No. 16-111

IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL.,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE COLORADO COURT OF APPEALS

BRIEF OF AMICI CURIAE CORPORATE LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are 34 law professors whose research and teaching focus on corporate governance law, securities law, or constitutional law as applied to corporations and other business entities. *See* Appendix A (listing the individual law professors joining this brief). This brief addresses issues that are within amici's particular areas of scholarly expertise.

INTRODUCTION AND SUMMARY OF ARGUMENT

The constitutional claims of petitioner Masterpiece Cakeshop, Ltd., "a Colorado corporation," Pet. Br. at ii, depend on assumptions running contrary to longstanding and fundamental principles of corporate law, namely the separation of shareholders from the corporate entity. The constitutional interests asserted here by Petitioners are not the interests of the corporation, but rather the interests of one of the corporation's shareholders, Jack Phillips, who demands that the Court project his religious beliefs and political views onto the company. Petitioners' brief is replete with assertions of how the Colorado Anti-Discrimination Act (CADA) burdens Phillips's *individual* religious beliefs. But Phillips wants to assert that such beliefs are burdened when the *corporation* in which he owns shares is required to act as

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

a public accommodation under the laws of Colorado. But he and the corporation are not the same and should not be deemed identical for purposes of the Constitution. Such unity between a shareholder and a corporation runs counter to longstanding corporate law principles this Court has repeatedly acknowledged. This Court should not base its constitutional jurisprudence on an implicit assumption that contravenes this fundamental tenet of corporate law.

Even in situations in which a single shareholder is dominant, the separation of shareholder from corporation is fundamental. Separateness is often the very reason why founders of companies—even small ones—choose the corporate form among the possible legal forms available. Shareholders receive immense benefits in exchange for this separation, including the right of limited liability, which protects their personal assets from claims against the corporation. Shareholders depend on and desire this separation; they should not be able to assert unity with the corporation whenever it suits their ideological, political, or religious purposes, or exempts the company from regulatory obligations that bind other corporations. Moreover, any relaxation of this rule would cause immense definitional difficulties, creating the likelihood of years of proxy fights followed by litigation regarding the extent of shareholder control necessary to permit corporations to assert shareholders' beliefs as their own.

This Court generally accepts as sincere the assertions of religious or political belief by individuals and nonprofit associations, and no one questions the sincerity of Phillips's beliefs here. But this Court

should be wary in expanding this deference to for-profit entities in cases, like this one, where a corporation's constitutional claims would operate to exempt it from regulatory requirements applicable to competitors. Because the drive to seek out competitive advantage is inherent in the nature of for-profit entities, the risk of subterfuge or puffery is significant and more pronounced than with nonprofit or human claimants. Before taking the unprecedented step of extending to for-profit enterprises the right to assert claims of religious or political exemption from otherwise applicable regulations, the Court should more carefully scrutinize the sincerity of such entities' religious and political claims. The Court should require that such beliefs be organic to the company, not merely projections of dominant shareholders, and not asserted as pretext to gain economic advantage.

ARGUMENT

I. Because Of The Separate Legal Personality Of Corporations And Shareholders, The Constitutional Interests Of Shareholders Should Not Be Projected Onto The Corporation.

The viability of the constitutional claims of petitioner Masterpiece Cakeshop, Ltd., a corporation chartered under Colorado law, depends on the Court's willingness to assume the corporation holds sincere beliefs that operate to exempt it from otherwise applicable law. It is not the corporation that holds any such beliefs, however, but rather one of its shareholders, Jack Phillips. It is shareholder Phillips

who "is a cake artist," who refused to sell a wedding cake to a same-sex couple because of "his" religious beliefs. Pet. at i. Phillips characterizes the question to be decided as whether Colorado can compel "him" to violate "his" sincere religious beliefs, not the beliefs of the corporation in which he owns shares. *Id.*

Thus, it is not the company but rather Phillips who asserts a "deep religious faith," Pet. Br. 1, and who "meticulously crafts each wedding cake," *id.* It is "Phillips's voice" that is allegedly being compelled, Pet. Br. 2, in violation of the "core tenets of *his* faith," Pet. Br. 9 (emphasis added). Phillips asserts a violation of his "*individual* dignity and choice." Pet. Br. 15 (emphasis added) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). He does not assert a compelled speech claim on behalf of the company but states it is "*his* artistic expression" at issue. Pet. Br. 17 (emphasis added). Cakes are "his" expression because "*he* intends to, and does in fact, communicate through them." Pet. Br. 19 (emphasis added). He stakes his coerced speech claim on the notion that the cakes embody "great religious meaning *for him*." Pet. Br. 22 (emphasis added).

