FOR-PROFIT CORPORATIONS, FREE EXERCISE, AND THE HHS MANDATE

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ABSTRACT

Under the Patient Protection and Affordable Care Act, most employers must provide their employees with health insurance that covers all FDA-approved contraceptive methods and sterilization procedures (the "HHS mandate"). Across the country, individuals, religious schools, and corporations have sued to enjoin the mandate, arguing, among other things, that it violates the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act ("RFRA"). These cases require the federal courts to sort out the complex relationship between the Free Exercise Clause and laws that are alleged to be neutral and generally applicable, such as the HHS mandate. But they also raise a novel threshold question: whether corporations can exercise religion under the First Amendment and RFRA. As several federal courts have noted, whether secular corporations can exercise religion is an open question. To date, this question has confounded the courts, resulting in a split between the Third, Sixth, Seventh, Tenth, and D.C. Circuits as well as the numerous district courts that have ruled on challenges to the HHS mandate. The Supreme Court recently granted certiorari in two of these cases, Hobby Lobby *(Tenth Circuit) and* Conestoga Wood Specialties *(Third Circuit). This Article analyzes this novel and unresolved issue, arguing that the Supreme Court should follow its reasoning in* Bellotti *and* Citizens United *and hold that, just as corporations can engage in free speech, for-profit corporations can exercise religion under the Free Exercise Clause and RFRA.*

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Although never having addressed this specific issue, I argue that the Supreme Court has established rules for determining whether corporations can invoke particular constitutional rights and that, under these rules, corporations can invoke the protection of the Free Exercise Clause. The Third and Sixth Circuits, along with several district courts have reached the opposite conclusion, while several others have avoided the issue altogether. Relying primarily on a single footnote in Bellotti, *the courts denying free exercise protection to for-profit corporations maintain that the free exercise of religion is a "purely personal" right that is limited to individuals and religious non-profit organizations. This Article contends, however, that a more detailed review of* Bellotti, Citizens United*, and the Court's other decisions regarding the constitutional rights of corporations reveals that free exercise, like the freedom of speech, is not a "purely personal" right. Consequently, corporations—whether for-profit or non-profit—can claim its protection. Moreover, in the wake of* Bellotti *and* Citizens United*, neither the "profit motive" of a for-profit corporation nor the "religious nature" of religious organizations (e.g., churches) justifies limiting the Free Exercise Clause only to individuals and non-profit religious organizations. Although many (perhaps most) corporations may choose not to engage in religious activities, there is no constitutional basis for precluding a priori all for-profit businesses from raising free exercise claims.*

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INTRODUCTION

In recent years, the Free Exercise Clause of the First Amendment[1] has not received a lot of attention from the Supreme Court or the circuit courts of appeals.[2] That is about to change. The Third and Tenth Circuits recently decided challenges to the mandatory contraception coverage provisions ("HHS mandate") of the Patient Protection and Affordable Care Act ("ACA"), and twelve other ACA cases are pending in five different federal circuit courts. To date, the federal courts have reached disparate conclusions regarding whether the HHS mandate violates the Free Exercise Clause and the Religious Freedom Restoration Act ("RFRA"). Given that some circuit courts of appeals have granted injunctions on appeal while other have not, the circuit courts are apt to reach conflicting conclusions—as evidenced by the split between the Third and Tenth Circuits—thereby creating the need for the Supreme Court to resolve the important free exercise and RFRA claims raised in these cases.[3]

Under the ACA, most businesses are required to provide certain minimum levels of health care coverage to their employees, including no-cost coverage for preventive care and screening for women.[4] Pursuant to regulations promulgated in relation to the preventive care for women, these businesses must provide health plans that cover all FDA-approved contraception and sterilization procedures.[5] Confronted with these new requirements, business owners across the country have challenged the ACA regulations, arguing that the new regulations force companies to

1. The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. In 2012, the Supreme Court unanimously approved the "ministerial exception," which acknowledges the freedom of religious institutions to select their ministers and, in turn, precludes certain employment discrimination claims against religious institutions. Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012). Although an important decision on a question of First Amendment law that the Court had not previously addressed, *Hosanna-Tabor* affirmed a doctrine that "the Courts of Appeals have uniformly recognized." *Id.* at 705. Accordingly, the Court did not have to decide a completely novel free exercise claim.

3. *See* Ethan Bronner, A Flood of Suits On The Coverage of Birth Control, N.Y. TIMES, Jan. 27, 2013, at A1. ("'This is highly likely to end up at the Supreme Court,' said Douglas Laycock, a law professor at the University of Virginia and one of the country's top scholars on church-state conflicts. 'There are so many cases, and we are already getting strong disagreements among the circuit courts.'").

4. 42 U.S.C. § 300gg-13(a)(4) (2012).

5. *See Women's Preventive Servs. Guidelines: Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being*, HRSA.GOV, http://www.hrsa.gov/womensguidelines/ (last visited Nov. 7, 2013).

cover procedures and drugs that are inconsistent with the faiths of the individual owners and the religious values upon which their businesses are based. For example, some business owners and their corporations object to all forms of contraception based on their religious beliefs. Others are primarily concerned because they believe that some of these contraceptives act as abortifacients.[6] The HHS mandate, therefore, requires these employers, who seek to implement their religious beliefs in and through their companies, to provide and pay for health coverage that violates their sincerely held religious beliefs in violation of the Free Exercise Clause of the First Amendment and RFRA.

In the wake of the Supreme Court's landmark decision in *National Federation of Independent Businesses v. Sebelius*, which upheld the ACA under Congress's taxing power, Congress has broad power to regulate the medical field and to pass legislation directed at curtailing health care costs.[7] The HHS mandate cases, however, raise a different and extremely important question regarding the ACA: whether the federal government can force individuals and businesses to provide medical coverage for procedures that directly contradict their religious tenets. Although the federal courts have consistently recognized that individuals have free exercise rights, the pending HHS mandate cases require the courts to look more closely at the proper scope of religious exercise under the Free Exercise Clause and RFRA. If the federal government can require businesses and their owners to provide health coverage that includes access to services contrary to the owners' religious beliefs, there may be no limit to the government's power to infringe on and contravene the religious tenets of business owners and their companies.

The HHS mandate, therefore, raises an entirely novel First Amendment question: whether for-profit corporations have free exercise rights.[8]

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6. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012); Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735, 738 (S.D. Ill. 2012).

7. 132 S. Ct. 2566 (2012) (holding that the individual mandate, which requires most individuals to purchase health insurance or pay a tax, exceeds Congress's power under the Commerce Clause but is constitutional under the Taxing Clause).

8. *See* Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 383 (3d Cir. 2013) ("whether *Citizens United* is applicable to the Free Exercise Clause is a question of first impression"); Newland v. Sebelius, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012) ("These arguments [regarding the free exercise rights of for-profit corporations] pose difficult questions of first impression."). *See also* Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 114 (D.C. Cir. 2012) (stating that "whether for-profit corporations can exercise religion within the meaning of the RFRA and the Free Exercise Clause" is an "unresolved question"); Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 406 (E.D. Pa. 2013) ("Neither the Supreme Court nor the Third Circuit have had occasion to decide whether for-profit, secular corporations possess the religious rights held by individuals.").

Because the federal courts have not previously been called on to address this issue, there are no cases "concluding that secular, for-profit corporations . . . have a constitutional right to the free exercise of religion."[9] Of course, the opposite is true as well: the "conclusory assertion that a corporation has no constitutional right to free exercise of religion is unsupported by any cited authority."[10] Thus, the HHS mandate cases present a unique opportunity for the Supreme Court to establish the proper guidelines for corporate free exercise under RFRA and the First Amendment.

While the lack of precedent may suggest that the lower federal courts are writing on a tabula rasa with respect to corporate free exercise rights, the slate is not as blank as several district courts have suggested. In 2010, the Court confirmed in *Citizens United v. Federal Election Commission* that corporations—both for-profit and non-profit—are protected by the First Amendment: "The Court has recognized that First Amendment protection extends to corporations."[11] Specifically, the Court explained that corporations have the same speech rights as individuals: "The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"[12] The plaintiffs in the HHS mandate cases in effect contend that the reasoning in *Citizens United* applies with equal force to free exercise rights—that, contrary to the government's claims, the religious exercise of corporations should not be treated differently just because corporations are not "natural persons" and seek to make profits.[13]

This Article contends that the plaintiffs are correct. Although the Supreme Court has not specifically addressed whether for-profit corporations have free exercise rights, it has established rules for determining whether corporations can invoke particular constitutional rights.[14] Surprisingly, in the cases decided to date, none of the federal courts have analyzed these rules in any meaningful way.[15] In the First

9. *Hobby Lobby*, 870 F. Supp. 2d at 1288.

10. State v. Sports & Health Club, Inc., 370 N.W.2d 844, 850 (Minn. 1985).

11. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342 (2010).

12. *Id.* at 343 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978)).

13. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1129 (10th Cir. 2013) ("The government therefore concludes RFRA does not extend to for-profit corporations."); Korte v. Sebelius, 735 F.3d 654, 680 (7th Cir. 2013) (disagreeing with the government's claim "that profit-making is incompatible with free-exercise rights").

14. *See, e.g.*, *Bellotti*, 435 U.S. 765; United States v. White, 322 U.S. 694, 698 (1944); Cal. Bankers Ass'n v. Schultz, 416 U.S. 21, 65–66 (1974).

15. This is true of all federal courts that have heard HHS mandate challenges whether deciding

Amendment context, though, the Court has emphasized that courts must focus on the *nature* of the constitutional right, not the "person"—whether an individual, non-profit, for-profit, or sole-proprietor—who is invoking the right. In particular, when determining whether corporations can invoke First Amendment protections "[t]he proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons."[16] Rather, "the question must be whether" the religiously motivated activity falls within an area "the First Amendment was meant to protect."[17]

In *First National Bank v. Bellotti*, the Court considered whether a statute, which prohibited corporations from spending money to publicize their views on a state-law referendum, abridged expression that the First Amendment was meant to protect.[18] Massachusetts passed legislation prohibiting financial institutions from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."[19] The corporate plaintiffs sued, seeking the opportunity to express their views on a proposed constitutional amendment relating to a graduated income tax. The Supreme Judicial Court of Massachusetts concluded that corporations, as creatures of state law, did not have First Amendment speech rights.[20] On appeal, the United States Supreme Court reversed, rejecting the lower court's conclusion and reasoning.[21] In particular, to determine whether the statute impermissibly infringed on the corporation's speech rights, the Court looked at the scope of First Amendment speech protection generally, not the state law origin of corporations.[22] Following *Bellotti*, then, the proper question in the HHS mandate cases is whether the contraception coverage mandate of the ACA infringes on religious exercise that the First Amendment protects.

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that corporations could exercise religion or not. For example, in *Korte* the Seventh Circuit invoked *Bellotti*'s discussion of "purely personal" rights but alleged, "the Court has never elaborated" on that standard. *Korte*, 735 F.3d at 682.

16. *Bellotti*, 435 U.S. at 776.

17. *Id.*

18. *Id.*

19. *Id.* at 768 n.2 (emphasis omitted) (citing MASS. GEN. LAWS ANN. ch. 55 § 8 (West Supp. 1977)).

20. *Id.* at 771–72.

21. *Id.* at 784.

22. *Id.* at 776–78.

The federal courts that have determined corporations "cannot exercise religion"[23] typically have made two fundamental errors. First, these courts, like the district court in *Bellotti*, have asked the wrong question—"whether and to what extent corporations have First Amendment rights."[24] Instead of focusing on whether the Free Exercise Clause covers religious objections to the contraception coverage mandate, the Third Circuit and the district courts have considered—usually in cursory fashion—only whether a for-profit corporation has free exercise rights like those of natural persons.[25]

Second, because these courts asked the wrong question, their analysis fails to consider all the relevant Supreme Court case law. In particular, the courts rely almost exclusively on an isolated sentence in *Wallace v. Jaffree*[26] or *School District of Abington Township v. Schempp*[27] or a single footnote in *Bellotti* to establish that free exercise is an individual or "purely personal" right that does not apply to corporations.[28] A more detailed review of *Bellotti* and the Court's decisions regarding the constitutional rights of corporations, however, reveals that free exercise, like the freedom of speech, is not a "purely personal" right. Consistent with these precedents, several lower courts have recognized that the Free

23. Mersino Mgmt. Co. v. Sebelius, No. 13-cv-11296, 2013 WL 3546702 at *10 (E.D. Mich. July 11, 2013) ("Mersino Management, as a secular for-profit company, cannot 'exercise' religion and cannot act as the alter ego of its owners in challenging the contraceptive mandate under RFRA."); Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 917 F. Supp. 2d 394, 411 (E.D. Pa. 2013) ("[W]e agree with Defendants that Conestoga cannot exercise religion within the meaning of the RFRA."); Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735, 743 (S.D. Ill. 2012) ("[T]he undersigned district judge views the exercise of religion as a 'purely personal' guarantee that cannot be extended to corporations."); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012) ("The court concludes plaintiffs Hobby Lobby and Mardel *do not have* constitutional free exercise rights as corporations . . . .") (emphasis added).

24. *Bellotti*, 435 U.S. at 775–76. *See* Conestoga v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 382–83 (3d Cir. 2013) ("The threshold question for this Court is whether Conestoga, a for-profit, secular corporation, can exercise religion."); *Hobby Lobby*, 870 F. Supp. 2d at 1287 ("[A] threshold determination [is] whether the particular plaintiffs have constitutional 'free exercise' rights subject to being violated.").

25. *See Bellotti*, 435 U.S. at 776.

26. 472 U.S. 38, 49 (1985) ("As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience."). *See Korte*, 912 F. Supp. 2d at 743–44 (quoting the same sentence from *Wallace v. Jaffree*).

27. 374 U.S. 203, 223 (1963) (stating that the purpose of the Free Exercise Clause is "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority."). *See Conestoga*, 724 F.3d at 385 (quoting the same sentence from *Sch. Dist. of Abington Twp. v. Schempp*).

28. *Bellotti*, 435 U.S. at 778–79 n.14 ("Certain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals.").

Exercise Clause applies to both for-profit and non-profit corporations.[29] Consequently, when the Supreme Court hears *Hobby Lobby* and *Conestoga Wood Specialties*, it should hold, contrary to the Third Circuit, that individual business owners and their for-profit corporations have standing to raise free exercise and RFRA claims.

I. BACKGROUND ON THE CURRENT CHALLENGES TO THE HHS MANDATE

For many people, the constitutionality of the ACA was resolved in 2012 when the Supreme Court upheld the "individual mandate" provisions of the ACA against commerce, spending, and taxing clause challenges.[30] While the Court's *NFIB v. Sebelius* decision was one of the most anticipated opinions in recent years given the important federalism and separation of powers issues involved in that case, it did not end the challenges to the ACA. Since its passage, the ACA has spawned more than eighteen lawsuits challenging the HHS Mandate in federal courts around the country.[31] These cases challenge the preventive care coverage

29. Commack Self-Serv. Kosher Meats, Inc. v. Hooker, 800 F. Supp. 2d 405, 407 (E.D.N.Y. 2011) (permitting an incorporated deli and butcher shop and its owners to assert Free Exercise and Establishment Clause challenges to a New York labeling law); Women's Servs., P.C. v. Thone, 483 F. Supp. 1022 (D. Neb. 1979); Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty., 450 F.3d 1295, 1305 (11th Cir. 2006) (noting in the context of a religious corporation that all "corporations possess Fourteenth Amendment rights of equal protection, due process, and, through the doctrine of incorporation, the free exercise of religion") (footnote omitted).

30. Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) ("*NFIB*"). Congress passed the ACA in 2010 to increase the number of Americans covered by insurance and to decrease the cost of health care by two main provisions: the individual mandate and Medicaid expansion. The individual mandate required most Americans to maintain "minimum essential" health insurance coverage or to pay a penalty to the IRS. *See* 26 U.S.C. § 5000A (2012). A majority of the Court upheld this provision under Congress's power to tax under Article I. *See* U.S. CONST. art. I, § 8; *NFIB*, 132 S. Ct. at 2600 ("The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness."). The Medicaid provisions of the ACA increased the scope of the Medicaid program as well as the number of people that states must cover. *See* 42 U.S.C. § 1396c (2012). The court struck down this provision under the spending clause. *See NFIB*, 132 S. Ct. at 2605 (striking down the Medicaid provision because "[t]he threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion").

