CONTRACEPTION AND CORPORATE PERSONHOOD: DOES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT PROTECT FOR-PROFIT CORPORATIONS THAT OPPOSE THE EMPLOYER MANDATE?

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> "Foremost among the rights Americans hold sacred is the freedom to worship as we choose. . . . Because of the protections guaranteed by our Constitution, each of us has the right to practice our faith openly and as we choose."
>
> —President Barack Obama[2]

I. INTRODUCTION

William E. Newland founded Hercules Industries, Inc. (Hercules Industries) in Denver, Colorado in 1962.[3] Over the ensuing fifty years, Hercules Industries has grown to become one of the largest manufacturers and wholesale distributors of heating, ventilation, and air conditioning equipment (HVAC) to contractors in the Western and Midwestern United States, with over 250 employees at four manufacturing facilities and twelve sales and distribution centers across Arizona, Colorado, New Mexico, and Utah.[4] Despite its growth, Hercules Industries strives to "nurture and maintain the culture of a family owned business in which [its] employees grow financially, intellectually, emotionally and spiritually."[5] Indeed, after all these years, it is still a family affair: the corporation is owned entirely by four siblings – William Newland, Paul Newland, James Newland, and Christine Ketterhagen.[6] Additionally, Andrew Newland, son of founder William Newland, is the company's president.[7] All five of the family members with an ownership interest or leadership role in Hercules Industries are "practicing and believing Catholic Christians" who believe the corporation has a religious purpose.[8]

In April 2012, Hercules Industries filed suit in the United States District Court for the District of Colorado challenging the Employer Mandate that was issued by the Department of Health and Human Services under the authority granted to it in the Patient Protection and Affordable Care Act (ACA). The ACA was signed into law by President Barack Obama on March 23, 2010,[9] and was immediately met by a "political

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[2] Press Release, President Barack Obama, Presidential Proclamation – Religious Freedom Day (Jan. 16, 2013), http://www.whitehouse.gov/the-press-office/2013/01/16/presidential-proclamation-religious-freedom-day.

[3] *About Hercules*, HERCULES INDUS., INC., http://www.herculesindustries.com/about.asp (last visited May 7, 2014).

[4] *Id.*; *see also* Petitioner's Reply In Support of Motion for Preliminary Injunction at 18, Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No.1:12-cv-1123-JLK) [hereinafter *Newland Reply*].

[5] *About Hercules*, HERCULES INDUS., INC., http://www.herculesindustries.com/about.asp (last visited May 7, 2014) (quoting the last sentence of Hercules Industry's mission statement).

[6] Complaint at 5–6, Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-1123-JLK) [hereinafter *Newland Complaint*].

[7] *Id.* at 6.

[8] *Id.* at 2.

[9] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

maelstrom."[10] One of its most controversial measures was the Employer Mandate, which, among other things, requires employers to provide their employees with insurance coverage that includes contraception and sterilization without cost sharing.[11] Hercules Industries claimed that these requirements constitute a violation of its Free Exercise rights under the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA).[12]

The Obama Administration met Hercules Industries' challenge with three principal arguments. First, the Administration argued that the ACA could not possibly burden Hercules' Free Exercise rights because secular, for-profit corporations cannot exercise religion.[13] In making this argument, the Administration relied on a prominent case from the early 1980s, *U.S. v. Lee*, which held that owners of for-profit entities accept government-imposed limitations on the exercise of their religious beliefs when they incorporate for a secular purpose.[14] Additionally, the Administration argued that even if for-profit corporations can exercise religion, the Employer Mandate should still be enforced because it has been narrowly tailored to the federal government's compelling interest in promoting women's health and reducing the inequity in health-care costs between men and women.[15] Finally, it argued that allowing Hercules Industries, and similarly situated corporations, to opt out of the requirements of the Employer Mandate started down a slippery slope that would "cripple the government's ability to solve national problems through laws of general application."[16]

On July 27, 2012, the Honorable John L. Kane of the United States District Court for the District of Colorado enjoined the Obama Administration from enforcing the penalties provision of the ACA against Hercules Industries.[17] After considering the parties' respective arguments, Judge Kane concluded that the case presented questions "so serious,

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[10] Robin Fretwell Wilson, *The Calculus of Accommodation*, 53 B.C. L. REV. 1417, 1418 (2012) (citing Timothy Stoltzfus Jost, *Analysis of the Obama Administration's Updated Contraception Rule*, WASHINGTON & LEE UNIV., *available at* http://law.wlu.edu/faculty/facultydocuments/jost/contraception.pdf); *see also* Ethan Bronner, *A Flood of Suits Fights Coverage of Birth Control*, N.Y. TIMES, Jan. 29, 2013, at A1.

[11] 42 U.S.C. § 300gg-13(a) (Supp. V 2011).

[12] *Newland Complaint*, *supra* note 6, at 18–20.

[13] Defendant's Memorandum in Support of Their Motion to Dismiss the First Amended Complaint at 1–2, Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-1123-JLK) [hereinafter *Administration's Memo*]. For the sake of simplicity, the Administration's separate arguments against Hercules' First Amendment and RFRA claims have been consolidated.

[14] *Id.* at 1 (quoting United States v. Lee, 455 U.S. 252, 261 (1982)).

[15] *Administration's Memo*, *supra* note 13, at 3.

[16] *Administration's Memo*, *supra* note 13, at 1.

[17] Newland v. Sebelius, 881 F. Supp. 2d. 1287, 1299 (D. Colo. 2012). Judge Kane specifically enjoined the Administration from application of 42 U.S.C. § 300gg–13(a)(4), 26 U.S.C. § 4980D, 26 U.S.C. § 4980H, and 29 U.S.C. § 1132. *Id.*; *see also*, John G. Malcolm & Dominique Ludvigson, *Hercules Halts Obamacare in Round One of Anti-Conscience Mandate Fight*, THE FOUNDRY (July 29, 2012, at 8:00 AM), http://blog.heritage.org/2012/07/29/hercules-halts-obamacare-in-round-one-of-mandate-fight/. The district court's injunction was affirmed by the Tenth Circuit. Newland v. Sebelius, No. 12-1380, 2013 U.S. App. LEXIS 20223, at *13 (10th Cir. Oct. 3, 2013).

substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation."[18] He identified several questions that have yet to be settled in case law:

> Can a corporation exercise religion? Should a closely-held . . . corporation owned and operated by a small group of individuals professing adherence to uniform religious beliefs be treated differently than a publicly held corporation owned and operated by a group of stakeholders with diverse religious beliefs? Is it possible to 'pierce the veil' and disregard the corporate form in this context?[19]

Judge Kane's questions merit a deep exploration. According to the Becket Fund for Religious Liberty, over forty-five for-profit corporations have filed lawsuits contesting the Employer Mandate.[20] Many of these suits have already been decided at the district and circuit court levels,[21] where the question as to whether for-profit corporations have Free Exercise rights has been answered in at least four different ways.[22] Some courts have decided that a corporation has standing to assert its own Free Exercise rights under the First Amendment;[23] other courts have found that a corporation has standing to assert the First Amendment rights of its owners;[24] still others have found that for-profit corporations have no Free Exercise rights;[25] and the last group of courts have declined to comment on the question, and have

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[18] *Newland*, 881 F.Supp. 2d at 1294. Judge Kane was citing *Okla. ex rel. Okla. Tax Comm'n v. Int'l Registration Plan, Inc.*, 455 F.3d 1107, 1113 (10th Cir. 2006), which articulated the "likelihood of success" element required for issuance of a preliminary injunction in the 10th Circuit. *Id.*

[19] *Id.* at 1296.

[20] *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral (last visited May 7, 2014).

[21] *See* John K. DiMugno, *The Affordable Care Act's Contraceptive Coverage Mandate*, 35 No. 1 INS. LITIG. REP. 5 (2013); *see also* BECKET FUND FOR RELIGIOUS LIBERTY, *supra* note 20. As of February 2014, the Becket Fund's "Current Scorecard for For-Profit Cases" reported that of the forty-six for-profit plaintiffs that have challenged the Employer Mandate, 33 have secured injunctive relief, for a current score of 33-6. *Id.*

[22] In fact, a fifth position has recently emerged. *See* Gilardi v. United States Dep't Health and Human Servs., 733 F.3d 1208, 1221 (D.C. Cir. 2013). The *Gilardi* court found no basis for the conclusion that a secular organization can exercise religion. *Id.* at 1215. Nevertheless, it did find that the owners of the corporate entities faced potential injury that was separate and distinct from that to the corporation, and hence that the owners themselves had standing to pursue their claims. *Id.* at 1221. Given the relative newness of this decision, it has not been addressed in the analysis that follows.

[23] *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120 (10th Cir. 2013); Grote v. Sebelius, 708 F.3d 850, 853 (7th Cir. 2013); Korte v. Sebelius, No. 12-3841, 2012 WL 6757353, at *2 (7th Cir. Dec. 28, 2012); Triune Health Grp., Inc. v. United States Dep't Health and Human Servs., 2013 U.S. Dist. LEXIS 107648, at *5–6 (N.D. Ill, Jan. 3, 2013) (finding that the Seventh Circuit's decisions in *Korte* and *Grote* are binding precedent).

[24] *E.g.*, Legatus v. Sebelius, 901 F. Supp. 2d 980, 988, 999 (E.D. Mich. 2012) (citing Stormans, Inc. v. Selecky, 586 F.3d 1109, 1120 (9th Cir. 2009)) (granting an injunction for Weingartz Supply Co.); Monaghan v. Sebelius, 916 F. Supp. 2d 802, 812 (E.D. Mich. 2012) (granting an injunction); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 130 (D.D.C. 2012) (granting an injunction).

[25] *E.g.*, Conestoga Wood Specialties Corp. v. Sec'y of the United States Dep't Health and Human Servs., 724 F.3d 377, 383–84 (3d Cir. 2013) (affirming the district court's denial of a preliminary injunction); Autocam Corp. v. Sebelius, 730 F.3d 618, 624–25 (6th Cir. 2013) (rejecting the "pass through" theory and finding that Autocam is not a person capable of religious exercise).

reached a decision on other grounds.[26] This divergence of treatment is intolerable when such large classes of legal persons stand to potentially suffer irreparable harm.[27] Hence, the United States Supreme Court has granted the petitions for writs of certiorari of two conflicting cases, and will soon have the opportunity to clarify whether or not Free Exercise rights extend to for-profit, secular entities.[28]

On the eve of oral arguments on these issues before the Court, this article shall argue that contrary to the Obama Administration's principal contentions in the Hercules Industries case,[29] both close corporations[30] and large, publicly-held corporations ought to be afforded Free Exercise rights. Although it is conceivable that the ACA could be found to satisfy the *Smith* standard established by the Supreme Court for violations of the Free Exercise Clause of the First Amendment,[31] it likely cannot withstand the heightened standard that Congress imposed upon government action through RFRA.[32]

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[26] *E.g.*, Annex Med., Inc. v. Sebelius, No. 13-1118, 2013 U.S. App. LEXIS 2497, at *5 (8th Cir. Feb. 1, 2013) (granting a stay based on the *O'Brien* precedent); Autocam Corp. v. Sebelius, No. 12-2673, 2012 U.S. App. LEXIS 26736, at *4–5 (6th Cir. Dec. 28, 2012) (denying an injunction but noting a possibility of success on the merits); Sioux Chief Mfg. Co. v. Sebelius, No. 13-cv-00036-CV-W-ODS (W.D. Mo. Feb. 28, 2013) (granting an injunction pending a decision in *O'Brien* or *Annex Medical*, whichever comes first); Sharpe Holdings, Inc. v. United States Dep't Health and Human Servs., No. 2:12-CV-92-DDN, 2012 U.S. Dist. LEXIS 182942, at *20 (E.D. Mo. Dec. 31, 2012); Am. Pulverizer Co. v. United States Dep't Health and Human Servs., No. 12-3459-CV-S-RED, 2012 WL 6951316, at *3–4 (W.D. Mo. Dec. 20, 2012) (granting an injunction pending a decision on the merits; noting that the question as to whether a corporation can exercise religion "merits 'deliberate investigation[]'"); O'Brien v. United States Dep't Health and Human Servs., 894 F.Supp 2d 1149, 1168–69 (E.D. Mo. 2012) (ruling against the plaintiff but avoiding the constitutional question) *stayed by* O'Brien v. United States Dep't Health and Human Servs., No. 12-3357, 2012 U.S. App. LEXIS 26633, at *4 (8th Cir. Nov. 28, 2012) (granting a stay pending a decision on the appeal from the district court); *see also* Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 642–63 (2012) (Sotomayor, Circuit Justice) (noting a divergence in opinion in the lower courts).