Masterpiece Cakeshop, Ltd., meanwhile, is a "Colorado corporation" whose shareholders are Phillips and his wife. Pet. Br. at ii. Originally chartered in 1992, the company has gone through at least three business forms: it began as a corporation, became a nonprofit corporation after Respondents Charlie Craig and David Mullins filed charges of discrimination, and most recently changed to a limited

liability company.[2] While Phillips repeatedly equates his interests with those of the corporation, in the company's most recent incarnation, Phillips does not even appear in its chartering documents. The sole incorporator is an attorney, and the company's "initial principal office" is a law firm. *See* Masterpiece Cakeshop, Ltd., Articles of Organization (July 5, 2017), *available at* http://tinyurl.com/ybkn9ksx.[3] While Phillips represents that he and his spouse are the only shareholders, he does not specify his percentage of share ownership, nor does he state that he is the majority owner. *See* Pet. Br. at ii. Colorado does not require private companies to disclose their

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[2] *See* Masterpiece Cakeshop Incorporated, Certificate and Articles of Incorporation of Masterpiece Cakeshop Incorporated (Dec. 2, 1992), *available at* http://tinyurl.com/yac5ol43; Masterpiece Cakeshop Ltd, Articles of Incorporation for a Nonprofit Corporation (Nov. 1, 2012), *available at* http://tinyurl.com/ycvhupdf; Masterpiece Cakeshop, Ltd., Articles of Organization (July 5, 2017), *available at* http://tinyurl.com/ybkn9ksx.

[3] When originally incorporated in 1992, Phillips was listed as one of four incorporators and one of four initial directors. *See* Masterpiece Cakeshop Incorporated, Certificate and Articles of Incorporation of Masterpiece Cakeshop Incorporated (Dec. 2, 1992), *available at* http://tinyurl.com/yac5ol43. Masterpiece Cakeshop reincorporated as a nonprofit corporation in November 2012, *see* Masterpiece Cakeshop Ltd, Articles of Incorporation for a Nonprofit Corporation (Nov. 1, 2012), *available at* http://tinyurl.com/ycvhupdf, but appears to have become delinquent when it failed to file a Periodic Report, *see* Masterpiece Cakeshop Ltd, History and Documents, http://tinyurl.com/y7gygbtv. In 2017, Masterpiece Cakeshop submitted Articles of Organization to become a Limited Liability Company. *See* Masterpiece Cakeshop, Ltd., Articles of Organization (July 5, 2017), *available at* http://tinyurl.com/ybkn9ksx. The articles also indicate the company's management is vested in "one or more managers" and not in "the members." *Id.* at 2.

ownership structure, *see* Colo. Rev. Stat. §§ 7-102-102, -90-501, and it is not apparent in the record whether the shareholding percentages have changed over time or whether Phillips's ownership share is the same under the current, post-litigation structure as it was in earlier iterations. The company is not chartered as a religious organization and has no recorded corporate policy with regard to the service of LGBT customers. J.A. 62.

Under Colorado law, a public accommodation must be a "place of business," Colo. Rev. Stat. § 24-34-601(1), and the Colorado Civil Rights Division determined that Masterpiece Cakeshop was a public accommodation and subject to CADA. J.A. 69. The initial administrative complaint was issued against the company. *See* J.A. 71, 80 ("The Respondent is a bakery that provides cakes and baked goods to the public, and operates within the state of Colorado."). Amici take no position as to whether Phillips has an individual claim to be exempted from CADA's requirements vis-à-vis "a person" who "refuse[s] … an individual … because of … sexual orientation … the full and equal enjoyment of the goods … of a place of public accommodation." Colo. Rev. Stat. § 24-34-601(2)(a). But Petitioners' brief does not appear to make such a distinction in any event.

