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Caring for the Body and the Soul: Small Businesses Post-Hobby Lobby and HHS Contraceptive Rule

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Caring for the Body and the Soul: Small Businesses Post-*Hobby Lobby* and HHS Contraceptive Rule

James Lesinski[†]

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Introduction

Since 1990, the institution of religion in the United States has undergone a fundamental transformation.¹ During the 1990s, traditional, prominent Protestant denominations of Christianity such as Lutheranism,

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1. Patrick Allitt, *Religion and Politics Since 1945*, THE CONCISE ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 688 (Michael Kazin, Rebecca Edwards & Adam Rothman eds., 2011).

Presbyterianism, and Episcopalianism saw marked decreases in the sizes of their congregations and, in turn, their political clout.² As these Protestant congregations shrank, alternative congregations grew.³ Assemblies of God, Southern Baptists, and independent (some say mega⁴) churches are among the sects of Christianity that saw rapid growth during this period.⁵ As the sizes of these congregations increased, so did their political clout,⁶ and, perhaps due to these denominations' more rhapsodic nature, the politicization of religion also increased.⁷ For instance, in the 2000s, religion played a cognizable role in presidential contests.⁸

Though religion may be playing a role in politics, the United States is still by and large a secular country, which is a function of both public opinion and law. Churches enjoy tax-exempt status as a function of their organization as non-profits. If a church explicitly endorses or opposes a candidate, it may lose that tax-exempt status, potentially inhibiting or foreclosing its ability to function.⁹ In the aggregate, religion in America, or at least its influence, appears to be on the decline.¹⁰ However, among those who are religious, Americans are evenly divided on whether churches should directly weigh-in on political issues.¹¹ This creates a scenario in which small but increasingly fervent populations seek to express their views, leading to outsized disputes as faith and secular society clash.

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2. *Id.*
 3. *Id.*
 4. *Megachurch Definition*, HARTFORD INST. FOR RELIGION RESEARCH (2015), available at <http://hrr.hartsem.edu/megachurch/definition.html>.
 5. Allitt, *supra* note 1, at 688.
 6. *Id.*
 7. *Religious Polarization is Part of 'American Grace,'* NPR (Oct. 2, 2010), <http://www.npr.org/templates/story/story.php?storyId=130264527> ("How frequently you attend church, or interestingly, how frequently you say Grace . . . measures like that, how religious you are, have a pretty strong correlation with how you vote and which party you prefer," Campbell says. Not too long ago, such a link between religiosity and political belief was almost unheard of.").
 8. See Joseph Carroll & Frank Newport, *Reasons Why People are Voting for Bush or Kerry*, GALLUP (Sept. 21, 2004), <http://www.gallup.com/poll/13096/reasons-why-people-voting-bush-kerry.aspx>. (22% of female respondents identified moral values/religion as why they would vote for Pres. George W. Bush. 10% of male respondents identified more values/religion as why they would vote for Pres. George W. Bush. Figures for then-Sen. John Kerry were < 0.5% and 1% respectively.)
 9. *Preach to Me: More Americans Want their Church Involved in Politics*, ECONOMIST (Oct. 25, 2015), <http://www.economist.com/news/united-states/21627672-more-americans-want-their-churches-involved-politics-preach-me>.
 10. *Id.*
 11. *Id.*

This division has led to some uncomfortable moments when calls for equal rights and equal protection under the law collide with the First Amendment rights to uninhibited practice of religion and speech. One such occurrence saw five pastors in Texas served with subpoenas for giving sermons regarding homosexuality and gay marriage at their churches.¹² Even though the Supreme Court has resolved the legal question of same-sex marriage,¹³ the debate is far from settled in the minds of many Americans.¹⁴ Another such area of conflict is access to reproductive services, brought to the forefront by President Barack Obama's signature legislative achievement, the Patient Protection and Affordable Care Act ("ACA" or "Act").¹⁵

The ACA is a comprehensive regulatory scheme that seeks to achieve near-universal healthcare coverage in the United States.¹⁶ Among other things, the Act sets minimum requirements for insurance plans so as to establish a minimum quality or level of care available to market participants.¹⁷ Among these minimum requirements is what has come to be known as the contraceptive mandate.¹⁸ The contraceptive mandate requires that certain forms of preventive care, including contraceptives and abortifacients, be covered by health insurance plans without cost to the insured.¹⁹ Another component of the ACA is the employer mandate,²⁰ which compels covered employers to provide their employees' with health

12. *Id.*

13. *See Obergefell v. Hodges*, 576 U.S. ---, 135 S.Ct. 2584 (2015).

14. *See, e.g., Kentucky Bows to Clerk Kim Davis and Changes Marriage License Rules*, L.A. TIMES (Dec. 23, 2015), <http://www.latimes.com/nation/nationnow/la-na-nn-kentucky-kim-davis-20151223-story.html>; *see also, Ruling Made in Case of Colo. Baker who Refused Gay Wedding Cake*, CBS NEWS (Aug. 13, 2015), <http://www.cbsnews.com/news/court-ruling-colorado-baker-refused-gay-wedding-cake/>.

15. Patient Protection and Affordable Care Act, 111 Pub. Law 115.

16. *See Robert Pear, Brawling Over Health Care Moves to Rules on Exchanges*, N.Y. TIMES (Jul. 7, 2012), <http://www.nytimes.com/2012/07/08/us/critics-of-health-care-law-prepare-to-battle-over-insurance-exchange-subsidies.html>.

17. 42 U.S.C. §§ 18021-18023 (2012).

18. *See Laura Bassett, Contraception Mandate Clarified to Accommodate Religious Groups, Obama Administration Announces*, HUFFINGTON POST (Feb. 25, 2013), http://www.huffingtonpost.com/2013/02/01/contraception-mandate_n_2598893.html.

19. *Id.*

20. 26 U.S.C. § 4980H (2012); The Employer Mandate has spawned controversy in its own right, however the controversy surrounding that mandate is not of particular importance to this note. The Contraceptive Mandate is imposed upon employers through the Employer Mandate.

insurance that meets certain minimum requirements.²¹ Some of these employers include private corporations owned by devoutly religious individuals who have moral objections to the use of contraception.

It has long been recognized that individuals possess certain fundamental rights²² and, when the Bill of Rights was ratified, the right to practice one's religion according to one's individual preference was enshrined in the Constitution.²³ In addition, the law has granted certain rights to non-human persons, or legal persons. This trend, often referred to as corporate personhood,²⁴ has left an indelible mark on American law.

The Supreme Court's trend of expanding corporate personhood is seemingly at odds with recent actions taken by the other two branches of the federal government, particularly the contraceptive mandate contained in the ACA. The conflict between the federal government and businesses held by religious individuals came to a head in 2014 when the Supreme Court released its opinion in *Hobby Lobby v. Burwell*, wherein the Court held that compelling companies owned by individuals who, as a function of their religious affiliation, objected to providing contraception coverage to their employees violated the Religious Freedom Restoration Act ("RFRA").²⁵

The *Hobby Lobby* decision was a departure from what had been the consensus regarding exemptions for religious employers, which previously had been made available only to churches and other religious non-profits prior to the decision.²⁶ Because Hobby Lobby Stores is a for-profit entity that sells craft goods and other art and hobby supplies, and just so happens to be owned by religious individuals, many academics and legal observers anticipated that Hobby Lobby would lose their challenge.²⁷ Prior to *Hobby Lobby*, the only challenges to the ACA that had been successful had been brought by religious organizations and non-profits, such as churches.