[27] *Korte*, 2012 WL 6757353, at *5. The Supreme Court has held that any violation of First Amendment rights "for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at *13 (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion)).

[28] Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013). The scope of the Court's decisions in these cases, however, is unclear; argumentation in the briefs to date have revolved exclusively around the RFRA issues. *See, e.g.*, Brief for Respondents, Sebelius v. Hobby Lobby, No. 13-354, *available at* http://www.becketfund.org/wp-content/uploads/2013/10/No-13-354-Brief-for-Respondents.pdf (last visited May 7, 2014).

[29] *See supra* notes 13–16 and accompanying text.

[30] Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L.J. 263, 274 (2008). A "close corporation" is one in which ownership and control are not separated, shares are not freely traded, and in which the firm's relatively few shareholders also serve as its directors and managers. *Id.*

[31] *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 882–83 (1990). Under the *Smith* standard, courts need only give rational basis review to legislative judgments resulting in neutral laws of general applicability. *Id.* In effect, the *Smith* case stands for the proposition that the First Amendment itself leaves the accommodation of religious belief largely to the political process. Richard W. Garnett & Joshua D. Dunlap, *Taking Accommodation Seriously: Religious Freedom and the O Centro Case*, 2006 CATO SUP. CT. REV. 257, 259 (2006); *see generally* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991).

[32] The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b) (2006). The Act provides that "Government may substantially burden a person's exercise of religion only if it demonstrates that [the

These arguments attempt to bridge two bodies of literature that have received much attention in recent years. On the one hand, there has been much discussion of corporate personhood in the wake of the Supreme Court's decision in *Citizens United v. Federal Election Commission* in 2010.[33] The focal point of most of these articles is either the potential electoral consequences of the extension of political speech rights to corporations under the First Amendment,[34] the impact of the decision on corporate governance law,[35] or the contribution of the decision to the academic discussion of corporate personhood.[36] On the other hand, there has been a resurgence of interest in the Free Exercise and Establishment Clauses of the First Amendment in the wake of the *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* decision by the Supreme Court in 2012, affirming the "ministerial exception,"[37] and the codification of a "religious exemption" to the ACA by the Obama Administration.[38] Yet little has been published on the implications for religious liberty of *Citizens United's* confirmation that First Amendment rights inhere in corporations.[39]

Part II of this paper will introduce the reader to the Employer Mandate, identify the points of conflict between that Mandate and the for-profit corporations bringing suit, and briefly discuss the decisions that have been handed down as of mid-2013. Part III will explore the threshold questions: can a secular, for-profit corporation exercise religion, and does it have Free Exercise rights to protect? Part IV will attempt to define the specific liberty interests that constitute Free Exercise rights. Finally, Part V

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burden] . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means . . . ." *Id.*

[33] Citizens United v. FEC, 558 U.S. 310, 357 (2010).

[34] *See, e.g.*, Monica Youn, *First Amendment Fault Lines and the Citizens United Decision*, 5 HARV. L. & POL'Y REV. 135, 136 (2011); Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 719–20 (2011); James Bopp, Jr. et al., *The Game Changer*, 9 FIRST AMEND. L. REV. 251, 256 (2010); Matthew J. Allman, Note, *Swift Boat Captains of Industry for Truth*, 38 FLA. ST. U. L. REV. 387, 389 (2011).

[35] *See, e.g.*, Paul S. Miller, *Shareholder Rights*, 28 J.L. & POL. 51, 53–54 (2012); Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1026 (2011).

[36] *See, e.g.*, Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1630 (2011).

[37] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 705 (2012). The term "ministerial exception" is rooted in the Free Exercise and Establishment Clauses of the First Amendment, and refers to instances in which the state is barred from interfering with the employment relationship between a church or other religious organization and one of its ministers. *Id.*; *see, e.g.*, Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL'Y 821, 833 (2012).

[38] 45 C.F.R. § 147.131 (2012); *see, e.g.*, Wilson, *supra* note 10, at 1430.

[39] Of course, with dozens of cases now challenging the Employer Mandate, this is starting to change. *See, e.g.*, Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1 (2013) (articulating a position for religious liberty rights for corporations based on the freedom of association); Andrew B. Kartchner, *Corporate Free Exercise*, 6 REGENT J. L. & PUB. POL'Y (forthcoming 2014) (surveying the major constitutional rights the Supreme Court has applied to corporations); Mark L. Rienzi, *God and the Profits*, 21 GEO. MASON L. REV. 59 (2013) (exploring whether religious liberty rights disappear when an organization earns profits); Mark L. Rienzi, *Unequal Treatment of Religious Exercises Under RFRA*, 99 VA. L. REV. IN BRIEF 10 (2013) (examining the proper conduct of RFRA's "substantial burden" analysis).

will presume that under *Citizens United* corporations do have Free Exercise rights, and proceed to analyze corporate Free Exercise claims under both the standard set forth in *Employment Division v. Smith* and RFRA's heightened standard.

II. BACKGROUND

A. The ACA and the Employer Mandate

That it stands at over 900 printed pages is a testament to the ambitious and comprehensive scope of the ACA.[40] To review the law in its entirety, or to review the multitude of criticisms leveled against it, would require a treatise equally as long as, if not longer than, the law itself.[41] Hence, this section will focus only on one of the more controversial measures within the ACA: the so-called Employer Mandate.[42]

The Employer Mandate requires organizations that employ more than fifty people, as well as organizations of any size that already provide health insurance, to provide their employees with a minimum level of health benefits as defined by the ACA.[43] Employers who fail to provide coverage that meets the requirements face severe financial penalties.[44] For instance, the retail chain Hobby Lobby estimated that, if it were to refuse to comply with the requirements, it would face penalties of approximately $1.3 million per day.[45]

Among the categories of health benefits that employers are required to provide without cost sharing by employees are "preventive health services" for infants, children, adolescents, and women. [46] The preventive services provided for women were not itemized in the 2010 law; instead, the law charged the Health Resources and Services Administration (HRSA) to

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[40] *See, e.g.*, 124 Stat. 119–1025.

[41] *Id.* Notwithstanding the bill initiated to repeal ACA one day after its passage, the Republicans were able to express their displeasure in two simple pages. *See* A Bill To Repeal the Job-Killing Health Care Law and Health Care-Related Provisions in the Health Care and Education Reconciliation Act of 2010, H.R. 2, 112th Cong. (2010), *available at* http://rules-republicans.house.gov/Media/PDF/HR__-Repeal.pdf.

[42] The general title "Employer Mandate" is an amalgamation of several provisions affecting a number of different statutes. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725–27 (Feb. 15, 2012); 45 C.F.R. § 147 (2012).

[43] 26 U.S.C. § 5000A (Supp. V 2011).

[44] 26 U.S.C. § 4980D (2006); *see also* Legatus v. Sebelius, 901 F. Supp. 2d 980, 987 n.1 ("If an employer with at least 51 full-time employees does not offer health care coverage to its employees, then beginning in 2014 the employer is assessed an annual penalty of $2,000 multiplied by the number of full-time employees minus 30.") (citing HINDA CHAIKIND & CHRIS L. PETERSON, CONGRESSIONAL RESEARCH SERVICE, SUMMARY OF POTENTIAL EMPLOYER PENALTIES UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA) (2010), *available at* http://www.shrm.org/hrdisciplines/benefits/documents/employerpenalties.pdf.).

[45] Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012).

[46] 42 U.S.C. § 300gg-13 (Supp. V 2011).

develop comprehensive guidelines.[47] In 2011, HRSA released its guidelines and declared that preventive services for women include "[a]ll Food and Drug Administration (FDA) approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[48] Many of these FDA-approved contraceptive methods and sterilization procedures—for example, Ulipristal (also known as Ella), "a chemical relative to RU-486, the abortion pill"[49]—are opposed by a multitude of religious denominations, including the Roman Catholic Church.[50]

In response to vociferous opposition from several of these denominations,[51] and other concerned groups, the Obama Administration issued a "religious employer exemption."[52] To qualify as a "religious employer," an organization must meet the following criteria:

> (1) The inculcation of religious values is the purpose of the organization.
> (2) The organization primarily employs persons who share the religious tenets of the organization.
> (3) The organization serves primarily persons who share the religious tenets of the organization.
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.[53]

In addition, the Administration instituted a temporary "safe harbor" provision that would accomplish the dual goals of "providing contraceptive coverage . . . to individuals who want it and accommodating non-exempted,

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[47] *Id.* HRSA, in turn, farmed the work out to a private organization, the Institute of Medicine. *See* Conestoga Wood Specialties Corp. v. Sec'y of the United States Dep't Health and Human Servs., 724 F.3d 377, 391 n.2 (3d Cir. 2013) (Jordan, J., dissenting).

[48] *Women's Preventive Services Guidelines*, DEPARTMENT OF HEALTH AND HUMAN SERVICES: HEALTH RESOURCES AND SERVICES ADMINISTRATION, http://www.hrsa.gov/womensguidelines/ (last visited May 7, 2014). These guidelines were based upon a report by the Institute of Medicine. *See generally* COMMITTEE ON PREVENTIVE SERVICES FOR WOMEN, INSTITUTE OF MEDICINE, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS (2011).

[49] Gardiner Harris, *F.D.A. Approves 5-Day Emergency Contraceptive*, N. Y. TIMES, Aug. 14, 2010, at A1.

[50] *Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 44–45 (2012). This hearing before the House Committee on Oversight and Government Reform, on February 16, 2012, included statements and testimony from more than a dozen leaders from several different religions. *Id.* at III.

[51] *See, e.g.*, Press Release, United States Conference of Catholic Bishops, U.S. Bishops Vow to Fight HHS Edict (Jan. 20, 2012), http://www.usccb.org/news/2012/12-012.cfm.

[52] 45 C.F.R. § 147.131 (2012).

[53] *Id.* § 147.130(a)(1)(iv)(B)(1–4). This narrow definition excludes many organizations that consider themselves "religious," such as private elementary and high schools, hospitals and universities. *Id.*; *see, e.g.*, Complaint and Demand for Jury Trial at 4, Univ. of Notre Dame v. Sebelius, No. 3:12CV253, 2012 WL 1859163 (N.D. Ind. May 21, 2012).

nonprofit organizations' religious objections . . . ."[54] The safe harbor gives qualifying organizations an additional year to figure out how to comply with the ACA.[55] To qualify for the safe harbor, an organization must have religious objections and meet the following criteria:

> (1) The organization is organized and operates as a non-profit entity.
> (2) From February 10, 2012 onward, the group health plan established or maintained by the organization has consistently not provided all or the same subset of the contraceptive coverage otherwise required [by the ACA].
> (3) The group health plan established or maintained by the organization . . . provides to plan participants a prescribed notice indicating that some or all contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012.
> (4) The organization self-certifies that it satisfies criteria 1–3 above . . . .[56]

Clearly, this temporary safe harbor applies only to non-profit organizations, and only provides these organizations an additional year to figure out how to implement the required coverage. It does not provide a permanent exemption.[57]

Hence, the limitations of both the religious exemption and the temporary safe harbor leave many who object to the ACA—especially for-profit organizations—with only two options: violate their religious beliefs by maintaining the preventive services coverage or incur substantial financial penalties for violation of the law.[58]

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[54] Legatus v. Sebelius, 901 F. Supp. 2d. 980, 986 (quoting Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8727 (Feb. 2012)).