As for the constitutional claims of the corporation, they can succeed only if the company can claim Phillips's religious beliefs as its own. But Phillips and Masterpiece Cakeshop are not the same. They are not identical for purposes of corporate law, and they should not be deemed identical for purposes of First Amendment law.

A. Corporate separateness—i.e., legal personhood—is the core principle of corporate governance.

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 two, two hundred, or two million shareholders. In each scenario, the corporate entity is distinct in its legal interests and existence from those who contribute capital to it.

This 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 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 these 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. Chicago 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 is so that its shareholders can acquire the pro-

tection 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.[4]

Even where a single shareholder owns all the corporation's shares (which is presumably not the case with Masterpiece Cakeshop), 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 con-

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[4] The leading treatise on closely held corporations notes that, in addition to limited liability,

> [t]here may [be other benefits] from the recognition of the separate entity[:] the participants in the enterprise may be entitled to claim benefits as an employee for purposes of workers' compensation, social security, unemployment compensation or other entitlement statutes. A corporate officer or employee who is also the sole or controlling shareholder of the corporation has sometimes been able to successfully assert a claim as an employee for workers' compensation. Similarly, some courts respect the separate entity of a close corporation so that shareholder-employees qualify for social security benefits for which they would not be eligible if self-employed.

1 F. Hodge O'Neal & Robert B. Thompson, *O'Neal and Thompson's Close Corporations and LLC's: Law and Practice* § 1:15 (rev. 3d ed. 2017) (footnotes omitted).

tract 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 form insulates entrepreneurs from those risks and acts as a subsidy to entrepreneurs and shareholders 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) ("[T]he best way to understand the purpose of limited liability is as a subsidy designed to encourage business investment. The subsidy comes at the expense of corporate creditors."); *id.* at 1324 ("By allowing entrepreneurs to externalize these costs of doing business, limited liability provides a subsidy paid for by uncompensated tort victims.").

In the present case, Masterpiece Cakeshop argues it should be exempt from CADA because of the religious values of a (presumably) controlling shareholder, while seeking to maintain the benefits of corporate separateness for all other purposes. The company has benefited from its separateness in countless ways, and Phillips has been insulated from actual and potential corporate liabilities since inception. Yet now the company and the shareholder ask this Court to disregard that separateness in connection with a government regulation they would rather not obey. Petitioners want to argue, in effect, that the corporate veil is only a one-way ratchet: its shareholders can get protection from tort or contract liability by standing behind the veil, but the corporation can ask a court to disregard the corporate veil whenever the company is required by law to act in a way that offends a shareholder's beliefs.

Petitioners cannot have their cake and eat it too. As this Court has said, "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).[5]

[5] As this Court is aware, federal and state courts may pierce the corporate veil as an equitable remedy where the cir-

The Court should not assume it can disregard this principle of separateness with closely held companies such as Masterpiece Cakeshop and not cause significant uncertainty, infighting, and litigation with regard to other companies. If the Court sought to limit its holding to private or even family companies with a dominant shareholder, courts will be forced to resolve questions about what degree and type of ownership constitutes "control"—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 (Summer 2016)—and what degree of unanimity among shareholders would allow them to project their views onto the corporate entity.[6] (Even here, it

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cumstances 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). 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 the corporate veil be disregarded on any basis other than religious belief. Indeed, far from having created a corporation to circumvent state policy, Petitioners instead ask this Court to permit circumvention of state policy by *ignoring* the corporation's creation.