31. The following is a list of recent cases challenging the HHS mandate in the federal court system: Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs., No. 12–3459–CV–S–RED, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012); Annex Medical, Inc. v. Sebelius, No. 12-cv-02804-DSD-SER, 2013 WL 101927 (D. Minn. Jan. 8, 2013), *injunction pending appeal granted*, No. 13–1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013); Autocam Corp. v. Sebelius, No. 1:12-cv-01096, 2012 WL 6845677 (W.D. Mich. Dec.. 24, 2012), *aff'd*, No. 12-2673, 730 F. 3d 618 (6th Cir. 2013); Beckwith Elec. Co. v. Sebelius, No. 8:13-cv-0648-T-17MAP, 2013 WL 3297498 (M.D. Fla. June 25, 2013); Belmont Abbey Coll. v. Sebelius, No. 1:13-cv-01831 (D.D.C. filed Nov. 20, 2013); Bick Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 4:13-cv-00462-AGF (E.D. Mo. filed Mar. 13,

regulations that require most employers with more than fifty employees to provide health insurance coverage for all FDA-approved contraception and sterilization procedures.[32] Business owners and their corporations have sued to enjoin the HHS mandate, contending that it impermissibly burdens their free exercise rights under the First Amendment and RFRA.[33] In the last year, seven circuits—the Third, Fourth, Sixth, Seventh, Eighth, Tenth,

2013); Briscoe v. Sebelius, 927 F. Supp. 2d 1109 (D. Colo. 2013); Eden Foods, Inc. v. Sebelius, No. 2:13-cv-11229-DPH-MAR, 2013 WL 1190001 (E.D. Mich. Mar. 22, 2013), *amended by* No. 13-11229 (E.D. Mich. May 21, 2013) (denying preliminary injunction), *aff'd*, No. 13-1677 (6th Cir. Oct. 24, 2013); Geneva Coll. v. Sebelius, No. 2:12-cv-00207-JFC (W.D. Pa. Dec. 23, 2013) (granting preliminary motion); Gilardi v. Sebelius, 926 F. Supp. 2d 273 (D.D.C. 2013) (denying preliminary injuction), *rev'd sub nom.* Gilardi v. U.S. Dep't of Health & Human Servs., No. 13-5069, 733 F.3d 1208 (D.C. Cir.); Grote Indus., LLC v. Sebelius, 914 F. Supp. 2d 943 (S.D. Ind. 2012) (denying preliminary injunction), *rev'd sub nom.* Grote v. Sebelius, 708 F.3d 850 (7th Cir. 2013) (granting motion for an injunction pending appeal); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (denying preliminary injunction), *aff'd*, No. 12-6294, 2012 WL 6930302 (10th Cir.) (denying injunction pending appeal), *aff'd*, 133 S. Ct. 641 (denying injunction pending appellate review), *rev'd and remanded*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, 134 S. Ct. 678; Infrastructure Alternatives, Inc. v. Sebelius, No. 1:13-cv-31 (W.D. Mich. Sept. 30, 2013); Korte v. Sebelius, 912 F. Supp. 2d 735 (S.D. Ill. 2012) (denying preliminary injunction), *rev'd*, 735 F.3d 654 (7th Cir. 2012) (granting injunction pending appeal); Hall v. Sebelius, No. 13-cv-00295-JRT-LIB (D. Minn. Apr. 2, 2013); Hartenbower v. U.S. Dep't of Health & Human Servs., No. 1:13-cv-02253 (N.D. Ill. Apr. 18, 2013); Holland v. U.S. Dep't of Health & Human Servs., No. 2:13-cv-15487 (S.D. W. Va. filed June 24, 2013); Johnson Welded Prods., Inc. v. Sebelius, No. 1:13-cv-00609-ESH (D.D.C. May 24, 2013); Legatus v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012) (granting preliminary injunction in part, denying in part), *rev'd*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013) (granting preliminary injunction); Lindsay v. U.S. Dep't of Health & Human Servs., No. 13-1210 (N.D. Ill. Mar. 20, 2013); Mersino Mgmt. Co. v. Sebelius, No. 2:13-cv-11296-PDB-RSW, 2013 WL 3546702 (E.D. Mich. July 11, 2013); MK Chambers Co. v. Dep't of Health & Human Servs., No. 13–11379 , 2013 WL 5182435 (E.D. Mich. Sept. 13, 2013); M&N Plastics, Inc. v. Sebelius, No. 13-819 (D.D.C.. Nov. 5, 2013) (granting motion to transfer dispute back to E.D. Mich.); Monaghan v. Sebelius, 931 F. Supp. 2d 794 (E.D. Mich. 2013), *motion for stay granted*, No. 12–15488, 2013 WL 3212597 (E.D. Mich. June 26, 2013); Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (granting preliminary injunction), *aff'd*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013); O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149 (E.D. Mo. 2012) (granting motion to dismiss), *motion for stay pending appeal granted*, No: 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir.); Ozinga v. U.S. Dep't of Health & Human Servs., No. 1:13-cv-03292 (N.D. Ill. July 16, 2013); Sharpe Holdings, Inc. v. Dep't of Health & Human Servs., No. 2:12-cv-00092-DDM (E.D. Mo. June 28,, 2013); Sioux Chief Mfg. Co. v. Sebelius, No. 4:13-cv-00036-ODF (W.D. Mo. Feb. 28, 2013); SMA, LLC v. Sebelius, No. 13-CV-01375-ADM-LIB (D. Minn. July 8, 2013); The QC Group, Inc. v. Sebelius, No. 13-cv-01726-JRT-SER (D. Minn. Sept. 11, 2013); Tonn & Blank Constr., LLC v. Sebelius, No. 1:12-cv-325-JD, 2013 WL 4830952 (N.D. Ind. Aug. 16, 2013); Trijicon, Inc. v. Sebelius, No. 1:13-cv-1207-EGS (D.D.C. Aug. 14, 2013); Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs., No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013), *appeal docketed*, No. 13-1478 (7th Cir. Mar. 5, 2013); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106 (D.D.C. 2012), *appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013); Univ. of Notre Dame v. Sebelius, No. 3:13-cv-01276-PPS, 2013 WL 6804773 (N.D. Ind. Dec. 23, 2013), *aff'd*, No. 13–3853, 2014 WL 687134 (7th Cir. Feb. 21, 2014); Willis Law v. Sebelius, No. 1:13-cv-01124 (CKK) (D.D.C. Aug. 23, 2013).

32. *Women's Preventive Servs. Guidelines*, *supra* note 5.

33. *See* 42 U.S.C. §§ 2000bb-1(a) – (b) (Supp. V 1994).

and DC Circuits—have heard challenges to the HHS mandate. Given the wide range of decisions among the federal district and circuit courts, it is not surprising that the United States Supreme Court decided to hear two cases that reached opposite conclusions about the constitutionality of the HHS mandate.[34]

The ACA, which President Obama signed into law on March 23, 2010, implemented a variety of changes to the healthcare system. Among other things, the ACA requires employers to provide certain minimum health care coverage, as determined by the federal government.[35] Many employers and religious organizations immediately were concerned about the preventive services provision of the ACA, which requires employers to

> at a minimum provide coverage for and . . . not impose any cost sharing requirements . . . (4) with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[36]

The Health Resources and Services Administration ("HRSA"), which is part of the Department of Health and Human Services ("HHS"), asked the Institute of Medicine ("IOM") to draft the HRSA guidelines. The IOM subsequently issued its proposed guidelines, requiring that the minimum health insurance coverage include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[37] The FDA-approved contraceptive methods include intrauterine devices, diaphragms, oral contraceptive pills, and so-called emergency contraceptives, such as Plan B and ulipristal (or "Ella"), which are known as the morning-after pill and the week-after pill, respectively.[38]

HRSA adopted IOM's proposed guidelines on August 1, 2011.[39] HHS, the Department of Labor, and the Department of Treasury issued rules finalizing the HRSA guidelines on February 15, 2012. Pursuant to these rules, employers generally are required to have group health plans covering the contraceptive methods and sterilization procedures set forth in the HRSA guidelines for plan years starting on or after August 1,

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34. *See* Bronner, *supra* note 3.
35. 26 U.S.C. § 4980H (Supp. V 2012).
36. 42 U.S.C. § 300gg-13(a) (Supp. IV 2011).
37. *See Women's Preventive Servs. Guidelines*, *supra* note 5.
38. *See* Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 403 (E.D. Pa. 2013).
39. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130 (2013).

2012.[40] Grandfathered plans, i.e., those that were in existence on March 23, 2010 and have not undergone any of a defined set of changes,[41] are not required to comply with the HHS mandate.[42] In addition, "religious employers" are exempt.[43] The guidelines, however, originally defined "religious employer" narrowly to include only those organizations that (i) have the primary purpose of inculcating religious values, (ii) primarily employ persons who share the organization's religious beliefs, (iii) primarily serve persons who share the organization's religious tenets, and (iv) are non-profits under specific provisions of the Internal Revenue Code.[44] Given this definition of "religious employer," many (and perhaps most) religious hospitals, religious schools, and for-profit corporations did not qualify as religious employers under the ACA. Responding to the outcry of such organizations, the HHS ultimately revised the definition of "religious employer" to include "an organization that is organized and operated as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code."[45] The guidelines also exempt employers with fewer than fifty employees[46] and provide a temporary safe harbor provision for other non-profit organizations that (i) do not fall within any other exemption and (ii) "do not provide some or all of the contraceptive coverage otherwise required, consistent with any applicable State law, because of the religious beliefs of the organization."[47]

The response to the HHS mandate was immediate. Many individuals, religious schools, religious hospitals, and private companies claimed that the mandatory coverage provisions violated the Free Exercise Clause and RFRA by forcing them to provide coverage for procedures and medicines that violated their sincerely held religious beliefs or to pay fines—amounting to roughly $2,000 per employee per year—for failing to provide coverage for contraception and sterilization.[48] In particular, because they believe that some of the FDA-approved contraceptive

40. 75 Fed. Reg. 41,726, 41,729 (July 19, 2010).

41. 26 C.F.R. § 54.9815-1251T (2013); 29 C.F.R. § 2590.715-1251 (2013); and 45 C.F.R. § 147.140 (2013).

42. 75 Fed. Reg. 34,538, 34,552 (June 17, 2010).

43. *See* 45 C.F.R. § 147.130(a)(1)(iv)(A) (2013).

44. 45 C.F.R. § 147.130(a)(1)(iv)(B) (2013); 76 Fed. Reg. 46,621-01, 46,623 (Aug. 3, 2013).

45. 45 C.F.R. § 147.131(a) (2013). The HHS's definition of "religious employer" also has been challenged in federal courts across the country. *See, e.g.*, The Roman Catholic Archdiocese of New York v. Sebelius, No. 1:12-cv-02542-BMC, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); Univ. of Notre Dame v. Sebelius, No. 3:13-cv-01276-PPS (N.D. Ind. Dec. 23, 2013); Belmont Abbey Coll. v. Sebelius, No. 1:13-cv-01831 (D.D.C. filed Nov. 20, 2013).

46. 26 U.S.C. § 4980H(c)(2)(A) (2012).

47. 77 Fed. Reg. 16,501, 16,502–03 (Mar. 21, 2012); 77 Fed. Reg. 8,725, 8,728 (Feb. 15, 2012).

48. Grote Indus., LLC v. Sebelius, 914 F. Supp. 2d 943, 948 (S.D. Ind. 2012).

methods act as abortifacients, several religious organizations and business owners complained that the HHS mandate infringed on their free exercise of religion, forcing them to provide coverage for procedures and drugs that are in direct conflict with their religious tenets.[49] Thus, religious employers (such as universities, charities, hospitals, and schools) and faithful business owners argued that they would have to either provide coverage that violates their faith, confine their services to members of their own faith, pay potentially ruinous fines, or cease operations.[50]

In response, HHS pledged to revisit the scope of the "religious employer" exception and to propose modifications that might address some of the concerns raised by those opposed to the mandate. On February 6, 2013, HHS, Department of Labor, the Department of the Treasury, and other agencies issued a document proposing amendments to the HHS mandate.[51] Specifically the amendments changed the definition of "religious employer," which in turn, possibly broadened the scope of the exemption for religious non-profit organizations that objected to providing contraception and sterilization coverage through their group health plans.[52]

The public comment period on the proposed amendments to the contraception coverage mandate closed, and the new rules became effective on August 1, 2013.[53] These new regulations have not resolved the prior concerns that religious organizations had because, as the HHS has stated, "the simplified and clarified definition of religious employer does not expand the universe of religious employers that qualify for the exemption beyond that which was intended in the 2012 final regulations."[54] Under the new definition, the exemption still is limited to "[h]ouses of worship and their integrated auxiliaries."[55] Thus, the criticism of the original regulations remains the same: the amendment fails to

49. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1125–26 (10th Cir. 2013) ("Because the Greens believe that human life begins at conception, they also believe that they would be facilitating harms against human beings if the Hobby Lobby health plan provided coverage for the four FDA-approved contraceptive methods that prevent uterine implantation (Ella, Plan B, and the two IUDs).").

50. *See, e.g.*, O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1156 (E.D. Mo. 2012) ("Plaintiffs state they face a choice between 'complying with [the ACA's] requirements in violation of their religious beliefs, or paying ruinous fines that would have a crippling impact on their ability to survive economically.'") (alteration in original).

51. *See* Coverage of Certain Preventive Services under the Affordable Care Act, 75 Fed. Reg. 8456-01 (Feb. 6, 2013).

52. *Id.*

53. Coverage of Certain Preventive Services, 78 Fed. Reg. 8456, published in final form on July 2, 2013, *see* 78 Fed. Reg. 39,870.

54. Coverage of Certain Preventive Services, 78 Fed. Reg. 39,874 (July 2, 2013).

55. *Id.*

address their concerns because, among other things, the new definition still defines religious ministry too narrowly and forces church ministries to fund and to make available services, such as abortion-inducing drugs and sterilization, that violate the religious tenets of their faiths.[56] In addition, these critics contend that the administration's proposed revisions fail to protect the free exercise rights of business owners and their for-profit corporations:

> [T]he HHS mandate creates still a third class, those with no conscience protection at all: individuals who, in their daily lives, strive constantly to act in accordance with their faith and moral values. . . . Friday's action confirms that HHS has no intention to provide any exemption or accommodation at all to this "third class." In obedience to our Judeo-Christian heritage, we have consistently taught our people to live their lives during the week to reflect the same beliefs that they proclaim on the Sabbath. We cannot now abandon them to be forced to violate their morally well-informed consciences.[57]

Thus, given that many of the challenges to the HHS mandate involved for-profit corporations and the amendments did not exempt those corporations, the numerous lawsuits across the country continued, leading to conflicting decisions between and among the Third, Sixth, Seventh, Tenth, and D.C. Circuits. Having granted certiorari in two of these cases, the Supreme Court now will have to decide whether, in the wake of *Citizens United*, for-profit corporations have standing to assert free exercise and RFRA challenges to the HHS mandate.

A. Overview of the Free Exercise Issues Implicated by the HHS Mandate

At first glance, the free exercise challenge to the HHS mandate might seem relatively straightforward. First Amendment rights, such as free speech and free exercise, are fundamental rights enshrined in the Constitution. The government can violate such rights only if its reasons for

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56. *HHS Proposal Falls Short in Meeting Church Concerns: Bishops Look Forward to Addressing Issues with Administration*, U.S. CONFERENCE OF CATHOLIC BISHOPS (Feb. 7, 2013), http://usccb.org/news/2013/13-037.cfm.

57. Statement of Cardinal Timothy Dolan Responding to Feb. 1 Proposal from HHS, *in* U.S. CONFERENCE OF CATHOLIC BISHOPS, *supra* note 56.

doing so meet the highest of judicial standards—strict scrutiny.[58] This is the standard applied to a variety of free speech claims,[59] and the same sort of protection might naturally be assumed to govern free exercise claims as well. In fact, in *Sherbert v. Verner*[60] and *Thomas v. Review Board of the Indiana Employment Security Division*[61] two cases directly addressing the free exercise rights of individuals who were denied unemployment benefits after refusing work that conflicted with their religious beliefs, the Court did just that—applied strict scrutiny to the plaintiffs' free exercise claims. Similarly, if the HHS mandate substantially burdens the free exercise rights of individual business owners or their companies, the mandate is subject to strict scrutiny. Given that strict scrutiny is frequently characterized as being "'strict' in theory, but fatal in fact,"[62] the HHS Mandate is possibly unconstitutional under this high standard of review.

The analysis is more complicated as a result of the Court's decision in *Employment Division v. Smith*.[63] In *Smith*, the plaintiffs were members of the Native American Church who ingested peyote, a hallucinogenic drug, for sacramental purposes as part of a religious ceremony.[64] Under Oregon law, the possession of peyote and other drugs listed on Schedules I through V of the Controlled Substances Act[65] are "guilty of a Class B Felony."[66] The plaintiffs' employers fired them after learning about their

58. Sherbert v. Verner, 374 U.S. 398, 403 (1963) (noting that if the right to free exercise is infringed, the government must show that "any incidental burden . . . may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . .'").

59. *See, e.g.*, Carey v. Brown, 447 U.S. 455 (1980); Ashcroft v. ACLU, 542 U.S. 656 (2004); Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988).

60. 374 U.S. 398.

61. 450 U.S. 707 (1981).

62. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 552 (1989) (Marshall, J., dissenting) (describing "convention 'strict scrutiny'" as "'strict' in theory, but fatal in fact"). The Court has made clear that this characterization of strict scrutiny is inaccurate as a universal proposition. In certain contexts, such as affirmative action in graduate admissions, strict scrutiny is applied with less rigor than when race is used to exclude members of a particular race:

> The upshot is that the cases to which the plurality refers, though all applying strict scrutiny, do not treat exclusive and inclusive uses the same. Rather, they apply the strict scrutiny test in a manner that is "fatal in fact" only to racial classifications that harmfully *exclude;* they apply the test in a manner that is *not* fatal in fact to racial classifications that seek to *include*.

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 833 (2007) (Breyer, J., dissenting). *See also* Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003) ("Strict scrutiny is not 'strict in theory, but fatal in fact.' Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.") (citation omitted).

63. 494 U.S. 872 (1990).

64. *Id.*

65. 21 U.S.C. §§ 811–12 (2012).

66. OR. REV. STAT. § 475.752(1) (1987).

sacramental—and, under Oregon law, illegal—use of peyote. The Employment Division denied the plaintiffs' subsequent request for unemployment benefits because they had been fired for "misconduct," i.e., violating Oregon law.[67] The Oregon Supreme Court held that the plaintiffs were entitled to unemployment benefits because the Oregon law impermissibly infringed on their free exercise rights.[68]

On appeal, the Supreme Court reversed. The Court reasoned, "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).'"[69] According to the Court, to allow everyone to opt out of neutral, generally applicable laws whenever those laws allegedly conflict with religious practice "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[70] Under such a regime, federal laws would become voluntary for religious believers, who could exempt themselves from general civic obligations (such as the payment of taxes, compulsory military service, health and safety regulations, drug and traffic laws, environmental laws, discrimination laws, and a host of other obligations) by invoking the Free Exercise Clause.[71] The Court refused to adopt such a far-reaching rule. Although legislation cannot specifically target religious conduct (because such laws would not be neutral and generally applicable) without satisfying strict scrutiny, merely having religious views or practices "which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[72] As a result, the Court upheld Oregon's denial of unemployment benefits because that decision was based on plaintiffs using a drug prohibited under a neutral, generally applicable Oregon law.[73]

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67. *Smith*, 494 U.S. at 874.

68. *Id.*

69. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

70. Reynolds v. United States, 98 U.S. 145, 167 (1878), *quoted in Smith*, 494 U.S. at 879.

71. *Smith*, 494 U.S. at 889.

72. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940). *See also* Braunfeld v. Brown, 366 U.S. 599 (1961) (plurality opinion) (upholding a Sunday-closing law against challenges by merchants who claimed that such laws burdened their religious practice of closing on Saturday, the Sabbath for their particular faiths); United States v. Lee, 455 U.S. 252, 258–61 (1982) (requiring an Amish employer to pay Social Security taxes despite his claim that the collection and payment of such taxes violated his religious exercise).

73. *Smith*, 494 U.S. at 890 ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which

After *Smith*, a claim that a neutral, generally applicable law allegedly infringes the Free Exercise Clause is subject only to rational basis review.[74] This low standard, though, directly threatens the free exercise of religion. As the President of ACLU, Nadine Strossen, stated during a congressional hearing, "[i]n the aftermath of the *Smith* decision, it was easy to imagine how religious practices and institutions would have to abandon their beliefs in order to comply with generally applicable, neutral laws" and that "such familiar practices as . . . permitting religiously sponsored hospitals to decline to provide abortion or contraception services" were at risk.[75] Thus, in the wake of *Smith*, the Free Exercise Clause does not provide robust protection for religious exercise, which may be restricted by neutral, generally applicable laws. Perhaps counterintuitively, any heightened protection for free exercise rights must be supplied through federal legislation, not the Free Exercise Clause of the First Amendment.