Following the decision, the Department of Health and Human Services ("HHS") set out to define what it meant to be a closely held corporation for

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21. 26 U.S.C. § 4980H(c)(2).
 22. See, e.g., THE DECLARATION OF INDEPENDENCE (U.S. 1776).
 23. See U.S. CONST. AMEND. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").
 24. See, e.g., Kent Greenfield, *If Corporations Are People, They Should Act Like It*, ATLANTIC (Feb. 1, 2015), <http://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/>.
 25. See *Burwell v. Hobby Lobby*, 573 U.S. ---, 134 S.Ct. 2751 (2014).
 26. Adam Liptak, *Supreme Court Rejects Contraceptives Mandate for Some Corporations: Justice Rule in Favor of Hobby Lobby*, N.Y. TIMES (Jun. 30, 2014), <http://www.nytimes.com/2014/07/01/us/hobby-lobby-case-supreme-court-contraception.html>.
 27. See, e.g., Noah Feldman, *Hobby Lobby Verdict Could be a Surprise*, BLOOMBERGVIEW (Mar. 26, 2014), <https://www.bloomberg.com/view/articles/2014-03-26/hobby-lobby-verdict-could-be-a-surprise>.

the purposes of gaining an exemption from the contraception mandate. The promulgated rule, which set out a procedure that certain companies could utilize in order to receive a waiver from providing contraceptive-mandate services, was made final September 14, 2015 and became effective January 1, 2016.²⁸ Unfortunately, the rule will bring about more harm than good and may itself be illegal under RFRA. The HHS rule also presents problems for closely-held corporations that the government may not have contemplated before it promulgated the regulation.

The purpose of this Note is to briefly examine the corporate-personhood movement before focusing on the HHS rule and its impact on closely-held corporations and individuals. I will argue that the recently promulgated HHS final rule regarding the definition of a closely held corporation is deeply flawed and, as a result, unable to accomplish the Court's objectives in applying RFRA to corporations and the Obama administration's objectives in requiring universal or near-universal health coverage. Part I of this Note will explore the origins of corporate personhood, while touching on key developments in the area, such as the *Citizens United* and *Hobby Lobby* Supreme Court decisions. Part II of this note will discuss the rule itself and illustrate why the rule has a broad impact. Also in Part II, I will apply the HHS rule to two corporations in order to explore its impact on those companies. Part III of this Note will examine the positions of various stakeholders in the healthcare debate and will propose courses of action that appropriately balance all competing interests while staying within the spirit and letter of RFRA and ACA.

I. How did we get Here: An Examination of Corporate Personhood

The issue of corporate personhood is controversial and promises to continue to be controversial for quite some time.²⁹ The central tenet of corporate personhood is that a legal person, essentially an entity created by statute, has certain rights similar to those rights held by natural persons. Recent Supreme Court decisions regarding corporate personhood have focused on issues such as First Amendment rights, Fourth Amendment rights, and Fifth Amendment rights.³⁰ Some argue that corporations should not be considered persons because corporations are simply legal constructs.³¹ Other critics of corporate personhood assert that a

28. 45 C.F.R. § 147.131 (2015).

29. Kent Greenfield & Adam Winkler, *The U.S. Supreme Court's Cultivation of Corporate Personhood*, ATLANTIC (Jun. 24, 2015), <http://www.theatlantic.com/politics/archive/2015/06/raisins-hotels-corporate-personhood-supreme-court/396773/>.

30. *Id.*

31. See Susan Kim Ripken, *Corporations are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 99-100 (2009).

corporation cannot do anything on its own; it is instead the employees and owners who undertake action and the corporation is merely the aggregation of these actions.³² Proponents of corporate personhood argue that the corporation is indeed a person. The corporate form is a creature of hundreds of years of common law and existed before any modern laws.³³ Therefore, the government has simply chosen to recognize that which existed before the government.³⁴

In many ways, both sides of the argument have merit. Certainly, a corporation is not a living, breathing thing; it cannot independently reason, nor can it feel emotion. On the other hand, a corporation can enter into contracts,³⁵ it can buy, sell, and own property,³⁶ and it exists separately from its owners and employees in the sense that it exists before them, before their employment, and after their retirement and death.³⁷ This seeming discord, between not being a natural person and having the ability to engage in activities typical to natural persons, has evolved from the early common law and has been affected by centuries of jurisprudence and statutory schemes.

A. *The Origins of Corporate Personhood*

The origins of corporate personhood lie in Article I, Section 10 of the Constitution of the United States. The article provides that “[n]o State shall . . . pass any . . . [l]aw impairing the Obligation of Contracts.”³⁸ In 1819, the United States Supreme Court applied Article I, Section 10 to corporations, specifically to Dartmouth College, recognizing, perhaps for the first time, that a fundamental right, the freedom to contract, applied not only to natural persons, but to legal persons as well.³⁹ In *Dartmouth*

32. *Id.* at 100.

33. *Id.*

34. *Id.* at 101.

35. *See, e.g.,* Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 667-668 (1819).

36. *Id.*

37. For example, General Electric was founded in 1892, and despite being created 99 years before the author’s birth, the author is a part-owner of General Electric as a function of holding General Electric stock. While a large multi-national conglomerate is not the best vehicle for exhibiting a corporation as an extension of its shareholders, because of the abstract nature of its size, the argument regarding the nature of corporate entity must, at minimum, recognize that while certain individuals, such as shareholders and employees, may interact with a corporation, the corporation itself has the capacity to both pre-date and post-date us, which inherently requires a degree of separation between the corporation and those who interact with it and control it.

38. U.S. CONST. art. I, § 10.

39. *See Trustees of Dartmouth College*, 17 U.S. at 667-68.

College, the Court held that the college's charter was a contract and was, therefore, subject to protection under the Constitution. The Court stated:

This is plainly a contract to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the constitution, and within its spirit also.⁴⁰

In the years following this decision, the Court found that other rights of natural persons applied to legal persons as well. For instance, the Court in *Society for the Propagation of the Gospel in Foreign Parts v. Town of Pawlet* found that a corporation could own land.⁴¹ The majority stated that "the point here raised is not so much whether the plaintiffs are entitled to sue generally as a corporation, as whether they have shown a right to hold lands . . . [W]e think, there is abundant evidence . . . to establish the right of the corporation to hold the lands in controversy."⁴²

Following the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, the Supreme Court held that corporations were granted rights similar to natural persons by those amendments. In *Pembina Consolidated Silver Mining & Milling Co. v. Commonwealth of Pennsylvania*, the Court stated that "under the designation of 'person' there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution."⁴³

Such a sentiment is not confined solely to early case law. The United States Code in 1 U.S.C. § 1, as amended in 1948, states that "in determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."⁴⁴ Thus, it is difficult, if not impossible, to argue that corporate personhood is a legal tradition that does not have its roots deeply intertwined with the broader American legal tradition.

40. *Id.* at 643-644; The Court went on to say, "Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity or of education, are of the same character. The law of this case is the law of all." *Id.* at 645.

41. *Soc'y for the Propagation of the Gospel in Foreign Parts v. Town of Pawlet*, 29 U.S. 480, 501-502 (1830).

42. *Id.* at 501-502.

43. *Pembina Consol. Silver Mining & Milling Co. v. Commonwealth of Pennsylvania*, 125 U.S. 181, 188-89 (1888).

44. 1 U.S.C. § 1 (2012).

B. *The Current State of Corporate Personhood*

Since the corporate-personhood foundation was laid in the early nineteenth century, the Supreme Court has continued to expand and refine the doctrine. *Buckley v. Valeo*, a landmark Supreme Court decision handed down during the 1975-1976 term, is an example of a case in which the Court expanded the corporate-personhood doctrine.⁴⁵ The case dealt with a challenge to the Federal Election Commission Act of 1971 (“FECA”), as amended in 1974, brought by a collection of individuals, candidates for federal office, and associations.⁴⁶ The Supreme Court held that limits on spending by associations, independent of the input or direction of a candidate, were unconstitutional as violations of the First Amendment.⁴⁷ The decision in *Buckley* allowed unlimited independent expenditures by associations, and, ostensibly, corporations. The decision also ascribed First Amendment speech rights to these legal persons.

The provision of First Amendment rights to corporations was further established by the Court’s decision in *First National Bank of Boston v. Bellotti*.⁴⁸ Therein, a group of banking associations and corporations challenged a Massachusetts statute that forbade associations and corporations from making campaign expenditures addressing certain ballot issues.⁴⁹ Specifically, under the statute, a corporation could only expend funds in an attempt to affect the outcome of an election if the ballot issue dealt with a matter that would “materially affect[] any of the property, business or assets of the corporation.”⁵⁰ The statute further provided that no ballot issue concerning the taxing of private individuals’ property, income, or commercial activities could qualify as materially affecting one of the categories allowing the expenditure of corporate funds.⁵¹ The ballot issue that the collective plaintiffs in *First National Bank of Boston* wanted to campaign against was a tax issue.⁵²

For the first time, building upon the decision in *Buckley v. Valeo*, the Court in *First National Bank of Boston* explicitly stated that speech may not be limited simply because its source is a corporation.⁵³ Because political

45. *See generally*, *Buckley v. Valeo*, 424 U.S. 1 (1976).