[6] The definitional problems posed by a reversal would be immense. Would the religious shareholder have to own the shares at the time of the asserted constitutional burden? (If so, it is not clear even in this case that such an ownership re-

is not clear from the record whether Phillips is the majority or minority shareholder, and the religious beliefs of his shareholding spouse are only presumed.) And states might find it necessary to require more disclosure as to the extent and nature of share ownership in order to monitor and substantiate the

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quirement would be satisfied since Masterpiece Cakeshop's legal structure has changed since the initiation of this litigation.) Would the religious shareholder have to own all the company's shares (not the case here), a majority of shares (unclear in the current case), or simply be sufficiently dominant that he can control the company's management? It is standard for privately held companies to have common shares and several series of preferred shares. How should courts determine which shareholder class's views and beliefs are to be projected onto the company? If a corporation dominated by a religious shareholder organizes its business in multiple layers of wholly owned subsidiaries, which is routine, would the shareholder's religious beliefs be projected onto the parent company only, or flow throughout the entire enterprise? When a corporation is insolvent (such that creditors become "the principal constituency injured by any fiduciary breaches that diminish the firm's value," *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 102 (Del. 2007)), would creditors' beliefs be projected onto the corporation? What if a majority shareholder without religious beliefs that require accommodation wishes to sell to a buyer who does? Would such difference be material to regulators and providers of capital? When the enterprises asserting religious beliefs are limited liability companies (LLCs), should courts distinguish between manager-managed LLCs (such as Masterpiece Cakeshop) and member-managed LLCs? If so, should courts inquire into the degree of manager involvement? Should courts distinguish between corporations chartered in the state asserting the regulation and those chartered in Delaware or elsewhere, as is routine? And what if the enterprise asserting religious beliefs changes its corporate form over time, as Masterpiece Cakeshop did here? *See supra* note 3.

need to provide constitutional accommodation to companies.

Moreover, the Court should not presume all privately held corporations are tiny. "'Closely held' is not synonymous with 'small.'" *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2797 n.19 (2014) (Ginsburg, J., dissenting). Some of the nation's most prominent corporations—Mars ($35 billion in revenues, 80,000 employees), Cargill ($110 billion in revenues, 150,000 employees), Bechtel ($33 billion in revenues, 58,000 employees), Uber ($6.5 billion in revenues, 12,000 employees), and Koch Industries ($100 billion in revenues, 100,000 employees), for example—are privately held. *See* Forbes, *America's Largest Private Companies 2017*, *available at* http://tinyurl.com/ycwn47v2.

Nor should the Court assume that "family owned" companies are small or even closely held. Walmart and Ford are both examples of large publicly traded corporations with major share ownership retained in one family. *See Wal-Mart Says Walton Family To Sell Shares To Keep Lid on Stake*, Reuters (April 10, 2015), *available at* http://tinyurl.com/ybkfve2z; Christina Rogers, *Shareholders Again Back Ford Family*, Wall St. J. (May 12, 2016), *available at* http://tinyurl.com/ybdhv97n. If this Court were to relax the rule of separateness in this case, it is hardly clear how lower courts would delineate which corporations could claim the beliefs of their shareholders and which could not.

Thus, Petitioners not only ask this Court to constitutionalize a view of corporations that displaces

the fundamental principle of separateness, but to do so in a way that invites years of litigation to define the contours of that displacement.[7]

B. Corporate separateness should not be ignored in constitutional law.

Given the importance and centrality of corporate separateness in corporate governance law and doctrine, Petitioners have a heavy burden in persuading this Court to ignore these entity distinctions in its constitutional analysis. But Petitioners do not seem

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[7] This Court should not mistake the longstanding debate in the corporate law scholarship over "shareholder primacy" i.e., the question of whether corporate managers should prioritize shareholder interests over those of other corporate stakeholders, to indicate disagreement about the principle of separateness. *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145 (1932); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 Harv. L. Rev. 833 (2005); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U. L. Rev. 547 (2003). Amici hold a variety of opinions on the question of management duties to shareholders and other corporate stakeholders. But our different views on shareholder primacy do not undermine our unanimity with regard to corporate separateness. Shareholder primacy is simply a description of one view of the fiduciary duties of management. It does not mean that shareholders and the corporation are identical as a matter of legal rights and obligations.

