No. 13-356

In The
Supreme Court of the United States

CONESTOGA WOOD SPECIALTIES CORP., et al.,

Petitioners,

v.

KATHLEEN SEBELIUS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR AMICUS CURIAE TRI VALLEY LAW, PC IN SUPPORT OF CONESTOGA WOOD SPECIALTIES CORP., ET AL.

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Tri Valley Law, a Professional Corporation ("Tri Valley Law"), respectfully submits this amicus curiae brief in support of Petitioners.

INTERESTS OF AMICUS CURIAE[1]

Tri Valley Law is a law firm with a practice that focuses, in part, on corporate law and governance matters. As Tri Valley Law advises clients on choice of corporate entity and the relevant governance standards thereof, Tri Valley Law has an interest in matters that clarify the federal legal rights applicable to corporations generally and the recently created Benefit Corporation ("Benefit Corporation") specifically.

SUMMARY OF ARGUMENT

This amicus curiae brief provides an analysis of recent developments in corporate law and examines

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith or are already on file with the Clerk of the Supreme Court, in the case of blanket consents. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to its preparation or submission.

whether there is, in fact, a basis in this Court's precedent for the Third Circuit's distinction between "religious non-profit" corporations and "secular for-profit" corporations for Free Exercise purposes.

The Third Circuit agreed that a corporation could have Free Exercise rights, but said that such rights did not apply if the corporation happened to be "secular" and "for-profit." These are defining characteristics that appear nowhere in the Constitution and are contrary to First Amendment jurisprudence and other precedent, including the seminal case of *Citizens United v. Federal Election Commission*, 558 U.S. 310, 365 (2010).[2]

Why would there be such a seemingly arbitrary distinction relating to a right as fundamental as the exercise of religion?

According to the Third Circuit, which adopted the government's argument in the case below, it all comes down to profit. A legal entity that exists to produce profits for those who organized it can't exercise religion, but one that exists without a primary interest in

[2] In *Citizens United* this Court found that corporations, without regard to their status as non-profit or for-profit, enjoyed First Amendment rights regarding speech. Because this amicus curiae brief focuses on the specific issue of developments in corporate law that are of relevance to both this case and the companion case of *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-356, this brief defers to, *inter alia*, the Petitioners' Brief in the instant case for detailed discussions of First Amendment precedent generally.

profits miraculously is vested with the right to exercise religion.

The position of the Third Circuit constitutes an unprecedented black and white distinction between non-profit religious corporations, which the Third Circuit says have Free Exercise rights, and for-profit secular corporations, which the Third Circuit says have no such rights.

Not only is the Third Circuit's distinction arbitrary and without logical or legal basis, it is utterly at odds with recent developments in corporate law.

The advent of the Benefit Corporation[3] has formally established a gray area between the Third Circuit's black and white treatment of corporate First Amendment rights generally and Free Exercise rights specifically.

In fact, a corporation organized as a Benefit Corporation can be formed to prioritize the exercise of religion over the pursuit of profit. Such a corporate creature was apparently beyond the knowledge of the Third Circuit's majority (though it was mentioned by Judge Jordan in his dissent).

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[3] This amicus brief is based on MARC A. GREENDORFER, BLURRING LINES BETWEEN CHURCHES AND SECULAR CORPORATIONS: THE COMPELLING CASE OF THE BENEFIT CORPORATION'S RIGHT TO THE FREE EXERCISE OF RELIGION (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2372464. The foregoing paper contains a more detailed discussion of the history and impact of Benefit Corporations.

In addition, the Third Circuit and the government each misunderstood this Court's previous decisions on the Free Exercise rights of corporations and turned what had been nothing more than a presumption relating to non-profit corporations into a bright-line rule that threatens to strip the fundamental right to exercise religion from a growing number of religious organizations that happen to be formed as something other than non-profit corporations.

