No. 21-476

IN THE

Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY; LORIE SMITH,

Petitioners,

v.

AUBREY ELENIS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF PROFESSOR KENT GREENFIELD AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

Kent Greenfield is Professor of Law and Dean's Distinguished Scholar at Boston College Law School. Professor Greenfield has written extensively about the constitutional rights of corporations. *See, e.g.*, Kent Greenfield, *Corporations Are People Too (And They Should Act Like It)* (2018); Kent Greenfield & Daniel A. Rubens, *Corporate Personhood and the Putative First Amendment Right to Discriminate*, in *Research Handbook on Corporate Purpose and Personhood* (Elizabeth Pollman & Robert B. Thompson, eds., 2021); Kent Greenfield, *In Defense of Corporate Persons*, 30 Const. Comment. 309 (2015). In 2017, he filed an amicus brief with the Court in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), presenting arguments similar to those raised in this brief. Greenfield was also the founder and President of the Forum for Academic and Institutional Rights, the Respondent in *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47 (2006). Professor Greenfield submits this brief to aid the Court in distinguishing between the constitutional claims of businesses and their owners or members.

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[1] Counsel for the parties have filed blanket consents to the filing of amicus briefs on the merits. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and his counsel made a monetary contribution intended to fund the preparation or submission of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' constitutional claims depend on a unity between the individual, Lorie Smith, and the business, 303 Creative LLC. But corporations and their shareholders are not the same, and LLCs and their members are not the same. They are not the same for purposes of corporate law, and they should not be the same for constitutional law. The Court should not distort constitutional law by ignoring a fundamental principle of corporate law.

Corporations and other business entities may raise constitutional claims. But those claims arise when the entity itself has constitutional interests burdened by state action. The interests of shareholders, investors, or other corporate constituencies should not be reflexively projected onto the entity. Separateness is often the very reason why founders of business—even small ones—choose the corporate or LLC form among the possible legal forms available. Shareholders and members receive immense benefits in exchange for this separation, including the privilege of limited liability, which protects their personal assets from claims against the entity. Given these benefits of corporate separateness, business owners should not be able to assert unity with the enterprise whenever it suits their ideological, political, or religious purposes. *See* § I, *infra*.

Presuming a unity between investors' beliefs and the constitutional interests of companies would create special difficulties and analytical complexities in

cases in which a business entity asserts a constitutional right to be exempt from antidiscrimination laws. Unity could also empower investors to pressure businesses to advance political or religious beliefs as a basis for exemptions to generally applicable laws, thereby gaining a competitive advantage in the marketplace. Before recognizing a company's claim to a First Amendment-based exemption, the Court should require that such beliefs be organic to the company, not mere projections of dominant shareholders or investors, and not asserted as pretext to gain economic advantage. *See* § II, *infra*.

Although this case rests on these weighty questions at the intersection of constitutional and corporate law, it is an exceptionally poor vehicle for resolving them. The question presented focuses exclusively on whether a public accommodation law can "compel an artist to speak or stay silent," and Petitioners' briefing likewise attends only to the constitutional claims of Ms. Smith as a "graphic artist and website designer." Pet. Br. 2. Petitioners have yet to explain why those interests should be projected onto the LLC, 303 Creative. Similarly, the courts below failed to separate the constitutional interests of Ms. Smith from those of 303 Creative.

Because Petitioners' briefing and the decisions below do not analyze the relationship between the interests asserted by the business and those of Ms. Smith, the Court should not resolve those matters "in the first instance." *Zivotofsky v. Clinton*, 566 U.S. 189, 202 (2012). The Court may instead dismiss this petition as improvidently granted, or remand to the Tenth Circuit for further consideration of these issues.

If the Court does reach these questions, it should limit its consideration to the specific facts presented—where the individual seeking the exemption is the sole member of the LLC through which she runs an artistic business. "[I]f it is not necessary to decide more, it is necessary not to decide more." *PDK Lab'ys Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring). A decision that conflates the constitutional claims of business owners with those of a corporate entity, regardless of the size of the corporation and the diversity of its stakeholders, would carry unpredictable and significant consequences. This case is not an apt occasion for such a sweeping holding.

ARGUMENT

I. Because Of The Separate Legal Personality Of Companies And Their Investors, The Court Should Not Reflexively Project The Constitutional Interests Of Investors Onto The Enterprise.