In fact, the debate over shareholder primacy suggests another difficulty lurking in future cases if Petitioners prevail. In companies where a dominant shareholder sincerely holds certain political or religious views, would non-religious directors and officers violate their fiduciary duties if they failed to assert the shareholder's views as a basis for an accommodation for the company?

to recognize the necessity of persuasion here, failing to make any argument at all as to why Phillips's constitutional interests should be projected onto the corporation. Petitioners either ignore the issue or hope this Court will.[8]

This Court has left no doubt that for-profit corporations and their trade associations may raise free speech claims. *See N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *see also Citizens*

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[8] On this important issue, this Court's holding in *Burwell v. Hobby Lobby Stores, Inc.*, does not control. There, 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 (RFRA). A divided Court concluded that closely held corporations are protected under that statute. 134 S. Ct. at 2767-75. 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 2761-62. This Court's decision did not address claims under the First Amendment, *id.* at 2785, and so it remains true that "no decision of this Court [has] recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law … under the Free Exercise Clause," *id.* at 2794 (Ginsburg, J., dissenting); *see also* Pet. App. 40a n.13 (noting that notwithstanding *Hobby Lobby*'s RFRA holding, "it is unclear whether Masterpiece (as opposed to Phillips) enjoys First Amendment Free Exercise rights"). And this Court's interpretation of a statute intended to protect the "exercise of religion" need not and should not be transplanted into the Court's free speech doctrine, especially if doing so requires a significant recasting of a foundational principle of corporate law.

United v. FEC, 558 U.S. 310 (2010) (striking down limits on independent political expenditures by non-profit and for-profit corporations). But the Court does not equate the interests of corporations with their shareholders for the purpose of free speech analysis. On the contrary—corporations are holders of their own rights. The Court has recognized corporate speech rights in order to preserve the "'open marketplace' of ideas protected by the First Amendment," *Citizens United*, 558 U.S. at 354 (quoting *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 208 (2008)), 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. *See generally* Kent Greenfield, *In Defense of Corporate Persons*, 30 Const. Comment. 309 (2015).

In this respect, for-profit corporations are distinct from membership associations, in that the latter 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). Corporations, in contrast, are legally distinct entities whose shareholders may have idiosyncratic investment objectives, distinctive and variable economic needs, and a diversity of political and religious beliefs. ExxonMobil and Masterpiece Cakeshop 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). Though this Court may have once theorized

corporations as akin to membership associations in some cases, this characterization no longer fits modern corporations, modern shareholding, or modern corporate law. *See* Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 Wm. & Mary L. Rev. 1673, 1707 (2015) (describing changes in corporations in late nineteenth century that were "at odds" with associational view).

Corporations stand in their own shoes as a matter of free speech law. Corporations, to be sure, can and should have a role to play in public discourse, *see First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), but courts should not merely presume that corporations act as conduits for the shareholders' points of view or have standing to assert their shareholders' constitutional interests.

This Court has long recognized this distinction between shareholders and corporations in other constitutional contexts. *See Hale v. Henkel*, 201 U.S. 43 (1906) ("[T]he corporation … receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter"). This Court has recognized the distinction even between a sole shareholder and the corporation for purposes of the Fifth Amendment. *See 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).

Jack Phillips is both a shareholder of Masterpiece Cakeshop and its employee. No one is challeng-

ing the sincerity of Phillips's beliefs. But CADA does not require him to do, say, or create anything as a *shareholder* that even arguably violates his beliefs. To the extent CADA requires him to act contrary to his beliefs, it is doing so in his role of an *employee* of a company determined to be a public accommodation under Colorado law. The rights of employees to assert a religious objection to a work requirement of an employer or to a requirement of state or federal anti-discrimination law is a separate question, one on which amici take no position. But there is no doubt that if Masterpiece has a *corporate* speech interest at issue here, it is not because it has an employee who disagrees with Colorado law. 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. 518, 636 (1819). There is nothing inherent in the operation of Masterpiece Cakeshop or in its chartering documents that would make obedience to state anti-discrimination law inconsistent with "its very existence."