ARGUMENT

Petitioners are, in pertinent part, a closely-held corporation owned by individuals with strong religious convictions. Through the corporation, the Petitioners both operate a business and practice their faith (*see* Pet. Br. at *4-5, *Conestoga Wood Specialties Corp. v. Sebelius*, 274 F.3d 377 (3d Cir. 2013), *cert. granted*, Nov. 27, 2013 (No. 13-356)) for details on the role religious exercise plays in Petitioner corporation's operations). Petitioners believe that the Affordable Care Act's contraception mandate would require them to violate their religious beliefs by providing insurance that enables the termination of a human life.

The Third Circuit's majority hewed to a strict, and unprecedented, interpretation of the First Amendment's Free Exercise Clause, differentiating a "religious, non-profit corporation," which the majority believed has Free Exercise rights, from a "secular, for-profit corporation," which the majority said was never

intended to be covered by the protections of the Free Exercise Clause. The Third Circuit stated that this bright-line rule was based on its understanding of the history and purpose of the First Amendment.

To get to this understanding, the Third Circuit engaged in logical gymnastics. It first opined that Free Exercise rights are unique to individuals (and not corporations). It then contradicted this conclusion by finding that a corporation could indeed have Free Exercise protections, but only if that corporation is a church or some "other religious entity" (a term which the Third Circuit did not define). Then, ignoring the inherent contradiction it was creating, the Third Circuit pivoted back to denying corporations Free Exercise rights if that corporation was "secular and for-profit."

This is so, the Third Circuit said in a self-proving conclusion, because a secular corporation isn't capable of exercising religion.

(a) Does Free Exercise cover corporations organized for religious purposes?

This leaves us with a conundrum. Assuming that a "secular for-profit corporation" can indeed be denied Free Exercise rights but churches and other "religious entities" organized as corporations are protected, how do we distinguish the two?

Since the Third Circuit didn't define "secular," we have to assume that they meant for it to have its

common meaning. The Merriam-Webster Dictionary defines "secular" as "not spiritual: of or relating to the physical world and not the spiritual world: not religious: of, relating to, or controlled by the government rather than by the church." Petitioner corporation is clearly not secular; if it were, this case wouldn't be before the Court. The heart of the question in this case centers on the Petitioner corporation's religious activities.

The Third Circuit couldn't find caselaw to support the assertion that "for-profit, secular corporations" can exercise religion. However, the absence of an affirmative statement from this Court is hardly the basis for a bright-line rule denying a fundamental right.

Where the Third Circuit and the government were led astray with this issue is likely a presumption described by Justice William Brennan in 1987.

In his concurrence in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (deciding whether religious employers could choose employees based on the religion of the employee), Justice Brennan explained the blanket First Amendment Establishment Clause protection for non-profits as follows:

> *The risk of chilling religious organizations is most likely to arise with respect to nonprofit activities. The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation. In*

contrast to a for-profit corporation, a non-profit organization must utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus to the owners. This makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose. ***Furthermore, unlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce. Churches often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster.***

Nonprofit activities therefore are most likely to present cases in which characterization of the activity as religious or secular will be a close question. If there is a danger that a religious organization will be deterred from classifying as religious those activities it actually regards as religious, it is likely to be in this domain. ***This substantial potential for chilling religious activity makes inappropriate a case-by-case determination of the character of a nonprofit organization, and justifies a categorical exemption for nonprofit activities****. Such an exemption demarcates a sphere of deference with respect to those activities most likely to be religious. It permits infringement on employee free exercise rights in those instances in*

> *which discrimination is most likely to reflect a religious community's self-definition. While not every nonprofit activity may be operated for religious purposes, the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion.*

Amos at 345 (internal citations omitted) (emphasis added).

Though *Amos* is an Establishment Clause case, this Court has previously acknowledged that the Establishment Clause and the Free Exercise Clause are two sides of the same coin and, by extension, the general principles of the Religion Clauses apply equally to both the Establishment Clause and the Free Exercise Clause. *See*, *e.g.*, *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970) (deciding that the grant of tax exemptions to religious entities does not violate the Establishment Clause), where this Court explained

> [e]ach value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.

Id. at 669-670.

As *Amos* shows, this Court has historically believed that it was not proper for courts to examine the sincerity of corporate religious beliefs; consequently, the extension of First Amendment religion clauses protections for non-profits has historically been a matter of expediency and deference to entities providing community service "as a means of fulfilling religious duties." Thus, there is a presumption that non-profit corporations are capable of the exercise of religion.

