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 *AMICI CURIAE* J.E. DUNN CONSTRUCTION GROUP, INC. AND J.J. WHITE, INC. IN SUPPORT OF HOBBY LOBBY STORES, INC. AND CONESTOGA WOOD SPECIALTIES CORP.

Scott W. Gaylord
Counsel of Record
Jennings Professor
Elon University School of Law
201 North Greene Street
Greensboro, NC 27401
(336) 279-9331
sgaylord@elon.edu

Counsel for Amici Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond VA 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutions

Statutes

Other Authorities

INTERESTS OF AMICI[1]

J.E. Dunn Construction Group, Inc. ("J.E. Dunn") is a family-owned construction company based in Kansas City, Missouri. Since its founding in 1924, J.E. Dunn has grown into one of the leading general building contractors in the nation with 20 office locations across the country and roughly 1,200 employees. Members of the Dunn family own 90% of the outstanding shares of J.E. Dunn and operate the company according to the moral and religious teachings of the Catholic Church. These religious values have led J.E. Dunn to, among other things, annually commit more than 10% of its pre-tax earnings to charities and to direct that its insurance policies not cover any drugs, such as Plan B (the "morning after pill") and Ella (the "week after pill"), that the Dunns believe, based on the teachings of their Catholic Christian faith, act as abortifacients. The contraceptive coverage mandate of the Patient Protection and Affordable Care Act ("ACA") forces J.E. Dunn and the members of the Dunn family to violate their sincerely held religious beliefs or face exorbitant fines and penalties.

J.J. White, Inc. ("J.J. White") is a single-source, multi-trade contractor with operations in the mid-Atlantic and mid-Western regions of the United States. Since its founding in 1920, J.J. White has

---

[1] The parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

been dedicated to the Blessed Virgin Mary of Lourdes, reflecting the deep religious convictions of the White family, which continues to own and operate the company. In implementing this faith in its business, J.J. White has been actively involved in community service and establishing policies that are consistent with its Catholic Christian heritage, such as excluding insurance coverage for drugs that act as abortifacients. The contraceptive coverage mandate now requires J.J. White to provide no cost insurance for such drugs, which directly contradicts the religious views of J.J. White and its owners.

As a result, J.E. Dunn and J.J. White have a direct interest in the contraceptive coverage mandate at issue in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) ("*Hobby Lobby*") and *Conestoga Wood Specialties Corp. v. Sect. of U.S. Dept. of Health and Human Servs.*, 724 F.3d 377 (3d Cir. 2013) ("*Conestoga*") and its effect on family-owned, for-profit businesses that seek to exercise religious principles in and through the corporate form. Moreover, J.E. Dunn and J.J. White believe that their years of experience in incorporating their religious beliefs in their business dealings and through their civic and charitable work will provide this Court with an important perspective on the Free Exercise Clause issues implicated by the contraceptive coverage mandate.

SUMMARY OF ARGUMENT

A threshold question in these cases is whether the contraceptive coverage mandate of the ACA infringes on religious activity of closely-held corporations that the First Amendment was meant

to protect. Although the Supreme Court has not addressed this question directly, *see Hobby Lobby Stores, Inc. v. Sebelius*, 133 S.Ct. 641, 643 (Sotomayor, Circuit Justice 2012) ("This Court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders"), it has explained when corporations and other organizations can invoke the protections of the First Amendment.[2] Under this Court's analysis in *First Nat'l Bank of Boston v. Bellotti*, the Constitution protects the speech and religious activity of corporations—both non-profit and closely-held—unless these rights are "purely personal" in that "the 'historic function' of the particular guarantee[s have] been limited to the protection of individuals." 435 U.S. 765, 778 n.14 (1978).

---

[2] Although *Conestoga* and *Hobby Lobby* involve claims under the Free Exercise Clause and the Religious Freedom Restoration Act ("RFRA"), this amicus brief focuses only on the Free Exercise Clause for two reasons. First, RFRA was meant to codify this Court's pre-*Smith* free exercise jurisprudence. Consequently, if the Free Exercise Clause protects the free exercise rights of family-run companies prior to and after *Smith*, then RFRA should as well. Second, under RFRA, "person" is defined to include corporations unless the context indicates otherwise. *See* 1 U.S.C. § 1 (defining "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"). Thus, if closely-held corporations can exercise religion under the Free Exercise Clause, there is no basis for concluding that RFRA does not apply in the context of family-run businesses objecting to the ACA.

As *Roberts v. United States Jaycees* demonstrates, however, the First Amendment does not protect purely personal rights because it applies to the expressive and religious activity of individuals as well as associations of individuals: "[a]n 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 [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed." 468 U.S. 609, 622 (1984). Consistent with *Roberts*, this Court has held that the Free Exercise Clause applies to groups of individuals who adopt the corporate form. *See Bob Jones University v. United States*, 461 U.S. 574, 604 n.29 (1983) (holding that two incorporated schools, which were not "churches or other purely religious institutions," could bring free exercise claims) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993) (permitting an incorporated church to assert claims under the Free Exercise Clause). Thus, the free exercise of religion is not a purely personal right, and groups of individuals, including non-profit and closely-held corporations can claim its protection.