46. *Id.* at 2-3.

47. *Id.* at 58-59.

48. *See generally*, *First Nat’l Bank Boston v. Bellotti*, 435 U.S. 765 (1978).

49. *Id.* at 767-68.

50. *Id.*

51. *Id.*

52. *Id.* at 769.

53. *Id.* at 784 (“We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise could be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court,

speech is protected under the First Amendment, the Court found that a legislature cannot limit who may engage in it and what those who engage in it may communicate.⁵⁴ The holdings in *Buckley* and *First National Bank of Boston* provided the groundwork for legal persons to participate in political elections, perhaps the most controversial aspect of corporate personhood.

The decisions in *Buckley v. Valeo* and *First National Bank of Boston* gave birth to the case that has become synonymous with the current state of corporate personhood, *Citizens United v. Federal Election Commission*.⁵⁵ There, the Court took its most significant step toward granting legal persons the same rights as natural persons. The holding of *Citizens United* is both widely hailed and condemned, depending upon one's view of campaign-finance regulations and the role of money in politics.⁵⁶ In its most elemental form, the Court's landmark holding can be described as stating that corporations have First Amendment rights under the Constitution and, furthermore, that the government may not impede a corporation from exercising its right to free speech in the political arena, regardless of whether it is organized as a for-profit firm or non-profit firm.⁵⁷

C. *Hobby Lobby and the Religious Freedom Restoration Act*

It is important to note that the rights protected by the First Amendment are not the only ones that have been held to apply to corporations in their various forms. The Supreme Court has also held that corporations have the benefit of the Equal Protection Clause of the Fourteenth Amendment.⁵⁸ The Court has also held that corporations are entitled to similar protections as

a material effect on its business or property . . . The "materially affecting" requirement . . . amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate.").

54. *Id.* at 784-785 ("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.").
55. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).
56. See Matt Bai, *How Much has Citizens United Changed the Political Game?*, N.Y. TIMES MAGAZINE (Jul. 17, 2012), <http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html>.
57. *Citizens United*, 558 U.S. at 365 ("We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").
58. See *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 882-83 (1985) (holding that the State of Alabama's taxing regime, whereby out-of-state insurance companies were taxed at a higher rate than in-state insurance companies, was unconstitutional, because it treated similarly situated companies in different manners due to their residency status).

natural persons under the Fourth⁵⁹ and Fifth Amendments.⁶⁰ These constitutional protections have been augmented by certain statutory regimes, such as the Religious Freedom Restoration Act.

In *Hobby Lobby v. Burwell*, the Court held that corporations have the same rights under RFRA as natural persons.⁶¹ In fact, the Supreme Court relies upon the aforementioned provision of the Dictionary Act, 1 U.S.C. § 1, as the foundation for the premise that a corporation may be considered a person under RFRA.⁶²

The Religious Freedom Restoration Act was passed in 1993 as a response to a 1990 Supreme Court decision, *Smith v. Employment Division*.⁶³ In *Smith*, two individuals who adhered to a Native American faith were fired for using peyote and were subsequently denied unemployment benefits.⁶⁴ The individuals' practice of their faith required the use of peyote, a species of cactus that is a naturally occurring source of mescaline.⁶⁵ Mescaline is a psychoactive substance that affects users similarly to reality-altering drugs such as LSD and psilocybin.⁶⁶ The Supreme Court surprised many⁶⁷ by holding that the Oregon law,⁶⁸ and the denial of benefits thereunder, was consistent with the First Amendment's guarantee of the free exercise of religion.⁶⁹

In response to the *Smith* decision, Congress overwhelmingly passed the Religious Freedom Restoration Act,⁷⁰ which was designed to establish a statutory regime to impose the protections that Congress thought should be provided by the First Amendment.⁷¹ Congress achieved this by taking the scenario at issue in *Smith*—the practice of religion being burdened by a facially neutral law—and mandating the use of a strict-scrutiny standard if

59. See *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2447 (2015).

60. See *Horne v. Dep't of Agric.*, 135 S.Ct. 2419, 2428 (2015).

61. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2759 (2014).

62. *Id.* at 2768.

63. *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

64. *Id.* at 874.

65. *Id.*

66. *Peyote/Mescaline*, CTR. FOR SUBSTANCE ABUSE RESEARCH, UNIV. OF MD., <http://www.cesar.umd.edu/cesar/drugs/peyote.pdf> (last visited Nov. 7, 2016).

67. See Eugene Volokh, *What is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013), <http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act/>.

68. The Oregon law at issue was a simple drug possession statute. *Smith*, 494 U.S. at 874.

69. *Id.* at 890.

70. Volokh, *supra* note 67.

71. *Id.*

the facially neutral law is challenged in the courts. The goal of RFRA is to ensure that the federal government cannot impede the practice of a person's religion, even through a law of general applicability.⁷²

Under RFRA, the government is forbidden from burdening the practice of religion, even if the burden to religion occurs incident to the execution of a statutory regime that does not target religion or the practice thereof. The government may avoid violating this statute by meeting the Supreme Court's strict-scrutiny test.⁷³ To prevent a facially neutral law from being struck down, the government must demonstrate that the law in question pursues a compelling government interest and that the challenged law is the least-restrictive means of pursuing said compelling government interest.⁷⁴ As previously mentioned, the Court relied on RFRA in the *Hobby Lobby* holding.

It should be noted that the *Hobby Lobby* case was concerned with closely-held corporations and, while the Court did not dismiss the possibility that larger corporations have similar rights, the Court stated that it would be very unlikely for a large corporation to bring a claim similar to the one in *Hobby Lobby*.⁷⁵ The fact that the majority included such language in its opinion raises the question of whether a large company would be successful in bringing such a claim, though. It has yet to be seen whether such a company would be able to satisfy the requirements of the HHS rule, though it is possible that if such a company were to bring a challenge, it would be successful.

II. Why does it Matter: Examining the HHS Rule and its Impact

The final HHS rule is the culmination of three rulemaking actions by the Department of Health and Human Services and other federal agencies: the July 2010 promulgation of interim final regulations regarding preventative services, the August 2014 promulgation of interim final regulations regarding eligible organizations obtaining a waiver from providing certain

72. See 42 U.S.C. § 2000bb-1(a) (2015); RFRA initially applied to state governments as well. However, the portion of RFRA applying to the states was struck down by the Supreme Court as an improper use of Congress's power to prophylactically enforce the Fourteenth Amendment through the enforcement powers of Section Five of the Fourteenth Amendment. See *City of Boerne v. Flores*, 521 U.S. 507, 515 (1997).

73. See 42 U.S.C. § 2000bb-1(b)(1)-(2).

74. *Id.*

75. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2774 (2014) (“[I]t seems unlikely that the sort of corporate giants to which HHS refers [i.e. General Electric] will often assert RFRA claims [T]he idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable In any event, we have no occasion in these cases to consider RFRA’s applicability to such companies.”).

preventive services due to religious objections, and the August 2014 promulgation of proposed regulations regarding the requirements of qualifying as an eligible organization for the purposes of obtaining a waiver.⁷⁶

A. *What Does the HHS Rule Actually Say?*

The purpose of the final rule is to define what constitutes an eligible organization for the purposes of obtaining a waiver from the contraceptive mandate.⁷⁷ The rule itself lays out a list of criteria, all of which must be met in order to qualify as an eligible organization.⁷⁸ The requirements are (1) that the organization, due to religious beliefs, opposes the provision of contraceptive services required by the contraceptive mandate and has adopted a resolution stating its opposition, (2) that the organization is either a non-profit corporation or a closely held for-profit corporation, as defined later in the regulation, and (3) that the organization self-certify that it meets the preceding requirements as directed by the Secretary of Labor or Health and Human Services.⁷⁹ If the organization is a closely held for-profit corporation, additional requirements apply.⁸⁰

In order to be deemed a closely held corporation, the organization must (1) be a for-profit entity, or at least not a non-profit entity, (2) have no publicly traded ownership interests as defined by Section 12 of the Securities Exchange Act of 1934; and (3) have five or fewer individuals holding more than fifty percent of the ownership interest in the organization on the date that the organization self-certifies to the Secretary of Labor or Health and Human Services.⁸¹

It is important to note that even though a company may obtain a waiver under the rule, the company's employees will still receive contraception coverage.⁸² The employer's insurance plan will still cover those services; however, the employer will not be paying for them.⁸³ The government will reimburse the insurance company for the costs of those services, ensuring

76. Coverage of Certain Preventative Services Under the Affordable Care Act, Final Rule, Dept. of HHS, 45 C.F.R. 147 (2015).