There is nothing inherently unique about the non-profit entity for these purposes.

Nor is there anything that justifies a categorical exclusion of Free Exercise rights for for-profit corporations. As Justice Brennan noted in *Amos*, " . . . determining whether an activity is religious or secular requires a searching case-by-case analysis. . . . Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity." Justice Brennan focused on the nature of the activity, not the corporate status of the entity engaging in the religious activity.

Amos stands for the proposition that non-profits, due to the likelihood that they are organized for primarily religious purposes, are *presumed* to be capable of exercising religion and are thus protected by the Religion Clauses; conversely, under *Amos*, for-profit corporations would have to be examined on a case-by-case basis, since, before the advent of the Benefit

Corporation, they traditionally operated primarily for-profit making, rather than religious, purposes.

It is here that the Third Circuit and the government make the logical mistake of assuming that if all non-profits are presumed to be religious actors with Free Exercise rights, all other corporations must be presumed to not have such rights.

Granted, it would be impractical for courts to engage in case-by-case determinations of the character of corporations to determine if they are "religious" as that would thrust courts into a role that is outside of their traditional milieu. However, it also would be impermissible for courts to adopt a doctrine that results in the categorical denial of Free Exercise rights simply because a corporation isn't a non-profit. This would be especially true if a for-profit corporation was formed to pursue religious purposes and, by law, had a duty to pursue those religious purposes at the cost of profits.

Since *Amos*, a new type of corporation has emerged – the Benefit Corporation, which is a corporation that can be legally bound to operate for purposes, including religion, that are other than profit.

We have found the Third Circuit's elusive "religious entity" one that is neither a church nor a profit obsessed corporation.

As *Amos* (and its presumption that non-profits were religious actors for First Amendment purposes) was decided before the creation of the Benefit

Corporation, it is critical that this Court revisit the blanket presumption from *Amos* and extend it to Benefit Corporations, whether they are de jure or de facto.[4]

(b) The New Reality: Benefit Corporations Blur The Traditional Lines Between For-Profits and Non-Profits

Until recently it was true that there was a rather stark difference between a corporation formed as a non-profit and one formed as a for-profit. Primary among those differences are the permitted activities of the traditional for-profit corporation. A traditional for-profit corporation ultimately has to be operated to enhance shareholder value. *See eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010) (holding that directors of a for-profit Delaware corporation cannot defend a business strategy that openly eschews stockholder wealth maximization).

This is why Justice Brennan said in *Amos* that non-profit status made "plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose," which justified the presumption that a non-profit corporation was a religious actor deserving Religion Clauses protections.

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[4] *See* § 3(f) of this brief for a discussion of de facto corporations.

In closely-held traditional for-profit corporations, such as the Petitioner corporation, the shareholders often choose some goal other than profit maximization and thereby voluntarily act against their own financial interests since they have foregone profit maximization. Nonetheless, if the shareholders were to subsequently divide on the desired goal of the corporation, with one group seeking profit maximization and the other seeking some other goal, the presumption of Delaware (and virtually all other states') courts would be in favor of profit maximization.

Consequently, unlike a non-profit corporation, if a traditional for-profit corporation sought to do something along the lines of promoting religion, it would have to do so as a secondary goal. To the extent the promotion of religion were to negatively and materially deviate from the interests of the shareholders, the shareholders would have any number of claims against the board of directors of that traditional for-profit corporation.

In sum, a traditional for-profit corporation is ultimately obligated to act in a profit-seeking manner so long as at least some shareholders desire the corporation to pursue profits over any other purpose.

(c) Enter the Benefit Corporation

The Benefit Corporation first came into existence in the United States in late 2010 when the State of

Maryland used the Model Benefit Corporation Code, produced in connection with the non-profit B Lab,[5] to create a new, hybrid entity that at once could pursue social benefits, much like a non-profit corporation, while still working to generate profits for its shareholders.