Throughout their filings, Petitioners refer to "Smith's" religious beliefs and artistic expression. Pet. Br. 4 ("Smith is … Christian, and her religious beliefs … teach that marriage is only between one man and one woman."); Pet. App. 186a ("Ms. Smith is compelled by her religious beliefs to use the talents God has given her to promote God's design for marriage in a compelling way."). Ms. Smith asserts that the State co-opted *her* "personal imagination and content creation" and forced her to speak in a way that violated *her* "conscience." Pet. Br. 23; *see also* Pet. App. 179a ("Ms. Smith's religious beliefs, including her religious

understanding about marriage as an institution between one man and one woman, are central to her identity, her understanding of existence, and her conception of her personal dignity and identity."). Her constitutional claims depend on an argument that Colorado law would burden *her* right to free speech. To the extent Colorado law burdens her individual constitutional interests separate from those of the business, this brief takes no position as to the proper disposition of her claims.

But the constitutional claims of Petitioner 303 Creative, LLC, a "for-profit limited liability company organized under Colorado law with its principal place of business in Colorado," Pet. App. 181a, must be analyzed distinctly and separately from those of Ms. Smith. It is not the LLC but rather Ms. Smith who asserts a deep religious faith and creates "unique speech." Pet. Br. 43. Therefore, the constitutional claims of the LLC can succeed only if the company can assert Ms. Smith's religious beliefs as its own. But Ms. Smith and 303 Creative are not the same. They are legally distinct entities under Colorado law, and Ms. Smith voluntarily chose a business form that protected her by way of that separation. The Court should not ignore those state law distinctions. To do so would distort First Amendment law and indeed all of constitutional law.

A. The legal distinction between companies and their investors is a core principle of business law.

The first principle of corporate law is that for-profit corporations are entities that possess legal interests of their own and a legal identity separate and distinct from their shareholders. This legal "personhood" holds true whether the for-profit corporation has one, one hundred, or one million shareholders. It is also true for limited liability companies, a legal form that offers certain tax advantages for small businesses while retaining the limited liability protections and legal personhood of corporations. *See* F. Hodge O'Neal & Robert B. Thompson, *O'Neal and Thompson's Close Corporations and LLC's: Law and Practice* §§ 1:15, 2:7, 8:27 (rev. 3d ed. 2017). In each scenario, the business entity is distinct in its legal interests and existence from those who contribute capital to it.[2]

The Court has repeatedly recognized this principle of strict separation, calling it "a general principle of corporate law deeply 'ingrained in our economic and legal systems.'" *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quoting William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193, 193 (1929)). This separation is not an ancillary part of corporate law and governance. It is instead the *sine qua non* of the wealth-creating legal innovation of the corporate

[2] Because the principle of separation is the same for LLCs and corporations, references and arguments in this brief to corporations and shareholders apply equally to LLCs and members, unless otherwise indicated.

form. The rationale behind corporate separateness is to encourage entrepreneurial activity by founders, investment by passive investors, and risk-taking by corporate managers. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 93-97 (1985). The corporate veil is a profound but simple device helping to achieve all three of those goals. Indeed, it is impossible to imagine a workable legal framework for corporate governance without such separation.

"After all," the Court has emphasized, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001).

The centrality of corporate separateness is well established and longstanding. *See Burnet v. Clark*, 287 U.S. 410, 415 (1932) (a "corporation and its stockholders are generally to be treated as separate entities"); *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 442 (1934) ("As a general rule, a corporation and its stockholders are deemed separate entities …"); 1 William Blackstone, *Commentaries on the Laws of England* *455 (U. Chi. Press 1979) ("[I]t has been found necessary … to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. These artificial persons are called bodies politic, bodies corporate, … or corporations ….").

Because the corporation is a separate entity, its shareholders are not responsible for its debts. This "privilege of limited liability," as protected by the corporate veil, is "the corporation's most precious characteristic." William W. Cook, *The Principles of Corporation Law* 19 (1925). Although the term "corporation" sometimes calls to mind large, publicly traded enterprises, incorporation provides equally critical benefits to smaller businesses even when their shares are not publicly traded. One of the most compelling reasons for a small business to incorporate—or choose another form of limited liability entity—is so that its contributors of capital can acquire the protection of the corporate veil. By incorporating a business, the founders and investors insulate their personal assets from risk. Absent significant misconduct and fraud, shareholders in a corporation cannot lose any more than their original investment. If the corporation cannot pay its bills, the creditors—not the shareholders—bear the loss, with only very narrow exceptions.