[55] CTR. FOR CONSUMER INFO. AND INS. OVERSIGHT (CCIIO), CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS), GUIDANCE ON THE TEMPORARY ENFORCEMENT SAFE HARBOR FOR CERTAIN EMPLOYERS, GROUP HEALTH PLANS AND GROUP HEALTH INSURANCE ISSUERS WITH RESPECT TO THE REQUIREMENT TO COVER CONTRACEPTIVE SERVICES WITHOUT COST SHARING UNDER SECTION 2713 OF THE PUBLIC HEALTH SERVICE ACT, SECTION 715(a)(1) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, AND SECTION 9815(a)(1) OF THE INTERNAL REVENUE CODE 2 (June 28, 2013), *available at* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf.

[56] *Legatus*, 901 F. Supp. 2d at 989 (quoting CTR. FOR CONSUMER INFO. AND INS. OVERSIGHT, *supra* note 55, at 3).

[57] *See, e.g.*, James Taranto, *The Weekend Interview with Timothy Dolan: When the Archbishop Met the President*, WALL ST. J., Mar. 31, 2012, at A11. Archbishop Timothy Dolan noted his disenchantment with President Obama's opposition to accommodating religious objections during their discussions. *Id.*

[58] *Id.*; *see also* Korte v. Sebelius, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012).

B. The Response from Secular, For-Profit Corporations

In general, the challenges to the ACA brought by for-profit corporations to date[59] are similar in nature, and the vast majority of them have been brought by businesses owned by Christian men and women and their families.[60] The primary claims presented in each suit are (1) violation of RFRA, (2) violation of the Free Exercise Clause of the First Amendment, (3) violation of the Free Speech Clause of the First Amendment, and (4) Violation of the Administrative Procedure Act.[61] This article will focus exclusively on the claims under the Free Exercise Clause of the First Amendment and RFRA.

Of the cases that have been decided, there has been a divergence of opinion by the lower courts.[62] Some courts have decided that corporations cannot exercise religion,[63] while others have decided they can. [64] Other courts have found that corporations have standing to assert the Free Exercise rights of its owners on a "pass-through instrumentality theory,"[65] and still more have avoided answering the question altogether, and instead reached a decision on other grounds.[66]

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[59] *Contraception Mandate Suit Dismissed in Missouri*, Oct. 1, 2012, ASSOCIATED PRESS, *available at* http://stlouis.cbslocal.com/2012/10/01/contraception-mandate-suit-dismissed-in-missouri.

[60] *See, e.g.*, *Korte*, 2012 WL 6757353, at *1; *Legatus*, 901 F. Supp. 2d at 986–87. The Magisterium of the Roman Catholic Church teaches that the use of artificial contraception is a moral evil; hence Catholics are the most likely litigants. *See generally* POPE PAUL VI, HUMANAE VITAE: ON THE REGULATION OF BIRTH (1968); *see also* Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 642 (2012) (Sotomayor, Circuit Justice). The Green family, owners of the Hobby Lobby chain, is evangelical Christian, not Roman Catholic. *Id.* The Hahn family, owners of Conestoga Wood, practices the Mennonite religion. Conestoga Wood Specialties Corp. v. Sec'y of the United States Dep't Health and Human Servs., 724 F.3d 377, 381–82 (3d Cir. 2013).

[61] *See, e.g.*, Complaint at 8–10, O'Brien v. United States Dep't Health and Human Servs., 894 F. Supp. 2d. 1149 (E.D. Mo., Sept. 28, 2012) [hereinafter, *O'Brien Complaint*].

[62] *See, e.g.*, *supra* notes 22–24, for a brief synopsis of the cases that have been decided already.

[63] *See, e.g.*, *Conestoga Wood Specialties Corp.*, 724 F.3d at 389.

[64] *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1121 (10th Cir. 2013); *Korte*, 2012 WL 6757353, at *3–5.

[65] *See e.g.*, *Legatus*, 901 F. Supp. 2d at 988 (citing Stormans, Inc. v. Selecky, 586 F.3d 1109, 1120 (9th Cir. 2009)).

[66] *See, e.g.*, *O'Brien,* 894 F. Supp. 2d at 1167. However, a three-judge panel of the Eighth Circuit Court of Appeals later issued a stay pending the outcome of O'Brien's appeal. O'Brien v. United States Dep't Health and Human Servs., No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012).

1. Avoiding the Constitutional Question[67]

O'Brien Industrial Holdings, LLC (OIH) is a St. Louis-based holding corporation for the Christy family of companies, which employs eighty-seven employees in the businesses of mining and processing refractory and ceramic raw materials.[68] Frank R. O'Brien, the chairman of OIH, is a practicing member of the Roman Catholic Church.[69] OIH explains the first clause of its mission—"To Make Our Labor a Pleasing Offering"—with a reference to St. Paul's Letter to the Ephesians.[70] Hence, although it is a secular, for-profit corporation, the OIH leadership clearly views its corporate activity as inspired and informed by its religious commitments.

On March 15, 2012, on behalf of himself and his company, O'Brien filed the first federal lawsuit by a for-profit corporation challenging the Employer Mandate for violating his Free Exercise rights under the First Amendment.[71]

On September 28, 2012, despite its acknowledgment that whether or not corporations had Free Exercise rights under the First Amendment was an important question of first impression, the United States District Court for the Eastern District of Missouri granted the Obama Administration's motion to dismiss *O'Brien v. Sebelius* for failure to state a claim.[72] Rather than address the question head-on, the Court assumed "arguendo" that corporations can exercise religion, and proceeded to demonstrate that OIH failed to show that the Mandate posed a "substantial" burden on its exercise of religion. Specifically, guided by the Supreme Court's Free Exercise jurisprudence from *Employment Division v. Smith*, the Court ruled that the ACA was "[a] neutral law of general applicability that incidentally burdens religious exercise [and therefore] need only satisfy rational basis review . . .

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[67] *See generally* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994). Professor Kloppenberg notes that the Supreme Court has provided six justifications for avoiding constitutional questions and/or deciding them only as a last resort: the court's "delicate" [i.e., unelected] position, the finality of the decision, the inherent limits of the judiciary process, the importance of constitutional adjudication, the separation of powers, and principles of federalism. *Id.* at 1036–65. Ultimately, she argues that "[a]s long as judicial review does not implicate voiding legislative or executive action, a federal court should not . . . avoid a constitutional issue . . . . [Unless] it is necessary for a court to invalidate legislative or executive action in order to fulfill its critical function of protecting non-majority rights . . . ." *Id.* at 1065. Under this analysis, it would seem that district courts avoiding the question as to whether corporations can be said to exercise religion under the First Amendment are only shirking their duties if they do in fact believe that corporations are being denied Constitutional rights under the ACA regime.

[68] O'BRIEN INDUS. HOLDINGS, LLC, http://www.christyco.com/About_OIH.html (last visited May 7, 2014); Susan Jones, *Missouri Man is First Private Business Owner to Sue HHS Over Contraception Mandate*, CATHOLIC NEWS SERVS. (Mar. 15, 2012), *available at* http://cnsnews.com/news/article/missouri-man-first-private-business-owner-sue-hhs-over-contraception-mandate.

[69] Jones, *supra* note 68.

[70] *Christy Mission and Values*, O'BRIEN INDUS. HOLDINGS, LLC, http://www.christyco.com/mission_and_values_details.html (last visited May 7, 2014).

[71] Jones, *supra* note 68.

[72] O'Brien v. United States Dep't Health and Human Servs., 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012).

."[73] The rational basis, it concluded, was the government's interest in improving women's access to healthcare and lessening the disparity between men and women's healthcare costs.[74]

2. The Pass-Through Instrumentality Theory

Weingartz Supply Co. employs approximately 170 people[75] to help sell and service outdoor power equipment at its five locations across Southern Michigan.[76] It is a closely-held secular corporation,[77] and has been family owned and operated since 1945.[78] Weingartz Supply Co. does offer employees health insurance coverage, but the coverage has been custom-designed to exclude contraception.[79] The company president, Daniel Weingartz, is a member of Legatus, a non-profit organization founded to help business professionals "[t]o study, live and spread the Catholic faith in [their] business, professional and personal lives."[80] Daniel Weingartz, Weingartz Supply Co., and Legatus all moved for a preliminary injunction to enjoin the Obama Administration from enforcing the provisions of the ACA that would require them to provide contraception without cost sharing to their employees.[81]

On October 31, 2012, the United States District Court for the Eastern District of Michigan issued a preliminary injunction prohibiting the Obama Administration from enforcing ACA penalties against Weingartz Supply Co. until a decision could be reached on the merits of its complaint.[82] In considering whether a corporation has standing to assert Free Exercise rights, the Court noted that neither the Supreme Court nor the Sixth Circuit has ruled on the issue, but pointed to a Ninth Circuit ruling from 2009 that presented "a strong case for standing, at least on a *Stormans* pass-through instrumentality theory . . . ."[83]

In that case, the Ninth Circuit found a close, family-owned, for-profit corporation had standing to sue on the Free Exercise rights of its owners because the company "is an 'extension of the beliefs' of the owners, and 'the beliefs of [the owners] are the beliefs and tenets of the

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[73] *Id.* at 1160; *see also* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879–81, 890 (1990) (holding that Oregon's prohibition of the consumption of peyote did not violate Petitioner's Free Exercise rights because the law was neutral and generally applicable).

[74] *O'Brien*, 894 F. Supp. 2d at 1160–61.

[75] Legatus v. Sebelius, 901 F. Supp. 2d 980, 994 (E.D. Mich. 2012).

[76] *Contact Us*, WEINGARTZ, http://www.weingartz.com/locations (last visited May 7, 2014).

[77] *Legatus*, 901 F.Supp. 2d at 988.

[78] *About Weingartz*, WEINGARTZ, http://www.weingartz.com/about (last visited May 7, 2014).

[79] *Legatus*, 901 F. Supp. 2d at 987.

[80] *Id.* (citing Plaintiff's Complaint at 6, *Legatus*, 901 F.Supp. 2d 980). Legatus is based in Michigan and is comprised of more than 4,000 members nationwide. *Id.*

[81] *Id.* at 984–85.

[82] *Id.*

[83] *Id.* at 988. For a more thorough discussion of *Stormans*, *see infra* Part III.C.

[company].'"[84] Size and structure clearly mattered to the court: the company in question was a fourth generation family-owned pharmacy that had "no rights of its own different from or greater than its owners' rights" because there were no other owners of the company. [85] The company was just the instrument of like-minded owners. Notably, the Ninth Circuit declined in that case to decide whether a for-profit corporation could assert its own Free Exercise rights.[86] So, too, did the district court in *Legatus*.[87]

3. A "Reasonable Likelihood" That Corporations Do Have Free Exercise Rights

Cyril and Jane Korte are 88% owners of Korte & Luitjohan Contractors, Inc. (K&L), a construction firm with around ninety full-time employees.[88] Although most of its employees are union members with union-sponsored health insurance, K&L does provide healthcare coverage for its roughly twenty full-time employees that are non-union members.[89] As Roman Catholics, the Kortes strive to manage their firm in a manner consistent with the teachings of their Church, including its teachings on abortion and contraception.[90] Hence, in August 2012, when the Kortes discovered that the healthcare plan K&L was providing for its non-union employees covered contraception, they sought to terminate that coverage and substitute a new one more consistent with their faith (i.e., one which did not cover preventive services).[91] However, as the Seventh Circuit notes, "[t]he ACA's preventive-care provision and implementing regulations prohibit [K&L] from doing so."[92] The Kortes filed suit on behalf of K&L seeking declaratory and injunctive relief on October 9, 2012.[93]

On December 28, 2012, the Seventh Circuit issued an injunction against the Obama Administration's enforcement of the ACA against K&L on the ground that the company "established both a reasonable likelihood of success on the merits [of their Free Exercise challenge to the ACA] and

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[84] Stormans, Inc. v. Selecky, 586 F. 3d 1109, 1120 (9th Cir. 2009) (quoting EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 620 (9th Cir. 1988)).

