
ESSAY

THE PRUDENTIAL THIRD-PARTY STANDING OF FAMILY-OWNED CORPORATIONS

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INTRODUCTION

On November 26, 2013, the Supreme Court agreed to decide whether for-profit corporations or their shareholders have standing to challenge federal regulations that implement the Patient Protection and Affordable Care Act (ACA).¹ At issue in the two cases consolidated for appeal, *Hobby Lobby*² and *Conestoga Wood Specialties*,³ are regulations mandating that employers with fifty or more employees offer health insurance that includes coverage for all contraceptives approved by the Food and Drug Administration (FDA).⁴ The plaintiffs assert that providing certain types of contraceptive

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¹ Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

² *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir.), cert. granted, 134 S. Ct. 678 (2013).

³ *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir.), cert. granted, 134 S. Ct. 678 (2013).

⁴ See 42 U.S.C. § 300gg-13(a)(4) (2006 & Supp. V 2011) (requiring coverage of women's preventive care provided for in the Health Resources and Services Administration (HRSA) guidelines); *Women's Preventive Services Guidelines*, HEALTH RESOURCES & SERVICES ADMIN., <http://www.hrsa.gov/womensguidelines> (last visited Jan. 26, 2014) (mandating coverage of “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity”). Over ninety challenges to the mandate have been filed, approximately half by for-profit corporations and half

care would be contrary to their religious beliefs and allege, therefore, that the mandate violates the Religious Freedom Restoration Act of 1993 (RFRA)⁵ as well as the First Amendment's Free Exercise Clause.⁶

The government does not dispute that the family owners of Hobby Lobby and Conestoga Wood Specialties are sincere in their religious objections.⁷ However, the mandate applies only to employers and imposes no direct duties upon corporate shareholders.⁸ Thus, a threshold issue in these cases and dozens of other pending cases involving for-profit corporations is whether any plaintiff has standing to challenge the mandate.⁹ Some courts have concluded that religious objections to the mandate are simply nonjusticiable.¹⁰ Other courts have found standing, either by endorsing the novel proposition that a for-profit business corporation is, itself, a person capable of religious exercise,¹¹ or by allowing individual owners who have no personal obligations or liability under the ACA's mandate to nevertheless interpose a religious objection.¹²

As even a quick summary of the existing circuit split reveals, resolution of the issues of first impression presented by *Hobby Lobby* and *Conestoga Wood Specialties* would require the Court to engage difficult questions at the intersection of religious faith and the corporate form.¹³ The Court's task is

by nonprofits. *HHS Mandate Information Central*, BECKET FUND, <http://www.becketfund.org/hhsinformationcentral> (last visited Jan. 26, 2014).

⁵ See 42 U.S.C. §§ 2000bb–2000bb-4 (2006), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (providing that the federal government may not substantially burden religious exercise without a compelling justification, even if the burden results from the application of a facially neutral law).

⁶ *Hobby Lobby*, 723 F.3d at 1120-21.

⁷ See Brief for Respondents at 15, *Hobby Lobby*, 134 S. Ct. 678 (No. 13-354), 2013 WL 5720377.

⁸ See 42 U.S.C. § 300gg-13(a)(4); see also *Autocam Corp. v. Sebelius*, 730 F.3d 618, 624 (6th Cir. 2013) (noting that “[t]he corporate form offers several advantages,” including “limitation of liability” (internal quotation marks and citations omitted)).

⁹ Article III of the U.S. Constitution limits the jurisdiction of the federal courts to disputes that are concrete enough to present a “case[.]” or “controvers[y].” U.S. CONST. art. III, § 2, cl. 1.

¹⁰ See, e.g., *Autocam*, 730 F.3d at 620; *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir.), *cert. granted*, 134 S. Ct. 678 (2013).

¹¹ *Hobby Lobby*, 723 F.3d at 1126, 1128-29.

¹² See, e.g., *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208, 1210, 1216-18 (D.C. Cir. 2013).

¹³ For a thorough analysis and thoughtful commentary on the merits issues, see Eugene Volokh, *Archive: Hobby Lobby, VOLOKH CONSPIRACY*, <http://www.volokh.com/category/hobby-lobby/> (last updated Dec. 11, 2013, 5:56 PM). See also Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2D 235, 237 (2013) (arguing that “the law of veil piercing provides the analytical framework currently missing” from the decisions addressing the mandate); Thomas E. Rutledge, *A Corporation Has No Soul—The Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. (forthcoming 2014) (manuscript at 26-56), available at <http://papers.ssrn.com/>

made more challenging by two background features of the legal landscape. First, although the Court has long held that corporations are legal persons and possess certain constitutional rights, the Court has never adopted a unified theory of corporate constitutional rights and has preferred to consider each issue on its own merits.¹⁴ Thus, the Court must consider the question of free exercise (whether framed as a constitutional or statutory analysis) without the benefit of clear principles to guide its analysis, and with limited institutional competence in matters of corporate governance.