As of the date of this brief, 19 states and the District of Columbia have enacted Benefit Corporation legislation using either the Model Benefit Corporation Code or some derivation thereof and 18 additional states are working on Benefit Corporation legislation.[6]

In the context of Free Exercise jurisprudence and the for-profit/non-profit dichotomy created by the Third Circuit, the key difference between a Benefit Corporation and a traditional for-profit corporation is that the shareholders of a Benefit Corporation can

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[5] B Lab describes itself as "a nonprofit organization dedicated to using the power of business to solve social and environmental problems." http://benefitcorp.net/about-b-lab. A Benefit Corporation is formed under state law that generally adheres to the model legislation that was promulgated in connection with efforts by B Lab. The model benefit corporation legislation is available at http://benefitcorp.net/for-attorneys/model-legislation and is hereinafter referred to as the "Model Benefit Corporation Code."

[6] *See* http://benefitcorp.net/state-by-state-legislative-status. The states are: Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia and the District of Columbia.

take action to compel the corporation to engage in the social benefit goals it was founded to achieve (even if such activities are at the expense of profits), while a traditional for-profit corporation's shareholders can only compel the corporation to maximize profits.

This distinction upends the Third Circuit's and government's for-profit/non-profit, secular/religious Free Exercise doctrine.

The Benefit Corporation fills the structural gap between the non-profits described by Justice Brenan in *Amos* and the for-profit corporations like the Petitioner corporation currently being denied Free Exercise rights. As such, de jure and de facto Benefit Corporations, like non-profits, should benefit from the same presumption of exercise of religion and the corresponding protections of the Free Exercise Clause.

(i) What makes a Benefit Corporation unique?

As an initial matter, it is important to understand that in almost all cases, corporations are formed under and governed by state, not federal, law.

While a Benefit Corporation is technically a for-profit corporation, it differs from a traditional for-profit corporation in many ways; most germane are the primacy of social benefit over profit and the third party influence over the Benefit Corporation's operations to ensure that it is operated in a socially beneficial manner.

Benefit Corporation statutes require the board of directors to consider the effects of their decisions on the Benefit Corporation's employees, customers and suppliers as well as the community and society at large.[7]

The drafters of the Model Benefit Corporation Code made it abundantly clear that the duty to maximize profits was a relic of traditional for-profit corporate governance and Benefit Corporations would not be limited to such pecuniary goals. In the comment to Section 301(a)(1) of the Model Benefit Corporation Code, the drafters explicitly stated:

> *This section is at the heart of what it means to be a benefit corporation. By requiring the consideration of interests of constituencies other than the shareholders, the section rejects the holdings in* Dodge v. Ford, 170 N.W. 668 (Mich. 1919), *and* eBay Domestic Holdings, Inc. v. Newmark, *16 A.3d 1 (Del. Ch. 2010), that directors must maximize the financial value of a corporation.*[8]

In a clear affront to Gordon Gekko (and the Third Circuit's rigid view of corporations), in a Benefit Corporation, greed is not good.

If there were any doubt as to whether a Benefit Corporation is more like a non-profit than a traditional for-profit corporation for Free Exercise purposes,

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[7] Model Benefit Corporation Code § 301(a)(1).

[8] Model Benefit Corporation Code, comments to § 301.

the rejection of the duty to maximize profits and the creation of a duty to act in a manner that creates social benefits that are embedded within the Model Benefit Corporation Code should convince even the Third Circuit that a Benefit Corporation is a fraternal twin to the non-profit while being a mere distant cousin to the traditional for-profit corporation. The Model Benefit Corporation Code explicitly stands for the proposition that in a Benefit Corporation, directors can defend a business strategy such as pursuing a religious purpose that does not involve stockholder wealth maximization.

And since that's obviously the plain language of the Model Benefit Corporation Code, a Benefit Corporation is absolutely the functional twin of a non-profit for Free Exercise purposes.

(d) Can a Benefit Corporation have a "religious purpose" similar to that of a non-profit, like a church?

A traditional for-profit corporation is formed with a "purpose" statement in its certificate of incorporation. Though the "purpose" statement is a statutorily required term, it is almost always left in the most general of terms possible.