Corporate separateness also provides meaningful benefits to the marketplace at large. Corporations themselves hold property, pay debts, and can sue and be sued. The financial capacity or creditworthiness of a company does not depend on the wealth of individual shareholders; corporations enter into contracts and borrow money in their own names. Creditors, investors, customers, employees, government agencies, and suppliers do not need to investigate the particularities of the corporation's shareholders to decide whether to engage in business with the corporation. They need only look at the resources and solvency of the business itself.

Even where a single shareholder owns all the corporation's shares, the corporate veil cannot be pierced absent significant misconduct or fraud on the part of the shareholder. This presumptive impermeability of the corporate veil has been confirmed by "thousands of instances where a sole shareholder was held *not* liable for either tort or contract obligation[s] of his wholly owned corporation." George D. Hornstein, *Corporation Law and Practice* § 751 (1959); *see generally* Stephen B. Presser, *Piercing the Corporate Veil* § 1:1 (2017) ("It is now accepted as one of the first principles of American law that those who own shares in corporations, whether such shareholders are individuals or are themselves corporations, normally are not liable for the debts of their corporations."); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036 (1991).

Because of these benefits, founders of even small businesses routinely choose the corporate form or another limited liability business form for the organization of a company. If entrepreneurs want to remain legally identified with their businesses, they can organize them as sole proprietorships or partnerships. But the cost of doing so is the exposure to much greater financial and legal risks. The corporate or LLC form insulates entrepreneurs from those risks and acts as a subsidy to entrepreneurs and investors by offering a way to shift those risks to creditors, tort victims, and the public at large. *See* David K. Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 Emory L.J. 1305, 1307 (2007).

In the present case, Ms. Smith voluntarily chose the LLC form for a web design business, and presumably seeks to maintain the benefits of legal separateness when it suits her. But she also asks the Court to disregard that separateness in connection with a Colorado statute that she would rather the company not obey. She argues, in effect, that separateness is a one-way ratchet: Ms. Smith is separate when the company is required to pay a tort or contract judgment, but separateness dissolves when the company is required to act in a way that offends Ms. Smith's beliefs.

Ms. Smith cannot have it both ways. "One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946); *see Moline Props., Inc. v. Comm'r*, 319 U.S. 436 (1943) (holding that even a sole shareholder cannot seek to sidestep a corporation's separateness to gain a personal tax advantage).[3] Nor can Ms. Smith expect

[3] As the Court is aware, federal and state courts may pierce the corporate veil as an equitable remedy where the circumstances justify it, including when corporate formalities are disregarded, when shareholders have used the veil to commit fraud, or when the corporate entity was created for the transparent purpose of evading state or federal policy. *See, e.g.*, *Anderson v. Abbott*, 321 U.S. 349, 362-63 (1944); *Ill. Bell Tel. Co. v. Glob. NAPS Ill., Inc.*, 551 F.3d 587, 598 (7th Cir. 2008); *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 26-27 (1st Cir. 2000); *see also* O'Neal & Thompson, *supra*, § 1:21

courts to disregard the separateness of the company when doing so would benefit her or the company. *Cf. Safiedine v. City of Ferndale*, 753 N.W.2d 260, 262-64 (Mich. Ct. App. 2008) (a family-owned corporation and LLC that owned gas station did not have standing to bring claim under Michigan civil rights law based on discriminatory acts against a family member who managed the station), *vacated in part on other grounds*, 755 N.W.2d 659 (Mich. 2008); *Krueger v. Zeman Constr. Co.*, 781 N.W.2d 858 (Minn. 2010) (holding that LLC's sole owner-member lacked standing to bring claim under Minnesota civil rights law based on discrimination in the performance of a contract between the LLC and a subcontractor); *Freedom Fin. Grp., Inc. v. Woolley*, 792 N.W.2d 134, 141 (Neb. 2010) (LLC member is not a proper party to a legal malpractice suit based on a duty owed to the LLC, and the member "may not attempt to use the corporate form of the LLC to shield itself from liability and then use the same corporate form as a sword to recover damages or enforce liability to the LLC").

("Courts in LLC piercing cases use the familiar indicia from corporate law in the familiar contexts of contract, tort or statutes that suggest no substantive difference in result than under corporate precedent."). But the "doctrine of piercing the corporate veil" remains "the rare exception, applied in the case of fraud or certain other exceptional circumstances." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003). There is no indication that such is the case here, and Petitioners do not ask that legal separateness be disregarded except for purposes of litigating Ms. Smith's constitutional claims.