77. 45 C.F.R. §§ 147.131(b)(1)-(3) (2015).

78. 45 C.F.R. § 147.131.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Your Employer or University Objects to Providing Insurance Coverage of Birth Control: What does that Mean for you?*, NAT'L WOMEN'S LAW CTR. (July 24, 2014), <http://nwlc.org/resources/your-employer-or-university-objects-providing-insurance-coverage-birth-control-what-does-mean-you/>.

83. *Id.*

that access to contraceptive care, as guaranteed in the Affordable Care Act, is provided.⁸⁴

B. *What are the Rule's Weaknesses?*

The rule as it is currently written went into effect on January 1, 2016.⁸⁵ The rule has numerous flaws, which may lead to consequences that are unintended and perhaps were not considered by the Department of Health and Human Services and the Obama Administration. Chief among these weaknesses is that the rule is over-inclusive. The number of companies that are potentially eligible for a waiver may constitute the majority of employers in the United States. Other weaknesses include that families can aggregate shares, the possibility that the rule, as written, violates RFRA under the Court's recent jurisprudence, the possibility that the rule may lead to increased litigation among the shareholders of closely held companies, and the fact that there is no mechanism for the verification of a company's professed religious beliefs—all of which leave open the possibility that companies will abuse the rule. These weaknesses in the rule raise the possibility that employers will undeservedly receive waivers from the contraceptive mandate, increasing the cost to taxpayers and insurance companies associated with providing these services.

1. The rule is over-inclusive

It is not clear how many closely-held corporations exist in the United States.⁸⁶ One potential proxy for closely-held corporations could be what is known as an S corporation. An S corporation is a corporate form that requires profits and losses to be passed directly to shareholders, rather than being held by the corporation prior to disbursement through mechanisms such as dividends.⁸⁷ In addition to other requirements, the Internal Revenue Service ("IRS") requires that an S corporation have fewer than one hundred shareholders.⁸⁸ The IRS states that there were 4,158,572 S corporations in the United States in 2011, 99.4 percent of which were held by ten or fewer shareholders.⁸⁹ This means that many of those companies,

84. *Id.*

85. 45 C.F.R. § 147.131 (2015).

86. Drew Desilver, *What is a 'Closely Held Corporation,' Anyway, and How Many are There?*, PEW RESEARCH CTR. (Jul. 7, 2014), <http://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there/>.

87. *S Corporations*, INTERNAL REVENUE SERV., <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/S-Corporations> (last updated Aug. 1, 2016).

88. *Id.*; Other requirements include being a domestic corporation, only having certain types of shareholders, only having one class of stock, and not qualifying as an ineligible corporation. *See id.*

89. Desilver, *supra* note 86.

if not all of them, could qualify for exemption under the HHS rule were they to assert sincerely held religious beliefs in opposition to the services required by the contraceptive mandate. Furthermore, the Census Bureau estimated that twenty-nine million people were employed by S corporations in 2012.⁹⁰ With 157 million people in the United States workforce,⁹¹ this means that eighteen percent of all American workers are employed by companies that could theoretically qualify for exemption under the HHS rule. *Inc. Magazine*, an industry publication, provides a higher estimate, stating that ninety percent of all companies in the United States are closely-held corporations, roughly fifty percent of which are family-controlled.⁹² Based on these statistics, it is easy to see how what is supposed to be an exception may very well swallow the rule.

2. The ability of families to aggregate shares

Aggregation is a legal construct whereby the ownership interests of certain individuals may be considered to be owned by a single individual or entity for the purposes of a certain statute or policy. While requiring five or fewer individuals to hold more than fifty percent of the company, as the rule does,⁹³ may sound like a reasonable way to sufficiently narrow the reach of the regulation, later in the regulation, HHS details ways in which ownership interests can be aggregated, thereby effectively allowing circumvention of the five-or-fewer requirement. The regulation states that “[a]n individual is considered to own the ownership interest owned, directly or indirectly, by or for his or her family. Family includes only brothers and sisters (including half-brothers and half-sisters), a spouse, ancestors, and lineal descendants.”⁹⁴

Families’ ability to aggregate shares is the most troubling weakness in the regulation, as it directly facilitates the rule’s over-inclusive nature. For example, consider a hypothetical family consisting of a married couple with two children, four grandchildren, and eight great-grandchildren—each with an ownership interest in a hypothetical company. Under the ownership aggregation standard employed by the HHS rule, the ownership interests of these sixteen people will be deemed to be held by one individual for purposes of the regulation. If one assumes an identical family structure for five families, the greater-than-fifty-percent-held-by-five-or-fewer

90. *Id.*

91. Press Release, Bureau of Labor Statistics, The Employment Situation—December 2015 (Jan. 8, 2016), available at <http://www.bls.gov/news.release/pdf/empisit.pdf>.

92. *Closely Held Corporations*, INC. MAGAZINE, <http://www.inc.com/encyclopedia/closely-held-corporations.html> (last visited Apr. 1 2017).

93. 45 C.F.R. § 147.131(b)(4)(iii) (2015).

94. 45 C.F.R. § 147.131(b)(4)(iv)(B).

threshold could actually be satisfied by aggregating the ownership interests of eighty individual shareholders.

It is also important to keep in mind that merely greater than fifty percent of the value of the company must be held in this way.⁹⁵ After the five-or-fewer threshold is met, the remaining ownership interests of a company may be held by a large number of people, so long as the company is not publicly listed and is owned by fewer than 2000 total persons and fewer than five hundred accredited investors to ensure compliance with Section 12 of the Securities Exchange Act of 1934.⁹⁶ It is not difficult to see how an organization could meet the legal definition of being closely held while still having a rather sizeable ownership group. Therefore, the moniker closely held is not very meaningful.

3. The rule as applied to large companies may still violate the RFRA

The Court in *Hobby Lobby* did not foreclose the possibility that larger corporations hold rights similar to those held by the smaller companies that brought the suit.⁹⁷ The Court simply stated that it would be very unlikely for a large corporation to bring a claim similar to the one in *Hobby Lobby*.⁹⁸ This raises the question of whether a large corporation would be successful in bringing a claim before the Court seeking to receive protections similar to those found in *Hobby Lobby*. Writing for the Court, Justice Alito casts doubt that such a claim would be brought but does not remark on the merits of such a potential claim.⁹⁹

Due to the Court's decision in *Metropolitan Life Insurance Co. v. Ward*, the Court would have great difficulty in departing from the language in the *Hobby Lobby* opinion in order to rule against a non-closely-held company. *Metropolitan Life* stands for the premise that similarly situated companies cannot be treated differently by the law due to the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁰ As RFRA is a federal statute, the

95. 45 C.F.R. § 147.131(b)(4)(iii).

96. Securities Exchange Act of 1934, 15 U.S.C. § 78l (g)(1)(A)(i)-(ii) (2015); An accredited investor is a natural person whose net worth, when taken together with any spouse the person may have, exceeds \$1,000,000. The person may also qualify by having greater than \$1,000,000 in assets under management, excluding their primary residence. Another way a person may qualify is by having an income in excess of \$200,000 in each of the preceding two years (in excess of \$300,000 of joint income with spouse), in addition to a reasonable expectation that similar income will be earned in the year of application. 17 C.F.R. §§ 230.50 (a)(5)-(6).

97. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2774 (2014).

98. *Id.*

99. *Id.*

100. *See Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 878-882 (1985) (holding that the State of Alabama's taxing regime, whereby out-of-state insurance companies were taxed at a higher rate than in-state insurance

challenge, if it were to ever be brought, would have to rely upon the Fifth Amendment. In the past, the Court has held that the Fifth Amendment right to due process includes equal protection.¹⁰¹ While the Court has entertained a Fifth Amendment due process claim before,¹⁰² the Court has never entertained a case in which a non-natural person has endeavored to use a Fifth Amendment due-process argument and been found to be similarly situated. While it would be difficult to depart from the language in *Hobby Lobby*, this lack of precedent on legal persons utilizing a Fifth Amendment due-process claim could leave room for the Court to determine that there are inherent differences between closely held companies and large, more diffusely owned companies.