In 1993, Congress took action to remove this perceived threat to the free exercise of religion. Drawing on broad bipartisan support, Congress passed the Religious Freedom Restoration Act ("RFRA") to undo the effect of *Smith* on religious free exercise claims: "[RFRA was meant] to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."[76] Under RFRA, the government can impose substantial burdens on religious exercise through a neutral law of general applicability only if the law survives strict scrutiny. That is, the government must "demonstrate[] that the application of the burden to the person (1) is in furtherance of a compelling

each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.").

74. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649 (10th Cir. 2006) ("[A] law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge."); WTC Families for a Proper Burial, Inc. v. City of New York, 567 F. Supp. 2d 529, 541 n.4 (S.D.N.Y. 2008) ("[T]he Supreme Court . . . confirmed that neutral laws, regulations and policies of general applicability that have only an incidental effect on religion need not be held to a standard higher than rational basis scrutiny."); City of Boerne v. Flores, 521 U.S. 507, 533–35 (1997).

75. *See* Kevin C. Walsh, *ACLU's President on Forced Provision of "Contraception Services" Over Religious Objections—circa 1992*, WALSHLAW (July 13, 2012), http://walshlaw.wordpress.com/2012/07/13/aclus-president-on-forced-provision-of-contraception-services-over-religious-objections-circa-1992/ (alterations in original)(quoting *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the H. Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 80–81 (1992) (statement of Nadine Strossen, President, ACLU)).

76. 42 U.S.C. § 2000bb(b)(1) (Supp. V 1994).

governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[77]

On its face, RFRA applied to federal and state action that substantially burdened religious exercise.[78] But it did not take long for RFRA to be challenged in the courts, and in *City of Boerne v. Flores*, the Court determined that, as applied to state action, RFRA exceeded Congress's power under § 5 of the Fourteenth Amendment.[79] In that case, the Archbishop of San Antonio applied for a building permit to expand a church. The city denied the application because the church was located in a recently classified historic district. The Archbishop sued, claiming that the ordinance creating the historic district violated RFRA by substantially burdening the church's religious exercise. The Supreme Court held that Congress lacked authority to enact RFRA with respect to state action but upheld RFRA as to federal legislation.[80] Consequently, RFRA did not constrain the City of Boerne's ability to deny the building permit.[81]

In the wake of *Boerne*, many states enacted state RFRAs—state legislation that mirrored the federal RFRA by providing strict scrutiny review for substantial burdens on religious exercise that the State creates.[82] As a result, plaintiffs asserting free exercise claims now confront a patchwork of different standards depending on whether the claims assert Free Exercise Clause, federal RFRA, state RFRA, or state constitution challenges.[83] If a claim is made under the First Amendment that a neutral law of general applicability substantially burdens religiously motivated conduct, then rational basis applies.[84] If the same claim is made under a

77. 42 U.S.C. §§ 2000bb-1(a)–(b) (Supp. V 1994).

78. *Boerne*, 521 U.S. at 532 ("RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments.").

79. *Id.* at 536.

80. *Id.* at 534–36. *See also* Nadia N. Sawicki, *The Hollow Promise of Freedom of Conscience*, 33 CARDOZO L. REV. 1389, 1412 (2012).

81. *See id.* at 536; *see also* Ruth Colker, *The Supreme Court's Historical Errors in* City of Boerne v. Flores, 43 B.C. L. REV. 783 (2002).

82. *See* Christopher C. Lund, *Religious Liberty after* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010); W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665 (1999).

83. If the law—state or federal—specifically targets a particular religious belief, then the Court has indicated that the law is per se unconstitutional. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible . . . ."). A law that "infringe[s] upon or restrict[s] practices because of their religious motivation . . . is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* (citation omitted).

84. For a more detailed analysis of the "Free Exercise landscape" post-*Smith*, see Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 41 (2013).

state or federal RFRA, then strict scrutiny applies.[85] Finally, if a state law is alleged to violate religious exercise in a state without a state RFRA, then the state constitution determines the level of protection afforded religious exercise.[86]

Against this backdrop, one might wonder whether the free exercise claims of the plaintiffs in the HHS mandate cases really matter. If free exercise claims receive only rational basis review, then the challengers should focus on RFRA, which imposes the higher strict scrutiny standard of review. There are at least three reasons why the free exercise challenges to the HHS mandate are critically important. First, as discussed above, *Smith* applies only to neutral laws of general applicability.[87] Given that the ACA exempts numerous corporations, grandfathers other health plans, and excludes employers with fewer than fifty employees, the HHS mandate may not be a neutral, generally applicable law. In that case, the pre-*Smith* standard—*i.e.*, the standard set forth in *Sherbert* and *Yoder*—applies. If the HHS mandate substantially burdens religious exercise and corporations can exercise religion, then the government would have to show that the HHS mandate is narrowly tailored to serve a compelling interest.[88] But, while the lower courts have acknowledged that individual business owners have free exercise rights,[89] the Supreme Court has not considered whether for-profit companies can exercise religion and, therefore, invoke the protection of the Free Exercise Clause.

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85. *See* Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 598 (1999) (explaining that state RFRAs "facially require strict scrutiny of all substantial burdens on religious practices"); Pub. L. No. 103-141, 107 Stat. 1488, sec. 2(b) (codified at 42 U.S.C. §§ 2000bb (Supp. V 1994)) (reinstating the strict scrutiny standard "in all cases where free exercise of religion is substantially burdened").

86. Colombo, *supra* note 84 at 44 ("[I]f a state law of general applicability 'substantially burden[s]' a person's religiously motivated conduct in a state that has not adopted . . . its own version of RFRA, then the person's ability to challenge such law will be dependent upon the religious liberty protections contained in his or her state's constitution, if any.").

87. *See supra* text accompanying notes 74–75.

88. Korte v. Sebelius, 735 F.3d 654, 671 (7th Cir. 2013) (explaining how *Smith* altered the prior standard under *Sherbert* and *Yoder* which held that "a substantial burden on religious exercise—even one arising from the application of a religion-neutral, generally applicable law—was unconstitutional unless the government could show that the burden was the least restrictive means of furthering a compelling public interest").

89. *See*, *e.g.*, Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 406 (E.D. Pa. 2013) ("[W]e must, as a threshold matter, determine, whether Plaintiffs have 'free exercise' rights under the First Amendment. The Hahns certainly possess these rights."); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1287 (W.D. Okla. 2012) ("[A] threshold determination [is] whether the particular plaintiffs have constitutional 'free exercise' rights subject to being violated. As to the Greens, the answer to that is obviously yes.").

Second, the free exercise claims of the closely-held companies in *Hobby Lobby* and *Conestoga* are important because they are part of an ongoing and hotly contested debate about the scope of corporations' constitutional rights in the wake of the Court's controversial decision in *Citizens United*. Those challenging the HHS mandate contend that the Court's reasons for extending speech rights to corporations in *Citizen United* compel the same outcome with respect to the Free Exercise Clause. In particular, they argue that, under *Citizens United* and *Bellotti*, corporations, whether non-profit or for-profit, can claim the protection of the Free Exercise Clause provided that free exercise is not a "purely personal" right. But, so the argument goes, free exercise is not a purely personal right. Thus, for-profit corporations can exercise religion. The problem for these challengers, though, is that the Third Circuit and several district courts have expressly rejected this line of argument, leading to the current split among the federal courts.

Moreover, even if the HHS mandate is neutral and generally applicable, establishing that for-profit corporations have free exercise rights is important because corporations can then assert a hybrid claim, i.e., a claim involving free exercise and some other constitutional claim (such as free speech or association). This is important because, as the Court noted in *Smith*, hybrid claims are subject to strict scrutiny: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved . . . the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."[90] Given that corporations are formed by individuals who exercise their right of association, corporate religious activity may qualify for strict scrutiny review.[91] This, in turn, would make it much harder for the government to limit free exercise rights of for-profit corporations as a matter of constitutional law, and not simply legislative grace under RFRA.

Finally, establishing that the Free Exercise Clause covers for-profit corporations demonstrates why corporations fall with RFRA's ambit as well. Even though the free exercise claims of corporations might receive only rational basis review under *Smith*, if for-profit corporations have free exercise rights, then any substantial burden on those rights would trigger

90. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881 (1990).

91. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

strict scrutiny review under RFRA.[92] To understand why, one must recall that RFRA was meant to restore the pre-*Smith* strict scrutiny regime for federal actions that impose a substantial burden on religious free exercise. If for-profit corporations can exercise religion, then, barring any statutory language excluding for-profit corporations from RFRA's coverage, RFRA restores heightened review for corporate free exercise claims as well as claims by individuals. But given that RFRA does not alter the general definition of "person" under the United States Code,[93] RFRA requires that courts apply strict scrutiny review for substantial burdens on corporate free exercise.[94]

B. The Federal Courts' Analysis of the Free Exercise Rights of For-Profit Corporations

Given the lack of case law addressing the free exercise rights of for-profit corporations, the federal courts have reached different conclusions. In the various cases that have been decided to date, the federal courts generally have taken one of three positions: (1) for-profit corporations do not have free exercise rights;[95] (2) the court need not resolve the question because an injunction is not warranted even if for-profit corporations can exercise religion;[96] or (3) for-profit corporations have standing to assert free exercise claims on behalf of their owners.[97] Interestingly, the federal

92. The opposite also is true. If for-profit corporations do not have free exercise rights, then they cannot assert a claim under RFRA. *See Conestoga*, 917 F. Supp. 2d at 411 ("As we have determined that a for-profit, secular corporation cannot exercise religion, . . . Conestoga cannot bring a claim under the RFRA.").

93. 1 U.S.C. § 1 (2012) (defining "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals").

94. RFRA defines "religious exercise" broadly (by cross-reference to the definition in the Religious Land Use and Institutionalized Persons Act) to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000cc-5(7)(A), 2000bb-2(4) (2000).

95. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013) ("We are unable to determine that the 'nature, history, and purpose' of the Free Exercise Clause supports the conclusion that for-profit, secular corporations are protected under this particular constitutional provision. Even if we were to disregard the lack of historical recognition of the right, we simply cannot understand how a for-profit, secular corporation—apart from its owners—can exercise religion.") (citation omitted); Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735, 743 (S.D. Ill. 2012).

96. Grote Indus., LLC v. Sebelius, 914 F. Supp. 2d 943, 949 (S.D. Ind. 2012) (expressing doubt that a for-profit corporation could exercise religion but deciding that the court need not "reach the issue"); O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012); Autocam Corp. v. Sebelius, 2012 WL 6845677 at *4 (W.D. Mich. Dec. 24, 2012).

97. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1150 (10th Cir. 2013); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 117 (D.D.C. 2012).

district courts generally have not questioned whether non-profit religious organizations have free exercise rights: "Courts have found repeatedly that religious organizations have free exercise rights."[98] Yet these courts have not explained why the two types of corporations—for-profit and non-profit—should be treated differently for free exercise purposes. The Court in *Hosanna-Tabor* acknowledged that "the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations."[99] But even assuming that religious organizations get special consideration under the Free Exercise Clause, that does not mean secular organizations, such as for-profit corporations, are excluded from the protection of the Free Exercise Clause. After all, media corporations were thought to get "special solicitude" with respect to speech rights, yet, in *Citizens United*, the Court extended speech rights to all corporations.[100]

Thus, in the absence of precedent directly on point, the lower federal courts have understandably struggled when trying to determine how *Citizens United*, *Bellotti*, and other Supreme Court precedents should apply to the HHS mandate. The federal court cases, decided to date, serve to (i) illustrate the different ways the courts have tried to reconcile the for-profit nature of certain corporations with the exercise of religion and (ii) provide the foundation for understanding why, under the Court's precedent, all corporations have standing to assert free exercise claims.

1. *The Argument Against Free Exercise Rights for For-Profit Corporations: The Third Circuit and the District Courts in* Hobby Lobby *and* Korte

The plaintiffs in the HHS mandate cases—individual business owners and their corporations—share the same general claims. The individuals seek to exercise their religion through their companies by, among other things, adopting policies and health plans that are consistent with their religious beliefs. They argue that the HHS mandate forces them to violate their sincerely held religious beliefs by requiring them to provide coverage

98. *Autocam*, 2012 WL 6845677 at *4; Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012) ("Churches and other religious organizations or religious corporations have been accorded protection under the free exercise clause . . . .").

99. Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012).

100. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 352 (2010) ("There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. 'We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.'") (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 691 (1990)).

for sterilization procedures, contraceptive drugs that they believe serve as abortifacients, and education and counseling related to such contraceptive and sterilization methods.[101] Because these requirements are directly at odds with the religious tenets of their faith, the plaintiffs contend that the HHS mandate imposes a substantial burden on their religious exercise in violation of RFRA and the Free Exercise Clause.

Although the plaintiffs' claims raise a variety of important legal issues—whether the HHS mandate is a neutral law of general applicability, whether its requirements impose a substantial burden on religious exercise, and whether the HHS mandate can survive strict scrutiny review under RFRA—a threshold question in each case is whether a for-profit corporation has standing to bring a free exercise claim. As noted above, this question is entirely novel. When the district courts started hearing these cases, neither the Supreme Court nor the Circuit Courts of Appeals had analyzed this specific issue: "Plaintiffs have not cited, and the court has not found, any case concluding that secular, for-profit corporations such as Hobby Lobby and Mardel have a constitutional right to the free exercise of religion."[102] The Third, Sixth, Seventh, Tenth, and D.C. Circuits subsequently split on the issue. Consequently, the Supreme Court faces a difficult task: against the backdrop of conflicting circuit court opinions, and without direct guidance from its prior decisions, the Supreme Court must draw upon case law that relates to the constitutional rights of corporations more generally in order to resolve the tension among the lower courts.

Given the importance of the question, coupled with the intense reaction that *Citizens United* caused by affirming the free speech rights of for-profit corporations, one might expect the lower federal courts to provide a detailed analysis of whether for-profit corporations can avail themselves of the Free Exercise Clause. To date, none has been forthcoming. The *Hobby Lobby* court issued one of the most detailed district court opinions addressing this issue, but its analysis consists of only two paragraphs.[103] These two paragraphs have proven to be quite influential, as the Third Circuit and several other district courts have cited to the *Hobby Lobby*

101. *Hobby Lobby*, 870 F. Supp. 2d at 1287.

102. *Id.* at 1288. *See also* Anselmo v. Cnty. Of Shasta, Cal., 873 F. Supp. 2d 1247, 1264 (E.D. Cal. 2012) ("Although corporations and limited partnerships have broad rights, the court has been unable to find a single RLUIPA case protecting the religious exercise rights of a non-religious organization such as Seven Hills.").

103. *Hobby Lobby*, 870 F. Supp. 2d at 1287–88.

decision.[104] But none of these courts provide an in-depth explanation as to why the for-profit status of a corporation precludes its having standing under the Free Exercise Clause.

The district court in *Hobby Lobby* starts its analysis by noting "the rights of corporate persons and natural persons are not coextensive."[105] Given the Supreme Court's prior decisions, this claim is not controversial. Corporations have free speech rights[106] but do not have a "right to exercise a privilege against self-incrimination."[107] According to the *Hobby Lobby* court, to determine whether a corporation can claim the protection of a constitutional right, courts must decide whether the claimed constitutional right is "purely personal."[108] Whether a constitutional right is purely personal "depends on the nature, history, and purpose of the particular constitutional provision."[109] Under *Bellotti*, if "the 'historic function' of the particular guarantee has been limited to the protection of individuals," then for-profit corporations cannot invoke the right.[110]

Drawing on (1) *Bellotti*'s focus on the historic function of constitutional guarantees and (2) a single sentence in *Schempp* stating that the purpose of the Free Exercise Clause "is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority,"[111] the *Hobby Lobby* court held that the Free Exercise Clause is a purely personal right because "[t]he purpose of the [F]ree [E]xercise [C]lause is 'to secure religious liberty in the *individual* by prohibiting any invasions thereof by civil authority.'"[112] The personal nature of the right, however, did not preclude the Court from extending free exercise protection to religious non-profit corporations, such as churches and religious organizations. Religions non-profits can claim the protection of the Free Exercise Clause "because believers 'exercise their religion through

104. *See, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 383 (3d Cir. 2013); Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735, 743 (S.D. Ill. 2012), Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013).

105. *Hobby Lobby*, 870 F. Supp. 2d at 1287.

106. *Citizens United*, 558 U.S. at 342 ("Under the rationale of these precedents, political speech does not lose First Amendment protection 'simply because its source is a corporation.'") (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978)).

107. Application to Enforce Admin. Subpoenas Duces Tecum of the SEC v. Knowles, 87 F.3d 413, 416 n.3 (10th Cir. 1996), *quoted* in *Hobby Lobby*, 870 F. Supp. 2d at 1287.

108. *Hobby Lobby* 870 F. Supp. 2d at 1288.

109. *Id.*

110. *Bellotti*, 435 U.S. at 778–79 n.14 (citing from U.S. v. White, 322 U.S. 694, 698–701 (1944)).

111. Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 223 (1963).

112. *Hobby Lobby*, 870 F. Supp. 2d at 1288 (emphasis in original) (quoting *Schempp*, 374 U.S. at 223).

religious organizations.'"[113] Given that (i) free exercise is a purely personal right and (ii) for-profit corporations, such as Hobby Lobby, are not "religious" organizations, the court concluded that for-profit corporations "do not have constitutional free exercise rights . . . and that they therefore cannot show a likelihood of success as to any constitutional claims they may assert."[114]

In *Korte*, the district court for the Southern District of Illinois followed the reasoning in *Hobby Lobby*, holding that "the exercise of religion [is] a 'purely personal' guarantee that cannot be extended to corporations."[115] The *Korte* court recognized *Bellotti*'s admonition that whether a constitutional right is purely personal "depends on the nature, history, and purpose of the particular constitutional provision,"[116] but instead of exploring that history, the court relied on one sentence from *Wallace v. Jaffree*[117] and part of a dissent from Justice Souter in *Hein v. Freedom from Religion Foundation, Inc.*[118] Based on these authorities, the district court concluded that "a corporation may be able to advance a belief system, but it cannot exercise religion."[119] Thus, the for-profit corporate plaintiff lacked standing to assert a free exercise or RFRA claim.