B. Corporate separateness should not be ignored under the First Amendment.

Given the importance and centrality of corporate separateness in corporate governance law and doctrine, Petitioners have a heavy burden in persuading the Court to ignore these entity distinctions in its constitutional analysis. But Petitioners do not seem to recognize the necessity of persuasion here. They fail to develop any argument as to why Ms. Smith's constitutional interests should be projected onto the company such that the enterprise itself can claim a First Amendment-based exemption.

The Court's prior decisions do not control the free speech claim here. In *Burwell v. Hobby Lobby Stores, Inc.*, the question was whether for-profit corporations qualify as "person[s]" that could "exercise … religion" within the meaning of the Religious Freedom Restoration Act of 1993. 573 U.S. 682, 705-719 (2014). A divided Court concluded that closely held corporations are protected under that statute. *Id.* That holding, in turn, depended on Congress's instruction that the statutory term "exercise of religion" "'be construed in favor of a broad protection of religious exercise,'" which the Court viewed as "an obvious effort to effect a complete separation from First Amendment case law." *Id.* at 696. The Court's decision did not address claims under the First Amendment. *Id.* at 736.

Masterpiece Cakeshop did involve a claim under the First Amendment. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). But the Court's opinion said nothing about corporate

separateness—its dispositive free-exercise holding focused entirely on the Colorado Civil Rights Commission's treatment of the cake baker and bakery. *See id.* at 1729-32. Given that the parties in *Masterpiece Cakeshop* drew no distinction between the baker and his business in their constitutional arguments, the Court's acquiescence in that framing can hardly be said to have settled the issue.

Even if *Masterpiece Cakeshop* offers support for the notion that corporations may pursue free exercise claims based on religious hostility to their shareholders, it does not follow that entity distinctions must be ignored in the free speech context. Indeed, the free exercise ruling in *Masterpiece Cakeshop* does not change the axiom of corporate separateness. When a company is targeted for official opprobrium because of the religious views of its shareholders—the theory of the case relied upon by the Court in *Masterpiece Cakeshop*—then the company itself has a legitimate constitutional claim to be free of such opprobrium. The same would be true if the company had been targeted because of the religious views of its employees, customers, or any other constituency. In all such cases

it is the company that is being targeted.[4] *See* Greenfield, *Corporations Are People Too*, *supra*, at 88-100. And corporations are holders of their own rights.[5]

In this respect, for-profit enterprises are distinct from membership associations, which represent and embody the legal interests of their members, are deemed to share the values of their members, and have standing to sue on their members' behalf. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 52 n.2 (2006). Corporations and LLCs, in contrast, are legally distinct entities whose shareholders and investors may have idiosyncratic investment objectives, distinctive and variable economic needs, and a diversity of political and religious beliefs. Google or 303

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[4] *Cf. Adarand Constructors, Inc. v. Peña,* 515 U.S. 200 (1995) (company had equal protection claim based on a statute that classified the company on the basis of race of shareholders); Kent Greenfield & Daniel A. Rubens, *Corporate Personhood and the Putative First Amendment Right to Discriminate* in *Research Handbook on Corporate Purpose and Personhood* 293-96 (Elizabeth Pollman & Robert B. Thompson, eds., 2021) (explaining why *Adarand* was not a violation of the principle of separation of company from shareholders).

[5] The Court has recognized corporate speech rights in order to preserve the "'open marketplace' of ideas protected by the First Amendment," *Citizens United v. FEC*, 558 U.S. 310, 354 (2010), and to protect the company's, consumers', and society's interest in "the free flow of commercial information," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64 (1976). The asserted interests are those of the company itself, not the company's shareholders or investors. *See generally* Kent Greenfield, *In Defense of Corporate Persons*, 30 Const. Comment. 309 (2015).

Creative are not the Boy Scouts or the NAACP. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *NAACP v. Button*, 371 U.S. 415 (1963).[6]

Corporations and LLCs stand in their own shoes as a matter of constitutional law. The Court, to be sure, has left no doubt that for-profit corporations and their trade associations may raise free speech claims, s*ee, e.g.*, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971), and business enterprises can and should have a role to play in public discourse. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). But companies do not act merely as conduits for shareholders' or members' points of view or have standing to assert their investors' constitutional interests. Courts have long recognized this distinction between natural persons and business entities in other constitutional contexts. *See, e.g.*, *Braswell v. United States*, 487 U.S. 99 (1988) (sole shareholder has no Fifth Amendment right to resist a subpoena to the corporation for corporate documents that personally incriminate him); s*ee also* O'Neal & Thompson, *supra*, § 1:15 ("The separate entity concept ordinarily prevents a shareholder, even a sole owner, from directly exercising any of the corporation's rights.").