This is not to say that corporations cannot assert First Amendment interests, but merely that courts should take care that the rights asserted belong to the corporation and not to someone else. If Phillips has an *individual* First Amendment interest here, it cannot be used as the basis for a regulatory waiver for the *company*. Even if the individual employee could assert a constitutional right to be exempted from CADA's obligations for employees of a public

accommodation (a question on which amici take no position), the company cannot leverage a solitary employee's or shareholder's objections to a regulation as the basis for a company-wide exemption.

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

As a general matter, a corporation will enjoy a competitive advantage in the marketplace if it is exempted from otherwise generally applicable laws and regulations. In this case, Masterpiece Cakeshop is asking to be relieved from a state law its competitors are required to obey. Companies that do not assert constitutionally protected beliefs will find themselves competing at a disadvantage on grounds that have nothing to do with efficiency.

To be sure, the First Amendment requires accommodation only when a claimant's political or religious belief is sincerely held. *See, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). But courts considering such claims typically do not inquire deeply into sincerity. *See Dale*, 530 U.S. 640; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573-74 (1995). In situations where the asserted interest would operate as to exempt for-profit entities from regulations applicable to competitors, however, courts should be wary.

In most free speech cases pertaining to for-profit corporations, the economic nature of the entity does

not 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, however, needs adjustment in situations, like this one, in which an assertion of belief would operate to give a for-profit entity an exemption from regulations applicable to competitors. Corporations, because of their economic nature, 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 corporations to care about the noneconomic, just as humans can care about the economic, the nature of corporations 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.

Competitive advantage need not come only by way of marketplace success. If a company is able to avoid regulatory requirements applicable to competitors, it will gain competitive advantage that will flow

financially to its bottom line. Because for-profit corporations exist to seek out economic advantage, any assertion of political or religious belief that would require relaxing regulatory burdens should be carefully scrutinized. Companies that can gain competitive advantage over other market participants by asserting political beliefs will have a tendency to overstate or manufacture such beliefs.

It is no answer to this concern to assert that Masterpiece Cakeshop is suffering a competitive disadvantage by refusing service to gay and lesbian customers. It is hardly clear that denial of service to a politically disfavored group imposes costs on a business. The opposite may be true if the business can seize upon a discriminatory purpose as a way to attract like-minded customers. *See* Amanda Holpuch, *Chick-fil-A Appreciation Day Brings Huge Crowds to Fast-Food Chain*, The Guardian (Aug. 1, 2012), *available at* http://tinyurl.com/y8veq28m (describing how eating at fast food chain Chik-fil-A became an act of resistance by opponents of LGBT rights); *see also* Law & Econ. Scholars Amicus Br. 19 (describing how "[c]onsumers may prefer" businesses that refuse to serve certain protected classes because such businesses' "convictions may be closely aligned with related religious or moral convictions that consumers value"). Moreover, in an efficient marketplace, the denial of service to a segment of the population raises costs to that population by narrowing their choices. *Cf. id.* (discussing how, if religious companies are required to abide by antidiscrimination laws, "search costs" of consumers sharing those companies' views are "thus increased"; such consumers are "less able to find the best provider to

match their preferences"). And compliance with laws requiring companies not to discriminate is often costly.

If this Court were to accept Petitioners' arguments, corporations would be empowered to invoke the political or religious views of their shareholders essentially at will in order to obtain exemptions from generally applicable laws and regulations that the corporation finds too costly. Laws protecting LGBT 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 nonprofit 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 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. *See*

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).

There is no conceptual difference between these examples and the claims asserted by Petitioners here. Recognizing or allowing corporations to assert the political and religious views of their shareholders would create a slippery slope that is unnecessary and easily avoidable.

These questions do not represent a mere parade of horribles. Rather, it is easy to imagine companies suffering a competitive disadvantage claiming a "Road to Damascus" conversion on any number of political or religious concepts. The risk of subterfuge and puffery would be significant. Unless federal courts were authorized and prepared to make inquiries into the legitimacy or good-faith nature of the corporation's putative political and religious beliefs, then the only checks on corporate claims of regulatory exemptions would be labor unrest or consumer avoidance. And, even if federal courts were authorized and prepared to enmesh themselves in determining whether a corporation's assertion of political and religious beliefs is in good faith or a mere subterfuge, that chore would not be easy.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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