In fact, the State of Delaware presumes that substantially all traditional for-profit corporations will be formed with a general purpose and as such, provides on its Secretary of State's website a sample certificate of incorporation to be filled in, with the

purpose section pre-printed as "the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware."[9]

It is exceedingly rare to find a certificate of incorporation that limits the powers of the company beyond engaging in all activities that are legally permissible in that jurisdiction.

Indeed, the remedy for a corporation violating its purpose statement, a suit based on the "ultra vires" doctrine, has mostly become a remnant of history.[10]

A Benefit Corporation, on the other hand, is by its nature, limited to certain permitted activities. At the very least, a Benefit Corporation is required to identify itself as a benefit corporation in its certificate of incorporation. As such, the corporation is limited to creating a general public benefit, which is typically defined as "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and

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[9] Available at http://corp.delaware.gov/incstk09.pdf.

[10] *See*, *e.g.*, Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality*, 87 VA. L. REV. 1279 (2001) (arguing that while the ultra vires doctrine as a way to limit a corporation's activities is generally "dead or at least invalid," the only enduring use of the doctrine is as a way for shareholders to stop a corporation from engaging in illegal behavior, as almost all purpose statements still limit a corporation's permitted purposes to those that are legal).

operations of a benefit corporation."[11] This purpose supersedes the traditional profit-making purpose that governs a traditional for-profit corporation.

In addition to the general public benefit purpose, a Benefit Corporation can further list more specific purposes, such as providing low income housing, protecting the environment, improving human health, promoting the arts or, even promoting religion.[12]

In this context, it is important to note that "[t]he Model [Benefit Corporation Code] explicitly states that '[t]he creation of a general public benefit and specific public benefit . . . is in the best interests of the benefit corporation.' **This serves to protect against the presumption that the financial interests of the corporation take precedence over the public benefit purposes**, which maximizes the benefit corporation's flexibility in corporate decision-making."[13]

Though each state's Benefit Corporation laws contain differing provisions relating to the purpose for which a Benefit Corporation may be formed,

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[11] *See*, *generally*, Model Benefit Corporation Code § 102.

[12] *Id*. and Del. Code Ann. tit. 8, § 362.

[13] White Paper, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS AND, ULTIMATELY, THE PUBLIC, at 17, dated January 18, 2013 (emphasis added), available at http://benefitcorp.net/storage/documents/Benecit_Corporation_White_Paper_1_18_2013.pdf.

Delaware, the authoritative jurisdiction for corporate law jurisprudence, specifically includes religious activities as a permitted Benefit Corporation purpose.[14]

A Benefit Corporation with a religious purpose in its statement of purpose should be seen as identical to a non-profit under the *Amos* First Amendment doctrine – it can safely be presumed to be an entity organized for and acting in furtherance of religious purposes. Justice Brennan's concurrence in *Amos* was clear on this logic: "The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation."

If this is true, then the fact that a corporation's certificate of incorporation requires it to be operated for religious purposes should remove any doubt, and any further inquiry, as to whether it is entitled to Free Exercise protections. Indeed, the Model Benefit Corporation Code explicitly states the public benefits for which the corporation was established are the corporation's best interests (and thus take precedence

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[14] Delaware General Corporation Law, Subchapter XV, § 362 requires any Delaware Benefit Corporation to state in its certificate of incorporation at least one of the following purposes for which it was formed: "a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, **religious**, scientific or technological nature." (emphasis added).

over profit-making activities). Consequently, to avoid any chilling of protected religious exercise, this court should accord all religious Benefit Corporations the same blanket First Amendment protections that any non-profits receive.

Not only does a Benefit Corporation have to specify in its certificate of incorporation the benefits that it is obligated to perform, like a non-profit corporation it must publicly publish an annual report on its progress in performing those benefits.[15] This report allows both shareholders and the general public to review the performance of the Benefit Corporation in fulfilling its stated purpose.