That the Free Exercise Clause protects closely-held businesses is not surprising. In the First Amendment context, this Court has emphasized that courts must focus on the nature of the activity (whether speech or religious exercise), not the "person"—whether an individual, non-profit, for-profit, or sole-proprietor—who is invoking the right. In particular, when determining whether the First Amendment protects closely-held corporations "[t]he

proper question … is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons." *Bellotti*, 435 U.S. at 776. Rather, "the question must be whether" the challenged statute infringes on an activity that "the First Amendment was meant to protect." *Id.* In *Bellotti*, this involved asking whether a statute, which prohibited corporations from spending money to publicize their views on a state-law referendum, abridged expression that the First Amendment safeguarded. Because, "[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech," this Court held that the First Amendment protected the speech of a for-profit corporation. 435 U.S. at 777.

In the present cases, the proper question is whether the ACA's contraceptive coverage mandate infringes on religious exercise that the First Amendment protects. The answer to that question is undoubtedly "yes." As in *Bellotti*, if the "persons" objecting to the mandate were sole proprietors instead of closely-held corporations, the individual owners could invoke the Free Exercise Clause and RFRA. *See United States v. Lee*, 455 U.S. 252 (1982); *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961). Challenging government regulations that infringe on sincerely held religious beliefs, therefore, constitutes religious activity that the Free Exercise Clause was meant to protect, and closely-held corporations can challenge the mandate on free exercise grounds.

Moreover, acknowledging that closely-held corporations, such as J.E. Dunn and J.J. White, that operate their businesses according to religious

principles have free exercise rights does not permit all corporations to assert Free Exercise Clause challenges to the ACA or any other statute. Many corporations—closely-held and publicly traded—may not seek to exercise religion through their business operations. Those that do, however, have the right to claim the protection of the Free Exercise Clause and RFRA, allowing the courts to decide the merits of these claims under the appropriate standards.

ARGUMENT

In *Conestoga*, the Third Circuit improperly held that corporations such as Conestoga and Hobby Lobby "cannot engage in the exercise of religion" as a result of two fundamental errors. *Conestoga*, 724 F.3d at 388. First, the *Conestoga* court, like the district court in *Bellotti*, asked the wrong question—"whether and to what extent corporations have First Amendment rights." *Bellotti*, 435 U.S. at 776; *Conestoga*, 724 F.3d at 383 (identifying the threshold question as "whether Conestoga, a for-profit, secular corporation, can exercise religion"). Instead of focusing on whether a religiously-based objection to the contraceptive coverage mandate constitutes an exercise of religion under the Free Exercise Clause, the Third Circuit considered only whether a for-profit corporation has free exercise rights like those of natural persons. *Id.* at 385 ("We do not see how a for-profit 'artificial being … existing in contemplation of law,' that was created to make money could exercise such an inherently 'human' right.") (internal citation omitted).

Second, because the court asked the wrong question, its analysis failed to consider all of the

relevant Supreme Court case law. In particular, the Third Circuit relied almost exclusively on *Bellotti*'s discussion of "purely personal" rights in footnote 14 and an isolated sentence in *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (stating that the purpose of the Free Exercise Clause "is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority."). A more detailed review of *Bellotti* and this Court's decisions regarding the constitutional rights of corporations reveals that free exercise, like the freedom of speech, is not a "purely personal" right. In fact, limiting free exercise rights to "religious" non-profits discriminates against family-owned businesses whose owners seek to live their faith in all aspects of their lives, including their business operations.

Consequently, the Free Exercise Clause applies to any family-run or non-profit company that exercises religion through the corporate form. *See Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty.*, 450 F.3d 1295, 1305 (11th Cir. 2006) (noting in the context of a religious corporation that all "corporations possess Fourteenth Amendment rights of equal protection, due process, and, through the doctrine of incorporation, the free exercise of religion."); *Commack Self-Service Kosher Meats v. Hooker*, 800 F. Supp.2d 405 (E.D.N.Y. 2011) (allowing a for-profit corporation to challenge a labeling statute on Establishment Clause grounds). This Court, therefore, should reject the Third Circuit's overly narrow interpretation of the Free Exercise Clause and confirm *Bellotti* and *Roberts*, which protect the free exercise of religion regardless

of the type of "person" acting on sincerely held religious beliefs.

I. The Free Exercise Clause protects both closely-held and non-profit corporations because, as *Bellotti* and *United States v. White* demonstrate, free exercise is not a "purely personal" right but "serves significant societal interests."

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. 1. The Constitution, therefore, expressly provides that the government cannot prohibit the free *exercise* of religion, not merely private "worship" or "freedom of conscience" as Madison had originally proposed. *See* Michael W. McConnell, 103 HARV. L. REV. 1409, 1488 (1990) (noting that "the term 'free exercise' makes clear that the clause protects religiously motivated conduct as well as belief"). For many believers, including the Dunns and Whites, religious exercise cannot be restricted to the private expression of religion in their homes and places of worship. Their faith permeates all aspects of their lives, leading them to form businesses that embody and promote the values that are central to their faith.

