopkeeping (*Braunfeld*)) may involve the exercise of religion if the person performing them undertakes to do so in conformity with the strictures of a sincerely held religious belief. In particular, the Court's recognition that the obviously profit-making activities at issue in *Braunfeld* involved the exercise of religion, *see* 366 U.S. at 605 (plurality); *id*. at 520-21 (op. of Frankfurter, J.), confirms that the profitable nature of an activity does not exclude it from the exercise of religion. The Government provides no coherent basis for concluding that conduct that is religious exercise when conducted by an individual is suddenly not religious exercise when conducted by a corporation. The Government's argument would mean, for example, that if an Orthodox Jewish family that runs a neighborhood kosher market (like the proprietors in *Braunfeld*) later chose to incorporate its business (so as to obtain the valuable protections of limited liability associated with the corporate form), it would lose its free-exercise right to challenge laws impinging on its ability to comply with the dictates of its faith. It is absurd and deeply problematic to construe the Free Exercise Clause, as the Government urges, as having the effect of conditioning the availability of the corpo-

rate form on the surrender of otherwise-available free exercise rights.

Indeed, the Government's position here is directly analogous to the argument made in *Bellotti*—and rejected by this Court—that free speech rights extend only to "media corporations and corporations otherwise in the business of communication or entertainment." 435 U.S. at 781. The Court agreed that the press has a "special and constitutionally recognized role … in informing and educating the public, offering criticism, and providing a forum for discussion and debate," but the Court held that "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *Id*. at 782. So too here. The fact that churches and other similar religious nonprofits have a special and constitutionally recognized role in the exercise of religion, *see*, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & School*, 132 S. Ct. 694, 706 (2012) (right to free exercise includes a "special solicitude to the rights of religious organizations"), obviously does not mean that *only* such entities are capable of engaging in religious exercise.

Moreover, the Government's assertion that trying "'to make a profit'" is incompatible with "'a religious values-based mission,'" U.S. Br. 19 (citation omitted), is itself ultimately an impermissible value judgment on a point of religious doctrine. *Cf*. *Psalm* 90:17 (NRSV) ("Let the favor of the Lord our God be upon us, and prosper for us the work of our hands—O prosper the work of our hands!"). Contrary to the Government's restrictive view of what counts as a "religious values-based mission," neither an individual nor a corporation need take a vow of poverty in order to claim the protection of the Free Exercise Clause.

The Government notably does not rely on the district courts' erroneous theory that, because corporations cannot "pray, worship, [or] observe sacraments," for-profit corporations are incapable of *any* exercise of religion. Pet. App. in No. 13-354, at 187a; *see also* Pet. App. in No. 13-356, at 19b-20b (same). The argument is a *non sequitur*. The fact that a corporation cannot perform *all* actions that constitute the free exercise of religion does not provide a basis for denying protection to the free exercise in which they *can* and *do* engage. Corporations likewise cannot be cast for the starring role in a movie or as the lead dancer in a ballet, but that does not mean that corporations lack free speech rights for the speech and expressive activities in which they *do* engage.

In sum, even if the phrase "a person's exercise of religion" in RFRA were to be construed as co-extensive with the "free exercise" of "religion" under the First Amendment, RFRA would still cover the corporate Plaintiffs in this case.

III. The Government's Parade of Horribles Is Illusory

Lastly, the Government contends that extending RFRA to corporate entities would lead to widespread exemptions from numerous statutes. U.S. Br. 19, 26. That the Government does not like the implications of RFRA's clear statutory language provides no basis for departing from it, but in any event the Government vastly overstates the implications of extending RFRA's protections to corporate entities. Whether or not the "exercise of religion" under RFRA is viewed as being strictly co-extensive with the First Amendment, *see supra* at 11-12, RFRA would only apply to a corporation that could demonstrate (1) a *corporate*

adherence (2) to a *religious* belief (3) that is *sincerely* held. Each of these legal requirements operates as a significant practical constraint on a corporation's ability to assert a free exercise claim.