[85] *Stormans*, 586 F.3d at 1120.

[86] *Id*.

[87] *Legatus*, 901 F. Supp. 2d at 988. However, this question has now been answered by the Sixth Circuit in the negative. *See* Autocam v. Sebelius, 730 F.3d 618, 625 (6th Cir. 2013) (finding that a corporate entity is not a "person" capable of "religious exercise"). The Sixth Circuit also rejected the "pass-through" theory articulated in *Stormans*, noting that it "seems to abandon corporate law doctrine at the point it matters most." *Id.* at 624. As a separate Sixth Circuit panel put it, "adoption of [the "pass-through" argument] that [a corporation] should not be liable individually for corporate debts and wrongs, but still should be allowed to challenge, as an individual, duties and restrictions placed upon the corporation would undermine completely the principles upon which our nation's corporate laws and structures are based." Eden Foods, Inc. v. Sebelius, 733 F.3d 626, 632 (6th Cir. 2013).

[88] Korte v. Sebelius, No. 12-3841, 2012 WL 6757353, at *1 (7th Cir. Dec. 28, 2012).

[89] *Id.*

[90] *Id.* at *2.

[91] *Id.* at *1.

[92] *Id.*

[93] *Id.* at *2.

irreparable harm . . . ."[94] In response to the Administration's argument that under the *U.S. v. Lee* decision,[95] for-profit corporations give up their rights of religious objection, the Seventh Circuit found "[t]hat the Kortes operate their business in the corporate form is not dispositive of their claim."[96] In particular, the court argued that because "[t]he religious liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services . . . not only . . . in [their] later purchase or use . . . ."[97] Favorably citing to the *Citizens United* decision, the Seventh Circuit presumed that decision extended the rights of corporations to all rights protected under the First Amendment.[98]

4. Free Exercise as a "Purely Personal" Right

Conestoga Wood Specialties Corporation (Conestoga) is a manufacturer of high-quality wood cabinetry that began out of a small garage in Lancaster County, Pennsylvania, and has since grown to employ over 950 people.[99] The founder of Conestoga, Norman Hahn, and his family own 100% of the voting shares of the company, and Norman's son, Anthony, presently serves as the President and CEO.[100] The Conestoga Mission Statement reflects the fact that the Hahns are practicing Mennonite Christians,[101] as does "[t]he Hahn Family Statement on the Sanctity of Human Life."[102] The company provides its employees with a health insurance plan that covers a number of the services required by the ACA, but it specifically excludes coverage for abortifacients.[103] On December 7, 2012, Conestoga filed suit in the Eastern District of Pennsylvania to enjoin the Obama Administration from enforcing the penalty provisions of the ACA against it.[104]

The court firmly rejected the idea that a for-profit secular

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[94] *Id.*

[95] *See supra* note 14 and accompanying text.

[96] *Korte*, 2012 WL 6757353, at *3 (citation omitted).

[97] *Id.* (emphasis in original). *But see id.* at *5 (Rovner, Circuit J., dissenting).

[98] *Id.* at *3 (citing *Citizens United v. FEC*, 558 U.S. 310 (2010)). The Tenth Circuit also reached this conclusion. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133 (10th Cir. 2013).

[99] *See About Conestoga*, CONESTOGA WOOD SPECIALTIES CORP., http://www.conestogawood.com/about-conestoga/ (last visited May 7, 2014).

[100] Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 402 (E.D. Pa. 2013).

[101] *Id.* The Mission Statement reads, in part: "[w]e operate in a professional environment founded upon the highest ethical, moral, and Christian principles . . . ." *Id.*

[102] *Id.* at 403.

[103] *Id.* Unlike the plaintiffs in *Korte* and *O'Brien*, the Hahn family only disagrees with a narrow subset of the drug and preventive services coverage required by the ACA. Conestoga Wood Specialties Corp. v. Sec'y of the United States Dep't Health and Human Servs., 724 F.3d 377, 382 (3d Cir. 2013) ("[T]he Hahns object to [only] two drugs that must be provided . . . under the Mandate that 'may cause the demise of an already conceived but not yet attached human embryo.'"). In other words, the Hahns do not object to providing coverage for contraceptives, but because they believe that life begins at conception, they oppose any drugs or services that would cause the extinguishment of the life created after fertilization. *Id.*

[104] *Conestoga Wood Specialties Corp.*, 917 F. Supp. 2d at 400.

corporation can exercise religion.[105] In addressing Conestoga's argument that *Citizens United* extended all First Amendment rights to corporations, the court remarked that it found no historical support for the proposition that for-profit corporations possess Free Exercise rights.[106] Indeed, the court concluded that the nature, history, and purpose of the Free Exercise Clause show that it is a "purely personal" right reserved for individual human beings.[107] Finally, the court found that Conestoga was incorporated to create a distinct legal entity, and that it would be "entirely inconsistent" to view the company as the alter ego of its owners.[108] This decision and reasoning was affirmed by the Third Circuit.[109]

As the discussion above reveals, there is a wide disparity between the Free Exercise rights that the various lower courts have recognized to inhere to the for-profit corporations bringing suit. Who is right? To get to the bottom of this question, it is necessary to look first to the recent *Citizens United* decision to determine precisely what First Amendment rights the Court found to inhere to the corporation: all First Amendment rights or just a fraction?

III. CORPORATE PERSONHOOD AND THE RIGHT TO THE FREE EXERCISE OF RELIGION

In 1886, the Supreme Court of the United States issued its opinion in *Santa Clara Co. v. Southern Pacific Railroad*, an action by Santa Clara County to recover unpaid taxes assessed against Southern Pacific and other railroad companies. [110] The primary focus of the decision was a series of questions relating to whether and how to value and assess fences on the line of the railroads running through Santa Clara County, California.[111] However, one of the issues discussed at length in the briefs to the Court from the railroads prompted the Court to include a brief headnote:

> The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to . . . corporations. We are all of the opinion that it does.[112]

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[105] *Id.* at 406–09.
[106] *Id.* at 407. The Court believed *Citizens United* to apply only to political speech rights. *Id.*
[107] *Id.* at 408.
[108] *Id.*
[109] Conestoga Wood Specialties Corp. v. United States Dep't Health and Human Servs., No. 13-1144, 2013 U.S. App. LEXIS 2706, at *6 (3d Cir. Feb. 7, 2013); Conestoga Wood Specialties Corp. v. Sec'y of the United States Dep't Health and Human Servs., 724 F.3d 377, 389 (3d Cir. 2013).
[110] *See* Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 397 (1886).
[111] *Id.*
[112] *Id.* at syllabus.

Far from a settled issue of law up to that point, the Court's unabashed declaration of corporate personhood under the Constitution was "totally without reasons or precedent[,]" leaving later courts to provide *post hoc* justifications, and commentators to speculate as to what theory of corporate personality it represented.[113]

Yet despite its ambiguous foundation, *Santa Clara's* establishment of corporate personhood under the Fourteenth Amendment has had a dramatic effect on the position and power of secular, for-profit corporations under the law.[114] Indeed, since *Santa Clara*, the Supreme Court has also declared that "[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."[115] Thus, it would seem that, if the corporation is a person entitled to due process of law under the Fourteenth Amendment, then the corporation *qua* person is also entitled to the protections of the First Amendment. As will be discussed below, this connection has been made and reinforced in regards to the Free Speech rights of corporations beginning with *First National Bank of Boston v. Bellotti*[116] in the mid-1970s, and continuing through *Citizens United v. Federal Election Commission* in 2010.[117] What is more, as the following discussion will show, that same logic may justify corporate Free Exercise rights, as well.

A. First National Bank of Boston v. Bellotti

In *First National Bank of Boston v. Bellotti*,[118] the Supreme Court granted certiorari to a group of national banking associations and for-profit corporations appealing a ruling by the Supreme Court of Massachusetts that upheld a Massachusetts law drastically limiting the ability of corporations to make political contributions.[119] The Massachusetts high court ruled that a corporation does have First Amendment rights, but that it may allege a violation of those rights only when the issue "materially affects a corporation's business property or assets."[120]

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[113] Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 29 CORP. PRAC. COMMENTATOR 313, 315 (1987).

[114] *Id.* at 316 (citing Howard Jay Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J., 851, 853 (1943)).

[115] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[116] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778–84 (1978). Indeed, Horwitz notes that the *Bellotti* Court "spoke as if it were simply axiomatic that the *Santa Clara* case settled the view that the free speech doctrine had been extended to corporations." Horwitz, *supra* note 113, at 315.

[117] Citizens United v. FEC, 558 U.S. 310, 318 (2010); *see also* Horwitz, *supra* note 113, at 315; Julie Marie Baworowsky, Note, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious Speech*, 83 NOTRE DAME L. REV. 1713, 1750–51 (2008).

[118] *Bellotti*, 435 U.S. at 772.

[119] *Bellotti*, 435 U.S. at 767–68 (citing MASS. GEN. LAWS ANN., ch. 55, § 8 (West Supp. 1977)).

[120] *Id.* at 771 (quoting First Nat'l Bank of Boston v. Atty. Gen., 359 N.E.2d 1262, 1270 (Mass. 1977)).

In reversing the ruling, the Supreme Court of United States held that the speech affected by the Massachusetts law was in fact "at the heart of the First Amendment's protection[,]"[121] and found no support for the proposition that speech otherwise protected by the First Amendment loses that protection "simply because its source is a corporation."[122] Although the Court acknowledged the existence of "purely personal" guarantees that may not be available to corporations, it further noted that "[w]hether or not a particular guarantee is 'purely personal' . . . depends on the nature, history, and purpose of the particular constitutional provision."[123] The Court faulted the Supreme Court of Massachusetts's framing of the issue:

> The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication . . . The proper question therefore is not whether corporations "have" First Amendment rights . . . Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect.[124]

In his concurrence, Chief Justice Burger reinforced this analysis by concluding that "the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms."[125]

Hence, in seeking to determine whether or not the Employer Mandate violates a corporation's First Amendment Free Exercise rights, the proper question to ask, per the *Bellotti* ruling, is whether the ACA abridges a liberty interest that the Free Exercise Clause of the First Amendment was meant to protect. That is, the question cannot be answered merely on the basis of a "person's" corporate form, but must be assessed in terms of whether or not the "person" may be said to exercise the protected right.