Included in the Benefit Corporation annual report is an analysis of the Benefit Corporation's performance of its social benefit goals compared to a third party standard for performance. The Model Benefit Corporation Code commentary for this requirement describes the obligation as follows:

> *The requirement in section 401 that a benefit corporation prepare an annual benefit report that assesses its performance in creating general public benefit against a third-party standard provides an important protection*

[15] Model Benefit Corporation Code § 401 requires each Benefit Corporation to prepare and publicly publish an annual report consisting of a narrative describing the progress made in providing the stated benefit as well as a report that measures the Benefit Corporation's progress against a third-party standard.

> *against the abuse of benefit corporation status. The performance of a regular business corporation is measured by the financial statements that the corporation prepares. But the performance of a benefit corporation in creating general or specific public benefit will not be readily apparent from those financial statements. The annual benefit report is intended to permit an evaluation of that performance so that the shareholders can judge how the directors have discharged their responsibility to manage the corporation and thus whether the directors should be retained in office or the shareholders should take other action to change the way the corporation is managed. The annual benefit report is also intended to reduce "greenwashing" (the phenomenon of businesses seeking to portray themselves as being more environmentally and socially responsible than they actually are) by giving consumers and the general public a means of judging whether a business is living up to its claimed status as a benefit corporation.*

Additionally, a Benefit Corporation may have (and, if it is a publicly traded corporation, is obligated to have), a "Benefit Director" who is a member of the board of directors charged with preparing an opinion describing any failures of the board or officers to

fulfill their obligations in providing the Benefit Corporation's stated benefits.[16]

In the event a Benefit Corporation fails to properly pursue its stated benefit, the Model Benefit Corporation Code provides for a "benefit enforcement proceeding" as a remedy, which can result in a court ordering the Benefit Corporation to take affirmative action to fulfill the purpose stated in its certificate of incorporation.

A benefit enforcement proceeding can be initiated by either the Benefit Corporation itself, by shareholders or by one or more director.[17] As a further protection, a Benefit Corporation can't change its status as a Benefit Corporation without the affirmative vote of two-thirds of the Benefit Corporation's shareholders.

Added up, Benefit Corporation governance procedures provide a guarantee that the entity will be guided by a commitment to public benefit over profit that is at least as robust as the rules that govern non-profits.

A Benefit Corporation with a stated purpose of promoting religion is, for Free Exercise purposes, substantively the same as a non-profit and, like a non-profit, such a Benefit Corporation should be presumed to possess Free Exercise rights.

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[16] Model Benefit Corporation Code § 302.

[17] *Id*. at § 305(c).

If the Free Exercise rights of Benefit Corporations are not recognized, it sets up a scenario where federal rulemaking could cause a corporation to violate its certificate of incorporation and thus subject the board of directors and the corporation to liability under state law.

The *Amos* court explained the presumption of Free Exercise rights for non-profits by pointing out that "[w]hile not every nonprofit activity may be operated for religious purposes, the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion." That same logic militates against the denial of Free Exercise rights to Benefit Corporations.

Without such a "categorical rule" (that Benefit Corporations with a stated religious benefit purpose, like non-profits, operate for religious purposes and thus have Free Exercise rights) there is a significant risk of an unacceptable entanglement of government with religion.

(e) The Need for de facto Benefit Corporation Jurisprudence

While corporations are created under and governed by state law, the protection of Free Exercise rights generally is derived at the federal level. If a Benefit Corporation with a religious purpose has Free Exercise rights, what happens in jurisdictions where Benefit Corporation status is not yet available?

In particular, only 20 of 50 states have adopted Benefit Corporation legislation and Benefit Corporation legislation in most states, including Pennsylvania (where Petitioner corporation is incorporated), is a very recent development. In fact, Pennsylvania's adoption of its Benefit Corporation legislation only became effective after Petitioner's complaint had been filed and Oklahoma, where Hobby Lobby Stores, Inc. was incorporated, does not yet have Benefit Corporation legislation.

The answer to this question is to grant for-profit corporations that have a demonstrable religious purpose "de facto" Benefit Corporation status for First Amendment purposes.