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[6] In *Hurley v. Irish American Gay, Lesbian & Bisexual Grp of Boston, Inc.*, the parade organizer was a "an unincorporated association of individuals elected from various South Boston veterans groups." 515 U.S. 557, 560 (1995). The Court's constitutional analysis likened the association to a "private club" that "could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 580-81. Whatever latitude a private club may have in that regard does not translate to the context of corporations and LLCs.

When corporations or LLCs assert free speech claims, courts should take care that the rights asserted belong to the entity and not to someone else. If Ms. Smith has an *individual* constitutional interest here, it cannot be used as the basis for a regulatory waiver for the *company*. Even if an individual employee or manager could assert a constitutional right to be exempted from the Colorado Anti-Discrimination Act's obligations for employees or managers of a public accommodation (a question on which amicus takes no position), the company cannot leverage the objection of a solitary employee or manager (much less an investor) to a regulation as the basis for a company-wide exemption.

For the company to have a claim, it would have to allege that the company *qua* company has been coerced into saying or doing something contrary to "those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). There is nothing inherent in the operation of a website design company or in its chartering documents that would make obedience to state antidiscrimination law inconsistent with "its very existence." On the contrary: Colorado law limits corporate charters and LLC creations to those entities organized for "lawful business." Colo. Rev. Stat. §§ 7-80-103, 7-103-101 (2021). 303 Creative should not anticipate the ability to take advantage of Colorado corporate law while disobeying Colorado antidiscrimination law, and obedience to law is hardly inconsistent with "its very existence."

C. An expansive ruling that fails to distinguish between the interests of companies and their investors could create unpredictable consequences and pose significant difficulties for lower courts.

The Court should not assume it can disregard the principle of separateness between Ms. Smith and 303 Creative without causing significant uncertainty, infighting, and litigation with regard to other companies. State business law takes separation as a given whether the business is organized as a corporation or an LLC. And separation between shareholders and the corporation is fundamental whether the corporation is closely held or publicly traded, and whether the investors are family members or strangers.

As a matter of corporate law, nothing inherent in Petitioners' arguments to disregard separateness would restrict those arguments to private companies or even LLCs. If investors are permitted to project their beliefs onto the company, companies of all sizes could be subject to investor pressure to announce religious or political views to exempt those companies from otherwise applicable regulation. These companies, as well as the courts hearing such claims for exemptions, would then be required to engage in a complex calculus to decide which rights of which investors (or other constituencies[7]) should prevail. For exam-

[7] Companies are legally separate not only from their investors but from other constituencies as well. And the question of

ple, courts would be required to determine what degree of unanimity among shareholders would allow them to project their views onto the corporate entity.[8]

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whether shareholders are "supreme" among these constituencies is a scholarly debate that has raged within corporate law for almost a century. *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145 (1932); Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy*, 76 Bus. Law. 397 (2021). If the Court were to decide that shareholders and a company are identical for purposes of constitutional analysis, it would implicitly take a stand on a fundamental question of corporate law that is hotly contested (and depends on state corporate law in any event). If the Court instead wished to remain agnostic with regard to the balance between shareholders and other constituencies, the constitutional questions would become even more complex. Could the views of employees be projected onto the company? What about other constituencies?

[8] The definitional problems posed by disregarding separateness would be immense. Would the religious member/shareholder have to hold a financial interest at the time of the asserted constitutional burden? Would the religious member/shareholder have to hold a threshold degree of voting power, or simply be sufficiently dominant to control the company's management? (The degree and type of ownership that constitutes "control" is a question to which corporate law provides no ready answer. *See, e.g.*, Alex Poor & Michelle Reed, *The* Control *Quagmire: The Cumbersome Concept of* Control *for the Corporate Attorney*, 44 Sec. Reg. L.J. Art. 1 (2016).) If a corporation has various classes of shares (as is common), how should courts determine which shareholder class's views and beliefs are to be projected onto the company? If a company dominated by a religious member/shareholder organizes its business in multiple layers of wholly owned subsidiaries (as is routine), would the member/shareholder's religious beliefs be projected onto the parent