B. Austin v. Michigan Chamber of Commerce

However, over a decade after *Bellotti* was decided, the Supreme Court seemed to qualify its position. In *Austin v. Michigan Chamber of Commerce*,[126] the Court granted certiorari to the State of Michigan's appeal

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[121] *Id.* at 776.
[122] *Id.* at 784.
[123] *Id.* at 778 n.14. For example, the Court notes that the privilege against compulsory self-incrimination is unavailable to corporations because the "historic function" of that guarantee has been limited to individuals. *Id.*
[124] *Id.* at 775–76.
[125] *Id.* at 802 (Burger, C.J., concurring).
[126] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 654 (1990).

of a Sixth Circuit ruling against a Michigan law prohibiting corporations from using funds from the corporate treasury to support or oppose any candidate in elections for state office.[127] In its ruling, the Court recognized that the law did burden a corporation's freedom of expression, but that the burden was justified by "the compelling governmental interest in preventing corruption [by] the restriction of the influence of political war chests funneled through the corporate form."[128] It noted that corporations were granted special advantages from the state that allowed them to accumulate large amounts of wealth that, if left unchecked, could permit an unfair advantage in the political marketplace.[129]

In other words, *Austin* seemed to modify the *Belloti* liberty interest inquiry with a balancing test of sorts.[130] That is, at least for First Amendment inquiries, not only must a court discern whether the statute abridges the exercise of the corporation's liberty interest, but it must then balance the Free Exercise of that interest against the interests of the State in abridging it.[131]

C. Stormans, Inc. v. Selecky

Although there were several First Amendment Free Speech cases after *Austin* that attempted to apply the Court's *Austin* decision in the area of campaign finance, there were very few attempts to explore a corporation's standing to bring a suit challenging an impingement on Free Exercise.[132] However, there was a case in the Ninth Circuit that seemed to pave the way for more corporate Free Exercise claims, at least for small, family-owned or "close" corporations.[133]

In *Stormans, Inc. v. Selecky*, a small family-owned pharmacy brought a Free Exercise challenge against a Washington state law that required it to stock and dispense the controversial "Plan B" contraceptive.[134] In considering whether the Washington law "abridge[d] [the rights] that the First Amendment was meant to protect[,]" the Ninth Circuit reasoned that Stormans, "a fourth-generation, family-owned business whose shareholders and directors are made up entirely of members of the Stormans family," did

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[127] *Id.* (citing § 54(1) of the Michigan Campaign Finance Act, 1976 Mich. Pub. Acts 388).

[128] *Id.* at 659 (quoting FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 500–01 (1985)).

[129] *Id.* (citing FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986)).

[130] *Id.* at 660.

[131] There is also some suggestion in the concurrence from Justice Brennan that the Michigan law protected the rights of stockholders with dissenting opinions. *See, e.g.*, *id.* at 673 (Brennan, J., concurring).

[132] *See generally* McConnell v. FEC, 540 U.S. 93 (2003) (regarding campaign finance).

[133] Stormans, Inc. v. Selecky, 586 F.3d 1109, 1113–14 (9th Cir. 2009); *see also* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 850 (Minn. 1985); *Newland Reply*, *supra* note 4, at 6–11.

[134] *Stormans*, 586 F.3d at 1114–18. "After [Stormans] learned that Plan B can prevent a fertilized egg from implanting in the uterus, and because Stormans's owners believe life begins with fertilization, Stormans decided that it would not sell the drug." *Id.* at 1117.

not present any rights different from or greater than that of its owners.[135] Hence, the court concluded that the corporation had "standing to assert the free exercise right of its owners."[136] In so doing, the Ninth Circuit held open the possibility for "close" corporations to bring suits on behalf of their respective owners, but the question remained as to whether this standing extended to all corporations, particularly large, publicly held corporations.[137]

D. Citizens United v. Federal Election Commission

The Supreme Court issued a resounding answer to this question in *Citizens United v. Federal Election Commission*.[138] In returning to its *Bellotti* reasoning, the Court affirmed that "First Amendment protection extends to corporations[,]"[139] and rejected the argument that—in the area of political speech—corporations should be treated differently simply because they are not "natural persons."[140] Quoting *Bellotti* extensively, the Court reiterated that the proper inquiry is not *who* is exercising the rights, but rather *what* interests are being abridged.[141]

Further, the Court offered flashes of insight into its thinking about the position of corporations under the law. Whereas the *Austin* Court was concerned about corporations gaining the upper hand in the political forum from special advantages that the state itself had granted it in its formation,[142] the *Citizens United* Court worried that *Austin* unreasonably disadvantaged "certain disfavored associations of citizens – those that have taken on the corporate form . . . ."[143] Whereas *Austin* seemed to view the corporate form as an artificial entity allowed or created by the state, *Citizens United* viewed a corporation first and foremost as an association of individuals.[144] And perhaps more to the point, whereas the Ninth Circuit in *Stormans* seemed to limit standing to sue on First Amendment rights to family-owned or "close" corporations,[145] the *Citizens United* Court presented a theory of "corporate democracy" by which large, publicly-held corporations may be said to protect the property of individual shareholders.[146]

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[135] *Id.* at 1120 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).
[136] *Id.*; *see* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 620 n.15 (9th Cir. 1988).
[137] *See generally* Wells, *supra* note 30.
[138] Citizens United v. FEC, 558 U.S. 310, 342 (2010).
[139] *Id.*
[140] *Id.*
[141] *Id.* at 347 ("*Bellotti's* central principle: that the First Amendment does not allow . . . restrictions based on a speaker's corporate identity.").
[142] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).
[143] *Citizens United*, 558 U.S. at 356.
[144] *Id.* at 353–56. The Court asserted that *Austin* interferes with the "open marketplace" of ideas protected by the First Amendment by banning the political speech of millions of associations of citizens. *Id.* at 354.
[145] *See supra* note 133–37 and accompanying text.
[146] *Citizens United*, 558 U.S. at 476–77 (Stevens, J., concurring in part, dissenting in part). This argument by the *Citizens United* Court seems to be consistent with the reasoning employed by John Norton Pomeroy in his briefs on behalf of the railroad in *Santa Clara*. Horwitz, *supra* note 113, at 319.

E. Arguments Against Citizens United

The theory of "corporate democracy" upon which *Citizens United* is premised can be challenged from two related standpoints. First, it has been argued that for-profit corporations are highly efficient machines that have been formed for one purpose: profit.[147] As such, they are inherently and exclusively self-interested, and, as such, may be "structurally incapable" of acting as productive citizens of the Republic.[148] Therefore, some argue that corporations should not be afforded the same basic rights as human beings.[149]

In addition, there is some question as to whether current corporate governance law allows for the robust corporate democracy required by the *Citizens United* approach.[150] In particular, at least one commentator has noted that most shareholders lack the information and power to effectively limit the actions of corporate management, and so are generally unable to participate in the governance of the corporation in any meaningful way.[151] Hence, it may be that rather than freeing corporations to exert their First Amendment rights, *Citizens United* could lead to such abuses of shareholder rights as the Court warned against in *Turner Broadcasting System v. FCC* when it reiterated that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression . . . ."[152]

However, these criticisms fail to get at the heart of the *Citizens United* conception of "corporate democracy." That is, the *Citizens United* Court argued neither that public corporations are benevolent giants, nor that the action of corporate management represents the unanimous consent of its shareholders. Rather, the Court reached its conclusion on the basis of another First Amendment freedom: the freedom to associate.[153] The purchase of common stock in a corporation is, in this day and age, a point-and-click transaction, and anyone so inclined to acquire an ownership

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Horwitz quotes Pomeroy: "statutes violating their prohibitions in dealing with corporations must necessarily infringe upon the rights of natural persons. In applying and enforcing these constitutional guarantees, corporations cannot be separated from the natural persons who compose them. . . . A State act depriving a business corporation of its property without due process of law, does in fact deprive the individual corporators of their property." *Id.* at 319–20.

[147] Kent Greenfield et al., *Should Corporations Have First Amendment Rights?*, 30 SEATTLE U. L. REV. 875, 883 (2007). The article is the transcript of a debate between Daniel H. Greenwood and Erik S. Jaffe, moderated by Kent Greenfield. *Id.* at 875. The criticisms of corporate First Amendment rights come from Greenwood. *Id.* at 893.

[148] *Id.* at 883.

[149] *Id.*

[150] Paul S. Miller, *Shareholder Rights: Citizens United and Delaware Corporate Governance Law*, 28 J.L. & POL 51, 78 (2012).

[151] *Id.* at 75–88.

[152] *Id.* at 67 n.92 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)).

[153] *See* Citizens United v. FEC, 558 U.S. 310, 392 (2010) (Scalia, J., concurring).

interest in a particular corporation may do so as long as he has the means.[154] So, too, with the sale of stock: anyone who disagrees with a position taken by corporate management may sell his shares at any time, or, in extreme cases, pursue derivative or personal legal action against the firm in court.[155] These are the organs of "corporate democracy," and they provide sufficient relief for a shareholder facing potential injury.[156]

Hence, *Citizens United* is able to withstand criticism,[157] and the rule holds that *all* forms of corporations may seek protection of their First Amendment interests on par with the individuals that own property (i.e., shares) in it. That is, in any First Amendment analysis the corporation must be treated the same as any other person.[158] However, it is not yet clear whether or not corporations possess the First Amendment right of the Free Exercise of religion. Two key questions remain: (1) what rights or interests does the Free Exercise Clause protect, and (2) can a corporation exercise those interests?

IV. THE FREE EXERCISE CLAUSE

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[159] Although this language seems straightforward, jurists and scholars have debated for more than two centuries about precisely which interests this clause was crafted to protect.[160] Generalizing broadly, we can split the participants in this debate into two groups: those who see the First Amendment as protecting both religious

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[154] *How to Buy a Stock*, WALL ST. J., http://guides.wsj.com/personal-finance/investing/how-to-buy-a-stock (last visited May 7, 2014).

[155] *Id.*; *see also* Ross v. Bernhard, 396 U.S. 531, 534–35 (1970). The shareholder derivative action originated as an equitable action permitting stockholders to hold corporate managers accountable. *Ross*, 396 U.S. at 534–35. "As elaborated in the cases, one precondition for the suit was a valid claim on which the corporation could have sued; another was that the corporation itself had refused to proceed after suitable demand, unless excused by extraordinary conditions." *Id.* at 534 (citation omitted).

[156] For example, at least two courts have examined the impact of the shareholder standing rule on the Employer Mandate controversy. That rule is "a longstanding equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment." Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd., 493 U.S. 331, 336 (1990). The Sixth Circuit has held that the shareholder standing rule prevents the owners of a corporation from bringing a RFRA claim arising from a legal obligation of that corporation. Autocam Corp. v. Sebelius, 730 F.3d 618, 622 (6th Cir. 2013). The D.C. Circuit held that the shareholder standing rule did not. Gilardi v. United States Dep't Health and Human Servs., 733 F.3d 1208, 1216 (D.C. Cir. 2013). Yet neither has questioned whether shareholders may take action against the corporation itself had they been wronged.

[157] There is one additional criticism not pointed out in the discussion in the preceding paragraphs: given the issues in the case, and the precedents that the Court relied upon, in future decisions the Supreme Court may decide that the First Amendment rights attributed to corporations in *Citizens United* are limited exclusively to political speech. *See Citizens United*, 558 U.S. at 341.

[158] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) ("[T]he First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms.").

[159] U.S. CONST., amend. I.

[160] *See, e.g.*, Garnett & Dunlap, *supra* note 31, at 259–61.

belief and *conduct*, and those who see the First Amendment as protecting *only belief*.[161]

Although the Supreme Court seemed to see the Free Exercise Clause as protecting interests—including both belief and conduct—from the early 1960s through the late 1980s, the Court's 1990 decision in *Employment Division v. Smith* signaled a shift to the protection of only religious belief.[162] Congress responded by reinstating a heightened standard in RFRA,[163] but the debate persists as to the nature and scope of Free Exercise rights.[164] As a necessary step in determining whether or not the Employer Mandate violates the interests that the Free Exercise Clause protects, one must first establish whether or not the corporate entity can truly "exercise religion." This section will revisit the developments in Free Exercise law over the last fifty years, and explore the jurisprudence underlying the two main positions in the Free Exercise debate to demonstrate that a corporation does indeed have protectable interests under the Free Exercise Clause.