Not surprisingly given the faith of the founding generation, the First Amendment limits the government's ability to interfere with the religious exercise and speech activity of individuals and associations of individuals. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose *institutions* presuppose a Supreme Being")

(emphasis added); *Roberts*, 468 U.S. at 622. Nothing in the First Amendment or this Court's prior decisions restricts the fundamental protections of the First Amendment to natural persons in their individual speech activity or exercise of religion. *See, e.g.*, *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 623 (9th Cir. 1988) (Noonan, J., dissenting) ("The First Amendment does not say that only one kind of corporation enjoys this right [to exercise religion]. The First Amendment does not say that only religious corporations or only not-for-profit corporations are protected. The First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion.").

That the First Amendment protects speech and the free exercise of religion regardless of *who* is invoking those protections is apparent from *Bellotti*. Instead of focusing on "whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons," *Bellotti* instructs that "the question must be whether" government action abridges an activity "the First Amendment was meant to protect." 435 U.S. at 776. That is, the operative question under the First Amendment is whether the government is infringing on protected speech or religious *activity*, not on *who* (a natural person, a closely-held company, or a non-profit corporation) is speaking or exercising religion. Hence, the *Bellotti* Court emphasized that "[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less

true because the speech comes from a corporation rather than an individual." 435 U.S. at 777.

The same reasoning applies in the free exercise context. If Hobby Lobby, Conestoga, J.E. Dunn, and J.J. White were sole proprietorships, there is no doubt that the Free Exercise Clause would protect their religious objections to the contraceptive coverage mandate. Their claims mirror the faith-based challenges to government legislation found in *Lee* and *Braunfeld*. *See United States v. Lee*, 455 U.S. 252 (permitting an Amish business owner to raise a free exercise defense to his alleged failure to pay social security taxes for his employees); *Braunfeld*, 366 U.S. at 601 (allowing sole proprietors to challenge Philadelphia's Sunday-closing laws on free exercise grounds). Thus, closely-held corporations also must be allowed to assert free exercise claims because, as *Bellotti* instructs, it is the religious nature of the activity that is important, not the nature of the "person" that engages in that activity.

The Third Circuit ignored *Bellotti*'s analysis, denying the free exercise claims of Conestoga because the majority did "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." *Conestoga*, 724 F.3d at 385 (internal citation omitted); Brief for the Petitioners at 13 ("Government's Brief") (denying that closely-held corporations have free exercise rights because incorporation "create[s] a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who

created it, own it, or whom it employees.'") (internal citation omitted). Drawing on footnote 14 in *Bellotti*, the majority claimed that free exercise is a "purely personal" right that is limited to individuals. Although certain religious non-profits may invoke free exercise protection because "the text of the First Amendment … gives special solicitude to the rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S.Ct. 694 706 (2012), for-profit corporations do not engage in such religious conduct. *See* Government's Brief at 13 (stating that this Court has "recognized free-exercise rights of individuals, churches, and religious communities" but not closely-held corporations). According to the Third Circuit, for-profit, family-run businesses "'do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.'" *Conestoga*, 724 F.3d at 385 (citation omitted).

This analysis is wrong for at least three reasons: (i) the Free Exercise Clause is not a "purely personal" right because it protects non-profits and closely-held companies alike; (ii) just as freedom of speech is not limited to corporations in the "speech business," free exercise is not restricted to organizations (churches and pervasively religious institutions) in the "religion business;" and (iii) limiting free exercise to non-profit religious organizations discriminates against religious individuals who seek to live their faith through their closely-held companies.

A. Free Exercise is not a "purely personal" right that applies only to natural individuals because, as this Court has acknowledged, associations and non-profit corporations can exercise religion.

In *Conestoga*, the majority held that the Free Exercise Clause does not extend to closely-held corporations because it protects a "purely personal" right, one designed to guard the exercise of religion by individuals. 724 F.3d at 383. Whether a constitutional provision is purely personal "depends on the nature, history, and purpose of the particular provision." *Bellotti*, 435 U.S. at 778 n. 14. Drawing primarily on footnote 14 in *Bellotti*, the *Conestoga* panel noted that this Court has refused to extend purely personal rights to corporations and other organizations. Instead of analyzing this Court's precedents discussing "purely personal" rights or evaluating "the nature, history, and purpose" of the Free Exercise Clause, though, the *Conestoga* majority attempted to establish the individual nature of free exercise by invoking the *Bellotti* footnote and a single sentence from *Schempp*: "the purpose of the Free Exercise Clause 'is to secure religious liberty *in the individual* by prohibiting any invasions thereof by civil authority.'" 724 F.3d at 385 (quoting *Schempp*, 374 U.S. at 223) (emphasis added by the *Conestoga* panel). Because the majority could "not see how a for-profit [corporation] … that was created to make money could exercise such an inherently 'human' right," it concluded that free exercise must be a purely personal right. *Id.*

The Third Circuit's interpretation of the Free Exercise Clause is flawed for at least two reasons.