In *Conestoga*, the Third Circuit considered two arguments offered in support of for-profit corporations having free exercise rights: the *Citizens United* theory (under which corporations can exercise religion as well as

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113. *Hobby Lobby*, 870 F. Supp. 2d at 1288 (quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 341 (1987) (Brennan, J., concurring)).

114. *Id.*

115. Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735, 743 (S.D. Ill. 2012).

116. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778–79 n.14 (1978).

117. The district court in *Korte* quotes *Wallace v. Jaffree* to support its view that the free exercise is a purely personal—*i.e.*, individual—right. *Korte*, 912 F. Supp. 2d at 743. In particular, the district court invokes *Wallace* for the proposition that "[a]s is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience." *Id.* at 743–744 (quoting Wallace v. Jaffree, 472 U.S. 38, 49 (1985)).

118. *See id.* at 743. (quoting Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 638 (2007) (Souter, J., dissenting) (quoting James Madison for the proposition that "[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate") (alteration in original)).

119. *Id*. at 744. The district court in Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394 (E.D. Pa. 2013) reached the same conclusion as the *Hobby Lobby* and *Korte* courts. The *Conestoga* court took "the distinction between religious organizations and secular corporations to be meaningful, and decline[d] to act as though this difference did not exist." *Id.* at 407. In the court's view, the Free Exercise Clause was meant to protect individual free exercise: "Religious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely 'human' rights provided by the Constitution." *Id.* at 408. Thus, a for-profit corporation—a non-human plaintiff—could not avail itself of the Free Exercise Clause.

speech)[120] and the "passed through" method (which permits corporations to assert the free exercise rights of their owners).[121] A split panel of the Third Circuit rejected both arguments. Specifically, with respect to extending *Citizens United* to the free exercise context, the majority noted that this was "a question of first impression."[122] To resolve this novel question, the court invoked *Bellotti*, which acknowledged that corporations may assert a variety of constitutional rights but not rights that are "purely personal." To make this determination, the court looked at "the nature, history, and purpose of the" Free Exercise Clause.[123]

Whereas in *Citizens United* the Supreme Court found "a long history of protecting corporations' rights to free speech,"[124] the Third Circuit majority found no "similar history of courts providing free exercise protection to corporations."[125] In fact, drawing on *Schempp* and the district court's opinion in *Hobby Lobby*, the court concluded that free exercise is a "purely personal" right such that no entity "created to make money could exercise such an inherently 'human' right."[126] Although the Supreme Court previously recognized that religious non-profit corporations could exercise religion, there was no history of courts upholding the free exercise rights of for-profit corporations.[127] Consequently, the majority rejected Conestoga's free exercise claim.

Similarly, the Third Circuit declined to follow the "passed through" theory of corporate free exercise[128] that the Ninth Circuit developed in *Townley*[129] and *Stormans*.[130] In these cases, the Ninth Circuit allowed for-profit corporations to assert the free exercise claims of their owners. Given the close relationship between the owners and the company, the religious beliefs of the former passed through and were a part of the latter: "[the

120. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 383 (3d Cir. 2013).

121. *Id.*

122. *Id.*

123. *Id.* at 383–84.

124. *Id.* at 384.

125. *Id.*

126. *Id.* at 385. *See also* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012) ("General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors."), *cited in Conestoga*, 724 F.3d at 385.

127. *See Conestoga*, 724 F.3d at 385 ("We will not draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follow that for-profit, secular corporations can exercise religion.").

128. *Id.* at 386–87.

129. EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988).

130. Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009).

pharmacy was] an extension of the beliefs of members of the Stormans family, and that the beliefs of the Stormans family are the beliefs of [the pharmacy]."[131] The *Conestoga* majority rejected this approach because, in its view, the "passed through" theory embodied "erroneous assumptions regarding the very nature of the corporate form."[132] In particular, under general principles of corporate law, corporations have a separate and distinct legal existence from their owners.[133] In exchange for the benefits of incorporation, such as limited liability, corporations and owners have different rights and responsibilities as evidenced by the HHS Mandate. According to the Third Circuit, the HHS Mandate operates only on Conestoga and not on its owners, the Hahns.[134] The corporation, not the owners, must comply with and pay for the HHS Mandate. Any injury, therefore, affects Conestoga and not the Hahns. Moreover, given that the company has its own separate existence, the Hahns' religious beliefs should not and cannot be imputed—or "passed through"—to the company.[135] And, given that *Citizens United* does not extend free exercise rights to for-profit corporations, there is no basis for allowing Conestoga to assert claims for violations of the Free Exercise Clause or RFRA.[136]

2. *Judicial Agnosticism Regarding the Free Exercise Rights of For-Profit Corporations:* Grote Industries *and* O'Brien

Whereas *Hobby Lobby* and *Korte* acknowledged the novelty of the free exercise claims involved in the HHS mandate cases and decided that the for-profit corporate plaintiffs lacked standing, other district courts have declined to resolve the threshold issue. For example, in *Grote Industries, Inc. v. Sebelius*, the district court for the Southern District of Indiana expressed doubt that a for-profit corporation could exercise religion, citing *Hobby Lobby*.[137] But the court ultimately determined that it need not "reach the issue of whether a secular, for-profit corporation is capable of exercising a religion within the meaning of RFRA or the First

131. *Id.* at 1120.

132. *Conestoga*, 724 F.3d at 387.

133. *See, e.g.*, Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001) (noting that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created" the corporation).

134. *Conestoga*, 724 F.3d at 388 ("Since Conestoga is distinct from the Hahns, the Mandate does not actually require *the Hahns* to do anything.").

135. *Id.* at 388.

136. *Id.*

137. Grote Indus., Inc. v. Sebelius, 914 F. Supp. 2d 943, 949 (S.D. Ind. 2012) (citing Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1288, 1291–92 (W.D. Okla. 2012)).

Amendment."[138] Because the district court determined that the HHS mandate did not impose a substantial burden on the religious exercise of the individual owners or their company, whether for-profit corporations could invoke the protection of RFRA or the Free Exercise Clause was irrelevant. Thus, the district court did not address whether Grote Industries, a closely-held, for-profit corporation, could exercise religion within the meaning of RFRA or the First Amendment.[139]

The district courts in *O'Brien v. United States Department of Health and Human Services*[140] and *Autocam Corp. v. Sebelius*[141] avoided the threshold determination in the same way. Because these courts held that the HHS mandate did "not impose a 'substantial burden' on either" the individual owners or their companies, the courts "decline[d] to reach the question of whether a secular limited liability company is capable of exercising a religion within the meaning of RFRA or the First Amendment."[142] Accordingly, the courts denied the requests for injunctive relief without addressing the threshold question relating to the free exercise rights of for-profit corporations.

3. The Argument That For-Profit Corporations Have Standing to Assert Free Exercise Claims: The Tenth Circuit and Tyndale House Publishers

Prior to the Tenth Circuit's decision in *Hobby Lobby*, none of the federal courts considering challenges to the HHS mandate expressly held that the Free Exercise Clause protects for-profit corporations as well as non-profit religious corporations.[143] The closest any of the federal district courts has come is to hold that for-profit corporations have third-party standing based on the free exercise rights of their owners. The district court in *Tyndale House Publishers* held that the corporate plaintiff, a Christian publishing company, had standing to assert the free exercise

138. *Id.*

139. *Id.* A closely-held corporation is a corporation in which all of the shares are owned by only a few shareholders. A closely-held corporation is private such that its shares are not publicly traded. Frequently some or all of the shareholders in a closely-held corporation also are involved in the management of the business, *e.g.*, in a closely held corporation that is family owned and operated.

140. 894 F. Supp. 2d 1149 (E.D. Mo. 2012).

141. 2012 WL 6845677 (W.D. Mich. 2012).

142. *O'Brien*, 894 F. Supp. 2d at 1158; see also *Autocam*, 2012 WL 6845677 at *4.

143. *See* Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 114 (D.D.C. 2012) ("This Court, like others before it, declines to address the unresolved question of whether for-profit corporations can exercise religion within the meaning of the RFRA and the Free Exercise Clause.").

rights of its owners,[144] drawing on the Ninth Circuit's decisions in *Townley* and *Stormans*.[145] Although Tyndale's corporate structure was complex, with four entities owning varying amounts of Tyndale's voting and non-voting shares, the court determined that "the beliefs of Tyndale and its owners are indistinguishable."[146] Tyndale shared a common Christian faith with the four entities that owned its shares, and each entity "play[ed] a distinct role in achieving shared, religious objectives."[147] Given the shared religious mission among the Tyndale entities and the fact that the primary owner was a non-profit religious organization that could exercise religion in its own right, "courts must 'consider the rights *of the owners* as the basis for the [f]ree [e]xercise claim' brought by the corporation, even if the regulation technically applies only to the corporation."[148] Thus, Tyndale had standing to assert its owners' religious objections to providing the insurance coverage required by the HHS mandate.

The *Tyndale* court limited its holding to closely-held corporations that implement the religious beliefs of its owners: "But *Townley* and *Stormans* are far more limited than the defendants indicate—the cases only permit a corporation to assert the free exercise rights of its owners when it is closely-held and the beliefs of the corporation are an extension of the owners' beliefs."[149] As a result, even under *Tyndale*, corporate free exercise is curtailed significantly. Any right of a corporation to assert a free exercise claim (i) is limited to closely-held corporations that are used as an extension of the owners' beliefs and (ii) derives from the First

144. *Id.* at 117.

145. *See* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1120 (9th Cir. 2009) (holding "that a corporation has standing to assert the free exercise right of its owners"); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 620 (9th Cir. 1988) ("Townley present[ed] no rights of its own different from or greater than its owners' rights.").

146. *Tyndale*, 904 F. Supp. 2d at 116.

147. *Id.*

148. *Id.* at 117 (alteration in original) (quoting *Stormans*, 586 F.3d at 1120–22). District courts in other circuits have disagreed with the *Tyndale* court. Focusing on the distinct legal status of a corporations, the *Conestoga* court held that

> [i]t would be entirely inconsistent to allow the Hahns to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations. We agree with the *Autocam* court, which stated that this separation between a corporation and its owners 'at a minimum [] means the corporation is not the *alter ego* of its owners for purposes of religious belief and exercise.'

Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d. 394, 408 (E.D. Pa. 2013) (quoting Autocam Corp. v. Sebelius, 2012 WL 6845677, at *7 (W.D. Mich. 2012).

149. *Tyndale*, 904 F. Supp. 2d at 117 n.11.

Amendment rights of the owners, not an independent right of the organization itself.

In *Hobby Lobby*, the Tenth Circuit, sitting *en banc*, became the first circuit court to hold that for-profit, secular corporations can exercise religion under RFRA and the Free Exercise Clause.[150] With respect to RFRA, the Tenth Circuit started with RFRA's directive that the "Government shall not substantially burden a person's exercise of religion."[151] Under the Dictionary Act, "person" is defined broadly to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" unless the context indicates that a narrower definition is warranted.[152] Neither other federal statutes nor prior Supreme Court case law provided any indication that "person" should exclude for-profit corporations under RFRA. Rather, the fact that the Supreme Court has confirmed that certain corporate claimants—namely, religious non-profits—fall within RFRA[153] indicated to the Tenth Circuit that Hobby Lobby, Mardel, and other for-profit corporations that exercise religion could assert claims under RFRA.[154]

Furthermore, the *Hobby Lobby* majority rejected the non-profit/for-profit distinction that played such an important role in the Third Circuit's analysis.[155] Because the Supreme Court expressly has held that individuals may come together in groups, associations, and even corporations to advance First Amendment rights,[156] the Tenth Circuit concluded that free exercise cannot be a purely personal right.[157] Given that the First Amendment protects the *exercise* of religion, "the protections of the Religion Clauses extend beyond the walls of a church, synagogue, or mosque to religiously motivated *conduct*, as well as religious belief."[158] As *Citizens United* confirmed, conduct—including speech activity—can occur by and through for-profit corporations.[159] The Tenth Circuit,

150. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1150 (10th Cir. 2013).

151. *Id.* at 1128; *see also* 42 U.S.C. § 2000bb-1(a) (Supp. V 1994).

152. 1 U.S.C. § 1 (2012), *cited in Hobby Lobby*, 723 F.3d at 1129–30.

153. *See* O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 973 (10th Cir. 2004) (en banc) (Affirming a RFRA claim brought by "a New Mexico corporation on its own behalf"), *aff'd*, 546 U.S. 418 (2006).

154. *See Hobby Lobby*, 723 F.3d at 1129 (citing *O Centro Espirita*, 389 F. 3d at 973).

155. *Hobby Lobby*, 723 F.3d at 1131.

156. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.") (emphasis added).

157. *Hobby Lobby*, 723 F.3d at 1133–34.

158. *Id.* at 1134.

159. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

therefore, determined that there was "no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression."[160] As a result, the court concluded that Hobby Lobby and Mardel were "persons" under RFRA and, given their overtly religious missions,[161] could exercise religion.[162]

As the Tenth Circuit's opinion in *Hobby Lobby* suggests, the *Tyndale* court, the Third Circuit, and all of the other district courts that have analyzed the threshold question of whether for-profit corporations can exercise religion are wrong.[163] As discussed below, for-profit corporations can exercise religion and their religious activities are protected by the Free Exercise Clause and RFRA. That is, they have standing in their own right under RFRA and the First Amendment without reference to "passed through" standing. For-profit corporations, like their non-profit counterparts, advance beliefs on a wide range of topics—from religion to ethics to the environment and everything in between. For-profits also take corporate actions to support their preferred causes and, under the HHS mandate, are the "persons" responsible for providing the contraception and sterilization coverage that conflicts with the plaintiffs' religious beliefs. Just as an individual exercises her religion when she refuses to work on the Sabbath day of her faith or to use FDA-approved contraceptive methods, for-profit corporations exercise religion when they refuse to open on the Sabbath and object to the HHS mandate on religious grounds. And, as it turns out, the Supreme Court's prior decisions in *Bellotti*, *Citizens United*, and *White* confirm this understanding of the Free Exercise Clause and RFRA.

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160. *Hobby* Lobby, 723 F. 3d at 1135.

161. *Id.* at 1137 ("The Greens, moreover, have associated through Hobby Lobby and Mardel with the intent to provide goods and services while adhering to Christian standards as they see them, and they have made business decisions according to those standards. And the Greens are unanimous in their belief that the contraceptive-coverage requirement violates the religious values they attempt to follow in operating Hobby Lobby and Mardel.").

162. *Id.* at 1135.

163. Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012), may be the one exception to this categorical statement. The *Newland* court apparently assumes that for-profit corporations are protected under the Free Exercise Clause and RFRA, but the court does not explain why. Rather, the court asserts that "[t]hese arguments [regarding the free exercise rights of corporations] pose difficult questions of first impression" and that they "merit more deliberate investigation," but the court does not investigate. *Id.* at 1296. Instead of analyzing the nature, purpose, and history of the Free Exercise Clause, the court simply considers the merits of the plaintiffs' claims, ultimately granting the requested injunction. *Id.* at 1299.

II. THE FREE EXERCISE CLAUSE PROTECTS FOR-PROFIT AND NON-PROFIT CORPORATIONS ALIKE BECAUSE, AS *BELLOTTI* AND *WHITE* DEMONSTRATE, THE RIGHT TO FREE EXERCISE IS NOT A "PURELY PERSONAL" RIGHT BUT "SERVES SIGNIFICANT SOCIETAL INTERESTS"

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[164] The Supreme Court has interpreted the Free Exercise Clause to protect the right to, among other things, believe and propound one's religious beliefs, whatever they might be.[165] Consequently, the First Amendment prohibits "governmental regulation of religious *beliefs* as such."[166] The government therefore is precluded from compelling affirmation of particular religious beliefs,[167] punishing the promulgation of religious beliefs that the government takes to be false,[168] discriminating against religious believers based on their religious beliefs or status as a religious person,[169] and weighing in on one side of a dispute over religious dogma or authority.[170]

As its name suggests, though, the Free Exercise Clause protects more than religious belief and expression: "[The First] Amendment embraces two concepts[]—[the] freedom to believe and freedom to act."[171] As its name suggests, the free *exercise* clause is more expansive than the merely private "worship" or "freedom of conscience" language that Madison had originally proposed when drafting early versions of the First Amendment.[172] "Exercise" includes not only paradigmatic religious

164. U.S. CONST. amend. 1.

165. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.").

166. Sherbert v. Verner, 374 U.S. 398, 402 (1963).

167. *See* Torcaso v. Watkins, 367 U.S. 488, 492–93 (1961).

168. United States v. Ballard, 322 U.S. 78, 86–88 (1944).

169. McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) ("The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953).

170. Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem. Presbyterian Church, 393 U.S. 440, 445 (1969); Serbian E. Orthodox Diocese of the U.S. & Can. v. Milivojevich, 426 U.S. 696, 708–25 (1976).

171. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

172. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1488 (1990) (noting that "the term 'free exercise' makes clear that the clause protects religiously motivated conduct as well as belief"). The free exercise of religion was understood to extend beyond worship or individual conscience to all religiously motivated conduct that was required by one's conscience or religious convictions. *See id.* at 1489–90.

activity, such as worshipping, celebrating sacraments, proselytizing, and observing dietary or dress requirements,[173] but also declining to work on Saturday[174] and refusing to help build materials for war.[175] Similarly, as the federal courts have unanimously held in the HHS mandate cases, free exercise permits individuals and religious non-profits to refuse to provide coverage for certain types of contraception and sterilization procedures.[176]

Under *Bellotti*, though, this is only a minimum. The First Amendment protects religious exercise generally; it is not limited to a privileged class of individual "persons" who seek to act on their religious beliefs—and for good reason.[177] For many believers, religious practice cannot be restricted to the private expression of religion in one's home or place of worship. Their faith permeates all aspects of their lives, leading them to form groups and associations that embody and promote the values that are central to their faith.[178] The Supreme Court has expressly acknowledged this "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties."[179]

Not surprisingly, then, the First Amendment limits the government's ability to interfere with any and all forms of religious exercise and speech.

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173. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990).

174. Sherbert v. Verner, 374 U.S. 398, 404–06 (1963). The Court in *Sherbert* noted, "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406.

175. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 713–16 (1981).

176. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1287 (W.D. Okla. 2012) ("The question of whether plaintiffs are likely to prevail on their constitutional claims requires a threshold determination of whether the particular plaintiffs have constitutional 'free exercise' rights subject to being violated. As to the Greens, the answer to that is obviously yes."); Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 406 (E.D. Pa. 2013) (holding that "[t]he Hahns certainly possess these [free exercise] rights"); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 117 (D.D.C. 2012) ("Nor is there any dispute that Tyndale's primary owner, the Foundation, can 'exercise religion' in its own right, given that it is a non-profit religious organization; indeed, the case law is replete with examples of such organizations asserting cognizable free exercise and RFRA challenges.").

177. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978).

178. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (10th Cir. 2013) ("A religious individual may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values.").

179. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

It does not restrict these fundamental constitutional protections to natural persons in their individual speech activity or exercise of religion:

> The First Amendment does not say that only one kind of corporation enjoys this right [to exercise religion]. The First Amendment does not say that only religious corporations or only not-for-profit corporations are protected. The First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion.[180]

That the First Amendment protects speech and the free exercise of religion regardless of *who* is invoking that protection is apparent from *Bellotti*. Instead of focusing on "whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons," *Bellotti* instructs that "the question must be whether" the religiously motivated activity falls within an area "the First Amendment was meant to protect."[181] That is, the operative question under the First Amendment is *what* is being done—whether there is an infringement on speech or the exercise of religion—not on *who* is speaking or exercising religion: "First Amendment protection extends to corporations . . . [, and the Court] has thus rejected the argument that . . . corporations or other associations should be treated differently under the First Amendment simply because such associations are not natural persons."[182] Hence, the *Bellotti* Court emphasized that "[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[183]

Consistent with *Bellotti*, the Court has recognized that a non-profit corporation can invoke the Free Exercise Clause, even when it is not a pervasively "religious organization" such as a church.[184] In *Bob Jones*

180. EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 623 (9th Cir. 1988) (Noonan, J., dissenting).

181. *Bellotti*, 435 U.S. at, 776.

182. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342–43 (citations and quotation marks omitted).

183. *Bellotti*, 435 U.S. at 777 (footnote omitted).

184. Korte v. Sebelius, 735 F.3d 654, 675 (7th Cir. 2013) ("Accordingly, we take it as both conceded and controversial that the use of the corporate form and the associated legal attributes of that status—think separate legal personhood, limitations on owners' liability, special tax treatment—do not disable an organization from engaging in the exercise of religion within the meaning of RFRA (or the Free Exercise Clause, for that matter).").

University v. United States, the Court held that two religious schools, which were not "churches or other purely religious institutions,"[185] could assert free exercise claims on behalf of the corporations, not merely on behalf of the individuals who comprised them.[186] The Court permitted the schools to pursue their claim that the IRS violated the Free Exercise Clause by rescinding their tax-exempt status as a result of allegedly discriminatory admissions policies. Similarly, last term in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, the Court acknowledged that another religious organization, this time a church and school, could invoke the protection of the Free Exercise Clause.[187] Although the Court noted that "the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations[,]"[188] it did not limit the Free Exercise Clause to such religious organizations or distinguish its prior holding in *Bob Jones University*. Rather, the Court focused on the only issue before it: whether a religious organization has the "freedom to select its own ministers."[189] The Court held that it did.[190]

Moreover, because the First Amendment protects speech and religious activity generally, having a profit-seeking motive is not sufficient to defeat a business's speech or free exercise claim.[191] On two separate occasions,

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185. Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.29 (1983).

186. As the Court noted, Bob Jones University is not a church or specific religious institution; rather, it is a

> nonprofit corporation located in Greenville, S.C.. Its purpose is 'to conduct an institution of learning . . ., giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures.'. . . Bob Jones University is not affiliated with any religious denomination, but is dedicated to the teaching and propagation of its fundamentalist Christian religious beliefs. It is both a religious and educational institution.

Id. at 579–80 (first alteration in original) (footnote omitted). Similarly, the other plaintiff in *Bob Jones University*,

> was established 'to conduct an institution of learning . . ., giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures.' The school offers classes from kindergarten through high school, and since at least 1969 has satisfied the State of North Carolina's requirements for secular education in private schools.

Id. at 583 (citation omitted).

187. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 702 (2012) (noting that, although there can be internal tension between the Free Exercise and Establishment Clauses, it was "[n]ot so here [because b]oth Religion clauses bar the government from interfering with the decision of a religious group to fire one of its ministers").

188. *Id.* at 706.

189. *Id.*

190. *See id.*

191. In several of the HHS mandate cases, the government relied on a summary statement in *United States v. Lee* to support its claim that for-profit activity prohibits corporations from invoking free exercise rights: "When 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." 455 U.S. 252,

the Court has upheld the right of sole proprietorships, which are profit-seeking enterprises, to invoke the protection of the Free Exercise Clause. In *United States v. Lee*, the Court held that an Amish business owner, who ran a farm and carpentry shop, could raise a free exercise defense to his alleged failure to pay social security taxes for his employees.[192] Because the Old Order Amish "believe it sinful not to provide for their own elderly and needy,"[193] the employer "object[ed] on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds."[194] Likewise, in *Braunfeld v. Brown*, "merchants" in Philadelphia challenged the city's Sunday-closing laws because the laws allegedly infringed on their free exercise of religion.[195] The merchants were Orthodox Jews who observed the Sabbath on Saturday. As a result of the Sunday-closing laws and their faith, the merchants could not open their stores on the weekends.[196] Given their desire to live out their religious beliefs in their businesses, they argued that the law violated the Free Exercise Clause because it "impair[ed] the ability of all appellants to earn a livelihood."[197] In addressing their claims on the merits, the Court acknowledged that the profit motive of the plaintiffs did not subvert their right to bring a free exercise claim.[198]

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261 (1982). If correct, the government's interpretation would prevent any profit-making enterprises from claiming the protection of the Free Exercise Clause because their conduct relates to commercial activity. But such a narrow interpretation of the Free Exercise Clause is inconsistent with *Lee*, in which the Court reached the merits of the Amish farmer's free exercise claim. At most, this passage may presage the Court's decision in *Smith*, but it does not exclude profit-making businesses from the protection of the Free Exercise Clause or RFRA. *See* Korte v. Sebelius, 735 F.3d 654, 680–81 (7th Cir. 2013).

192. United States v. Lee, 455 U.S. 252, 257 (1982).

193. *Id.* at 255.

194. *Id.* at 254. Having determined that the Amish employer could invoke the Free Exercise Clause, the Court applied strict scrutiny, protecting the religious duty unless the government could show that the statute "is essential to accomplish an overriding governmental interest." *Id.* at 257–58. In *Lee*, the Court found that the government carried its burden in relation to the social security system and that, under such circumstances, "[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." *Id.* at 261. Accordingly, *Lee* indicates that profit-seeking businesses can claim the protection of the Free Exercise Clause but that the government still can interfere with the religious exercise when it satisfies strict scrutiny.

195. Braunfeld v. Brown, 366 U.S. 599 (1961).

196. *Id.* at 601.

197. *Id.*

198. *See* Korte v. Sebelius, 735 F.3d 654, 680 (7th Cir. 2013) ("[I]f profit-making alone was enough to disqualify the merchants [in *Braunfeld*] from bringing the claim, the Court surely would have said so. It did not. Instead, the Court addressed and rejected their free-exercise claim on the merits.").

As discussed in the following subsections, taken together these cases highlight three reasons why the Third Circuit and the federal district courts erred in holding that corporations cannot invoke the protection of the Free Exercise Clause: (i) the Free Exercise Clause is not a "purely personal" right; (ii) just as freedom of speech is not limited to corporations in the "speech business," free exercise applies to for-profit corporations as well as non-profits in the "religion business;" and (iii) limiting free exercise to non-profit religious organizations discriminates against religious groups and individuals who seek to live their faith through their for-profit corporations.

A. Because, as the Supreme Court Previously Acknowledged, Non-Profit Corporations Can Exercise Religion, the Free Exercise Clause Is Not a "Purely Personal" Right That Applies "Only to Natural Individuals"

Following the district court's reasoning in *Hobby Lobby Stores, Inc. v. Sebelius*,[199] several federal courts have held that "the exercise of religion [is] a 'purely personal' guarantee that cannot be extended to corporations."[200] Drawing on a footnote in *Bellotti*,[201] these courts note that the Supreme Court has refused to extend certain constitutional rights, such as the privilege against self-incrimination and the right to privacy, to corporations.[202] They also recognize that under *Bellotti* whether a constitutional provision is purely personal "depends on the nature, history, and purpose of the particular provision."[203] But, instead of analyzing the cases that discuss "purely personal" rights or evaluating "the nature, history, and purpose" of the Free Exercise Clause, several of these courts rely on isolated sentences in *Wallace v. Jaffree*[204] and *Schempp*[205] to

199. 870 F. Supp. 2d 1278 (W.D. Okla. 2012).

200. Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735, 743 (S.D. Ill. 2012). *See also* Conestoga v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013) ("We do not see how a for-profit 'artificial being, invisible, intangible, and existing only in contemplation of law,' that was created to make money could exercise such an inherently 'human' right.") (quoting Consol. Edison Co. of N.Y, Inc. v. Pataki, 292 F.3d 338, 346 (2d Cir. 2002)).

201. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778–79 n.14 (1978).

202. *Conestoga*, 724 F.3d at 383 (quoting *Bellotti*, 435 U.S. at 778–79 n.14).

203. *Bellotti*, 435 U.S. at 778–79 n.14. See *Conestoga*, 724 F.3d at 385 (citing *Bellotti*); *Korte*, 912 F. Supp. 2d at 743 (citing *Bellotti*).

204. Wallace v. Jaffree, 472 U.S. 38, 49 (1985) ("The First Amendment was adopted to curtail the power of Congress to interfere with the *individual*'s freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience.") (emphasis added).

205. Sch. Dist. of Abington Tp., Pa. v. Schemmp, 374 U.S. 203, 223 (1963) (stating that the purpose of the Free Exercise Clause "is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority").

support their conclusion that for-profit corporations cannot exercise religion: "[The purpose of the free exercise clause] is to secure religious liberty in the *individual* by prohibiting any invasions thereof by civil authority."[206] Presumably, because these district courts view free exercise as an *individual* right, they conclude that "a corporation may be able to advance a belief system, but it cannot exercise religion."[207]

Conestoga is a notable exception. Although the Third Circuit relies heavily on the "purely personal" language in *Bellotti* and *Schempp*, it actually considers the history of the Free Exercise Clause concluding that, unlike the free speech context where *Citizens United* invoked a litany of cases protecting corporate free speech, there is not "any case preceding the commencement of litigation about the Mandate, in which a for-profit, secular corporation was itself found to have free exercise rights."[208] The lack of a specific history of corporate free exercise is not surprising given the novelty of the free exercise claims raised in the HHS mandate cases. But the Third Circuit's predicating free exercise protection on such a history ignores the interpretive method set out in *Bellotti*, which focuses on the nature of the religious exercise, not whether corporations "have" specific constitutional rights. Thus, the relevant history under the *Bellotti* framework relates to the protection afforded religious objectors to laws that conflict with religious tenets. As *Sherbert*, *Thomas*, *Lee*, *Braunfeld*, *Lukumi*, and *Hosanna-Tabor* demonstrate, the Free Exercise Clause does protect religious objections to laws that conflict with a plaintiff's sincerely held religious beliefs—regardless of *who* (individual or corporation) is asserting the claim.

The Third Circuit's analysis, therefore, is flawed for at least two reasons. First, recognizing that a right is personal does not preclude extending the right to corporations. For example, the Supreme Court previously described free speech as an individual right:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal

206. *Hobby Lobby*, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012) (emphasis in original) (quoting *Schempp*).

207. *Korte*, 912 F. Supp. 2d at 744.

208. *Conestoga*, 724 F.3d at 384; Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 407 (E.D. Pa. 2013) (noting that there is "no such historical support for the proposition that a secular, for-profit corporation possesses the right to free exercise of religion").

> rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.[209]

The fact that free speech is a "fundamental personal" right, however, did not stop the Court from extending free speech rights to corporations. As the Court confirmed in *Citizens United*, "First Amendment protection extends to corporations. . . . The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"[210] Similarly, even if the Free Exercise Clause protects "the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience,"[211] individuals can avail themselves of the corporate form, and the resulting corporation can engage in the exercise of religion. The Court suggested as much in *Roberts v. United States Jaycees*, where the Court explained that "an expressive association" is a group of individuals coming together "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and *the exercise of religion*."[212] This is why, as all the federal courts have acknowledged, the Free Exercise Clause protects an "individual's freedom to believe" as well as a non-profit corporation's exercise of religion.[213] But if non-natural persons (religious non-profit corporations) can exercise religion, *Bellotti*'s reasoning instructs that for-profit corporations can also

209. Gitlow v. New York, 268 U.S. 652, 666 (1925). *See also* Thornhill v. Alabama, 310 U.S. 88, 95 (1940) ("The freedom of speech . . . which [is] secured by the First Amendment against abridgment by the United States, [is] among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State."); Cohen v. California, 403 U.S. 15, 24 (1971) (explaining that the free speech clause "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests").

210. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342–43 (2010) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978).

211. Wallace v. Jaffree, 472 U.S. 38, 49 (1985).

212. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (emphasis added).

213. See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525 (1993) (upholding the Free Exercise claim of a "not-for-profit corporation organized under Florida law"); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1134 (10th Cir. 2013) (acknowledging that "individuals may incorporate for religious purposes and keep their Free Exercise rights"); *Conestoga*, 724 F.3d at 385 ("We will not draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular corporations can exercise religion.").

exercise religion.[214] Not all corporations will engage in religious conduct, but, given that the Free Exercise Clause protects conduct whether exercised by natural persons or corporations, they can.

The second, and more important, flaw with the Third Circuit's analysis is that it and the federal district courts have ignored the Supreme Court's discussion of "purely personal" rights in *White*[215] and *Schultz*,[216] which demonstrate why free exercise is not a purely individual right. Most of the federal courts denying that for-profit corporations have free exercise rights invoke footnote fourteen in *Bellotti* for the proposition that "[c]ertain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals."[217] To determine "[w]hether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason [one must look at] the nature, history, and purpose of the particular provision."[218]

Although *Bellotti* did not explain why self-incrimination is a purely personal right that is unavailable to corporations, it cited *White*, which does provide a detailed discussion of what makes a right purely personal.[219] In *White*, the district court subpoenaed documents from a union as part of a grand jury investigation into alleged irregularities in the construction of a Navy supply depot.[220] An assistant supervisor of the union refused to produce the documents, invoking the right against self-incrimination because the documents might incriminate the union or the assistant supervisor, in his official or individual capacity.[221] On appeal, the Supreme Court rejected the assistant supervisor's claim, holding that

214. In *Bellotti*, the Court expressly rejected the claim that only corporations in the "speech" or communication business (*e.g.*, media companies) had broad free speech rights. 435 U.S. at 781. The Court also acknowledged that "[f]reedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause." *Id.* at 780. Given that free exercise is a fundamental right that some corporations may claim, *Bellotti* indicates that there is no reason for limiting that right to corporations in the "religion" business, *i.e.*, religious non-profits: "None of [the Court's prior decisions] mentions, let alone attributes significance to, the fact that the subject of the challenged communication materially affected the corporation's business." *Id.* at 781.

215. United States v. White, 322 U.S. 694, 698 (1944).

216. Cal. Bankers Ass'n v. Schultz, 416 U.S. 21, 65–66 (1974).

217. *Bellotti*, 435 U.S. at 779 n.14.

218. *Id.*

219. *Id.*

220. United States v. White, 322 U.S. 694, 695 (1944).

221. *Id.* at 696.

"[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals."[222]

In determining whether a constitutional right is "purely personal," the Court did not rely on the distinction between for-profit and non-profit corporations. Instead, the Court looked to the nature of the right at issue.[223] Even though the labor union was an unincorporated, non-profit organization, it still could not claim the privilege against self-incrimination given the "personal" nature of the right: "[s]ince the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of *any organization*,"[224] regardless of the for-profit or non-profit designation.

Furthermore, *White* set out a test to determine whether "a particular type of organization" can invoke a personal privilege.[225] According to the Court, an organization such as a union or corporation cannot avail itself of a "purely personal" right if it "has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only."[226] By extension, unions and corporations—both non-profit and for-profit cannot invoke purely personal rights, because they do not represent the personal interests of the individuals who comprise those organizations; it is not because "the distinction between religious organizations and secular corporations [is] meaningful."[227] Instead, unions and corporations "represent[] organized, institutional activity as contrasted with wholly individual activity," their existence is "perpetual" and does not "depend[] upon the life of any members," their various activities cannot "be said to be the private undertakings of the members," their officers have no "authority to act for the members in matters affecting only the individual rights of such members," they "own[] separate real and personal property," and "the official . . . books and records are distinct from the personal books and records of the individuals."[228]

Similarly, in *California Bankers Association v. Schultz*,[229] the Court once again focused on the personal nature of the constitutional right, not

222. *Id.* at 698.
223. *Id.* at 704–05.
224. *Id.* at 699 (emphasis added).
225. *Id.* at 701.
226. *Id.*
227. Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 407 (E.D. Pa. 2013).
228. *White*, 322 U.S. at 701–02.
229. 416 U.S. 21 (1974). The district court in *Korte* cited to *Schulz* but only for the proposition

the corporate form. The right to privacy applies only to information about which the public does not have a right to know. Because "'law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest,'" "corporations can claim no equality with individuals in the enjoyment of a right to privacy."[230] The same holds true for the right against self-incrimination. Corporations cannot invoke that privilege because of "the reservation of the visitatorial power of the State, and in the authority of the National Government where the corporate activities are in the domain subject to the powers of Congress."[231]

Schultz, *Wilson*, and *White* highlight two important differences between purely personal rights and the right to free exercise. First, unlike the privacy and self-incrimination contexts, the government has no right to satisfy itself that "corporate behavior is consistent with"[232] certain state approved religious beliefs or practices. As the Court explained in *Thomas*, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[233] The exercise of religion, unlike the production of business documents in *Wilson*, is not "in the domain subject to the powers of Congress."[234] Second, *Schultz* acknowledges that corporations are "endowed with public attributes" and "have a collective impact upon society."[235] Under *Bellotti*, this societal impact is one of the things the First Amendment was meant to protect through the speech and religion clauses: "The First Amendment in particular, serves significant societal interests."[236] To promote these "societal interests," the speech and religion clauses protect against government action that "abridges expression" and religious exercise "that the First Amendment was meant to protect."[237]

As a result, the Third Circuit's and other district courts' conclusion—that for-profit corporations cannot exercise religion because free exercise

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that "corporate identity has been determinative of why corporations are denied . . . the right to privacy on a par with individuals. Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735, 743 (S.D. Ill. 2012). The district court did not consider the scope of purely personal rights generally.