While a challenge brought by a large company may succeed on the merits, Justice Alito's contention, that it is doubtful a large company would bring a challenge, will likely prove prescient. The ownership structures of large companies are so diffuse and diverse that it is unlikely that a company bringing such a challenge would have the support of a cognizable block of shareholders, much less a majority. If a board of directors were to initiate suit on its own, they would surely be inundated with litigation from shareholders. Even if a large company were to successfully bring a challenge against the rule, other problems would abound when it came time to apply for the waiver.

To qualify for a waiver, a company's board of directors must pass a resolution asserting their sincerely held religious beliefs.¹⁰³ Such a resolution would require a majority of directors to vote in its favor.¹⁰⁴ This corporate action could be challenged by shareholders through a derivative lawsuit, necessitating the expenditure of corporate funds and other resources. The hurdles simply seem too high and the propensity for problems too great for a widely-held corporation to consider applying for a waiver under the rule. Therefore, while a legal wrong may be present in the sense that a company with legitimate religious beliefs may be denied relief under the HHS rule, it appears that the company cannot seek redress due to the difficulty that a large company would face in bringing a suit.

companies, was unconstitutional, because it treated similarly situated companies in different manners due to their residency status).

101. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); See also *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment").

102. See *McConnell v. Fed. Election Com'n*, 540 U.S. 93, 187-188 (2003) (Rejecting the Fifth Amendment Due Process claim because of the inherent differences between political parties and interest groups – therefore petitioners failed to establish that they were similarly situated as in *Metropolitan Life*).

103. 45 C.F.R. § 147.131 (2015).

104. Assuming no other threshold has been set forth for the passage resolutions in the corporation's charter.

4. The rule may facilitate increased litigation among the owners of closely-held corporations

While there is undoubtedly federal regulation of companies,¹⁰⁵ state law sets most rules regarding the organization and operation of companies.¹⁰⁶ State statutes define what constitutes a closely held corporation because many states confer certain tax benefits and other special treatment.¹⁰⁷ In most states, the requirements for qualifying as a closely held corporation are considerably more stringent than the HHS rule.¹⁰⁸ Under most states' closely held corporation doctrines, shareholders in such corporations owe a heightened duty to their fellow shareholders.¹⁰⁹ In most places, this heightened duty is identical, if not greater, than their fiduciary duty.¹¹⁰

This duty of utmost good faith and loyalty in matters concerning the business undoubtedly extends to decisions with the propensity to impact revenues and profits.¹¹¹ In *Dodge v. Ford*, the Dodge brothers, investors in Ford Motor Company, brought suit against Henry Ford because of his decision to lower the price of automobiles.¹¹² Ford did so as a means of acting in the public interest, making the automobiles available to a broader portion of the population at the expense of company profits and dividends.¹¹³ The Court found that Ford's decision ran counter to the interests of the corporation and the other shareholders and held that Ford's actions were improper.¹¹⁴

While courts are now more liberal in their interpretations of the purposes of corporations, it is not out of the realm of possibility that shareholders in a close corporation could bring a similar suit if revenues

105. See, e.g., The Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, et seq. (2012).

106. See, e.g., OHIO REV. CODE ANN. §§ 1701-1785.

107. See, e.g., OHIO REV. CODE ANN. § 1701.591.

108. For instance, to qualify as a close corporation in Ohio, every shareholder must consent to the adoption of a close corporation agreement, the agreement must be set forth in the charter, bylaws, or another corporate writing, and the agreement must assert the intent of the corporation to be governed as close corporation. See OHIO REV. CODE ANN. § 1701.591(A)(1)-(3).

109. See, e.g., *Meinhard v. Salmon*, 164 N.E. 545, 546-551 (N.Y. 1928); see also, *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 662-663 (1976).

110. *Wilkes*, 353 N.E.2d at 663; *Meinhard*, 164 N.E. at 551 (stating that, "where parties engage in a joint enterprise each owes the other the duty of the utmost good faith in all that relates to their common venture.").

111. See generally *Dodge v. Ford*, 170 NW 668 (Mich. 1919).

112. See *id.* at 668-72.

113. *Id.*

114. *Id.* at 684-685.

were to fall due to societal backlash after applying for a waiver under the HHS rule. With the advent of social media and increased societal interconnectedness, companies, and particularly small businesses in discrete, cyclical sectors of the economy, are susceptible to societal attitudes on social-policy issues.¹¹⁵ The impacts on these companies and their employees can be severe, simply because of the religious beliefs of the company's shareholders.¹¹⁶ Such outcomes make it even more likely that shareholders in closely-held corporations who disagree with the decision to apply for a waiver under the HHS rule would have viable claims against their co-owners. Because a corporation can apply for a waiver with a simple majority of owners or board members consenting, depending upon how the corporate charter is written, there is a distinct possibility of increased litigation among owners of close corporations.

5. There is no mechanism for verifying the existence of sincerely held religious beliefs

In the *Hobby Lobby* case, the sincerity of the religious beliefs professed was never questioned.¹¹⁷ Following the release of the decision, legal academics questioned the absence of an inquiry.¹¹⁸ Because of Hobby Lobby's history of engaging in Christian ministry, even a cursory inquiry into the sincerity of their beliefs would have shown that they were sincere.¹¹⁹ Even though the sincerity of the religious beliefs held in *Hobby Lobby* was not and could not have been contested, the lack of an inquiry in the record does not mean that the sincerity of proffered religious beliefs should be assumed. In fact, the question of what should occur when insincere religious beliefs are proffered should be contemplated. It is possible that in other cases, the sincerity of the beliefs being asserted may be in doubt.

The Court's opinion in *Hobby Lobby* acknowledges the possibility that courts will be asked to determine the sincerity of professed religious

115. See, e.g., Francesca Infante, *Christian B&B Owners who Refused to let gay Couple Stay Suffer Death Threats and are Forced to sell up Because of a Lack of Business*, DAILY MAIL (Sept. 19, 2013), <http://www.dailymail.co.uk/news/article-2424983/Christian-B-B-owners-refused-gay-couple-close-business.html>.

116. *Id.*

117. See *Burwell v. Hobby Lobby*, 134 S.Ct. 2751, 2774 (2015).

118. See, e.g., Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts after Hobby Lobby*, STAN. L. REV. ONLINE (Nov. 2014), available at: <https://www.stanfordlawreview.org/online/questioning-sincerity-the-role-of-the-courts-after-hobby-lobby/>.

119. Forbes estimates that David Green, founder and CEO of Hobby Lobby, has donated over \$500 million to charities, predominantly Christian. Green has also pledge to join other billionaires, such as Warren Buffet, Bill Gates, and Mark Zuckerberg, in pledging to donate a majority of their wealth to philanthropic interests. See Brian Solomon, *Meet David Green: Hobby Lobby's Biblical Billionaire*, FORBES (Sept. 18, 2012), <http://www.forbes.com/sites/briansolomon/2012/09/18/david-green-the-biblical-billionaire-backing-the-evangelical-movement/>.

beliefs.¹²⁰ As a functional matter, Justice Alito notes that federal courts have already been asked to evaluate the sincerity of religious claims and that this was the intention of Congress.¹²¹ Following the Court's decision in *City of Boerne v. Flores*, in which the Court held that applying the RFRA to the states was not a proper exercise of Congressional power under Section Five of the Fourteenth Amendment,¹²² Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA") which requires the courts to determine the sincerity of an individual's religious beliefs.¹²³ Justice Alito notes in the *Hobby Lobby* decision that the propensity of institutionalized persons to feign religious beliefs when seeking accommodations was well known at the time of the passage of RLUIPA and it can therefore be inferred that Congress trusted the courts to identify insincere claims.¹²⁴

The possibility that the Supreme Court will act as the arbiter of individuals' religious beliefs, however, will make many people uncomfortable. While some argue that determining the sincerity of professed religious beliefs is a fact-intensive exercise for which the courts are well suited,¹²⁵ at a point, the Court interpreting a statute passed by Congress that necessitates an evaluation of the sincerity of a person's religious beliefs will necessarily come close to establishing criteria for the possession of religious beliefs. While the Supreme Court may be well suited to conduct fact-intensive inquiries, Congress must take care not to attempt to define criteria for such inquiries. Such an occurrence may face a challenge questioning whether the establishment of criteria for sincerely held religious beliefs is a valid exercise of governmental authority under the Establishment Clause of the First Amendment, or possibly even RFRA itself. It is clear that many aspects of the law in this arena are yet unmade and untested, which will lead to further litigation in federal courts by religious persons seeking to assert their rights.