First, recognizing that the First Amendment safeguards the rights of "individuals" does not preclude organizations from invoking those rights. After all, this Court previously described free speech as an individual or personal right: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. New York*, 268 U.S. 652, 666 (1925). *See also Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (describing freedom of speech as a "fundamental personal right[]"). The fact that free speech is a fundamental "personal" right, however, did not stop this Court from extending free speech rights to corporations. As this Court confirmed in *Citizens United*, "First Amendment protection extends to corporations … [, and this Court] has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 342 (2010) (quoting *Bellotti*, 435 U.S. at 776).

Given that the religion clauses protect liberties that are as fundamental (and individual) as the right to free speech, *Citizen United*'s reasoning applies with equal force to the free exercise of religion by closely-held businesses. *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944) ("[I]t may be doubted that any of the great liberties insured by the First Article

can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together."). Even though free exercise protects "the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience," *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985), associations of individuals (including non-profits and family-run businesses) can come together and exercise religion. In fact, as *Roberts* instructs, preserving the right to come together for group action is critical to insure that the protections of the First Amendment are safeguarded: "[a]n 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 [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed." 468 U.S. at 622.

Second, the Third Circuit ignores this Court's discussion of "purely personal" rights (such as the right against self-incrimination and the right to privacy) in *United States v. White* and *California Bankers Association v. Schultz*, which demonstrate why free exercise cannot be limited to individuals. Although *Bellotti* did not explain why self-incrimination and privacy are purely personal rights that are unavailable to any type of corporation, it cited *White*, which provides a detailed discussion of what makes a right purely personal.

In *White*, the district court subpoenaed documents from a union as part of a grand jury investigation into alleged irregularities in the construction of a Navy supply depot. An assistant

supervisor of the union refused to produce the documents, invoking the right against self-incrimination because, he argued, the documents might incriminate the union or the assistant supervisor, in his official or individual capacity. On appeal, the Supreme Court rejected the assistant supervisor's claim, holding that "[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals." 322 U.S. 694, 698 (1944).

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

In reaching this conclusion, *White* set out a test to determine whether "a particular type of organization" can invoke a personal privilege. *Id.* at 701. According to the Court, an organization cannot avail itself of a "purely personal" right if it has "a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." *Id.* Unions and corporations (whether non-profit or closely-held) cannot invoke purely personal rights, therefore,

because they do not represent the personal interests of the individuals who comprise those organizations. Instead, unions and corporations "represent[] organized, institutional activity as contrasted with wholly individual activity," their existence is "perpetual" and does not "depend[] upon the life of any members," their various activities cannot "be said to be the private undertakings of the members," they have no "authority to act for the members in matters affecting only the individual rights of such members," they "own[] separate real and personal property," and "the official … books and records are distinct from the personal books and records of the individuals." *Id*. at 701-02.

Similarly, in *California Bankers Association v. Schultz*, this Court focused on the personal nature of the right to privacy rather than any differences between non-profit and closely-held corporations. According to *Schultz*, the right to privacy applies only to information about which the public does not have a right to know. Because "'law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest,'" "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *Schultz*, 416 U.S. 21, 66 (1974). The same is true for the right against self-incrimination. Neither non-profit nor for-profit corporations can invoke that privilege because of "the reservation of the visitatorial power of the state, and in the authority of the national government where the corporate activities are in the domain subject to the powers of Congress." *Wilson v. United States*, 221 U.S. 361, 382 (1911).

White, Schultz, and *Wilson* highlight two important reasons why closely-held corporations can invoke the protection of the Free Exercise Clause. First, unlike the privacy and self-incrimination contexts, the government has no right to satisfy itself that "corporate behavior is consistent with" certain state approved religious beliefs or practices. *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."). The exercise of religion, unlike the production of business documents in *Wilson*, is not "in the domain subject to the powers of Congress." *See, e.g.*, *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith or the validity of particular litigants' interpretations of [their] creeds.").

Second, *Schultz* recognizes that corporations are endowed with "public attributes" and "have a collective impact on society." *Schultz*, 416 U.S. at 65. Under *Bellotti*, this societal impact is a main reason why the First Amendment protects speech and religion regardless of the "person" who is speaking or exercising religion: "The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests." 435 U.S. at 776. Because the First Amendment is meant to protect both individual and collective interests, freedom of speech and religious exercise are not purely personal rights.

Stated differently, *Conestoga*'s conclusion—that for-profit corporations cannot exercise religion because free exercise is a "purely personal" right—is inconsistent with *White*, *Schultz*, and *Bellotti*. Under these precedents, neither non-profits nor closely-held businesses can exercise purely personal rights. *White*, 322 U.S. at 699 (stating that purely personal rights "cannot be utilized by or on behalf of *any organization*") (emphasis added). Given that religious non-profits *can* claim the protection of the Free Exercise Clause, *see Bob Jones University*, 461 U.S. 574 and *Hosanna-Tabor*, 132 S.Ct. 694, free exercise cannot be a purely personal right. Thus, the Free Exercise Clause extends to individuals and associations, including family-owned and operated businesses like J.E. Dunn and J.J. White.

B. The First Amendment protects speech and religious activity generally and is not limited to businesses that are in the "speech business" or the "religious business."