230. *Schultz*, 416 U.S. at 65–66 (quoting United States v. Morton Salt Co., 338 U.S. 632, 651–52 (1950)).

231. Wilson v. United States, 221 U.S. 361, 382 (1911).

232. *Shultz*, 416 U.S. at 66 (quoting *Morton Salt Co.*, 338 U.S. at 651–52).

233. *See* Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981).

234. *Wilson*, 221 U.S. at 382. *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith or the validity of particular litigants' interpretations of [their] creeds.").

235. *Schultz*, 416 U.S. at 65.

236. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978).

237. *Id.*

is a "purely personal" right[238]—is inconsistent with *White*, *Schultz*, and *Bellotti*. Under these precedents, neither non-profits nor for-profits can exercise purely personal rights.[239] But, as the Third and Tenth Circuits, as well as the lower federal courts, properly recognize, religious non-profits *can* claim the protection of the Free Exercise Clause[240]: "Churches and other religious organizations or religious corporations have been accorded protection under the Free Exercise Clause."[241] Given that under *White* non-profit corporations do not appear to represent the purely personal interests of their members any more than for-profit corporations do, free exercise cannot be a purely personal right. Thus, all corporations—those that are non-profits and those that are for-profits—should have standing to assert claims under the Free Exercise Clause.

B. The First Amendment Protects Speech and Religious Activity Generally and Is Not Limited to Corporations That Are in the "Speech Business" or the "Religious Business," Respectively

In denying that the Free Exercise Clause applies to for-profit corporations, the Third Circuit and several federal district courts suggest that the profit-making nature of secular corporations somehow disqualifies them from seeking the protections of the First Amendment.[242] The Supreme Court, however, has never made such a distinction. The sole proprietors in *Lee*[243] and *Braunfeld*[244] were engaged in for-profit businesses and sought to protect the exercise of their religious beliefs

238. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dept. of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013) ("We do not see how a for-profit 'artificial being, invisible, intangible, and existing only in contemplation of law' that was created to make money could exercise such an inherently 'human' right.") (citation omitted). *See also* Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735, 743 (S.D. Ill. 2012); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012); and Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 406 (E.D. Pa. 2013).

239. United States v. White, 322 U.S. 694, 699 (1944) (stating that purely personal rights "cannot be utilized by or on behalf of any organization").

240. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 602–03 (1983); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012).

241. *Hobby Lobby*, 870 F. Supp. 2d at 1288.

242. *See Conestoga*, 724 F.3d at 385 ("We will not draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular corporations can exercise religion.") *Conestoga*, 917 F. Supp. 2d at 407 ("We find the distinction between religious organizations and secular corporations to be meaningful and decline to act as though this difference does not exist.").

243. United States v. Lee, 455 U.S. 252 (1982).

244. Braunfeld v. Brown, 366 U.S. 599 (1961).

through their business operations. The schools in *Bob Jones University*[245] and *Hosanna Tabor*[246] were non-profits and sought to generate revenue just like for-profit corporations do. Instead of distributing any surplus revenue to shareholders, these non-profits simply funneled any surplus moneys back into the institutions. Under *Bellotti*, though, the way in which surplus revenue is distributed has no bearing on whether the underlying activity implicates the Free Exercise Clause.[247] In the First Amendment context, the focus is on what was done—the particular speech or religious activity—not on whether the actor is a non-profit corporation.

Stated differently, the Third Circuit and the district courts in *Korte* and *Hobby Lobby* make the same analytical mistake that the lower court made in *Bellotti* when it held "that corporate speech is protected by the First Amendment only when it pertains directly to the corporation's business interests."[248] In *Bellotti*, the Massachusetts Supreme Court improperly suggested that only corporations in the "speech business"—media corporations and the press—could claim the protection of the free speech clause.[249] Several courts, including the district courts in *Korte* and *Hobby Lobby* as well as the Third Circuit in *Conestoga*, do the same thing—limiting religious exercise to non-profit corporations that are in the *religion* business: "Churches and other religious organizations or religious corporations have been accorded protection under the free exercise clause because believers 'exercise their religion through religious organizations.' However, Hobby Lobby and Mardel are not religious organizations."[250] On this view, as expressed by Judge Garth in his concurrence in denying the motion for an injunction on appeal in *Conestoga*, "the purpose—and only purpose—of the plaintiff Conestoga is

245. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

246. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

247. Just as "the inherent worth of the speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual," the religious nature of an activity does not depend on its source, whether for-profit corporation, non-profit corporation, association, union, or individual. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978). *See also* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (10th Cir. 2013) ("We are also troubled—as we believe Congress would be—by the notion that Free Exercise rights turn on Congress's definition of 'non-profit.'").

248. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978).

249. First Nat'l Bank of Bos. v. Attorney Gen., 359 N.E.2d 1262, 1270 n.13 (1977) (noting without deciding that "there may be a difference between the First Amendment rights afforded corporations in the business of communications and corporations pursuing general commercial interests"), *overruled by Bellotti*, 435 U.S. 765.

250. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012) (citation omitted) (quoting Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 341 (1987) (Brennan, J., concurring)).

to make money!'"[251] Adopting the district court's view in *Hobby Lobby*, Judge Garth excludes such profit-making enterprises from the protection of the Free Exercise Clause because "'[g]eneral business corporations . . . do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.'"[252] In so doing, the courts in *Hobby Lobby*, *Conestoga*, and *Briscoe*,[253] like the district court in *Bellotti*, impose a "novel and restrictive gloss on the First Amendment" by impermissibly restricting the Free Exercise Clause to individuals and religious non-profits.[254]

The problem is that the Supreme Court's precedents do not support such a "novel and restrictive" interpretation of the Free Exercise Clause. *Bellotti* and *Citizens United* preclude the government's limiting free speech to businesses in the "speech business."[255] Likewise, the Court's reasoning in these cases prohibits the government from restricting free exercise to businesses that are in the "religion business" (churches and, under the new HHS regulations, "religious employers")[256]: "[i]f a legislature may direct business corporations to 'stick to business,' it also may limit other corporations—religious, charitable, or civic—to their respective 'business' when addressing the public."[257] If, as Judge Garth in

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251. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., Opinion/Order Re Expedited Motion for Injunction, 2013 WL 1277419 at *4 (3d Cir. Feb. 8, 2013) (Garth, J., concurring) (concurring in the order denying expedited motion for injunction), *aff'd*, 724 F.3d 377 (3d Cir. 2013).

252. *Id.* (alteration in original) (quoting Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013).

253. *Hobby Lobby*, 870 F. Supp. 2d at 1291; *Conestoga*, 917 F. Supp. 2d at 408; Briscoe v. Sebelius, 927 F. Supp. 2d 1109, 1115 (D. Colo. 2013).

254. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777; *Conestoga* Opinion/Order, 2013 WL 1277419, at *4 (Garth, J., concurring) ("Unlike religious *non-profit corporations or organizations*, the religious liberty relevant in the context of for-profit corporations is the liberty of its individuals, not of a *profit-seeking* corporate entity.") (emphasis in original).

255. *See Bellotti*, 435 U.S. at 784–85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."); *Citizens United*, 558 U.S. at 352 ("There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.").

256. *See* Coverage of Certain Preventive Services under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013) (defining "religious employer" to include only "[h]ouses of worship and their integrated auxiliaries).

257. *Bellotti*, 435 U.S. at 785. In fact, recent developments such as Benefit and B corporations further undermine such a narrow view of the corporation as concerned with only profit maximization. As Professor Ronald Colombo has noted:

> [o]n a secular level, society appears to have already recognized this, giving form to the yearning of investors, customers, employees, and officers to combine and form businesses consistent with their particular values and convictions. This is evidenced by developments

the Third Circuit contends, the government may require corporations to "stick to business," i.e., profit maximization, then it also may limit civic-minded or environmentally aware corporations to stick to that same business—profit maximization—precluding individuals from using the corporate form to advance religious, ethical, environmental, or other social values.

Given that the nature of the underlying conduct, not the identity of the speaker, is the central consideration under *Bellotti*, the *Citizens United* Court emphasized that "'[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.'"[258] The same should apply to the Free Exercise Clause—if the conduct is protected, then the government is disqualified from specifying who can exercise religion generally and who can invoke that clause in response to the HHS mandate.

Stated differently, there is nothing about the corporate form or the Free Exercise Clause that requires individuals to so limit their individual or corporate activities. Although pursuing profits is one purpose of a corporation, the officers, directors, and shareholders may decide to advance other ends as well—religious, environmental, civic, or political.[259] Ben & Jerry's and Chick-fil-A provide two well-known examples of corporations that advance goals other than profit maximization; these examples illustrate the importance of protecting the right of corporations to pursue civic or religious values. According to its website, Ben & Jerry's corporate mission involves three goals:

> Social Mission: To operate the Company in a way that actively recognizes the central role that business plays in society by

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> both in the marketplace and in state legislatures, such as the promulgation of "Benefit Corporation" statues and the "B Corporation" movement.

Colombo, *supra* note 84, at 60 (footnote omitted). *See, e.g.*, NY BUS. CORP. § 1707(a)(3) (McKinney 2012) (stating that in a benefit corporation's directors and officers "shall not be required to give priority to the interests of any particular person or group [including shareholders] . . . over the interests of any other person or group").

258. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 347 (2010) (quoting *Bellotti*, 435 U.S. at 784–85).

259. *See, e.g.*, Professor Kevin C. Walsh, *The Third Circuit is wrong: RFRA protects corporations, without any carve-out of for-profit corporations from its protections*, WALSHLAW (Feb. 9, 2013), http://walshslaw.wordpress.com/2013/02/09/the-third-circuit-is-wrong-rfra-protects-corporations-without-any-carve-out-of-for-profit-corporations-from-its-protections/ ("Even a publicly traded corporation with an obligation to act in the best interest of shareholders can be 'socially responsible' and incur various costs in pursuit of long-term value and goodwill.").

> initiating innovative ways to improve the quality of life locally, nationally and internationally.
>
> Product Mission: To make, distribute and sell the finest quality all natural ice cream and euphoric concoctions with a continued commitment to incorporating wholesome, natural ingredients and promoting business practices that respect the Earth and the Environment.
>
> Economic Mission: To operate the Company on a sustainable financial basis of profitable growth, increasing value for our stakeholders and expanding opportunities for development and career growth for our employees.[260]

Although Ben & Jerry's is a for-profit corporation, only its economic mission focuses narrowly on profits. The company also seeks to improve "the quality of life" generally and to "promot[e] business practices that respect the Earth and the Environment."[261] Under Judge Garth's view, these last two goals are improper because they transcend the only purpose of a for-profit corporation—"to make money!"[262] Yet *Bellotti* makes clear that the government *cannot* force companies to give up their First Amendment rights and "stick to business."[263]

Similarly, Chick-fil-A predicates its business on biblical values and closes its stores on Sundays in observance of the Christian Sabbath.[264] It states that its Corporate purpose is "[t]o glorify God by being a faithful steward of all that is entrusted to us. To have a positive influence on all who come in contact with Chick-fil-A."[265] In furtherance of its religious values, the company has given money to certain advocacy groups that promote what Chick-fil-A believes is a Christian view on various issues, including marriage. Some of these donations caused national controversy in the summer of 2012, leading political leaders in Boston and Chicago to threaten to block Chick-fil-A's bid to open franchises in those cities.[266]

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260. *See Our Values*, BEN & JERRY'S, http://www.benjerry.com/values/ (last visited Mar. 4, 2014).

261. *Id.*

262. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., Opinion/Order Re Expedited Motion for Injunction, 2013 WL 1277419 at *4 (3d Cir. Feb. 8, 2013) (Garth, J., concurring), *aff'd*, 724 F.3d 377 (3d Cir. 2013).

263. *Bellotti*, 435 U.S. at 785.

264. *See Fact Sheets: Chick-Fil-A's Closed-on-Sunday Policy*, CHICK-FIL-A, http://www.chick-fil-a.com/Pressroom/Fact-sheets/Sunday/Sunday_2012 (last visited Nov. 16, 2013).

265. *Id.*

266. Andrew Ryan and Martine Powers, *Boston's Mayor Menino clarifies Chick-fil-A Stance*, BOSTON GLOBE (July 27, 2012) http://www.bostonglobe.com/metro/2012/07/26/menino-clarifies-

The fact that Chick-fil-A is a for-profit corporation, though, should make no difference to the free exercise analysis. Because Chick-fil-A is the entity that made the donations and sought to open the stores, Chick-fil-A is the "person" that would be injured if retaliated against for the exercise of its religious beliefs.[267]

Given that the Free Exercise Clause would protect a non-profit religious organization in such circumstances, under *Bellotti*, free exercise also should protect Chick-fil-A or any other for-profit corporation exercising religion. As *Bellotti* instructs, the First Amendment protects "religious exercise" generally, not simply the religious exercise of natural persons or religious non-profits.[268] As a result, if the Free Exercise Clause protects an individual's refusal to do something for religious reasons, it should apply when the "person" is a for-profit corporation. The Court has held that the Free Exercise Clause reaches an individual's objection to policies, such as the HHS mandate, based on his or her religious beliefs.[269] In *Thomas*, a Jehovah's Witness was denied unemployment benefits after he quit his job making turrets for military tanks.[270] Thomas claimed that he terminated his employment because "his religious beliefs prevented him from participating in the production of war materials."[271] The Court held that the State's denial of benefits violated Thomas's free exercise rights: "Where the state . . . denies [an important] benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."[272]

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view-stance-against-chick-fil/S8zwf3nBeDUXKbWQ6TjExM/story.html; Ricardo Lopez and Tiffany Hsu, *San Francisco is the Third City to Tell Chick-fil-A: Keep Out*, LA TIMES (July 26, 2012) http://articles.latimes.com/2012/jul/26/business/la-fi-mo-san-franciso-mayor-to-chickfila-keep-out-20120726.

267. *See* Colombo, *supra* note 84 at 67–68.

268. *Bellotti*, 435 U.S. at 785 (rejecting the claim that the government can restrict business, religious, charitable, or civic corporations to what the government determines is their "respective business" because "[s]uch power in government to channel the expression of views is unacceptable under the First Amendment").

269. *See* Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

270. *Thomas*, 450 U.S. at 711–12.

271. *Id.* at 709.

272. *Id.* at 717–18. The fact that many for-profit corporations may not object to the HHS mandate, even though those corporations are owned and operated by individuals with religious beliefs, is irrelevant to the free exercise analysis under *Thomas*:

> [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith.

In *Sherbert*, the plaintiff, a member of the Seventh-day Adventist Church, was fired after she refused to work on Saturdays, the Sabbath day for her faith.[273] Being unable to find other work as a result of her religious beliefs, she filed for unemployment benefits under South Carolina's Unemployment Compensation Act.[274] The South Carolina Employment Security Commission denied her request, claiming that under the Act her refusal to work on Saturdays did not constitute good cause for failing to accept "suitable work when offered . . . by the employment office or the employer."[275] She subsequently filed suit in state court alleging that the Commission's decision infringed on her free exercise rights. The South Carolina Supreme Court ultimately affirmed the Commission's decision.[276] On appeal, the United States Supreme Court reversed, holding that the State could not condition unemployment benefits on the plaintiff's relinquishing her religious convictions,[277] analogizing such a requirement to a fine imposed on religious exercise:

Id. at 715–16.

273. *Sherbert*, 374 U.S. at 399.

274. *Id.* at 399–400.

275. *Id.* at 401.

276. *Id.* The South Carolina Supreme Court determined that the denial of benefits did not infringe on Ms. Sherbert's free exercise of religion for reasons that are very similar to the justifications given by several of the district courts that have ruled against the corporations and business owners challenging the HHS mandate:

> The State Supreme Court held specifically that appellant's ineligibility infringed no constitutional liberties because such a construction of the statute 'places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience.'

Id. Similarly, the district courts in *O'Brien* and *Grote Industries* refused to enter an injunction against the HHS mandate because "the challenged regulations do not demand that plaintiffs alter their behavior in a manner that will directly and inevitably prevent plaintiffs from acting in accordance with their religious beliefs. . . . [P]laintiffs remain free to exercise their religion, by not using contraceptives and by discouraging employees from using contraceptives." O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012); *accord* Grote Indus., LLC v. Sebelius, 914 F. Supp. 2d 943, 951 (S.D. Ind. 2012).

277. *Sherbert*, 374 U.S. at 409–10. In fact, as the Court noted in *Welsh*, the refusal to comply with government rules does not even have to be based on a belief in God to qualify as religious exercise:

> If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose on him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons . . . [and] such an individual is as much entitled to a 'religious' conscientious objector exemption . . . as is someone who derives his conscientious opposition to war from traditional religious convictions.

Welsh v. United States, 398 U.S. 333, 340 (1970) (first alteration in original). The same could be said of corporations such as Ben & Jerry's or Chick-fil-A, which pursue secular moral or ethical policies.

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[278]

Yet this is exactly what is happening when for-profit corporations are denied free exercise rights in relation to the HHS mandate—the government forces compliance with a government program by denying corporations an exemption and then penalizing them for non-compliance:

> 'To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.' Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.[279]

In *Sherbert* and *Thomas*, the government sought to condition unemployment benefits on the relinquishment of religious beliefs. In the HHS mandate situation, the benefit is the limited liability (and other advantages) afforded those who incorporate. By forcing for-profit corporations (especially closely-held corporations) to provide contraception coverage when that coverage is inconsistent with the sincerely held religious beliefs of the company's owners and the resulting religious mission of the company, the government places them in a position of choosing between paying a fine, acting contrary to their religious beliefs, or foregoing their business altogether. The Free Exercise Clause precludes the government's conditioning corporate status on the relinquishment of a person's First Amendment rights.[280]

The ACA compels the choice between religious values and forfeiting the corporate form through large fines—on companies that refuse to provide coverage for all FDA-approved contraception and sterilization

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As in the HHS litigation, these policies may reflect the ethical views of the owners of these businesses, but the policies are those of the corporation.

278. *Sherbert*, 374 U.S. at 404. The Court continued, "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.*

279. *Id.* at 406 (citation omitted) (quoting Speiser v. Randall, 357 U.S. 513, 518 (1958).

280. *See Speiser*, 357 U.S. at 528–29 (holding that the government cannot impose conditions upon public benefits if those conditions operate to inhibit or deter the exercise of First Amendment freedoms).

procedures. The penalty is imposed on and is payable by the corporation, not the individual owners who joined together through the corporate form. In *Hobby Lobby*, the owners estimated the fine ($100 per day for each of its 13,000 employees) to be roughly $475 million per year;[281] in *Korte*, the owners of K&L Contractors would be exposed to a fine of $730,000 per year.[282] As a result, the choice between violating the religious beliefs that underscore the corporation and paying potentially ruinous fines substantially burdens the corporation's free exercise of religion.