It is important to remember that the original reason for establishing the presumption that non-profits have Free Exercise rights was to avoid the chilling of religious expression where the corporate actor was likely to be operating for religious purposes. The *Amos* court used the most expedient test that was relevant for its time, which was the non-profit/for-profit distinction. The rise of Benefit Corporations, however, provides a more precise basis for the presumption, and one that will ensure less court entanglement in religious questions.

There can be no dispute that Petitioner corporation operates for religious purposes. The combination of the small and united shareholder base and formal commitment to the promotion of religion puts it in a position that is functionally equivalent to either a

non-profit religious organization or a Benefit Corporation with a religious purpose.

(f) Legal Basis for de facto Benefit Corporation Status

The doctrine of the "de facto" corporation has a long history in the United States. Each state has different tests and rules pertaining to de facto corporation status, but Delaware's is illustrative. In Delaware, a court will deem a corporation to exist even if one hasn't been properly formed under the state's law. The general theory behind the de facto corporation doctrine is that where a party has made a bona fide attempt to organize as a corporation and it's likely that others have dealt with the entity assuming that it was a corporation, the courts should give legal effect to the expectations of the various parties.

A Delaware court will examine three factors to determine whether de facto corporate status should apply. First, there must be a state law under which the corporation could have been formed. Second, there must be some evidence of an intent to form the corporation and comply with the corporate governance laws. Finally, there must have been some exercise of corporate powers in furtherance of the attempted incorporation. *See Caudill v. Sinex Pools, Inc.*, C.A. No. 04C-10-090 WCC, 2006 WL 258302 (Del. Super. Ct. Jan. 18, 2006).

In the case of a de facto Benefit Corporation, the standard Delaware test could be easily modified and implemented to provide Free Exercise rights to a

corporation that has a religious purpose. In the event the putative de facto Benefit Corporation is in a state that doesn't have Benefit Corporation legislation, the court could look to the Model Benefit Corporation Code.

To prove evidence of intent to form a Benefit Corporation, the court could look to see if the corporation has a purpose statement that includes a religious goal or if its board has adopted standards of conduct and operations that are religious in nature. Then, the court could look to see whether there had been exercise of corporate powers that showed that the company was being operated with an emphasis on religious purpose. Assuming that all three elements existed, the court would deem the corporation to be a de facto Benefit Corporation for First Amendment purposes.

It may take many years before the Benefit Corporation is established in all 50 states and even more time before a robust body of Benefit Corporation jurisprudence exists such that the Benefit Corporation becomes well enough known that small businesses transition from a traditional for-profit corporation to a Benefit Corporation form.

However, the existence of the Benefit Corporation as a legal for-profit entity with a religious purpose (if the shareholders so choose) proves that there is a much larger world than the one imagined by the Third Circuit and its rigid, baseless "religious nonprofit/secular for-profit" dichotomy.

Until such time as Benefit Corporation legislation exists in all 50 states, status as a de facto Benefit Corporation with attendant Free Exercise rights should inure to any for-profit corporation that asserts a religious purpose. Only a decision from this Court can clarify the Free Exercise rights and privileges of the Benefit Corporation, whether it is de jure or de facto, and thus give certainty to those who would consider adopting it as a corporate form.

CONCLUSION

This Court is understandably reluctant to engage in case-by-case investigations into the religious practices of individuals or associations of individuals. There was indeed a time not long ago when, for purposes of judicial efficiency, it was acceptable to create a presumption that only non-profit corporations should have Free Exercise rights.

However, there never before has been a corresponding legal presumption that for-profit corporations are barred from enjoying Free Exercise rights. The recent decision of the Third Circuit to codify the denial of Free Exercise rights on an utterly arbitrary and whole-cloth legal construct of a "secular, for-profit" corporation is an unconstitutional shredding of one of the most fundamental of all rights – the right to exercise religion, whether as an individual or as an association of individuals.

At a minimum, the existence of Benefit Corporations provides a basis for this Court to find that there should be no bright-line rule denying Free Exercise rights to corporations not organized as non-profits that nonetheless exercise religion.

Benefit Corporations and de facto Benefit Corporations, when formed or operated with a religious purpose, are no less capable of religious exercise than non-profit corporations and deserve the same Free Exercise protections.

Respectfully submitted,

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