In *Conestoga*, the Third Circuit claims that the profit-making nature of closely-held corporations somehow disqualifies them from seeking the protections of the Free Exercise Clause. *See Conestoga*, 724 F.3d at 385 ("We simply cannot understand how a for-profit, secular corporation … can exercise religion."). The majority does not state whether it is the corporate form, the profit-making motive, or the "secular" nature of closely-held businesses that prevents them from receiving free exercise protection.

The problem with the Third Circuit's analysis is that this Court has never held that the corporate form or a for-profit motive precludes application of any First Amendment rights. Consistent with *Bellotti*, this Court has recognized that a non-profit corporation can invoke the Free Exercise Clause, even when it is not a pervasively "religious organization" such as a church. In *Bob Jones University v. United States*, the Court held that two religious schools, which were not "churches or other purely religious institutions," 461 U.S. at 604 n.29, could assert free exercise claims on behalf of the corporations, not merely on behalf of the individuals who comprised them. The Court permitted the schools to pursue their claim that the IRS violated the Free Exercise Clause by rescinding their tax-exempt status as a result of allegedly discriminatory admissions policies.

Similarly, last term in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, the Court acknowledged that another organization, this time a church and school, could invoke the protection of the Free Exercise Clause. Although noting that "the text of the First Amendment itself … gives special solicitude to the rights of religious organizations," 132 S.Ct. at 706, this Court did not limit the Free Exercise Clause to such religious organizations or distinguish its prior holding in *Bob Jones University*. Rather, this Court focused on the only issue before it: whether a religious organization has the "freedom to select its own ministers." *Id.*

Although non-profit organizations, the schools in *Bob Jones University* and *Hosanna Tabor* sought to generate revenue just like closely-held businesses do.

Instead of distributing any surplus revenue to shareholders, these non-profits simply funneled any surplus moneys back into the institutions. Under *Bellotti*, though, the way in which surplus revenue is distributed has no bearing on whether the underlying activity implicates the Free Exercise Clause. In the First Amendment context, the focus is on what was done—the particular speech or religious activity—not on whether the actor is a non-profit or closely-held corporation.

That a profit or revenue generating motive does not move activity outside the scope of the First Amendment also is clear from *Lee* and *Braunfeld*. The sole proprietors in these cases were engaged in for-profit businesses and sought to protect the exercise of their religious beliefs through their business operations. In each case, this Court upheld the right of the sole proprietors to invoke the protection of the Free Exercise Clause. In *United States v. Lee*, the Court held that an Amish business owner, who ran a farm and a carpentry shop, could raise a free exercise defense to his alleged failure to pay social security taxes for his employees. Because the Old Order Amish "believe it sinful not to provide for their own elderly and needy," the employer "object[ed] on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds." 455 U.S. at 255, 254.

Likewise, in *Braunfeld v. Brown*, "merchants" in Philadelphia challenged the city's Sunday-closing laws because the laws allegedly infringed on their free exercise of religion. The merchants were Orthodox Jews who observed the Sabbath on

Saturday. As a result of the Sunday-closing laws and their faith, the merchants could not open their stores on the weekends. Given their desire to live out their religious beliefs in their businesses, they argued that the law violated the Free Exercise Clause because it "impair[ed] the ability of all appellants to earn a livelihood." 366 U.S. at 601. This Court addressed their claims on the merits.

Since neither the corporate form nor a profit motive strips a family-owned company of its First Amendment rights, the Third Circuit must base its conclusion on the allegedly secular nature of a closely-held corporation. *See Conestoga*, 724 F.3d at 386 ("That churches—as means by which individuals practice religion—have long enjoyed the protections of the Free Exercise Clause is not determinative of the question whether for-profit, secular corporations should be granted these same protections."). In emphasizing the "secular" nature of corporations, however, the Third Circuit makes two fundamental errors.

First, the majority impermissibly limits the Free Exercise Clause to the *practice* of religion instead of the *exercise* of religion. Under *Conestoga*, only churches and religious institutions that pray and worship are sufficiently "religious" to qualify for Free Exercise Clause protection. But courts are constitutionally prohibited from weighing the nature or importance of a person's or group's religious beliefs: "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his

fellow worker more correctly perceived the commands of their common faith." *Thomas*, 450 U.S. at 715-16. Given that courts cannot determine whether a corporation is sufficiently religious to invoke the Free Exercise Clause, any organization that seeks to implement its sincerely held religious beliefs in its business activities may claim the protection of that clause. *See West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

Second, the majority in *Conestoga* makes the same mistake that the lower court made in *Bellotti* when it held "that corporate speech is protected by the First Amendment only when it pertains directly to the corporation's business interests." 435 U.S. at 777. In *Bellotti*, the district court improperly held that only corporations in the "speech business"—media corporations and the press—could claim the protection of the Free Speech Clause. The *Conestoga* majority does the same thing—limiting religious exercise to non-profit corporations that are in the *religion* business: "We will not draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follow that for-profit, secular corporations can exercise religion." 724 F.3d at 385. In so holding, the Third Circuit (like the district court in *Bellotti*) imposes a "novel and restrictive gloss on the First Amendment" by impermissibly

restricting the Free Exercise Clause to religious non-profits. *Bellotti*, 435 U.S. at 777.