Allowing corporations to assert the political and religious views of their shareholders would create a slippery slope that is unnecessary and easily avoidable. Laws protecting LGBTQ consumers would not be the only type of regulation subject to attack. Indeed, some corporate directors may consider themselves duty-bound to adopt the political views of some subset of the company's shareholders in order to exempt the corporation from the greatest numbers of applicable laws and regulations. A corporate claim to be exempted from minimum wage laws or pollution limits could result from a shareholder's sincerely held belief in laissez faire economics. *Cf. Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985) (considering non-profit organization's claim that minimum wage laws infringed its free exercise rights). A corporation whose dominant shareholder believes a woman's place is in the home could sue to be exempted from state or federal parental leave mandates. *Cf. Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990) (considering religious school's claim for an exemption from the Fair Labor Standards Act so that it could pay female teachers less than male teachers and below the minimum

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only, or flow throughout the entire enterprise? Should courts distinguish between entities organized in the state asserting the regulation (in this case Colorado) and those organized in Delaware or elsewhere? And what if the enterprise asserting religious beliefs changes its corporate form over time? What if a majority shareholder or controlling member without ideological or religious commitments wishes to sell to a buyer who does? Would such a potential change be material to regulators and providers of capital?

wage). A corporation with a religiously devout shareholder could assert the right to require employees to attend devotional services as a condition of employment, in contravention of Title VII of the Civil Rights Act. S*ee EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) (holding that, notwithstanding the deeply held beliefs of the shareholders, a manufacturing company could not require a nonreligious employee to attend a mandatory "devotional service" each week).

Even if the Court sought to limit its holding to private or family companies with a dominant shareholder or member, the implications would nevertheless be significant and widespread. The Court should not presume all privately held or family corporations—or even LLCs—are tiny. "'Closely held' is not synonymous with 'small.'" *Burwell*, 134 S. Ct. at 2797 n.19 (Ginsburg, J., dissenting). Some of the nation's most prominent corporations—Mars ($40 billion in revenues, 130,000 employees), Cargill ($134 billion in revenues, 155,000 employees), Publix Super Markets ($45 billion in revenues, 227,000 employees), and Koch Industries ($115 billion in revenues, 122,000 employees), for example—are privately held.[9] Family businesses include Wal-Mart ($559 billion in revenues, 2.3 million employees, 48.9% family shareholding), Ford Motor Company ($127 billion, 186,000 employees, 40% family shareholding), and Berkshire Hathaway ($245.5 billion, 360,000 employees, 37%

[9] *See America's Largest Private Companies*, Forbes (2021), http://tinyurl.com/ycwn47v2.

shareholding).[10] Nor are LLCs necessarily small; massive companies, including Fidelity Investments and Google, are organized as such.[11]

A ruling for Petitioners would also erode the efficiency benefits that derive from corporate separateness. Customers, creditors, suppliers, investors, and state regulators will be unable to know whether a particular company or LLC is subject to the same laws as others without investigation into, and disclosure of, the religious and political beliefs of the shareholders/members, the number of shareholders/members, and the capital structure of the enterprise. The result of allowing some companies to opt out of regulatory requirements would be a legal patchwork, with some companies subject to antidiscrimination laws and others not. Consumers, investors, and actual and potential employees will be forced to investigate specific companies to discern their legal compliance. The era of the "Green Book"[12] was not only morally shameful but also economically inefficient.

If the Court insists on deciding this case for Petitioners on the current record, it should make clear

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[10] *See* Helena Robertsson et al., *2021 Family Business Index*, EY and University of St. Gallen Global Family Business Index, https://tinyurl.com/yckjjmth (2021).

[11] *See* Justin Baer, *Fidelity Investments Posts Record Revenue on Stock Market Rally*, Wall St. J., Mar. 9, 2022, https://tinyurl.com/muacjhhh; Natasha Lomas, *Google Parent Alphabet Forms Holding Company, XXVI, to Complete 2015 Corporate Reorganization* (Sept. 4, 2017), https://tinyurl.com/2trpb938.

[12] *See* Candacy Taylor, *Overground Railroad: The Green Book and the Roots of Black Travel in America* (2020).

that its holding does not extend beyond single-member LLCs engaged in artistic endeavors, such as 303 Creative. "[I]f it is not necessary to decide more, it is necessary not to decide more." *PDK Lab'ys Inc.*, 362 F.3d at 799 (Roberts, J., concurring). The further afield the Court roams from the specific facts at hand, the greater the analytical, definitional, and practical difficulties created for local regulators, lower courts, and businesses themselves.