A. The Sherbert Balancing Test

In the 1963 case of *Sherbert v. Verner*, the Court considered a claim by Adell Sherbert that the state of South Carolina abridged her First Amendment Free Exercise rights by denying her unemployment benefits.[165] Ms. Sherbert, a member of the Seventh-day Adventist Church, had her employment terminated because she would not work on Saturdays, the Sabbath Day for Seventh-day Adventists.[166] When she applied for unemployment benefits, her claim was denied because, under the law she "failed, without good cause . . . to accept available suitable work when offered . . . ."[167]

In finding for Ms. Sherbert, the Court employed a two-part test that asked, first, whether the law imposed a substantial burden upon the Free Exercise of the appellant's religion and, second, if it did, whether that substantial burden was justified by a compelling state interest.[168] As it pertained to Ms. Sherbert, the Court found that "to condition the availability

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[161] Vincent Phillip Munoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1083–84 (2008).

[162] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877–88 (1990); *see also* City of Boerne v. Flores, 521 U.S. 507, 548 (1997) (O'Connor, J., dissenting) ("I believe that, in light of both our precedent and our Nation's tradition of religious liberty, *Smith* is demonstrably wrong.").

[163] Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488.

[164] *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 699 (2012).

[165] Sherbert v. Verner, 374 U.S. 398, 399–400 (1963).

[166] *Id.* at 399.

[167] *Id.* at 401.

[168] *Id.* at 403, 406. Notably, although Justice Brennan uses citations quite liberally throughout his opinion, there are no citations in direct support of his use of this test in this particular case.

of benefits upon [Sherbert's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties[,]"[169] and therefore rejected the state's argument that fear of fraudulent claims diluting the unemployment fund justified the burden.[170]

Over the ensuing thirty years, the Court employed the *Sherbert* test a number of times to balance an individual's Free Exercise rights against state action. On the one hand, the Court acted to protect an individual's Free Exercise rights by upholding an Amish family's decision not to send its children to school after the eighth grade,[171] and by requiring the provision of state unemployment benefits to an individual who resigned from his factory position because his religious beliefs would not allow him to produce or directly aid in the manufacture of items used in warfare.[172]

However, on the other hand, the Court also showed that the *Sherbert* test was not an absolute guarantee for the individual. On at least two occasions, the Court found that the government's interest outweighed the burden on the individual's Free Exercise rights.[173] Most notably, in rejecting an Amish employer's attempt to opt out of Social Security tax payments on religious grounds, the Court wrote that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[174]

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[169] *Id.* at 406.

[170] *Id.* at 407–09. In a decision just two years prior to *Sherbert*, the Supreme Court upheld a Sunday-closing law that advanced the purported state interest of providing a uniform day of rest. Braunfeld v. Brown, 366 U.S. 599, 600–601 (1961)). In that case, the Court found that the burden this placed on observers of a Saturday Sabbath was justified. *Id.* at 607.

[171] Wisconsin v. Yoder, 406 U.S. 205, 211 (1972). The Court recognized that First Amendment Free Exercise rights are not absolute when it noted that the "activities of individuals, even when religiously based, are often subject to regulation by the States . . . or the Federal Government . . . ." *Id.* at 220. Yet it found that the Wisconsin act in question, "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 232–33 (quoting Pierce v. Soc'y of Sisters, 268 US. 510, 534–35 (1925)).

[172] Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 719 (1981). In *Thomas*, the Court provided a glimpse into its understanding of the scope of "religion" in the Free Exercise Clause: "[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. . . . [I]t is not within the . . . judicial competence to inquire whether the petitioner . . . correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." *Id.* at 715–16.

[173] *See* United States v. Lee, 455 U.S. 252, 261; Bowen v. Roy, 476 U.S. 693, 712 (1986). In *Bowen*, Native American parents refused to register their daughter for a Social Security number on the ground that, according to their religion, such action would tarnish the purity of her spirit. *Id.* at 695. The Court found for the government because "[t]he requirement that applicants provide a Social Security number is facially neutral and applies to all applicants for the benefits involved." *Id.* at 708.

[174] *Lee*, 455 U.S. at 261. The Court distinguished from the situation presented in *Yoder* on the grounds that Lee was taking on the Social Security system, an entity that the government could not afford to have jeopardized. *Id.* at 259–60. The Obama Administration relies heavily on the *Lee* opinion in its briefs, and many courts find the argument persuasive. *See, e.g.*, Grote v. Sebelius, 708 F.3d 850, 859 (7th Cir. 2013) (Rovner, Circuit J., dissenting); *Administration's Memo*, *supra* note 13, at 1–2.

B. Smith: The End of the Balancing Test

The majority ruling in *Employment Division v. Smith*, in 1990, drastically limited the scope of *Sherbert*, and effectively overruled the thirty-year old balancing test.[175] The primary issue in *Smith* was whether or not the Free Exercise Clause required that a state exempt individuals from a criminal statute outlawing the ingestion of peyote, when those individuals ingested peyote as part of a Native American sacramental right.[176] The Court held that it did not. Regardless of the burden imposed by the state on religious belief, the Court wrote, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[177]

The *Smith* Court did concede that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts[]" such as worship assemblies, participation in physical sacraments, proselytizing, and more.[178] But it concluded that the only constitutionally-protected dimension of the Free Exercise of religion is "the right to believe and profess whatever religious doctrine one desires."[179] Although states certainly *can* choose to make certain religious exemptions, such as the sacramental use of peyote, the Court insisted that the Free Exercise Clause did not *require* that it do so.[180] For the Court to mandate exemptions in such cases would "permit every citizen to become a law unto himself."[181]

The Court did not directly overrule the *Sherbert* balancing test, but it declared that the test was useful only in situations dealing with issues like unemployment compensation, which lend themselves to individualized government assessment.[182] Such cases "have nothing to do with an across-the-board criminal prohibition on a particular form of conduct[,]"[183] the Court reasoned, noting that although the balancing test had been used to challenge across-the-board laws, it had never invalidated one.[184] Rather than continue with the perilous—and subjective—process of weighing the

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[175] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884–85 (1990) ("Although . . . we have sometimes used the *Sherbert* test to analyze free exercise challenges to [across-the-board criminal prohibitions on conduct] . . . we have never applied the test to invalidate one.").

[176] *Id.* at 874.

[177] *Id.* at 879 (quoting *Lee*, 455 U.S. at 263 n.3 (Sevens, J., concurring)).

[178] *Id.* at 877.

[179] *Id.*

[180] *Id.* at 889.

[181] Reynolds v. United States, 98 U.S. 145, 167 (1878). *Reynolds* is the well-known "polygamy case," in which the Supreme Court affirmed the government's right to outlaw polygamy despite Reynolds's assertion that his Mormon faith demanded that he take more than one wife. *Id.* at 167–68.

[182] *Smith*, 494 U.S. at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)). Ironically, *Smith* was an unemployment compensation case, too. *Id.* at 874.

[183] *Id.* at 884.

[184] *Id.* at 883.

pros and the cons, the *Smith* majority sought to establish a clear test that could be applied with some degree of objectivity.[185] In a telling remark, the majority noted that "it is horrible to contemplate that [were a *Sherbert* regime to persist] federal judges will regularly balance against the importance of general laws the significance of religious practice."[186] The majority clearly felt the Court was ill-suited for such a task.[187]

Hence, although *Smith* may not have explicitly overruled *Sherbert*, it did radically change the Court's approach to Free Exercise cases and effectively ended the Court's use of a balancing test.[188] The judicial approach to be employed heretofore would be to eschew exemptions and support "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . ."[189] Or, as the Court succinctly summarized it in the first big Free Exercise case after *Smith*, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[190]

Later, Justice Antonin Scalia, the author of the Court's *Smith* opinion, summarized the historical, jurisprudential, and philosophical underpinnings of the *Smith* approach.[191] Responding directly to Justice O'Connor's defense of the *Sherbert* test in her dissent in *City of Boerne v. Flores*,[192] Justice Scalia argued that the historical evidence that Justice O'Connor "claims is at odds with *Smith* either has little to say about the issue or is in fact more consistent with *Smith* than with the dissent's interpretation of the Free Exercise Clause."[193] Although he admits that O'Connor's evidence cannot fairly be said to prove *Smith* is the Free Exercise approach most consistent with the Founders' views, he believes the evidence to be more supportive of the *Smith* standard than contrary to it.[194] Scalia's conclusion is essential to an understanding of the *Smith* standard:

> The [*Sherbert* balancing test] has, of course, great popular attraction. Who can possibly be against the abstract proposition that government should not, even in its general,

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[185] *See generally* Gerard V. Bradley, *Beguilded: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991).

[186] *Smith*, 494 U.S. at 889 n.5.

[187] *See, e.g.*, Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981).

[188] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

[189] *Smith*, 494 U.S. at 885.

[190] *Hialeah*, 508 U.S. at 531.

[191] City of Boerne v. Flores, 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring in part).

[192] *Id.* at 537. Justice O'Connor did not believe *Smith* to be a rightly-reasoned opinion but she did agree that the Oregon state law ought to be upheld; she believed that Oregon showed a compelling state interest to justify its burden under the *Sherbert* test. *Smith*, 494 U.S. at 891–907 (O'Connor, J., concurring).

[193] *See Boerne*, 521 U.S. at 537.

[194] *Id.* at 544.

> nondiscriminatory laws, place unreasonable burdens upon religious practice? Unfortunately, however, that abstract proposition must ultimately be reduced to concrete cases. The issue presented . . . is . . . whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases. . . . *Smith* [says] [i]t shall be the people.[195]

In other words, the *Smith* approach rests upon a separation of powers argument. It contemplates only a limited role for the judiciary at the nebulous intersection of law and religious belief because, it is believed, the Founders did not contemplate a *judicial* power to exempt individuals from these laws, only a *legislative* power.[196] It belongs to the popularly elected legislatures to make any difficult tradeoffs that must be made, because legislators are accountable to the people through democratic elections in which the people can voice their agreement or disagreement with decisions made.[197] Hence, the *Smith* Court concluded that the Free Exercise Clause protects an individual's freedom of belief, but it does not afford a complete freedom to act in any manner that an individual may deem consistent with his beliefs. When it comes to conduct, the Free Exercise Clause affords legislatures the latitude to regulate activity in the interest of the common good as it sees fit, provided the legislature stays within Constitutional bounds in other regards.[198]

C. RFRA: "The People" Respond

Congress reacted to the *Smith* decision by passing RFRA "to restore the compelling interest test as set forth in Sherbert v. Verner . . . ."[199] In response to the *Smith* Court's express distaste for implementing a balancing test to protect Free Exercise,[200] Congress asserted that *Sherbert* "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[201] In *City of Boerne v. Flores* a few years later, the Court found RFRA to exceed Congressional power under Section 5 of the Fourteenth Amendment as it applied to local and state governments.[202] However, RFRA continues to apply to action of the Federal

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[195] *Id.*

[196] Munoz, *supra* note 161, at 1096.

[197] *See generally* Bradley, *supra* note 185.

[198] *See* Munoz, *supra* note 161 at 1096.

[199] Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, § 2(b)(1), 107 Stat. 1488, 1488; *see also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006) (discussing the congressional response to *Smith*).

[200] *See supra* note 195 and accompanying text.

[201] § 2(a)(5), 107 Stat. at 1488.

[202] Sossamon v. Texas, 131 S. Ct. 1651, 1656 (2011) (citing City of Boerne v. Flores, 521 U.S. 507, 536 (1997)).