This Court's precedents, however, do not support such a "novel and restrictive" interpretation of the Free Exercise Clause. *Bellotti* and *Citizens United* preclude the government's limiting free speech to businesses in the "speech business." *Id.* at 784-85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."); *Citizens United*, 558 U.S. at 352 ("There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.").

And the reasoning in these cases likewise prohibits the government's restricting free exercise to businesses that are in the "religion business" (which the Third Circuit defines as "churches and other religious entities," *Conestoga*, 724 F.3d at 385). As *Bellotti* warns, "[i]f a legislature may direct business corporations to 'stick to business,' it also may limit other corporations—religious, charitable, or civic—to their respective 'business' when addressing the public." 435 U.S. at 785. Under *Conestoga*'s and the government's position, civic-minded or environmentally aware corporations could be forced to stick to the business of profit maximization, precluding individuals from using the corporate form to advance religious, ethical, environmental, or other social values. Under this restrictive interpretation, J.E. Dunn could be required to stop donating 10% of its pre-tax earnings

to charity, and J.J. White could be precluded from supporting various Catholic charities.

Yet there is nothing about the corporate form or the Free Exercise Clause that requires closely-held companies to so limit their activities. As J.E. Dunn and J.J. White demonstrate, while pursuing profits is one purpose of a corporation, the officers, directors, and shareholders may decide to advance other ends as well—religious, environmental, civic, or political. Two well-known examples of corporations that advance goals other than profit maximization illustrate the importance of protecting the right of corporations to pursue civic or religious values. According to its website, Ben & Jerry's corporate mission involves three goals:

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

Ben & Jerry's Mission Statement (http://www.benjerry.com/activism/mission-statement/) (last visited Jan. 20, 2014). Although Ben & Jerry's is a for-profit corporation, only its economic mission focuses narrowly on profits. The company also seeks to improve "the quality of life" generally and to "promot[e] business practices that respect the Earth and the Environment." *Id.*

Similarly, Chick-fil-A predicates its business on biblical values and closes its stores on Sundays in observance of the Christian Sabbath. *See* http://www.chick-fil-a.com/Company/HighlightsFact-Sheets (last visited Jan. 20, 2014). Its corporate purpose is "[t]o glorify God by being a faithful steward of all that is entrusted to us. To have a positive influence on all who come in contact with Chick-fil-A." *See* http://www.chick-fil-a.com/Press room/Fact-Sheets/sunday_2012) (last visited Jan. 20, 2014). Following its religious values, the company has given money to certain advocacy groups that promote what Chick-fil-A believes is a Christian view on various issues, including marriage. Some of these donations caused national controversy in the summer of 2012, leading political leaders in Boston and Chicago to threaten to block Chick-fil-A's bid to open franchises in those cities.

The fact that Chick-fil-A is a for-profit corporation, though, should make no difference to the free exercise analysis. Because Chick-fil-A is the entity that made the donations and sought to open the stores, Chick-fil-A is the "person" that would be injured if retaliated against for the exercise of its religious beliefs. Under the narrow interpretation of free exercise that the Third Circuit and the

government adopt, however, neither Chick-fil-A nor its owners could challenge such religious discrimination because for-profit organizations lack free exercise rights and their owners are legally distinct from the entity that suffered the injury. *See Conestoga*, 724 F.3d at 389; Government's Brief at 23.

This view is untenable in light of *Bellotti* and *Roberts*. Just as the government's attempt "to channel the expression of views is unacceptable under the First Amendment," *Bellotti*, 435 U.S. at 785, the effort to channel the free exercise of religion to individual worship or religious non-profits also is unacceptable under the Free Exercise Clause. The contraceptive coverage mandate and the threats by public officials in Chicago and Boston to deny permits to Chick-fil-A show why family-run businesses need the protection of the Free Exercise Clause—without it public officials can force associations of individuals to engage in conduct that violates their sincerely held religious beliefs. *See Citizens United*, 558 U.S. at 340 (noting that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content").

Extending free exercise protection to all corporations that exercise religion (as opposed to only those non-profits in the "religion business") not only is required by the Constitution, but also makes good sense. Corporations, whether for-profit or non-profit, do not engage in exclusively religious or secular activity. As this Court observed in *Hosanna-Tabor*, even in "purely religious" organizations, there may not be any "employees who perform exclusively

religious functions:" "The heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities." 132 S.Ct. at 709. In the same way, not all for-profit organizations perform exclusively secular functions. Many faiths direct the faithful to implement their faith and religious beliefs in their businesses.

For example, in "Vocation of the Business Leader: A Reflection," the Vatican's Pontifical Counsel for Justice and Peace explains that for Catholics "[t]he vocation of the businessperson is a genuine human and Christian calling." Vocation of the Business Leader: A Reflection at ¶ 6 (available at http://www.stthomas.edu/cathstudies/cst/conferences/Logic%20of%20Gift%20Semina/LogicofgiftdocFinalsoftproofVocati.pdf). According to the Counsel, one of the greatest obstacles to fulfilling this Christian calling "at a personal level is a 'divided life,' or what Vatican II described as 'the split between the faith which many profess and their daily lives.'… Dividing the demands of one's faith from one's work in business is a fundamental error which contributes to much of the damage done by businesses in our world today…. The divided life is not unified or integrated; it is fundamentally disordered, and thus fails to live up to God's call." *Id.* at ¶ 10. Like the business owners in *Conestoga* and *Hobby Lobby*, the Dunns and Whites expressly seek to do just that—live their religious calling in and through their businesses. *See Hobby Lobby*, 723 F.3d at 1122 ("[T]he Greens have organized their businesses with express religious principles in mind … [and] allow

their faith to guide business decisions for both companies.").