Second, any holding the Court might render regarding individual or corporate standing would necessarily rest upon features of state corporate law. Because corporations are creatures of state law, the scope of the corporate charter as well as the governance rules that define the respective roles of shareholders, directors, and officers are determined by state, not federal law.¹⁵ For example, the salience of the fact that the cases before the Court involve closely held, family-owned corporations depends upon the extent to which a jurisdiction recognizes special rules for close corporations, including the flexibility to tailor the corporate contract to suit the investors' objectives.¹⁶

We offer a much simpler alternative: under well-established exceptions to the prudential rule against third-party standing, one party can sometimes assert the interests of a third party.¹⁷ Allowing *Hobby Lobby* and *Conestoga*

id=2294582; Dahlia Lithwick, *Corporations Are People, the Biblical Sequel*, SLATE (Nov. 26, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/supreme_court_and_obamacare_contraception_mandate_are_companies_persons.html.

¹⁴ See, e.g., Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 62 (2005); Charles R. O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 GEO. L.J. 1347, 1348 (1979); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 4 UTAH L. REV. 1629, 1631-63 (2011).

¹⁵ See STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 14 (2002).

¹⁶ Generalizations in this area are especially difficult because some jurisdictions take an expansive view of the fiduciary obligations owed among shareholders while others emphasize the importance of specific, contractual bargaining to protect minority interests. Compare *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663-64 (Mass. 1976) (holding that the majority shareholders of a close corporation owe a fiduciary "duty of utmost good faith and loyalty"), with *Nixon v. Blackwell*, 626 A.2d 1366, 1380 (Del. 1993) ("The tools of good corporate practice are designed to give a purchasing minority stockholder the opportunity to bargain for protection before parting with consideration.").

¹⁷ As a general matter, litigants may advance only their own claims. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." (citing *Tileston v. Ullman*, 318 U.S. 44 (1943))). But the Court has articulated exceptions to this rule that fit the circumstances of the *Hobby Lobby* and *Conestoga* cases. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972) (holding that a reproductive rights advocate had standing to

Wood Specialties to litigate religious objections to the mandate on behalf of their shareholders obviates the need for the Court to venture into uncharted territory.¹⁸ The crucial insight is that the corporation's injury need not be religious in nature for the religious objections to the ACA regulations to be adjudicated. So long as the corporate plaintiff is injured *economically* by the regulations, it has standing under Article III to challenge them. At that point, the corporation's assertion of the constitutional or statutory rights of absent third parties is properly analyzed under the rubric of third-party standing.¹⁹

Below, we first defend our claim that *Hobby Lobby* and *Conestoga Wood Specialties* present near-perfect examples of a situation in which prudential third-party standing would be appropriate.²⁰ As family-owned businesses, the corporations are "extension[s] of family relationships,"²¹ and there is every reason to expect that the corporations will serve as effective advocates for their owners. Moreover, unless the corporations can object on behalf of their shareholders, the shareholders may be "denied a forum in which to assert their own rights."²²

"assert the rights of unmarried persons denied access to contraceptives"); *Barrows v. Jackson*, 346 U.S. 249, 257 (1953) (granting third-party standing where "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court").

¹⁸ In analogous circumstances, the Ninth Circuit has used third-party standing doctrine to avoid unnecessary questions of first impression. In *EEOC v. Townley Engineering & Manufacturing Co.*, the court observed,

Townley [the corporation] urges this court to hold that it is entitled to invoke the Free Exercise Clause on its own behalf. Because Townley is merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs, it is unnecessary to address the abstract issue whether a for profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers.

859 F.2d 610, 619-20 (9th Cir. 1988). The Court's institutional role is broader, and the circuit split concerns the very issues the Ninth Circuit declined to decide, but we argue that the Ninth Circuit's cautious approach provides better guidance for the Court than any of the decisions below.

¹⁹ For a related approach, see Steven J. Willis, *Corporations, Taxes, and Religion: The Hobby Lobby and Conestoga Contraceptive Cases*, 65 S.C. L. REV. 1, 26-28 (2013), which argues that the corporation should have associational standing to assert unified shareholder interests because the corporation's interests are not distinct from those of its shareholders. Our argument, however, does not require a finding that shareholder interests flow through the corporation. Thus, our proposal does not call for a special approach to third-party standing in the corporate context.

²⁰ Although beyond the scope of our present argument, we note that one commentator offers third-party standing as the best approach to a wide range of constitutional questions involving corporations. See Brandon L. Garrett, *The Constitutional Standing of Corporations* 40-60 (Va. Pub. Law & Legal Theory Research Paper No. 2013-33, 2013), available at <http://ssrn.com/id=2330972>.

²¹ Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185, 1194 (2013).

²² See *Eisenstadt*, 405 U.S. at 446. Of course, asserting a right is not the same as establishing it. The point, rather, is that impediments to standing are not dispositive of, or necessarily even relevant to, the underlying merits.