Just as the government's attempt "to channel the expression of views is unacceptable under the First Amendment,"[283] the effort to channel the free exercise of religion to individual worship or religious non-profits is likewise unacceptable under the Free Exercise Clause. The decision by Chick-fil-A and Hobby Lobby to close on Sundays represents an exercise of religion in the same way that the decisions by Ms. Sherbert or the merchants in *Braunfeld* not to work on Saturdays are exercises of religion.[284] In both situations, persons—individuals and for-profit businesses—seek to make money through their labor/business, and both individuals and closely-held corporations decide not to work/open on certain days based on sincerely held religious beliefs. The same principle holds true in the HHS mandate cases. Just as the denial of welfare benefits punished Sherbert for exercising her religious beliefs, the ACA regulations "effectively penalize[] the free exercise" of religion of individuals and corporations that seek to follow religious principles in their business and professional activities.[285] This is unconstitutional under *Sherbert*, *Bellotti*, and *Citizens United*.[286]

Extending free exercise protections to all corporations that exercise religion (as opposed to only those in the "religion business") not only is required by the Constitution, but it also makes good sense. Corporations, whether for-profit or non-profit, do not engage in exclusively religious or secular activity. As the Court observed in *Hosanna-Tabor*, even in "purely religious" organizations, there may not be any "employees who perform exclusively religious functions": "The heads of congregations themselves often have a mix of duties, including secular ones such as helping to

281. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1125 (10th Cir. 2013).
282. Korte v. Sebelius, 735 F.3d 654, 663 (7th Cir. 2013).
283. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 785 (1978).
284. *See Sherbert*, 374 U.S. 398; Braunfeld v. Braun, 366 U.S. 599 (1961).
285. *Sherbert*, 374 U.S. at 406.
286. *Korte*, 735 F.3d at 680 ("If the government is correct that entering the marketplace and earning money forfeits free-exercise rights, then *Thomas* and *Sherbert* would have been decided differently.").

manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities."[287] In the same way, not all for-profit organizations perform exclusively secular functions. As Judge Jordan notes in his dissent in *Conestoga*:

> Judge Garth asserts that "the purpose—and only purpose—of the plaintiff Conestoga is to make money!" That assumes the answer to the question the Hahns have posed. As a factual matter, it is unrebutted that Conestoga does not exist solely to make money. This is a closely held corporation which is operated to accomplish the specific vision of its deeply religious owners, and, while making money is part of that, it has been effectively conceded that they have a great deal more than profit on their minds.[288]

Many faiths, including Catholicism, which is the basis for the ethical guidelines that are at issue in several of the ACA challenges direct their followers to implement their faith and religious beliefs in their businesses. For example, in *Vocation of the Business Leader: A Reflection*, the Vatican's Pontifical Counsel for Justice and Peace explains that for Catholics "[t]he vocation of the businessperson is a genuine human and Christian calling."[289] According to the Counsel, one of the greatest obstacles to fulfilling this Christian calling

> at a personal level is a *divided life*, or what Vatican II described as "the split between the faith which many profess and their daily lives". . . . Dividing the demands of one's faith from one's work in business is a fundamental error which contributes to much of the damage done by businesses in our world today . . . . The divided life is not unified or integrated; it is fundamentally disordered, and thus fails to live up to God's call.[290]

As in the HHS mandate cases, many business owners expressly seek to do just that—live their religious calling in and through their businesses.[291]

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287. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 708–09 (2012).

288. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., Opinion/Order Re Expedited Motion for Injunction, 2013 WL 1277419 at *10 n.8 (3d Cir. Feb. 8, 2013) (Jordan, J., dissenting) (citation omitted), *aff'd*, 724 F.3d 377 (3d Cir. 2013).

289. *See* PONTIFICAL COUNCIL FOR JUSTICE & PEACE, VOCATION OF THE BUSINESS LEADER: A REFLECTION 5 (2012), *available at* http://www.stthomas.edu/cathstudies/cst/conferences/Logic%20of%20Gift%20Semina/Logic ofgiftdoc/FinalsoftproofVocati.pdf.

290. *Id.* at 6.

291. *See* Korte v. U.S. Dep't Health & Human Servs., 912 F. Supp. 2d 735, 738 (S.D. Ill. 2012) (noting that the Kortes believe that they cannot "arrange for, pay for, provide, facilitate, or otherwise

Under the district court decisions that deny free exercise rights to for-profit corporations, however, businesses that desire to "live up to God's call" and implement the values of a particular faith must choose between living a "divided life" in a corporation that pays for services deemed immoral, forgoing the corporate form altogether, or adhering to their religious beliefs and paying penalties and fines. Yet, as the Court has acknowledged, the government cannot condition a benefit—such as the limited liability that attaches to the corporate form—on the relinquishment of one's free speech or free exercise rights:

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege . . . . [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.[292]

But this is exactly what the district courts have done. They have made the for-profit corporate form generally available unless a business owner seeks to live her faith through the corporate form. Religiously motivated business owners now must commit their companies to conduct that violates their faith or conduct their businesses in a manner consistent with their religion and pay large fines and penalties.[293] The Free Exercise Clause protects individuals, non-profits, and for-profits from having to make this choice between civic benefits and their religious beliefs. The government cannot force individuals "to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept work,

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support not only contraception and sterilization, but also abortion," without violating their religious beliefs).

292. Sherbert v. Verner, 374 U.S. 398, 404–06 (1963) (citations and footnote omitted); *See also* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 698 (1994) ("It is true that religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise, which the First Amendment guarantees as certainly as it bars any establishment.") (citation omitted); Thomas v. Rev. Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981) ("More than 30 years ago, the Court held that a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program.").

293. *See, e.g.*, 26 U.S.C. § 4980D(a)–(c) (2000 & Supp. V 2006) (providing for a tax of $100 per day per employee if a company fails to comply with ACA's coverage provisions, subject to caps for certain failures); 26 U.S.C. § 4980H(a)(2) (Supp. IV 2011) (setting forth an annual tax assessment if a company fails to comply with the ACA's coverage requirements).

on the other hand."[294] Or, at a minimum, when the government does do this, the individual and the corporation affected may invoke the protection of the Free Exercise Clause and RFRA.

This discussion of *Sherbert* is not meant to suggest that *Sherbert*'s compelling interest test necessarily applies to a for-profit corporation's challenge to the HHS mandate. In *Smith*, the Court expressly stated that *Sherbert* generally has been limited to two situations: (i) the denial of unemployment benefits[295] and (ii) hybrid claims, which involve "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."[296] Whether the current challenges to the HHS mandate implicate one or both of these situations goes beyond the scope of this Article, although a few brief observations are warranted.

First, with respect to the proper scope of the *Sherbert* test, the Court noted that heightened scrutiny is appropriate in the unemployment compensation context because of the need for "individualized governmental assessment of the reasons for the relevant conduct."[297] In determining whether an individual qualifies for unemployment benefits, the government must determine whether the plaintiff had "good cause" for quitting or refusing other work.[298] This "good cause" standard creates a system of individualized exemptions under which the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[299] Under the proposed amendments to the ACA, exemptions, like unemployment benefits, are available only to those who meet certain regulatory definitions of "religious organization" or "religious ministry."[300] Instead of a "good cause" standard under an unemployment benefits scheme,[301] courts have limited free exercise rights to "religious" non-profits.[302] Under such a standard, the district courts must determine in

294. *Sherbert*, 374 U.S. at 404.

295. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883 (1990) ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation.").

296. *Id.* at 881. To the extent that the law is not neutral or generally applicable (*i.e.*, the law is directed at specific practices), though, strict scrutiny would apply. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

297. *Smith*, 494 U.S. at 884.

298. Bowen v. Roy, 476 U.S. 693, 708 (1986).

299. *Smith*, 494 U.S. at 884 (quoting *Roy*, 476 U.S. at 708).

300. Coverage of Certain Preventive Services under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,874 (July 2, 2013).

301. *See* Thomas v. Rev. Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 712–13 (1981).

302. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381 (3d Cir. 2013) ("We conclude that for-profit, secular corporations cannot engage in religious exercise . . . .").

each case whether an organization is sufficiently religious to qualify for an exemption.[303] To the extent this involves an individualized determination, *Sherbert*'s compelling interest test might apply.

Second, the HHS mandate cases may involve the type of hybrid situation contemplated in *Smith*: "And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns."[304] As the Court explained in *Roberts v. United States Jaycees*, "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed."[305] As the Court acknowledged in *Citizens United*, "[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets."[306] Because the right of association advances First Amendment freedoms, "'[it] is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.'"[307]

Under the HHS mandate, however, the government seeks to do just that—condition "those special advantages" of the corporate form on the relinquishment of the free exercise of religion through the for-profit corporate form. In *Citizens United*, the Court rejected the distinction between "wealthy individuals and unincorporated associations [that] can spend unlimited amounts on independent expenditures" and corporations, which could not.[308] The same principle applies here. The district courts permit individuals and religious non-profit corporations to object to the HHS mandate under the Free Exercise Clause and RFRA, but "certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same [religious exercise]."[309] Just

303. Under the current proposed revisions, to qualify for a religious exemption to the HHS mandate an organization must (1) oppose the HHS mandate on account of religious objections, (2) be organized and operated as a non-profit, and (3) hold itself out as a religious organization. *See* Coverage of Certain Preventive Service, 78 Fed. Reg. at 39,874. Given that the proposed amendments to the contraceptive coverage requirements have not been finalized, and the various agencies may amend the regulations further after the comment period, it is difficult to determine how much individualized consideration will be required.

304. *Smith*, 494 U.S. at 882.

305. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

306. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 351 (2010) (alteration in original).

307. *Id.* (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting)).

308. *Citizens United*, 558 U.S. at 356.

309. *Id.*

as the government's attempt to limit the speech rights of corporations violated the First Amendment, the government's predicating the availability of certain organizational forms—for-profit corporations—on the surrender of free exercise rights also might be unconstitutional under *Citizens United* and *Sherbert*.

For present purposes, though, the central point is more limited in scope. Under the logic of *Citizens United* and *Sherbert*, regardless of the level of scrutiny that applies, the government cannot condition the benefits of the corporate form on a business owner's relinquishing her right to exercise religion through the corporation.[310] Non-profit and for-profit corporations, like the individuals who comprise them, can engage in religious exercise—from closing or refusing to work on Sundays to objecting to the HHS mandate on religious grounds—and, consequently qualify for protection under the Free Exercise Clause.

C. Restricting the Free Exercise Clause to Pervasively Religious Organizations Impermissibly Discriminates Against For-Profit Corporations That Promote Religious Views

Several federal courts claim that for-profit corporations cannot invoke the Free Exercise Clause because religious exercise is a "purely personal"[311] right, i.e., a right "applying only to natural individuals."[312] At the same time, these courts contend that religious non-profits, which are not "natural individuals," are covered by the Free Exercise Clause because of the "religious" nature of the organizations.[313] The Third and Sixth Circuits as well as several district courts claim religious non-profits are fundamentally different from for-profit corporations when it comes to exercising religion.[314] According to *Hobby Lobby*, which the Third Circuit and the district court in *Briscoe* favorably cite,[315] "[g]eneral business corporations" cannot exercise religion because they "do not pray, worship,

310. *Id.*; Sherbert v. Verner, 374 U.S. 398 (1963).

311. United States v. White, 322 U.S. 694, 699 (1944).

312. *Id.* at 698.

313. Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 407 (E.D. Pa. 2013) ("While religious organizations, as a means by which individuals practice religion, have been afforded free exercise rights, courts have consistently limited such holdings to religious organizations.") (citations omitted); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012) ("Churches and other religious organizations or religious corporations have been accorded protection under the free exercise clause because believers 'exercise their religion through religious organizations.'") (citations omitted).

314. *Hobby Lobby*, 870 F. Supp. 2d at 1291–92.

315. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013); Briscoe v. Sebelius, 927 F. Supp. 2d 1109, 1115 (D. Colo. 2013).

observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors."[316]

What these courts apparently fail to recognize is that non-profit religious organizations also "do not pray, worship, observe sacraments or take other religiously-motivated actions"[317] independently of the individuals who comprise the organization. Religious organizations that are non-profit corporations (e.g., a church) do not pray, worship, observe sacraments, or take other religious actions as a corporation. All such activities are conducted by the individuals who are part of that non-profit organization—the priests, religious, and lay members of the faith. The same holds true with respect to for-profit corporations. Whether exercising their speech rights or implementing their religious beliefs in their business operations, for-profit corporations act through the individual owners/members of the organization. This is not surprising given the distinction between for-profit and non-profit corporations does not consist in the latter's ability to conduct religious activities independently of their members. Both types of corporations are creatures of the State that depend on individuals to carry out all of their activities—from engaging in speech to exercising religion.

The key is that, in many situations involving non-profit and for-profit corporations, the actions of the individuals comprising the organization *are* the actions of the corporations. Discrimination in hiring provides one such example. If a corporation—whether for-profit or non-profit—discriminates against women or minorities, the discrimination is attributed to the company, not simply the individuals who own or operate the organization. Likewise, if a corporation refuses to hire Jews, Muslims, Catholics, or members of some other religion, the corporation is properly viewed as and held responsible for the religion-based discrimination.[318]

316. *Hobby Lobby*, 870 F. Supp. 2d at 1291–92; *see also Conestoga*, 917 F. Supp. 2d at 408.

317. *See Hobby Lobby*, 870 F. Supp. 2d at 1291–92.

318. This is not to say that Congress cannot distinguish between non-profit and for-profit corporations with respect to religion under certain circumstances. For instance, Title VII allows some not-for-profit corporations to limit hiring to co-religionists while denying that same ability to for-profit corporations. 42 U.S.C. § 2000e-1(a) (Supp. III 1992); Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 335 (1987) ("[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."). In the same way, the ministerial exception that the Court recognized in *Hosanna-Tabor* gives not-for-profit religious organizations the ability to limit the hiring of ministers to those who share the organization's faith given free exercise concerns. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."). But the fact that Congress may be able to distinguish between for-profit corporations and non-profits in the hiring context to promote free

But if a for-profit corporation can discriminate based on religion, there is no reason to preclude that company from doing other things based on religion. Chick-fil-A and Hobby Lobby can close on Sunday, the Christian Sabbath, for religious reasons. Conestoga can implement corporate policies that promote specific Mennonite values. And all of these companies can refuse—based on religious principles—to provide coverage to their employees for specific procedures or drugs related to contraception and sterilization. In choosing their health plan coverage, for-profit corporations can object to certain procedures and not others based on the corporation's exercise of religion.

Furthermore, in *Larson v. Valente* the Court emphasized that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[319] But this is precisely what happens when the Third Circuit and federal district courts limit free exercise protection to non-profit religious corporations. These courts impermissibly discriminate among religions by giving certain religions (those that operate through non-profit corporations) the ability to exercise religion as a group while denying that opportunity to individuals who sincerely try to live their beliefs through all aspects of their lives, including their for-profit businesses. As the Tenth Circuit notes in *Hobby Lobby*, "[a] religious individual may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values."[320] To preclude this "witness" to one's faith by denying free exercise protection while granting full protections to ministers or the religious who evangelize within an established non-profit religious organization is discriminate against some religious beliefs in direct violation of *Larson*'s command.

In *Larson*, the Court struck down a rule that exempted certain organizations from Minnesota's reporting requirements because the so-called fifty per cent rule[321]

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exercise does not give the government the right to distinguish between these two types of corporations in derogation of free exercise rights. Moreover, with respect to RFRA, Congress has made no such distinction. *See, e.g.*, 1 U.S.C. § 1 (2012) (defining "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals).

319. Larson v. Valente, 456 U.S. 228, 244 (1982); Wilson v. NLRB, 920 F.2d 1282, 1285–88 (6th Cir. 1990) (holding that a statutory exemption limited to individuals who are "member[s] of and adhere[] to established and traditional tenets . . . of a bona fide religion, body, or sect which has historically held conscientious objections to [a certain practice]" are unconstitutional because they prefer members of established denominations over those with more idiosyncratic religious beliefs).

320. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (10th Cir. 2013)

321. Pursuant to the Minnesota Charitable Solicitation Act, Minn. Stat §§ 309.50–309.61 (1969 & Supp. 1982), charitable organizations generally were required to register with the state and file an

> makes explicit and deliberate distinctions between different religious organizations. . . . [T]he provision effectively distinguishes between 'well-established churches' that have 'achieved strong but not total financial support from their members' . . . and 'churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members . . . .'[322]

By limiting free exercise to religious non-profits, the federal district courts also discriminate in favor of preferred or established religious organizations, denying free exercise protection to for-profit corporations that are directed at advancing the religious beliefs of their owners.

Not all religiously motivated people are called to be priests, ministers, religious, or lay persons who work for a religious non-profit. Some individuals, such as the plaintiffs in the HHS mandate cases, sincerely believe they are called to live their faith through their for-profit business endeavors.[323] As Pope John Paul II instructed the Catholic faithful in *Centesimus Annus*:

> In fact, the purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a community of persons who in various ways are endeavoring to satisfy their basic needs, and who form a particular group at the service of the whole society. Profit is a regulator of the life of a business, but it is not the only one; other human and moral factors must also be considered which, in the long term, are at least equally important for the life of a business.[324]

The problem under the district court opinions is that two organizations—both corporations—that are comprised of members of the

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annual report that states, among other things, the total receipts and income from all sources, the costs of management, fundraising, and public education, and any transfers of property or funds out of the state. Larsen, 456 U.S. at 231. The "fifty per cent rule" provided an exemption from the registration and reporting requirements but only for "those religious organizations that received more than half of their total contributions from members or affiliated organizations." *Id.* at 231–32.

322. *Larson*, 456 U.S. at 246–47 n.28.

323. Thomas J. Molony, *Charity, Truth, and Corporate Governance*, 56 LOY. L. REV. 825, 853 (2010) ("Catholic Social Thought requires, at a minimum, that corporate law allow managers to act in a moral manner. A legal norm, therefore, that would *require* a manager to take an action that is immoral is inconsistent with Catholic Social Thought. For this reason, a *pure* profit maximization norm cannot meet the requirements of Catholic Social Thought.").