Under the Third Circuit's decision in *Conestoga*, however, individuals who desire to "live up to God's call" and implement the values of their faith in their businesses must choose between living a "divided life" in a corporation that pays for services deemed immoral, forgoing the corporate form altogether, or adhering to their religious beliefs and paying exorbitant penalties and fines. Yet, as this Court has stated in other contexts, the government cannot condition a benefit—such as the limited liability that attaches to the corporate form—on the relinquishment of one's free speech or free exercise rights: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege…. [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994) ("It is true that religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise, …, which the First Amendment guarantees as certainly as it bars any establishment.").

But this is exactly what *Conestoga* does. It conditions the closely-held corporate form on a family's' willingness to give up living their faith in

and through their family businesses. In the Third Circuit, religiously motivated business owners, such as the Dunns and Whites, now must provide insurance coverage that violates their faith or conduct their businesses in a manner consistent with their religion and pay large fines and penalties. *See*, *e.g.*, 26 U.S.C. § 4980D (providing for a tax of $100 per day per employee if a company fails to comply with ACA's coverage provisions, subject to caps for certain failures); 26 U.S.C. § 4980H (setting forth an annual tax assessment if a company fails to comply with the ACA's coverage requirements). The Free Exercise Clause prohibits imposing this type of Hobson's choice. Neither non-profits nor for-profits can be forced to choose between receiving the benefits of incorporation and maintaining their religious beliefs.

C. Restricting the Free Exercise Clause to pervasively religious organizations impermissibly discriminates against family-owned businesses that promote religious views and their owners who seek to live their faiths through their business activities.

According to the Third Circuit, religious non-profits are fundamentally different from for-profit corporations when it comes to exercising religion: "General business corporations" cannot exercise religion because they "'do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.'" *Conestoga*, 724 F.3d at 385 (quoting *Hobby Lobby Stores, Inc. v.*

Sebelius¸ 870 F. Supp.2d 1278, 1291 (W.D. Okla. 2012), *rev'd en banc*, 723 F.3d 1114 (10th Cir. 2013)).

What the *Conestoga* majority apparently fails to recognize is that non-profit religious organizations also "do not pray, worship, observe sacraments or take other religiously-motivated actions" independently of the individuals who comprise the organization. The not-for-profit corporations that are the Dioceses of Kansas City and Philadelphia, in which J.E. Dunn and J.J. White are based, do not themselves pray, worship, observe sacraments, or take other religious actions. All such activities are conducted by the individuals who are members of those non-profit organizations—the priests, religious, and lay members of the faith.

The same holds true with respect to closely-held companies. Whether exercising their speech rights or implementing their religious beliefs in their business operations, family-run businesses act only through the individual owners/members of the organizations. This is not surprising given that the distinction between for-profit and non-profit corporations does not consist in the latter's ability to conduct religious activities independently of their members. Both types of corporations are creatures of the State that depend on individuals to carry out all of their activities—from engaging in speech to exercising religion.

The government's argument (that because "a corporation is legally distinct from its owners" the beliefs of the owners cannot be attributed to the corporation, Government's Brief at 25), therefore, is inconsistent with both this Court's First Amendment speech precedents and its treatment of non-profit

corporations. If the government is correct, then *Bellotti* and *Citizens United* were wrongly decided. Both cases are predicated on the idea that corporations can and do speak. But the views expressed by a corporation are traceable to the individuals who manage the company. As *Roberts* notes, the corporate form simply permits these individuals to come together and more effectively exercise their First Amendment rights. *Roberts*, 468 U.S. at 622. In the process, though, the First Amendment extends its protection to the speech and religious activity of the association of individuals. This is why the schools in *Bob Jones* and *Hosanna-Tabor* could raise free exercise claims despite the fact that they were corporations.

In addition, the majority's reasoning in *Conestoga* impermissibly discriminates among religious believers by giving certain groups of religious people (those that operate through non-profit corporations) the ability to exercise religion as a group while denying that opportunity to individuals who sincerely try to live their beliefs through all aspects of their lives, including their family-run businesses. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Wilson v. NLRB*, 920 F.2d 1282, 1285-88 (6th Cir. 1990) (holding that a statutory exemption limited to individuals who are "member[s] of and adhere[] to established and traditional tenets … of a bona fide religion, body, or sect which has historically held conscientious objections to [a certain practice]" are unconstitutional because they prefer members of

established denominations over those with more idiosyncratic religious beliefs).