C. Illustrative Application to Real Companies

The easiest way to bring the HHS rule out of the realm of abstractions is to apply it to existing closely held companies. I selected these companies in an attempt to capture a representative sample of closely held and family-

120. *Hobby Lobby*, 134 S.Ct. at 2774 ("HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere 'beliefs' of a corporation. HHS goes so far as to raise the specter of 'divisive polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric").

121. *Id.*

122. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

123. 42 U.S.C. § 2000cc, et seq. (2012).

124. *Hobby Lobby*, 134 S.Ct. at 2774.

125. See e.g., Adams & Barmore, *supra* note 118.

held companies. To facilitate this representative sample, I examine Hobby Lobby Stores, Inc. and Hearst Communications, Inc.

1. Hobby Lobby Stores, Inc.

The first company to which I apply the rule is the namesake of the case that spawned it, Hobby Lobby Stores, Inc. Hobby Lobby Stores was founded by David and Barbara Green in 1970.¹²⁶ As the Green's three children, Mart, Steve, and Darcy, became older, they took roles in Hobby Lobby Stores, and some founded their own related businesses.¹²⁷ The ownership structure of Hobby Lobby Stores consists of two classes of stock, voting and non-voting.¹²⁸ In closely held and family companies, such a division is not unusual.¹²⁹ Control of the company and operations depends upon control of the board of directors. If a board of directors is eliminated through the corporate charter or other appropriate avenue in accordance with state statute, then this oversight falls to the shareholders. Having an ownership structure as the Greens do with Hobby Lobby facilitates family control of the company, while having the ability, through the non-voting shares, to offer equity interests as collateral to financial institutions or as incentive compensation to officers or other employees.

For Hobby Lobby, all of the voting shares have been placed into a trust, of which each of the five members of the family are trustees, with each holding an equal voting interest as a function of their positions as trustees.¹³⁰ The non-voting shares are divided into various interests held by the individual members of the Green family.¹³¹ The proceeds of any sale or assignment of interest in these non-voting shares has been pre-determined by agreement between the members of the Green family.¹³² In the event of a sale or assignment, ninety percent of any proceeds must be granted to Christian ministries, with the remaining ten percent becoming available to provide for the health or education of members of the Green family.¹³³ If no members of the family need those resources for health or education, the remainder of the proceeds will be donated to Christian ministries as well.¹³⁴

126. *Our Story*, HOBBY LOBBY STORES, <http://www.hobbylobby.com/about-us/our-story> (last visited Apr. 1, 2017).

127. Telephone Interview with Peter Dobelbower, General Counsel, Hobby Lobby Stores (Nov. 5, 2015) (hereinafter, Dobelbower).

128. *Id.*

129. Though, sometimes it is forbidden for the purposes of receiving treatment as a closely held company under federal law. *See*, IRS, *supra* note 87.

130. Dobelbower, *supra* note 127.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

Hobby Lobby is well within the bounds of the HHS rule based on its ownership structure. Because the company is owned by the five members of the Green family, it meets the five-or-fewer threshold set forth in the HHS rule. Even if additional individuals with ownership interests were to be added to the ownership group, it is still likely that Hobby Lobby Stores would qualify under the HHS rule because of the present small ownership structure. The organization opposes providing coverage for certain contraceptive items and services because of its owners' religious objections and the organization is structured with no publicly traded ownership interests.

Despite meeting the strictures of the HHS rule, some may object to the idea that Hobby Lobby Stores is a closely-held company. In 2014, Hobby Lobby had an estimated \$3.7 billion in revenue and employed 28,000 people.¹³⁵ Hobby Lobby also operated in excess of six hundred stores across the country.¹³⁶ Even though the company is owned by the Green family, and the Green family unquestionably holds sincere religious beliefs, casual observers may be troubled by idea of a company with 28,000 employees having the ability to obtain a waiver from providing certain healthcare services to its employees.

2. The Hearst Corporation

Hearst, formally called Hearst Communications, Inc., is a media conglomerate with ownership interests in both print and digital media.¹³⁷ The corporation's founder, William Randolph Hearst, was a baron of print media in the late nineteenth and early twentieth centuries.¹³⁸ Mr. Hearst's reputation was so widely-known during his life that he inspired the 1951 classic film *Citizen Kane*.¹³⁹ Today, Hearst Communications owns more than two hundred businesses and operates in more than 150 countries.¹⁴⁰ Notable brands in which Hearst holds an ownership interest include ESPN, Car and Driver, Esquire, Harper's Bazaar, A+E Networks, Cosmopolitan, thirty local television networks, and various newspapers such as the San Francisco Chronicle, The Advocate, and the Houston Chronicle.¹⁴¹ Hearst

135. *America's Largest Private Companies: #118 Hobby Lobby Stores*, FORBES, <http://www.forbes.com/companies/hobby-lobby-stores/> (last visited Feb. 6, 2016).

136. *Id.*

137. *William R. Hearst*, HEARST COMM'N., INC., <https://www.hearst.com/about/bios/william-r-hearst> (last visited Feb. 6, 2016).

138. *History*, HEARST COMM'N., INC., <https://www.hearst.com/newsroom/history> (last visited Feb. 6, 2016).

139. *Id.*

140. *Id.*

141. *About Us*, HEARST COMM'N., INC., <https://www.hearst.com/about> (last visited Feb. 6, 2016).

Communications employs 20,000 individuals, produces \$10.3 billion in annual revenues,¹⁴² and is entirely family owned.¹⁴³

At the time of William Randolph Hearst's death, he had five sons.¹⁴⁴ His last will and testament established a series of trusts to manage the corporation's affairs.¹⁴⁵ Today, there are more than fifty members of the Hearst family; presumably, most—if not all—have ownership interests.¹⁴⁶ Because all the shares of the Hearst Corporation are held by members of the Hearst family and because all shareholders are lineal descendants of one of William Randolph Hearst's five sons, if Hearst were to profess religious beliefs and apply for a waiver, they would be successful in meeting all of the requirements for approval because they are not publicly listed and can meet the ownership rules under permissible share-aggregation practices. Most casual and non-casual observers alike would balk at the idea of a mass-media conglomerate worth tens of billions of dollars qualifying as a closely held corporation.¹⁴⁷

III. How to Fix the HHS rule: Putting Forth Solutions

Now that I have demonstrated the shortcomings of the HHS rule, the operative question becomes what can be done to effectuate an appropriate solution. The government has a clearly demonstrated interest in the provision of services covered under the contraceptive mandate. Contraceptive services can be invaluable for employees both in terms of their ability to facilitate women remaining in control of their bodies and in terms of a reduction in disease and other ailments.¹⁴⁸ On the other hand, many individuals hold deep-seated religious beliefs that make the contraceptive mandate morally objectionable for them. What is more, the Supreme Court has recognized legal protections for such individuals and the

142. *Hearst*, FORBES, <http://www.forbes.com/companies/hearst/> (Providing valuation metrics and other data for Hearst Communications, Inc.) (last visited Feb. 6, 2016).

143. Mark Lacter, *The Case of Ungrateful Heirs*, FORBES (Dec. 25, 2000), <http://www.forbes.com/forbes/2000/1225/6616137a.html>.

144. *Id.*

145. *Id.*

146. *Id.*

147. For comparison, Columbia Broadcasting System (CBS) is a similarly situated diversified media company, that similarly employs around twenty thousand employees, has revenues of \$13.66 Billion and an estimated enterprise value of \$30.3 Billion. See *CBS Corporation*, YAHOO FINANCE, <http://finance.yahoo.com/q/ks?s=CBS> (last visited Feb. 6, 2016).