II. Courts Should Not Reflexively Defer To Political Or Religious Beliefs Asserted By For-Profit Enterprises To Gain Exemptions From Regulatory Constraints Applicable To Competitors.

Business enterprises are situated differently from individuals in the context of constitutional claims that operate to exempt the claimant from otherwise applicable regulation. The Court should recognize such differences and should not presume the proper outcome is the same regardless of the nature of the claimant.

For purposes of the First Amendment, the economic nature of an entity does not typically affect the constitutional analysis. Economic motivations for speech should not necessarily receive a lower level of constitutional respect than nonpecuniary motivations. There is no intrinsic reason why economic arguments and values are constitutionally different from the charitable. Democratic debate often depends on economic matters and benefits from the views and expertise of those involved in the market. *See Bellotti*, 435 U.S. at 777 ("The inherent worth of the speech in

terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

This general rule requires adjustment in situations, like this one, in which a successful free speech claim would operate to exempt a for-profit entity from regulations their competitors must follow. Such an exemption will often provide a competitive advantage for those companies, since the business claimant will be relieved from abiding by regulations that their competitors will be required to expend resources to obey. Awarding such exemptions to businesses on the basis of bare, untested assertions of belief or ideology—or on the basis of assertion of belief or ideology by an investor—would pervert the marketplace and undermine First Amendment protections.

Economic entities tend to seek market advantages wherever and however they can. Human beings are of course motivated by self-interest, but it is the rare human who reduces all decisions to the economic. And though it is possible for for-profit entities to care about the noneconomic, just as humans can care about the economic, the nature of businesses is that they are uniquely and particularly focused on gaining competitive advantage. Such is their essence and purpose, and if they fail to achieve it they will cease to exist.

The First Amendment provides exemption from otherwise applicable law, if at all, only when a claimant's political or religious belief is genuinely held. *See, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). If a regulated party does not

have genuine beliefs that are contrary to a regulation, there is no burden on any cognizable speech interest. *See* Pet. Br. 21 ("A speaker's freedom of conscience is not implicated when they do not object to the message."). Even so, courts considering such claims typically brought by non-profit associations or individuals usually take the beliefs of the parties as asserted. *See, e.g.*, *Dale*, 530 U.S. 640; *Hurley,* 515 U.S. at 573-74. And the sincerity of Ms. Smith's ideological and religious beliefs is not at issue here, as she is not the speaker.

But businesses are not the same as their investors, and Ms. Smith is not the same as 303 Creative. The First Amendment inquiry is distinct, and there is good reason for the Court to be more rigorous when it evaluates the purported religious or ideological beliefs of companies. Because for-profit businesses exist to seek out economic advantage, companies that can gain a competitive edge over other market participants by asserting political beliefs will have a tendency to overstate or manufacture such beliefs. The risk of deceit and puffery is significant. And nothing would prevent competitors from claiming a "Road to Damascus" conversion of their own to achieve an equalizing accommodation. A regulatory race to the bottom would ensue.

As argued above, Courts evaluating a company's asserted ideological or religious beliefs must distinguish between the views of the company itself and its investors, shareholders (in the case of corporations), and members (in the case of LLCs). The beliefs assessed must be those of the company, and a judicial evaluation of their authenticity will turn on evidence

about the nature, practices, behavior, and statements *of the company*, not its investors. And courts must be prepared to evaluate the evidence to discern whether the asserted beliefs of the company are in good faith or instead subterfuge for the purpose of gaining competitive advantage.

If the Court decides in this case to conflate the individual and company inquiries, the Court should limit its holding to single-member LLCs engaged in artistic endeavors. As the number of investors, members, shareholders and other constituencies expand, and as a company's covered activities extend past the artistic, the authenticity inquiry will become even more complex and ripe for manipulation.

CONCLUSION

The Court should dismiss the petition as improvidently granted or remand for further consideration of whether Ms. Smith's constitutional claims can be projected onto 303 Creative. Alternatively, to the extent the Court treats 303 Creative's constitutional rights as equivalent to those of Ms. Smith, it should reserve the possibility of a different analysis when the corporate entity has multiple shareholders, members, owners, or employees.

Respectfully submitted,

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