In *Larson*, the Court struck down a rule that exempted certain organizations from Minnesota's reporting requirements because the so-called fifty per cent rule (exempting religious organizations that received more than half of their total contributions from members or affiliated organizations) "makes explicit and deliberate distinctions between different religious organizations…. [T]he provision effectively distinguishes between 'well-established churches' that have 'achieved strong but not total financial support from their members' … and 'churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members.'" 456 U.S. at 246 n.28.

The Third Circuit's distinction between non-profits and for-profits does the same thing. By limiting free exercise to religious non-profits, the Third Circuit discriminates in favor of preferred or established religious organizations and their members, denying free exercise protection to closely-held businesses that are directed at advancing the religious beliefs of their owners.

Yet not all religiously motivated people are called to be priests, ministers, religious, or lay persons who work for a religious non-profit. Some individuals, such as the Dunns and Whites, sincerely believe that they are called to live their faith through their family-run businesses. As Pope John Paul II instructed the Catholic faithful in *Centesimus Annus*: "In fact, the purpose of a business firm is not simply to make a profit, but is also to be found in its

very existence as a community of persons who in various ways are endeavoring to satisfy their basic needs, and who form a particular group at the service of the whole society. Profit is a regulator of the life of a business, but it is not the only one; other human and moral factors must also be considered which, in the long term, are at least equally important for the life of a business." John Paul II, *Centesimus Annus*, ¶ 35 (1991) (*available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centes imus-annus_en.html).

Under *Conestoga*, two organizations (one a non-profit corporation and the other a closely-held business) that are comprised of members of the same faith may object to the contraceptive coverage mandate for exactly the same reasons, but only one—the religious non-profit—may claim the protection of the Free Exercise Clause. This result flies in the face of *Bellotti*, which expressly holds that the proper "question must be whether [the government regulation] abridges [activity] that the First Amendment was meant to protect." 435 U.S. at 776. Because, as this Court has confirmed, religious non-profits are protected by the Free Exercise Clause, the First Amendment *is* meant to protect this type of activity—objecting to government regulations on religious grounds. The fact that the person conducting the religious activity is a "for-profit corporate person" instead of a "natural person" or a "non-profit corporate person" is irrelevant. *Bellotti*, 435 U.S. at 776 ("The proper question therefore is not whether corporations 'have' First

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

Contrary to the Third Circuit's and the government's claims, acknowledging that closely-held companies can exercise speech and religion does not "eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners." *Conestoga*, 724 F.3d at 389. Rather, it simply confirms what this Court previously established—that "[t]he First Amendment … serves significant societal interests," *Bellotti*, 435 U.S. at 776, and that free exercise rights "could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward these ends were not also guaranteed." *Roberts*, 468 U.S. at 622.

II. Although the Free Exercise Clause applies to closely-held corporations, such corporations can invoke its protection only if they are exercising religion.

To recognize that family-run businesses, such as J.E. Dunn and J.J. White, can raise a free exercise claim is not to determine that a particular corporation's free exercise claim has merit. Rather, acknowledging that corporations can invoke the Free Exercise Clause and RFRA simply permits corporations to litigate their claims and to have a neutral court apply (whatever it decides is) the appropriate standard under the circumstances. Many corporations—perhaps most—will not engage in religious activities or attempt to implement the religious convictions of their owners. In particular, large, publicly traded corporations (in which

ownership and control are separate) may decline to adopt, maintain, or implement a set of religious beliefs as part of their business model. A publicly traded company could adopt such a business plan if its management and shareholders decide to do so, but such cases are apt to be rare.

The key is that there is no constitutional basis for this Court to preclude such an association from invoking the Free Exercise Clause *a priori*. The decision as to what type of business model to pursue is left to the corporation—whether publicly or privately owned—not the courts. As this Court has acknowledged in the free speech context, "[u]ltimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues. Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management." 435 U.S. at 794.

The same is true with respect to corporate decisions to pursue religious, environmental, or other civic activities. If a closely-held business is owned and operated by individuals like the Dunns and Whites who are deeply committed to a particular faith, then it may be unsurprising that the company will reflect the religious principles of its owners. As J.E. Dunn and J.J. White demonstrate, some

business owners seek to implement religious principles regarding corporate responsibility, attempting to promote the well-being of their employees in a financial and moral sense. According to these companies, the contraceptive coverage mandate of the ACA requires them to provide insurance coverage for medical services, such as abortifacients, contraceptives, and sterilization, which violate the religious values that underscore their operations. As such, the ACA infringes on the religious activities of the corporation and requires the company to take specific actions that are inconsistent with their ethical guidelines. Under this Court's precedents, J.E. Dunn and J.J. White can invoke the Free Exercise Clause and RFRA to protect their religious activities, and the courts are left to determine whether their claims are meritorious under the appropriate standard.

CONCLUSION

For the reasons set forth above, this Court should hold that closely-held companies have standing to bring claims under the Free Exercise Clause and RFRA.

Respectfully submitted,

Scott W. Gaylord
Counsel of Record
Jennings Professor
ELON UNIVERSITY LAW SCHOOL
201 North Greene Street
Greensboro, North Carolina 27401
Phone: (336) 279-9331
Email: sgaylord@elon.edu

Counsel for Amici Curiae J.E. Dunn Construction Group, Inc. and J.J. White, Inc.

January 28, 2014