Government.[203]

In her dissent in *Boerne*, Justice Sandra Day O'Connor summarized the historical, jurisprudential, and philosophical underpinnings of the *Sherbert* test now embodied in RFRA.[204] O'Connor examined four types of historical sources—early documents, early state constitutions, the practices of the Colonies and early states, and the writings of the Founders—from which she culled three general principles:

> Foremost, these early leaders accorded religious exercise a special constitutional status. . . .
>
> Second, all agreed that government interference in religious practice was not to be lightly countenanced. Finally, all shared the conviction that "true religion and good morals are the only solid foundation of public liberty and happiness."[205]

In short, O'Connor argued that the Founders viewed the Free Exercise Clause as a guarantee that government would not come between believers and the free practice of their religion, and therefore envisioned a balancing test that would give judges the authority to exempt individuals from generally applicable laws that burdened their religious conduct.[206]

D. Can Corporations Exercise Religion?

The apparent conflict between the Supreme Court and Congress, in understanding the Free Exercise Clause, may appear to create competing standards under which to determine whether or not a corporation can exercise religion. In fact, however, the *Smith* decision and RFRA work hand in hand. As Garnett and Dunlap point out, "[t]he *Smith* case teaches clearly that the political process is the main arena, and politically accountable actors are the primary players, when it comes to accommodating the special needs of religious believers."[207] With RFRA, the political arena and the politically accountable actors provided those

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[203] *Id.*

[204] City of Boerne v. Flores, 521 U.S. 507, 544–66 (1997) (O'Connor, J., dissenting). O'Connor wrote: "I examine here the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause – an inquiry the Court in *Smith* did not undertake." *Id.* at 548.

[205] *Id.* at 563–64 (citations omitted). Examples of the early sources surveyed include: the Maryland Assembly's "Act Concerning Religion" from 1649, Rhode Island's Charter of 1663, and "[v]arious agreements between prospective settlers and the proprietors of Carolina, New York, and New Jersey." *Id.* at 551–52. Examples of early state constitutions include: New York, New Hampshire, Maryland, and Georgia. *Id.* at 552–55. Examples of early practices include those dealing with Quakers and others on, among other things, the issues of oaths and military conscription. *Id.* at 557–60. Examples of Founders consulted include: James Madison, Thomas Jefferson, and George Washington. *Id.* at 560–63.

[206] Munoz, *supra* note 161, at 1088–90 (citing *Boerne*, 521 U.S. at 544–65 (O'Connor, J., dissenting)).

[207] Garnett & Dunlap, *supra* note 31, at 259.

accommodations in the form of a heightened standard of scrutiny of government action that substantially burdens religious belief.[208]

The first step in deciding whether corporations have Free Exercise rights, then, is to ask: can corporations hold a "religious belief?" Answering this question requires the application of the plain meaning rule, which requires an inquiry into the plain meaning that the ordinary speaker of the English language would draw from a given term.[209] The interpreter may turn to a dictionary or other language in the statute for help in discerning the plain meaning, but ultimately the test is simple: "could [a person] use the word in that sense at a cocktail party without having people look at [him] funny?"[210]

Merriam Webster's dictionary defines "belief" as a "conviction of the truth of some statement or the reality of some being or phenomenon . . . ."[211] And, in an oft-cited passage in Free Exercise and Establishment Clause cases, James Madison defined religion as "the duty which we owe to our Creator and the Manner of discharging it . . . ."[212] Hence, using the plain meaning rule, "religious belief" can be roughly defined as "the conviction of the truth of the duty we owe our creator, and the manner of discharging it." Presenting fellow guests at a cocktail party with this definition would not likely evoke funny looks in response.

So, can a corporation hold a conviction of the truth of the duty we owe our Creator, and the manner of discharging it? Just ask the dozens of corporations who are presently challenging the Employer Mandate because the provision of contraception to its employees flies in the face of its religious beliefs.[213] One plaintiff argues that to contend that corporations cannot hold such a conviction "would prevent businesses from operating according to any kind of ethical norm, charitable effort, stewardship of nature, or just plain honesty, on the basis that its profit motive is 'overriding.' The First Amendment has never excluded religion from business."[214]

Put another way, if a corporation of any kind can hold and express a political conviction under *Citizens United*, there is no logical barrier to adopting and holding convictions that relate to the duty owed to the Creator.

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[208] Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, § 3(b), 107 Stat. 1488, 1488–89.

[209] *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697 (1995).

[210] WILLIAM N. ESKRIDGE, JR. ET AL, CASES AND MATERIALS ON STATUTORY INTERPRETATION 230 (2012) (citing Johnson v. United States, 529 U.S. 594, 718 (2000) (Scalia, J., dissenting)).

[211] *Belief – Definition and More from the Free Merriam-Webster Dictionary*, MERRIAM-WEBSTER, http://merriam-webster.com/dictionary/belief (last visited May 7, 2014).

[212] James Madison, *Memorial and Remonstrance Against Religious Assessments*, *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, 64 (1947).

[213] *See, e.g.*, *God and the Profits*, *supra* note 39; *see also supra* notes 22–26.

[214] *Newland Reply*, *supra* note 4, at 8 (footnote omitted).

[215] This argument applies equally to "close" and publicly-held corporations.[216]

V. DOES THE EMPLOYER MANDATE VIOLATE AN UNWILLING CORPORATION'S FREE EXERCISE RIGHTS?

If a corporation can indeed exercise religion, then *Citizens United*—indeed, the Constitution—requires that they be extended the Free Exercise protections originating in the First Amendment and reinforced by RFRA.[217] This section will apply the appropriate analyses to the Employer Mandate to show that although the ACA likely holds up under the *Smith* standard established for the Free Exercise Clause of the First Amendment,[218] it likely will not withstand the heightened scrutiny of RFRA.[219]

A. Applying the Smith Standard

A case decided just a few short years after *Smith*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[220] provides an excellent blueprint for applying *Smith's* standard of neutrality and general applicability.[221] Although an analysis under the *Smith/Hialeah* standard suggests that the ACA may withstand the First Amendment challenges, there are at least three points of weakness that merit further exploration.

In *Hialeah*, the Court examined a series of ordinances of the City of Hialeah, Florida, that—given both their legislative history and their narrow focus—were very obviously designed to prohibit a religious group from conducting animal sacrifices consistent with the Santeria religion.[222] In striking down the ordinances, the Court employed a very simple two-part test. First, the Court considered the neutrality of the law by looking at both

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[215] *See supra* Part III for a discussion of the *Citizens United* decision. This position is also supported by the Tenth Circuit's conclusion that the plain language of RFRA suggests that "corporations" are to be treated as persons with the capacity to exercise religion. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133 (10th Cir. 2013).

[216] *Id.* at 1128.

[217] *See infra* Parts III and IV for arguments supporting this assertion.

[218] *See generally* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

[219] Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, § 6(b), 107 Stat. 1488, 1489. RFRA provides that "Government may substantially burden a person's exercise of religion only if it demonstrates that [the burden] . . . (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means . . . ." *Id.* § 3(b), 107 Stat. 1488, 1488–49.

[220] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 520 (1993).

[221] *Id.* at 531–32.

[222] *Id.* at 524–30. There were a number of facts that made it fairly clear the city was targeting the adherents of Santeria: upon learning of plans for a house of worship, school and museum for the Santeria religion in Hialeah, the city council held an emergency session and passed an ordinance adopting a state law and subjecting to criminal punishment any person who unnecessarily kills any animal. *Id.* at 526. The Hialeah city attorney then contacted the State attorney general to ensure that the state law it had adopted in its ordinance included animal sacrifice such as that performed in Santeria. *Id.* at 527. Upon receiving confirmation that animal sacrifice was included, the city issued a resolution noting the great concern of its residents about animal sacrifice. *Id.* And soon thereafter it passed three ordinances that prohibited religious animal sacrifice. *Id.* at 527–28.

the text of the law[223] and the law's operation.[224] Although the text of the Hialeah ordinance was facially neutral, the Court found that the effect was under-inclusive because it subjected an arbitrarily narrow class of persons to criminal penalties, and over-inclusive because it prohibited conduct that went well beyond what was necessary to achieve the stated intent of the law.[225]

Second, the Court examined whether or not the law was generally applicable by employing a "selective manner" analysis.[226] A law fails the "selective manner" analysis if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief . . . ."[227] The Hialeah ordinance clearly was not generally applicable in practice; as the Court noted, "it was religion, and religion alone, that bore the burden of the ordinances . . . ."[228]

The ACA is not as overtly discriminatory as the Hialeah ordinances, and therefore has a stronger chance to pass the *Smith* test as it was applied in *Hialeah*. To be sure, compelling for-profit employers to provide no-cost contraception coverage to their employees over their religious objections does qualify as a burden on the employers' exercise of religion.[229] However, it can be argued that the Employer Mandate is both facially neutral, and neutral in operation. The text of the Employer Mandate does not single out those who believe that contraception is immoral, but rather applies to all employers with over fifty employees and to all smaller employers offering healthcare coverage at the time of the law's passage.[230] Further, the law is neutral in operation in that it is neither under-inclusive nor over-inclusive. Both in word and in effect, the Employer Mandate penalizes any employer who does not provide coverage in accordance with the plan's requirements, whether or not that employer has religious objections.[231]

Moreover, arguably the law does not impose the burden in a selective manner. A law applies selectively if it burdens only conduct motivated by religious belief. Yet the Employer Mandate burdens the conduct of all employers that meet the size qualifications, not merely the employers who meet the size qualifications that believe contraception is wrong.[232] Indeed, if there can be any degree of selectivity, it could be said

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[223] *Id.* at 533. This analysis is often referred to as "facial neutrality." *Id.*
[224] *Id.* at 535. This analysis is often referred to as "neutrality in effect." *See id.* at 533–34.
[225] *Id*. at 579 (Blackmun, J., concurring).
[226] *Id.* at 543.
[227] *Id.*
[228] Stormans, Inc. v. Selecky, 586 F.3d 1109, 1134 (9th Cir. 2009), *commenting on Hialeah*, 508 U.S. at 543–46.
[229] *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 712 (1986).
[230] 26 U.S.C. § 4980H (Supp. V 2011).
[231] *Id.*
[232] *Id.*

that it applies selectively to those organizations that do not have a religious objection, as there is a defined process enabling qualified organizations to obtain a religious exemption.[233]

Finally, and perhaps most importantly, given the separation of powers argument at the heart of *Smith*, the ACA was passed by two legislative chambers with members elected every two years and every six years, respectively, and with rules imposed by an Executive Branch subject to election every four years.[234] That is, to the extent provided under the Constitution, it was "the people" who decided.

B. Hang-ups Under the Smith Standard

However, *Hialeah* was an easy case,[235] and at least one commentator has noted that the ease with which the Court found the City of Hialeah's laws to be unconstitutional using the *Smith* framework has led many to the "incorrect, or at least incomplete" conclusion that neutral and generally applicable laws are completely immune from Free Exercise attack.[236] Indeed, there are three issues that one might raise in relation to the ACA's Employer Mandate: (1) it can be argued that the law is under-inclusive in that it seeks to penalize only for-profit corporations that refuse to comply; (2) the Employer Mandate actually emanates from an executive agency and not a popularly elected body, as Justice Scalia in *Boerne* suggests it must; and (3) it is not clear whether there is a distinction under *Smith* between laws that *restrict* a person's religious conduct, and laws that *coerce* a person to violate his religious beliefs.

1. The Profit-Making Motive: A Questionable Distinction

Arguably, "the Supreme Court has already recognized that profit-seekers have a right to the free exercise of religion."[237] Decisions such as *Braunfeld v. Brown* and *U.S. v. Lee* acknowledge that "those who engage in profit-making enterprises can still have religious convictions that require them to do or refrain from doing certain things in their businesses."[238]

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[233] *Id.* § 5000A(d)(2); *see also* 45 CFR § 147 (2012). See *supra* note 53 and accompanying text for the religious exemption requirements.

[234] Although the issue is beyond the scope of this article, it is altogether another question as to whether the rules promulgated by the Obama Administration and the Department of Health and Human Services followed valid procedure. *See generally*, *e.g.*, *O'Brien Complaint*, *supra* note 61 and accompanying text. Indeed, nearly all Free Exercise challenges filed against the Employer Mandate have included allegations of violation of the Administrative Procedures Act. *Id.* at 10.