324. Centesimus Annus: Encyclical Letter on the Hundreth Anniversary of *Rerum Novarum* from John Paul II, § 35 (May 1, 1991), *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html (emphasis omitted).

same faith may object to the HHS mandate for exactly the same reasons but only one—the religious non-profit corporation—may claim the protection of the Free Exercise Clause. This result flies in the face of *Bellotti*, which expressly holds that the proper "question must be whether [the government regulation] abridges [activity] that the First Amendment was meant to protect."[325] Given that religious non-profits *are* protected by the Free Exercise Clause, the First Amendment *is* meant to protect this type of activity—objecting to the contraception coverage mandate on religious grounds. The fact that the person conducting the religious activity is a "for-profit corporate person" instead of a "natural person" or a "non-profit corporate person" is irrelevant.[326]

In *Bellotti*, the Court struck down a state-law ban on corporate expenditures related to a referendum because the legislation "amount[ed] to an impermissible . . . requirement that the speaker have a sufficiently great interest in the subject to justify communication."[327] The same can be said of the district courts' decisions in the HHS mandate cases—they require a corporation to have a sufficiently great religious interest in the subject to justify objecting on religious grounds. But courts are constitutionally prohibited from weighing the nature or importance of a person's or group's religious beliefs:

> [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith.[328]

Because courts cannot determine whether a corporation is sufficiently religious to invoke the Free Exercise Clause, any corporation that sincerely seeks to implement religious beliefs in its corporate activities may claim the protection of that clause. Thus, the Free Exercise Clause protects the right of individuals and corporations—whether for-profit or non-profit—to advance religious beliefs, just as the Free Speech Clause protects their right to engage in speech as individuals and through the corporate form.[329]

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325. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978).

326. *Id.* ("The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons.").

327. *Id.* at 784.

328. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 715–16 (1981).

329. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 343 (2010) ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated

III. RFRA—SECURING STRICT SCRUTINY FOR CORPORATE FREE EXERCISE CLAIMS

The Court's reasoning in *Citizens United* and *Bellotti* demonstrates that the First Amendment protects certain types of activity—whether that activity involves speech or religious exercise—regardless of the identity of the person who is engaging in that activity.[330] Recognizing that for-profit corporations have free exercise rights is important as a matter of constitutional law because it helps to clarify our understanding of the scope of the Free Exercise Clause. But it is even more important in relation to the ongoing HHS mandate litigation. If the First Amendment protects natural and corporate persons, federal courts cannot exclude for-profit corporations from RFRA's strict scrutiny standard. Even though the free exercise claims of individuals and corporations receive only rational basis review under *Smith*[331] (if the HHS mandate is neutral and generally applicable), if both groups are "persons" under the ACA, then both are entitled to heightened protection for substantial burdens on their religious exercise. And the government must demonstrate that the HHS Mandate is narrowly tailored and is supported by a compelling government interest.

Under the express terms of RFRA, the "[g]overnment shall not substantially burden a person's exercise of religion . . . even if the burden results from a rule of general applicability"[332] unless the government can satisfy strict scrutiny. If the government can "demonstrate[e] that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," then the burden will be upheld.[333] Any "person" whose religious exercise is burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief."[334] Thus, in the context of

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differently under the First Amendment simply because such associations are not 'natural persons.'").

330. *Id.* at 340–41 ("By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. . . . The First Amendment protects speech and speaker, and the ideas that flow from each."); Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 8 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster.") (quoting *Bellotti*, 435 U.S. at 783).

331. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

332. 42 U.S.C. § 2000bb-1(a) (Supp. V 1994).

333. 42 U.S.C. § 2000bb-1(b) (Supp. V 1994).

334. 42 U.S.C. § 2000bb-1(c) (Supp. V 1994). RFRA originally applied to State and federal governmental actions that substantially burdened religious exercise. In City of Boerne v. Flores, 521

corporate challenges to the HHS mandate, the threshold inquiry under RFRA mirrors the initial inquiry under the Free Exercise Clause—whether the exercise of religion applies only to natural persons or to for-profit corporations as well.[335]

RFRA was meant to restore the pre-*Smith* strict scrutiny regime for federal action that imposes a substantial burden on religious free exercise: "Congress passed RFRA to restore the compelling interest test that had been applied to laws substantially burdening religious exercise before the Supreme Court's decision in *Smith*."[336] That is, RFRA was intended to give greater protection for religious exercise than the current constitutional standard under *Smith*.[337] Thus, if for-profit corporations are "persons" under the Free Exercise Clause, then, barring any statutory language excluding for-profit corporations from its coverage, RFRA reinstates heightened scrutiny to substantial burdens on the religious exercise of for-profit corporations. As discussed above, for-profit corporations are "persons" under the United States Code[338] and, arguably, under the Free Exercise Clause of the First Amendment. Consequently, RFRA covers for-profit corporate "persons," such as the corporate plaintiffs in the HHS mandate cases, and any substantial burdens on corporate free exercise must satisfy strict scrutiny.

Unlike the Free Exercise Clause, the United States Code actually defines who and what counts as a "person." Under the Code, "person" normally includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[339] RFRA does not add to or subtract from the general definition of "person" in 1 U.S.C. § 1. Accordingly, on its face, RFRA appears to include corporations as persons, which is confirmed by the Supreme Court's decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.[340] In *Gonzales*, a Christian Spiritist sect filed suit against the government challenging provisions of the Controlled

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U.S. 507 (1997), the Court held that RFRA was unconstitutional as applied to state action because it exceeded Congress's legislative authority under § 5 of the Fourteenth Amendment.

335. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012) ("As was the case with plaintiffs' constitutional claims, a threshold question here is whether all the plaintiffs are in a position to assert rights under RFRA.").

336. *Id.*

337. *See* United States v. Wilgus, 638 F.3d 1274, 1279 (10th Cir. 2011) (explaining that RFRA "provides a statutory claim to individuals whose religious exercise is burdened by the federal government").

338. 1 U.S.C. § 1 (2012).

339. *Id.*

340. 546 U.S. 418 (2006).

Substances Act that regulated the use of a hallucinogenic plant in the sect's religious practices.[341] Although the Court described the organization as a religious sect,[342] the plaintiff was a non-profit corporation.[343] The Court held that the ban on the use of the hallucinogen imposed a substantial burden on the group's sincere religious practice and that the government failed to meet the strict scrutiny burden imposed by RFRA.[344] As a result, RFRA required the government to exempt a non-profit corporation from the neutral, generally applicable Controlled Substance Act.[345]

Confronted with the text of 1 U.S.C. § 1 and the lack of any language in RFRA carving out for for-profit corporations from the definition of "person," the federal district courts employ two related strategies to support their view that for-profit corporations cannot assert claims under RFRA. First, in the absence of express language carving out for-profit corporations from the definition of "person," these courts have looked to "context"[346] to distinguish for-profit and non-profit corporations. In particular, these courts draw on other language in 1 U.S.C. § 1 that states: "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' includes corporations . . . as well as individuals."[347] Context, in turn, "means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts, and this is simply an instance of the word's ordinary meaning."[348] While the term "context" has been construed narrowly, "[t]he qualification 'unless the context indicates otherwise,' is intended to assist the court 'in the awkward case where Congress provides

341. The religious group used the plant to brew a sacramental tea that was ingested as part of the religious sect's communion ritual. *Gonzales*, 546 U.S. at 423.

342. In *Hobby Lobby*, the district court emphasized that "Centro Espirita Beneficente Uniao do Vegetal is described in *Gonzales* as a religious sect. There is no indication it was incorporated." Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 n.12 (W.D. Okla. 2012). As it turns out, the sect in *Gonzales* is a non-profit corporation. Thus, the critical issue becomes whether RFRA distinguishes between non-profit and for-profit corporations.

343. *See Centro Espirita Beneficente Uniao Do Vegetal in Santa Fe, New Mexico (NM)*, NONPROFITFACTS.COM, http://www.nonprofitfacts.com/NM/Centro-Espirita-Beneficente-Uniao-Do-Vegetal.html (last visited Nov. 17, 2013) (listing Centro Espirita Beneficente Uniao do Vegetal as a non-profit corporation). As the Court made clear in *Lukumi*, non-profit corporations have free exercise rights under the First Amendment. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525 (1993) (permitting an incorporated church to assert claims under the Free Exercise Clause).

344. *Gonzales*, 546 U.S. at 439.

345. *Id.*

346. *See Hobby Lobby*, 870 F. Supp. 2d at 1291.

347. 1 U.S.C. § 1 (2012).

348. Rowland v. Cal. Men's Colony, 506 U.S. 194, 199 (1993).

no particular definition, but the definition in 1 U.S.C. § 1 seems not to fit.'"[349] Thus, if the context "indicates" that the inclusion of for-profit corporations within RFRA "seems not to fit," these district courts can then distinguish non-profit corporations and for-profit corporations, giving strict scrutiny protection to the former while denying it to the latter.

Second, once focused on the context of challenges to the HHS mandate, these courts contend that there is a meaningful distinction between non-profit and for-profit corporations.[350] In particular, these courts distinguish non-profit corporations and for-profit corporations based on their ability to exercise religion. While the former can exercise religion, the latter allegedly cannot:

> General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors. Religious exercise is, by its nature, one of those "purely personal" matters referenced in *Bellotti*, which is not the province of a general business corporation.[351]

Thus, because (i) for-profit corporations do not exercise religion and (ii) free exercise is a "purely personal" right, the context indicates that for-profit corporations are not "persons" under RFRA.[352]

Not surprisingly, the district courts' argument in the RFRA context mirrors their argument relating to the Free Exercise Clause. Although framing the discussion in terms of the definition of "person," the district courts actually distinguish non-profit and for-profit corporations based on their understanding of what counts as "religious exercise."[353] Their attempt to distinguish non-profits and for-profits fails for at least two reasons. First, the statutory language in RFRA and 1 U.S.C. § 1 does not differentiate between types of corporate persons. Under 1 U.S.C. § 1, "person" includes "corporations, companies, associations, firms,

349. *Hobby Lobby*, 870 F. Supp. 2d at 1291 (quoting *Rowland*, 506 U.S. at 200).

350. Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 407 (E.D. Pa. 2013) ("We find the distinction between religious organizations and secular corporations to be meaningful, and decline to act as though this difference does not exist.").

351. *Hobby Lobby*, 870 F. Supp. 2d at 1291.

352. *Id.*

353. *See Conestoga*, 917 F. Supp. 2d at 408 (concluding that "the Free Exercise Clause . . . is unavailable to a secular, for-profit corporation" because such corporations "'do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors'") (citation omitted).

partnerships, societies, and joint stock companies," not simply religious non-profit corporations, companies, associations, firms, and partnerships.[354] The district courts seek to introduce a distinction between different types of "persons," replacing the statutory definition under RFRA with their own definition. But there is no statutory or other legal basis for defining "person" so narrowly under RFRA. Neither the Supreme Court nor the circuit courts have previously held that, as the district court pronounced in *Conestoga*, "a for-profit, secular corporation does not" possess free exercise rights.[355]

Consistent with their analysis of the Free Exercise Clause, the district courts that deny for-profit corporations have free exercise rights confront an immediate problem. Although they want to exclude for-profit corporations from the protection of RFRA, they are forced to acknowledge that religious non-profits can exercise religion. In fact, the Supreme Court has repeatedly permitted non-profit corporations to invoke the protection of the Free Exercise Clause.[356] But if the exercise of religion is a "purely personal" right as the district courts contend, then how can religious non-profits but not for-profit corporations exercise religion? According to the courts in *Hobby Lobby* and *Conestoga*, the answer is the same under RFRA and the Free Exercise Clause: "religious corporations have been accorded protection under the Free Exercise Clause because believers 'exercise their religion through religious organizations.'"[357] Unlike their for-profit counterparts, religious non-profits allegedly "pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors."[358]

As discussed in relation to the Free Exercise Clause, this is demonstrably false. All corporations—religious non-profits and secular for-profits—act only by and through the individuals who make up the organization. Churches like those in *Hosanna-Tabor*, *Lukumi*, and *Amos* depend on the ministers and religious who run the organizations to pray, worship, and engage in other religiously-motivated activity.[359] Thus, the

354. 1 U.S.C. § 1 (2012).

355. *Conestoga*, 917 F. Supp. 2d at 406.

356. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).

357. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d at 1288 (citations omitted).

358. *Id.* at 1291.

359. Stated differently, if directly praying and worshiping are necessary to exercise religion, then, contrary to the Supreme Court's holdings in *Hosanna-Tabor* and *Amos*, religious non-profits cannot exercise religion. Conversely, if engaging in secular activity disqualifies a corporation for free exercise protection, then religious non-profits also do not qualify for such protection. *See Hosanna-Tabor*, 132

religious conduct of a non-profit corporation cannot be the constitutionally relevant distinction because the non-profit entity does not engage in any such conduct qua corporate entity. As *Bellotti* explains, "[t]he proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons"[360] but instead "the question must be whether" the religiously motivated activity falls within an area "the First Amendment was meant to protect."[361] The fact that a religious non-profit could object to the HHS mandate under RFRA and the Free Exercise Clause, though, shows that the First Amendment is meant to protect such religious activity. Accordingly, any corporation that exercises religion, be that a non-profit or a for-profit corporation, has standing under RFRA and the Free Exercise Clause.

IV. ALTHOUGH THE FREE EXERCISE CLAUSE APPLIES TO FOR-PROFIT CORPORATIONS, SUCH CORPORATIONS CAN INVOKE ITS PROTECTION ONLY IF THEY EXERCISE RELIGION

To recognize that corporations, such as Hobby Lobby or Chick-fil-A, can raise a free exercise claim is not to determine that a particular corporation's free exercise claim has merit. Rather, acknowledging that corporations can invoke the Free Exercise Clause simply permits corporations to litigate their claims and to have a neutral court apply the appropriate standard under the circumstances—be that rational basis, strict scrutiny, or something else. Many corporations—perhaps most—will not engage in religious activities or attempt to implement the religious convictions of their owners. In particular, large, publicly traded corporations may decline to adopt, maintain, or implement a set of religious beliefs as part of their business model. A publicly traded company could adopt such a business plan if its management and shareholders decide to do so, but such cases are apt to be rare.[362]

S. Ct. at 709 ("The heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities.").

360. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978).

361. *See id.*

362. *See* Colombo, *supra* note 84, at 84 ("Very few corporations could be expected to engage in conduct that would be rampantly unpopular, regardless of whether such conduct would be protected by the Free Exercise Clause. There would be tremendous market pressure against such actions, especially if the corporation was publicly traded, and, as such, needed to concern itself with the capital markets as well as the consumer market.").

The key is that there is no constitutional basis for courts to preclude such an association *a priori*. The decision as to what type of business model to pursue is left to the corporation—whether publicly or privately owned—not the courts. As the Court has acknowledged in the free speech context,

> [u]ltimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues. Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.[363]

The same holds true with respect to corporate decisions to pursue religious, environmental, or other civic activities. If a corporation, such as Hobby Lobby, is owned and operated by individuals who are deeply committed to a particular faith, then it may be unsurprising that the company will reflect the religious principles of its owners. As the HHS mandate cases demonstrate, corporate plaintiffs adopt ethical guidelines to implement religious principles regarding corporate responsibility, attempting to promote the well-being of their employees in a financial and moral sense. According to these companies, the ACA requires them to provide insurance coverage for medical services, such as abortifacients, contraceptives, and sterilization, that violate the religious values that underscore the companies' operations. As a result, the ACA infringes on the religious activities of these for-profit corporations and requires the companies to provide health insurance coverage for medications and procedures that are inconsistent with their religious tenets. Therefore, because all corporations can exercise religion (even if not all do) and RFRA does not exclude for-profit corporations from its coverage, for-profit corporations can invoke the Free Exercise Clause to protect their religious activities, and the courts are left to determine whether that claim is meritorious under the appropriate standard.

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363. *Bellotti*, 435 U.S. at 794 (footnote omitted).

CONCLUSION

Freedom of religion is frequently viewed as the "first freedom" under our Constitution.[364] This is due in part to the fact that the religion clauses are contained in the first lines of the First Amendment.[365] But the primacy placed on religious exercise also reflects the important role religion has played in our nation's history and that it continues to play in the lives of millions of Americans—in their homes, families, places of worship, and even their businesses.

The HHS mandate challenges this first freedom in a unique way. By requiring business owners and their companies to provide coverage for contraceptive drugs and sterilization procedures that are contrary to their religious beliefs, the HHS mandate pits free exercise against the regulatory power of the federal government. More specifically, it raises an entirely novel free exercise question: whether for-profit corporations can exercise religion for purposes of the Free Exercise Clause and RFRA. While the courts have recognized that individuals and religious non-profit organizations have standing to challenge the HHS mandate, to date no District Court has held that for-profit corporations can bring claims on their own behalf under RFRA or the Free Exercise Clause.

The HHS mandate cases, therefore, provide the Circuit Courts of Appeals and the Supreme Court with an opportunity to clarify the scope of this first freedom. Building on the Supreme Court's recognition in *Citizens United* that "First Amendment protection extends to corporations,"[366] the courts should expressly acknowledge that religious exercise "does not lose First Amendment protection 'simply because its source is a corporation.'"[367] Contrary to the district courts in *Hobby Lobby*, *Korte*, and *Conestoga*, the first freedom is not a "purely personal" right limited only to natural persons.[368] Rather, "[t]he First Amendment, in particular, serves

364. *See* Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243 (2000); THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); WILLIAM LEE MILLER, THE FIRST LIBERTY: AMERICA'S FOUNDATION IN RELIGIOUS FREEDOM (1986).

365. U.S. CONST., amend. 1.

366. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342 (2010).

367. *Id.* (quoting *Bellotti*, 435 U.S. at 784).

368. *See* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1287 (W.D. Okla. 2012); Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 407–08 (E.D. Pa. 2013). *See also* Autocam Corp. v. Sebelius, 730 F.3d 618, 625 (6th Cir. 2013) ("In this case, we agree with the government that Autocam is not a "person" capable of "religious exercise" as intended by RFRA and affirm the district court's judgment on this basis.").

significant societal interests."[369] For-profit corporations, like the individuals who comprise them and their non-profit counterparts, help advance those societal interests by enabling individuals to come together "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[370] Neither the "profit motive" of a for-profit corporation nor the "religious nature" of religious organizations justifies limiting the Free Exercise Clause only to individuals and non-profit religious organizations. Although many (perhaps most) corporations may choose not to engage in religious activities, there is no constitutional basis for precluding *a priori* all for-profit businesses from raising free exercise claims. As the HHS mandate cases demonstrate, some corporations do exercise religion through their business policies and guidelines, and the courts should recognize that they have standing to assert their first freedom under RFRA and the Free Exercise Clause.

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369. *Bellotti*, 435 U.S. at 776.
370. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).