First, absent some indicia that the corporation itself adheres to certain religious principles, it cannot be said that the *corporation* (as opposed merely to individuals within it) has a religious belief, much less one that is sincerely and consistently held. Obviously, incorporation as a *religious* corporation under state law would be sufficient (as the Government concedes), but so too would be (for example) a formal statement of belief adopted on behalf of the corporation itself by those persons with the power to control the corporation. But the Government is wrong to the extent that it suggests that any religious employee (however low-level) who merely seeks to invoke religion in the course of performing his or her duties would cause the corporation to subscribe to that religion. U.S. Br. 30. Likewise, the suggestion that recognizing corporate free exercise rights would require intractable inquiries into the possibly diverse beliefs of a corporation's owners and managers, *see Korte v. Sebelius*, 735 F.3d 654, 704 (7th Cir. 2013) (Rovner, J., dissenting), is a red herring. The applicable state corporate law will neutrally determine who has authority to announce whether the corporation will adhere to a particular religious view, and if the requisite persons specified by state law cannot agree to do that (or decline to do that), then the corporation will have no religious beliefs and will be incapable of exercising religion. *See McGinley*, 366 U.S. at 592.

Second, because "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause," *Thomas*, 450 U.S. at 713, a corporation's commitment to principles

that are "based on purely secular considerations" is insufficient to invoke the protection of the Clause, *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

Third, this Court has long held that a free exercise claim requires a showing of action or inaction "based on a *sincerely held* religious belief." *Frazee v. Illinois Dep't of Emp't Sec.*, 489 U.S. 829, 834 (1988) (emphasis added). Just as an individual's belief that is haphazardly invoked only when convenient is unlikely to be found to be sincere, so too for a corporation. *See*, *e.g.*, *International Soc. for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981) ("For example, an adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief, … or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine") (citations omitted). Thus, one consequence of the sincerity requirement is that, unless those with ultimate authority over the corporation have taken steps to attempt to ensure that the corporation will generally *act* in conformity with the corporation's stated religious principles, it is unlikely that the corporation's religious belief would be found to be sincerely held.[6] *See also supra* at 11-12.

Few, if any, publicly traded corporations have undertaken, or likely ever would undertake, to ascribe to a sincerely held religious belief in the conduct of

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[6] As the district court correctly concluded, and the Government agrees, an inadvertent or insubstantial deviation from an otherwise sincerely held belief does not defeat its sincerity. *See* Pet. App. in No. 13-354, at 174a (noting that Hobby Lobby previously had unwittingly covered drugs it subsequently excluded on religious grounds); U.S. Br. 12 (expressly agreeing that the sincerity of the religious beliefs of Hobby Lobby's owners "is not subject to question in these proceedings").

their operations, much less endeavor to achieve company-wide conformity of the corporation's actions to those beliefs. And although the Government raises the specter that all of the very largest privately held companies will suddenly get religion, *see* U.S. Br. 26, it is hardly surprising that the Government did not identify any large closely-held corporation other than Hobby Lobby (which is only #276 on the Forbes list of "private" companies that the Government cites) that had asserted a claim to exercise religion. On the contrary, most of the cases that have been brought concerning the mandate at issue in this case have been filed by much smaller closely-held corporations (such as Conestoga). *See* Pet. App. in No. 13-356, at 1*l*-4*l*.

Moreover, it bears repeating that recognizing a corporation's exercise of religion under RFRA or the Free Exercise Clause does not mean that the corporation's free exercise rights will always prevail under the applicable standard. To be sure, the application of the HHS mandate here *does* violate the RFRA and Free Exercise Clause rights of these corporate Plaintiffs, *see* Pet. App. in No. 13-356, at 69a-89a (Jordan, J., dissenting) (RFRA and Free Exercise Clause); Pet. App. in No. 13-354, at 44a-61a (RFRA); Petitioners' Br. in No. 13-356, at 32-65. But if the Government is correct in its dire predictions as to the harmful consequences that will supposedly follow from upholding religiously-based corporate exemptions from various other statutes not at issue here, then presumably it will be able to defeat such claims by demonstrating that those statutes serve compelling interests and employ the least restrictive means.

Indeed, if there is any reading of RFRA and the Free Exercise Clause that raises disturbing implications, it is the Government's. According to the Gov-

ernment, it can make any market for goods or services a Free-Exercise-Free Zone simply by the artifice of placing whatever obligations it wants on *corporate* entities rather than on natural persons. In the Government's view of the matter, an incorporated kosher deli could be forced to carry non-kosher goods; an independent Catholic hospital with a lay board could be required to provide abortions; a closely-held market owned by Seventh-day Adventists could be required to open on Saturdays; and an incorporated retail store owned by Muslims could be forced to carry liquor. As Judge Jordan recognized in dissent below in the *Conestoga* case, there is a word to describe the Government's position: "Remarkable." Pet. App. in No. 13-356, at 67a.

CONCLUSION

The Court should affirm the judgment in No. 13-354 and reverse the judgment in No. 13-356.

Respectfully submitted,

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