148. *Preventive Care Benefits for Women*, HEALTHCARE.GOV, <https://www.healthcare.gov/preventive-care-women/>.

corporations they control.¹⁴⁹ These two competing interests make finding a way forward difficult.

Perhaps the easiest course of action for HHS and the federal government is to leave the rule intact as it is currently written. Because the rule has just recently taken effect, it is not yet clear how many companies will take advantage of the rule or how many employees will be impacted.¹⁵⁰ Leaving the rule as it is written also promotes stability and predictability for closely-held companies and will leave intact an existing regulatory regime. Furthermore, it provides flexibility—albeit at the cost of uncertainty for those who benefit from the coverage of these services—to future administrations who can use the regulatory process to adjust the national healthcare agenda to their political and social preferences.

One alternative to the current rule, which was even suggested by the Court in *Hobby Lobby*, is to abandon the rule and have the government bear the cost of the provision of the services enumerated in the contraceptive mandate. A second alternative may be to embrace the recent state-statutory creation of public-benefit corporations and to incentivize closely held companies with religious owners to reorganize as public-benefit corporations. Then, the government could bear the costs of the provision of the services enumerated in the contraceptive mandate to the employees of those firms.

A. *Little Sisters of the Poor*

Before the Supreme Court during the 2015 term was a challenge brought by a collection of religious non-profit corporations, styled by legal commentators as *Little Sisters of the Poor Home for the Aged v. Burwell*, but known on the Supreme Court docket as *Zubik v. Burwell*.¹⁵¹ *Little Sisters of the Poor* was a consolidation of six other challenges to the HHS rule as it is currently written, making use of RFRA.¹⁵² In the challenge, the petitioners argued that being forced to engage in the waiver process was a burden on

149. See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

150. See Jennifer Haberkorn, *Two Years Later, few Hobby Lobby Copycats Emerge* (Oct. 11, 2016), <http://www.politico.com/story/2016/10/obamacare-birth-control-mandate-employers-229627>.

151. *Little Sisters of the Poor Home for the Aged v. Burwell*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/little-sisters-of-the-poor-home-for-the-aged-v-burwell/> (last visited Apr. 1, 2017).

152. *Id.*; The certified questions were, (1) “[Whether] the availability of a regulatory method for nonprofit religious employers to comply with [the Department of Health and Human Services’] contraceptive mandate eliminate[s] either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell v. Hobby Lobby Stores, Inc.*” and (2) “[whether] HHS satisf[ies] RFRA’s demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection will not fulfill HHS’s regulatory objective—namely, the provision of no-cost contraceptives to the objector’s employees.” See *id.*

the exercise of their religion because their action—applying for the waiver—triggered the provision of services to which they object.¹⁵³ The petitioners also argued that there exists a less-restrictive way in which the government may achieve its compelling interest—simply paying for it themselves.¹⁵⁴

If the challenge had been successful, it would have set the stage for a for-profit company to bring a similar challenge. Because the Court held in *Hobby Lobby* that non-profit corporations and for-profit corporations must be treated similarly under RFRA,¹⁵⁵ if the Little Sisters of the Poor had been successful in their challenge a for-profit corporation would likely have been similarly successful in a subsequent challenge making use of the same argument. If such a result had occurred, the federal government would ostensibly have had the choice between rewriting the rule in some manner so as to comply with the decision or abandoning the rule altogether and providing the services mandated under the contraceptive mandate itself.

While the outcome of the Little Sisters of the Poor’s challenge seemed destined for a similar outcome to *Hobby Lobby*,¹⁵⁶ the result of the Sisters’ challenge was cast into doubt by Justice Scalia’s death, as he was a member of the Court’s close majority in *Hobby Lobby*. While uncertainty abounded over when Justice Scalia’s former seat would be filled,¹⁵⁷ the case was set for argument on March 23, 2016.¹⁵⁸ A 4-4 result, assuming the same votes

153. Emma Green, *The Little Sisters of the Poor are Headed to the Supreme Court*, ATLANTIC (Nov. 6, 2015), <http://www.theatlantic.com/politics/archive/2015/11/the-little-sisters-of-the-poor-are-headed-to-the-supreme-court/414729/>.

154. *Id.*

155. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2769 (2014) (“No known understanding of the term “person” includes *some* but not all corporations. The term “person” sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.”).

156. Particularly since the majority in *Hobby Lobby* seemingly implied that the waiver process may not meet the least restrictive means test in all circumstances. See *Hobby Lobby*, 134 S.Ct. at 2782 (“We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims”); See also *Hobby Lobby*, 134 S.Ct. at 2782 (“The principal dissent faults us for being “noncommittal” in refusing to decide a case that is not before us here. The less restrictive approach we describe accommodates the religious beliefs asserted in these cases, and that is the only question we are permitted to address”) (internal citation omitted).

157. Julie Edwards & Jeff Mason, *White House Narrows Search to Three for Supreme Court*, REUTERS (Mar. 12, 2016), <http://www.reuters.com/article/us-usa-court-obama-idUSKCN0WD2LE> (“Senate Republicans have vowed not to hold confirmation hearings or an up-or-down vote on any nominee picked by [President Obama] . . .”).

158. *Zubik v. Burwell*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/zubik-v-burwell/> (last visited Oct. 25, 2016).

as in *Hobby Lobby*, would have left lower court rulings in place.¹⁵⁹ Such a result would have been problematic, because even though the consolidated cases all were adverse decisions for the Little Sisters, there exists a case from the Eighth Circuit wherein similar groups were successful.¹⁶⁰ A 4-4 non-precedential decision would leave the Eighth Circuit result intact, perhaps thereby necessitating the Court accepting a similar Petition for Certiorari when a new justice was confirmed, due to the existence of a circuit split. The Court could also have elected to relist the case for argument after a new justice joined the Court. Despite lacking a ninth justice, the Court heard the case as scheduled.

Following oral argument, the Court took the unusual step of asking for additional briefs from the parties following oral argument.¹⁶¹ The Court's order requested that the parties explore ways in which contraceptive coverage could be provided to the employees of the challengers in a way that did not infringe the challengers' religious rights.¹⁶² In light of the briefs submitted pursuant to this order, the Court vacated the consolidated judgments of the appellate courts and remanded the cases back to the appropriate courts of appeals for further proceedings.¹⁶³ The Court employed this approach because, in the Court's view, there existed sufficient similarity in the post-order briefs that the challengers and the government could find a system that ensured the interests of the government—providing access to these services—and the interests of the challengers—not having their religious rights burdened—could be satisfied.¹⁶⁴ However some scholars disagree that a solution is likely, or even possible, at the appellate level; going so far as to call it an “intractable task.”¹⁶⁵

159. Joan Frawley Desmond, *What Will Justice Scalia's Death Mean for the Little Sisters of the Poor?*, NAT'L CATHOLIC REG. (Feb. 18, 2016), <http://www.ncregister.com/daily-news/what-will-justice-scalias-death-mean-for-the-little-sisters-of-the-poor/>.

160. See *Sharpe Holdings, Inc. v. United States Dep't of Health & Human Services*, 801 F.3d 927, 929 (8th Cir. 2015).

161. See *Losing Their Religion: New Briefs Further Complicate Supreme Court Contraception Battle*, ECONOMIST (Apr. 13, 2016), <http://www.economist.com/blogs/democracyinamerica/2016/04/losing-their-religion>.

162. March 29, 2016 Order, 577 US ---, at 1 (2016), available at https://www.supremecourt.gov/orders/courtorders/032916zr_3d9g.pdf.

163. *Zubik v. Burwell*, 136 S.Ct. 1557, 1560 (2016).

164. *Id.* at 1559-60.

165. Josh Blackman, *The Supreme Court's Punt on the Little Sisters of the Poor Cannot Be Returned*, VOLOKH CONSPIRACY (Sept. 23, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/23/the-supreme-courts-punt-on-the-little-sisters-of-the-poor-cannot-be-returned>.

With the election of Donald Trump and a unity government under the Republican party, it seems likely that the *Zubik* case will remain unresolved for the foreseeable future. As some legal scholars point out, it is unlikely that the new administration will continue to pursue the various circuit cases that were consolidated to form *Zubik*.¹⁶⁶ In such a scenario, the appropriate agencies would simply exempt organizations like the Little Sisters of the Poor from the mandate to which they object. Were this to happen, the political machinations surrounding the Supreme Court nomination process would become less relevant, as the Court would no longer have a controversy to resolve.