[235] For a discussion of facts of *Hialeah*, see footnotes 221–28 and accompanying text.

[236] Mark L. Rienzi, *Smith, Stormans, and the Future of Free Exercise: Applying the Free Exercise Clause to Targeted Laws of General Applicability*, 10 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 143, 145 (2009).

[237] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1148 (10th Cir. 2013) (Hartz, J., concurring) (discussing the Court's analysis of the Free Exercise of religion in Braunfeld v. Brown, 366 U.S. 599 (1961) and United States v. Lee, 455 U.S. 252 (1982)).

[238] *Id.*

Moreover, there is no doubt that the Free Exercise protections extend to associations like churches that choose to incorporate.[239] Therefore, the rationality of the line that the ACA draws between for-profit corporations and qualified non-profit corporations for enforcement purposes is questionable.

It cannot be that the state-sanctioned corporate form, and the limited liability and lower tax rates that go with it, are at the root of the distinction, because "[r]eligious associations can incorporate, gain those protections, and nonetheless retain their Free Exercise rights."[240] Neither the executive branch nor the judiciary is in a position to distinguish between the sincerity or validity of forms of evangelism that involve profit-making activities and those that do not.[241] Such distinctions would seem to "take[] us down a rabbit hole where religious rights are determined by the tax code, with non-profit corporations able to express religious sentiments while for-profit corporations and their owners are told that business is business and faith is irrelevant."[242] Given the relatively arbitrary nature of such distinctions, it could be that the ACA is subject to attack as under-inclusive under the test as applied in *Hialeah*.

2. "It shall be the people."[243]

Further, the issue under the *Smith* standard is not so much whether there is a burden on religious belief, but the manner in which the burden was created in the first place. [244] At the end of his *Boerne* concurrence, Justice Scalia noted that Free Exercise considerations ultimately boil down to concrete cases in which decisions must be made about the degree to which laws passed for the common good may infringe upon the burden of Free Exercise rights of a group of individuals.[245] In eschewing the balancing test put forward in *Sherbert*, he argued that the foundation of the *Smith* standard is that the people, through their elected representatives, should be making decisions about these tradeoffs, not the unelected members of the Supreme Court.[246] These sentiments were echoed in the recent opinion written by Chief Justice John Roberts upholding the Individual Mandate of the ACA: "[the Individual Mandate] may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not [the Supreme Court's]

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[239] *Id.* at 1134 (majority opinion) (noting that the church in *Hialeah* was a not-for-profit corporation organized under Florida law).

[240] *Id.* at 1135.

[241] *Id.*; *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706–07 (2012); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715–16 (1981).

[242] Conestoga Wood Specialties Corp. v. Sec'y of the United States Dep't Health and Human Servs., 724 F.3d 377, 390 (Jordan, J., dissenting).

[243] City of Boerne v. Flores, 521 U.S. 507, 544 (1997) (Scalia, J., concurring).

[244] *Id.*

[245] *Id.*

[246] *Id.*

role to forbid it, or to pass upon its wisdom or fairness."[247]

Under the logic of *Smith*, the fact that the ACA was passed by both chambers of Congress and signed by the President would seem to suggest that the proper branches were involved in making the tradeoff decisions.[248] However, the specific preventive services to be provided under the Employer Mandate—i.e., the various forms of sterilization and contraception—were not enumerated in the legislation itself.[249] Rather, the preventive services were specified in guidelines issued by an executive agency, the HRSA, and based upon a report by the Institute of Medicine.[250] While such discrepancy may not rise to the level of constitutional grounds to strike down the law, it certainly raises questions for future legislation.

3. The Distinction Between Restriction and Coercion

Finally, the trouble with a strict application of the *Smith* standard to the Employer Mandate cases is that it dealt with restrictions on conduct that constituted the exercise of the plaintiff's religion. *Smith* dealt with Oregon state laws that prohibit the ingestion of peyote,[251] and *Hialeah* dealt with ordinances of the City of Hialeah that prohibited conduct particular to the Santeria religion.[252] Neither of these foundational Free Exercise cases under the *Smith* regime dealt with any form of *coercion to violate* one's religious beliefs. Yet as the Seventh Circuit has noted, "[t]he religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services . . . not only . . . in [their] later purchase or use . . . ."[253] It is by no means clear that the same logic that applied in *Smith* and *Hialeah* would apply equally well to cases of coercion.

In distinguishing *Sherbert*, the *Smith* Court placed a heavy emphasis on the fact that the Oregon laws were "across-the-board criminal prohibition[s] on a particular form of conduct[,]"[254] and noted that the *Sherbert* test had never been used to invalidate any such prohibitions other than denial of unemployment compensation.[255] Yet the Employer Mandate obviously is not a prohibition, but a specific directive to action. *Smith* is silent on such directives, but history reveals the government must meet a very high threshold to justify invading the realm of religious belief.[256]

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[247] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012).
[248] *See supra* note 9 and accompanying text.
[249] 42 U.S.C. § 300gg (Supp. V 2011).
[250] *See supra* note 48.
[251] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).
[252] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993).
[253] Korte v. Sebelius, No.12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012) (emphasis in original). *But see id.* at *5 (Rovner, Circuit J., dissenting).
[254] *Smith*, 494 U.S. at 884.
[255] *Id.*
[256] *See, e.g.*, Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 720 (1981).

For example, there were two *Sherbert*-era cases in which the Court applied the balancing test and found that the government interest was found to be compelling enough to justify burdens on religious conduct.[257] Both of these cases involved the coercion of the plaintiffs to participate in the Social Security system.[258] Yet the Court made very clear that the only reason it found for the government was because the plaintiffs were taking on the Social Security system, an entity that the government could not afford to have jeopardized because too much was already invested.[259] The State has far less invested in the ACA and the Employer Mandate, as the law is still being phased in.[260] The equities certainly seem to stack up differently for the Employer Mandate.

C. Applying the RFRA Standard

Furthermore, there is little question that the Employer Mandate burdens the religious belief of employers, thus invoking the heightened scrutiny required by RFRA.[261] Indeed, the Employer Mandate seems open to challenge on both components of this heightened scrutiny: it is not clear that the Mandate serves a compelling government interest, nor that it is the least restrictive means available to further that interest.

The Obama Administration argues the Employer Mandate furthers the compelling interest of promoting women's health and reducing the inequity in health-care costs between men and women.[262] However, the test adopted by RFRA requires the Court to look "beyond broadly formulated interests justifying the general applicability of government mandates and [scrutinize] the asserted harm of granting specific exemptions to particular . . . claimants."[263] That is, the Administration must not only present the broad interests of promoting women's health and reducing cost imbalances, it must show how allowing an exemption for corporations that object would harm the interest. At least one circuit court has expressed skepticism about the damage to the Administration's overall goals that could be done by a minority of objecting corporations.[264] Moreover, there is more than a fair degree of evidence that the preventive services involved in the Employer

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[257] *See* United States v. Lee, 455 U.S. 252, 254–55 (1982); Bowen v. Roy, 476 U.S. 693, 695–96 (1986).

[258] *Id.*

[259] *Lee*, 455 U.S. at 261.

[260] *See, e.g.*, Louise Radnofsky, *Health Law Penalties Delayed*, WALL ST. J. (July 3, 2013, 9:55 AM), http://online.wsj.com/article/SB10001424127887324436104578582082787214660.html (reporting that the Obama Administration has decided not to implement the penalties provisions of the ACA until 2014).

[261] Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, § 6, 107 Stat. 1488, 1489.

[262] *Administration's Memo*, *supra* note 13 at 21–22.

[263] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006).

[264] Legatus v. Sebelius, 901 F. Supp. 2d 980, 988 (2012). "Considering this in the context of a United States population of more than 311 million, an exemption for a few hundred seems a miniscule hindrance to whatever interest . . . the Government may seek to advance." *Id.* at 994.

Mandate are *not* in the best interest of women or the country.[265]

Nor will the Administration likely be able to demonstrate that this is the least restrictive means to further its interest on a theory of the "slippery slope." In rejecting a similar argument, the *O Centro* Court scoffed that it is "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."[266] Further, the Court noted that it had recently reaffirmed "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules."[267] Indeed, the feasibility of case-by-case review of exemptions for the Employer Mandate would seem to be relatively strong, given both the exemptions that the Administration has allowed for religious corporations, and the temporary safe harbor it created for qualifying objectors.[268] It is not clear, in such a situation, why the government could not carefully consider whether its interest in the goals of the ACA outweighs the burdens on Free Exercise that it is imposing.

VI. CONCLUSION

On December 26, 2012, Supreme Court Justice Sonia Sotomayor issued an in-chambers opinion to affirm a lower court's denial of injunctive relief in the case of *Hobby Lobby v. Sebelius*.[269] Hobby Lobby, an arts and crafts retail chain with more than 500 stores and 13,000 employees nationwide,[270] had appealed to the Tenth Circuit,[271] and then to Justice Sotomayor,[272] after injunctive relief was denied by the district court in the Western District of Oklahoma. The district court reached its decision in part from its conclusion that Hobby Lobby failed to demonstrate a probability of success on its claims because, as a secular, for-profit corporation, it does not have Free Exercise rights.[273]

In affirming the district court's decision to deny relief, however, Justice Sotomayor declined to affirm its conclusion regarding corporations

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[265] *See, e.g.*, Brief for Women Speak for Themselves, as Amicus Curiae Supporting Plaintiffs-Appellants at 9–12, Wheaton Coll. v. Sebelius, 887 F. Supp. 2d 102 (2012) (Nos. 12-5273, 12-5291), 2012 WL 4842927.

[266] *O Centro*, 546 U.S. at 436.

[267] *Id.*

[268] *See supra* notes 52 and 56 and accompanying text.

[269] Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 642 (2012) (Sotomayor, Circuit Justice).

[270] Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013).

[271] Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294, 2012 WL 6930302, at *1–2 (10th Cir. Dec. 20, 2012).

[272] 28 U.S.C. § 42 (2006) ("The Chief Justice of the United States and the associate justices of the Supreme Court shall from time to time be allotted as circuit justices among the circuits [of the federal courts of appeals] . . . ."). The Justices' powers as Circuit Justice are relatively limited: "[a]part from granting stays, arranging bails, and providing for other ancillary relief, an individual Justice of the Supreme Court has no power to dispose of cases on their merits." 5 AM. JUR. 2d Appellate Review § 381 (2007) (citing Locks v. Commanding General, Sixth Army, 89 S. Ct. 31, 32 (1968)).

[273] *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d at 1287–88.

and Free Exercise rights. [274] Instead, she simply noted that the Supreme Court "has not previously addressed similar . . . free exercise claims brought by closely held for-profit corporations . . . . [L]ower courts have diverged on whether to grant temporary injunctive relief to similarly situated plaintiffs raising similar claims . . . and no court has issued a final decision granting permanent relief with respect to such claims."[275]

Indeed, there has been a broad divergence of opinion by the lower courts in deciding these cases. Some courts have avoided the question altogether. Other courts have found that the corporations had standing to assert the First Amendment rights of its owners on a "pass-through instrumentality theory." Still other courts have found the for-profit corporations do not have Free Exercise rights, and at least one court has decided that there is a "reasonable likelihood" that they do. Soon, however, the Supreme Court will have to decide one way or the other.

In doing so, it must give serious consideration to Judge Kane's questions. Can a corporation exercise religion? Should a closely-held corporation be treated differently than a publicly-held corporation? Most importantly, if a corporation can exercise religion, do the severe financial penalties imposed by the Employer Mandate unduly impede the exercise of religion of those corporations who refuse to comply on religious grounds? This comment argues that they do.

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[274] *Hobby Lobby Stores, Inc.*, 133 S. Ct. at 643.
[275] *Id.*