This seemingly happy ending for the plaintiffs in *Zubik* still leaves the broader issue of the HHS rule in place. As has been demonstrated above, a multi-tens-of-billions-of-dollars media conglomerate could conceivably gain a waiver under the current HHS scheme. This outcome is seemingly at odds with the *Hobby Lobby* decision, wherein RFRA was only applied to *small* businesses. Because the potential resolution of the *Zubik* plaintiffs' concerns does nothing to resolve to previously described flaws of the HHS rule, it is still necessary to consider alternatives other than one result or the other in the *Zubik* litigation.

B. A National Contraceptive Mandate Coverage Program

An alternative to the waiver program designed by HHS, raised by Justice Alito in the majority opinion for *Hobby Lobby*, is instituting a national program wherein the federal government bears the cost of providing the services required by the contraceptive mandate.¹⁶⁷ Establishing such a program would require an act of Congress; however, it would not require the formation of a new federal office or agency. Such a program could function similarly to the way in which women employed by closely held companies who receive waivers receive the services enumerated in the contraceptive mandate—the insurance company covers the services at no cost to the insured with reimbursement taking place behind the scenes

166. Josh Blackman, *Trump's Victory Expands the Supreme Court – and Shrinks Its Docket*, NAT'L REV. (Nov. 10, 2016), http://www.nationalreview.com/article/442069/donald-trumps-supreme-court-could-dismantle-obamas-executive-actions?utm_source=nr&utm_medium=twitter&utm_content=blackman&utm_campaign=obama-court.

167. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2780-81 (“The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers’ objections If, as HHS tells us, providing . . . [these services] . . . is a Government interest of the highest order, it is hard to understand HHS’s argument that it cannot be required under RFRA to pay anything in order to achieve this important goal”) (emphasis original).

between the government and the insurance company.¹⁶⁸ A national program could also be facilitated by the Centers for Medicare & Medicaid Services, under the HHS umbrella.

The key obstacle to implementing such a program would likely be cost. It is difficult to determine the cost of the provision of these services due to the dearth of data on the topic. One viable estimate may be \$483 million on an annual basis. In 2013, the Affordable Care Act facilitated women receiving over twenty-four million contraceptive prescriptions and saving \$483 million in out-of-pocket costs.¹⁶⁹ However, this figure is not a direct proxy because it consists of out-of-pocket costs saved, rather than the insurer's cost of providing that coverage or the employers' cost for the particular component of employee-health plans that goes toward providing contraceptive services. In the event that the *Zubik* litigation is pursued by the new administration, and an adverse decision for the government is the result, this solution will be the most prudent way to ensure access to the services enumerated under the contraceptive mandate, despite the uncertainty surrounding implementation and cost.

C. Public-Benefit Corporations

A second alternative to the existing waiver program are public benefit corporations. Public benefit corporations are a new collection of corporate forms that have been gaining popularity in recent years.¹⁷⁰ In 2008, the first state legislatures began to authorize alternative forms of corporate organization known as social enterprises.¹⁷¹ Despite being labeled as a public-benefit corporation, corporations that are organized in this manner are still largely considered for-profit entities.¹⁷² In addition to pursuing the traditional corporate goal of earning a profit, public-benefit companies may also seek to further public, social, or environmental ends.¹⁷³ Permitting such a corporate form essentially solves the problem presented in the age-old business law case, *Dodge v. Ford*,¹⁷⁴ which established the proposition that

168. NAT'L WOMEN'S LAW CENTER, *supra* note 82.

169. Press Release, *Republican Budget Puts Special Interests Ahead of Montana Women*, DEMOCRATIC POL'Y & COMM'NS CTR., available at <http://www.dpcc.senate.gov/files/documents/2015BudgetWomen/MontanaWomen2015.pdf>.

170. *Social Enterprise Law Tracker*, N.Y.U. SCHOOL OF LAW & N.Y.U. STERN, <http://www.socentlawtracker.org/#/bcorps> [hereinafter BENEFIT CORPS.] (last visited Apr. 1, 2017).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Dodge v. Ford Motor Co*, 204 Mich. 459, 459 (1919).

a for-profit enterprise must be primarily concerned with creating a profit for its shareholders.¹⁷⁵

The federal government could incentivize corporations with religious beliefs, such as Hobby Lobby Stores, Inc., to reorganize as public-benefit corporations. Such action would allow these companies to continue to operate as for-profit entities in addition to furthering and promoting their religious activities. Such a transition could be achieved through any number of tax-credit regimes or even an outright Congressional mandate under the Commerce Clause power, similar to the way in which Congress presently incentivizes certain actions by religious organizations under the tax code.¹⁷⁶

Concurrently, the federal government could institute a national program similar to that described earlier, but limit it to those women employed by public-benefit corporations. At present, thirty states have enacted legislation facilitating the existence of public-benefit corporations, including traditional corporate-law stronghold, Delaware.¹⁷⁷ This course of action would ensure access to essential contraceptive services without burdening small-business owners' religious beliefs, while also reducing the cost of engaging in such a program by ensuring that only those employers who object to the contraceptive mandate or otherwise engage in the provision of a public benefit are exempted.

The disadvantage of incentivizing such a transition is the lack of jurisprudence to guide owners of public-benefit companies. While certain areas of business law, such as partnership law, agency law, and corporate law have centuries of jurisprudence from which to glean guiding principles, public-benefit corporations are a recent invention and have been in existence for less than a decade. The benefits of this new statutory creation are counterbalanced by the lack of certainty regarding what law would apply in litigation. An argument could be made that, due to their altruistic focus, public-benefit corporations should be treated similarly to non-profit corporations. On the other hand, some states, such as Delaware, explicitly state in their statutory schemes that public-benefit corporations are for-profit entities that are permitted to focus on their shareholders' pecuniary interests in addition to producing public benefits for society.¹⁷⁸

175. Ford had been making use of his controlling interest in Ford Motor Company to decrease prices so as to expand affordability of the automobile in addition to using corporate funds to further other charitable ends. The Dodge brothers, holders of a minority interest of Ford Motor Co., opposed these practices due to their effect of reducing dividends and income attributed to the shares they held. *Id.* at 670-673.

176. See TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS, PUB. NO. 1828, INTERNAL REVENUE SERV., available at <https://www.irs.gov/pub/irs-pdf/p1828.pdf>.

177. BENEFIT CORPS., *supra* note 170.

178. 8 Del.C. § 362.

Conclusion

It is clear that the HHS rule on closely-held corporations is flawed. A rule that is intended to identify a discrete population of American corporations for participation in a regulatory program instead permits potentially tens of thousands of companies to opt out of providing preventative services identified as critical to women's health.¹⁷⁹ As written, the rule is overly inclusive, potentially allowing a company with 1,999 individuals holding ownership interests to qualify as closely held. The rule could also promote an increase in litigation among business partners and could install the Supreme Court as arbiter of whether someone's religious beliefs are sincerely held or legitimate.

In the coming months, the appellate courts may once again take up challenges to the current rule, brought by the Little Sisters of the Poor and others. The challengers argue that the rule is still a violation of the Religious Freedom Restoration Act. Based upon the contents of the supplemental briefs filed in *Zubik*, there may indeed be a way forward for the government and the challengers; though, as Professor Blackman suggests, the way forward may not be easy—or feasible at all. With the election of Donald Trump, the most likely way forward is the unilateral issuance of waivers to organizations like the Little Sisters of the Poor by the government. This would result in the government bearing the cost of providing these services to those who are employed by entities that are affiliated with a religion or are owned by persons with sincerely held religious beliefs that make the provision of contraceptive services objectionable.

Regardless of how the *Zubik* challenges are resolved, HHS and the federal government must reexamine their practice of issuing exemptions to companies controlled by religious individuals and the mechanism used to issue those exemptions. The best way to resolve problems with the current method is to implement a national program to bear the costs of the provision of contraceptive mandate services facilitated by the Department of Health and Human Services. The government could also provide incentives to companies held by religious owners to become public-benefit corporations; however, this may require Congressional action to amend the Affordable Care Act. Though there are only difficult ways forward, if the government is committed to ensuring access to these services for women, it may have bear the costs.

179. *Preventive Care Benefits for Women*, *supra* note 148.