Second, if the badly fractured decisions below do not already serve as a cautionary tale, we elaborate the difficulties the Court would encounter were it to accept the parties' invitation to wade into the morass of defining corporate constitutional rights. The inquiry is daunting because it involves application of an imperfectly defined right of free exercise to an imperfectly defined subject. Corporations are legal persons defined by state statutes, and while they enjoy certain constitutional rights,²³ the Court has not previously adopted an overarching theory that explains when corporations can assert rights and when they cannot.²⁴ The Court is at a disadvantage in addressing these questions as it lacks any particular expertise in matters of state corporate law. Put bluntly, we offer the Court a way to resolve the cases before it that, unlike the approaches advocated by the parties, avoids the need to decide questions of first impression regarding the free exercise rights of for-profit corporations.

I. THE CASE FOR THIRD-PARTY STANDING

Ordinarily, litigants may not assert the rights of third parties.²⁵ However, the Court has crafted an exception for cases like *Hobby Lobby* and *Conestoga*, in which the litigant seeks to assert the rights of related nonparties who face obstacles that prevent them from asserting those rights directly.²⁶ As summarized in a leading treatise, "third-party standing requires three elements: an injury in fact to a party, a close relationship to the nonparty whose rights are asserted, and some significant obstacle that impedes the nonparty's assertion of his own rights."²⁷ We address each element in turn.

A. *Injury in Fact*

Corporations that defy the ACA mandate are subject to penalties that satisfy the constitutional requirement of concrete injury. The ACA requires corporations to provide insurance coverage that includes "preventive care

²³ See Willis, *supra* note 19, at 35-36; see also Garrett, *supra* note 20, at 15-40.

²⁴ Cf. *Citizens United v. FEC*, 130 S. Ct. 876, 971 n.72 (2010) (Stevens, J., concurring in part and dissenting in part) ("Nothing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession, a nexus of . . . contracts, . . . or any other recognized model." (citations omitted)); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 501-06 (2011) (highlighting the importance of fundamental corporate theory for constitutional analysis of corporate rights).

²⁵ See *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

²⁶ See *supra* note 17.

²⁷ 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.9.3, at 737 (3d ed. 2008).

and screenings” for women as specified in guidelines set by the Health Resources and Services Administration.²⁸ Those guidelines require coverage of “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”²⁹ Failure to abide by the mandate triggers “immediate tax penalties, potential regulatory action, and possible private lawsuits.”³⁰ For Hobby Lobby, the tax penalties alone could total almost \$475 million per year.³¹ There is nothing abstract about a fine.³²

B. Close Relationship

In assessing third-party standing, the Court has required both a relationship between the litigant and the third party and a connection between that relationship and the alleged constitutional injury. In the foundational 1925 case of *Pierce v. Society of Sisters*, for instance, two private schools successfully challenged an Oregon state law requiring all children to attend public schools.³³ The plaintiff schools (each, incidentally, a corporation, and one a for-profit corporation)³⁴ alleged an economic injury on their own behalf,³⁵ and also a violation of substantive due process on behalf of parents wishing to send their children to private school.³⁶ The Court permitted the litigant corporations to assert the constitutional rights of the absent parents, finding that the close relationship between them was tightly connected to the alleged violation of the parents’ rights, and therefore justified permitting the schools to assert those rights on the parents’ behalf.³⁷

An even closer relationship exists in the cases involving closely held, family-owned businesses now before the Court, which should more than

²⁸ 42 U.S.C. § 300gg-13(a)(4) (2006 & Supp. V 2011).

²⁹ *Women’s Preventive Services Guidelines*, HEALTH RESOURCES & SERVICES ADMIN., <http://www.hrsa.gov/womensguidelines> (last visited Jan. 26, 2014).

³⁰ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1125 (10th Cir.) (citing 26 U.S.C. §§ 4980D, 4980H (2012); 29 U.S.C. § 1132 (2012)), *cert. granted*, 134 S. Ct. 678 (2013).

³¹ *See id.* (noting that this figure assumes that the term “individual” in § 4980D(b)(1) refers to each of the more than 13,000 individuals insured under Hobby Lobby’s plan).

³² *See Barrows v. Jackson*, 346 U.S. 249, 255-57 (1953) (holding that threat of “pocketbook injury” to litigant was sufficient to create a case or controversy, and permitting litigant to assert rights of absent third parties).

³³ 268 U.S. 510, 529-33, 535-36 (1925).

³⁴ *Id.* at 531-33.

³⁵ *Id.* at 531.

³⁶ *Id.* at 536.

³⁷ *Id.* at 534-36 (noting that the “unlawful interference” with the parents’ right to direct their children’s education would lead to “the consequent destruction of [the litigant corporations]’ business and property”).

suffice to establish a prudential basis for third-party standing. First, in all corporations, the relationship between shareholders and corporation is not one of arm's-length commercial dealing, as between vendor and vendee. Rather, when shareholders invest capital, they become equity owners and the corporation has a fiduciary obligation to protect their interests.³⁸ (By contrast, the rights of other stakeholders are defined mostly by contract.³⁹) Thus, even when control and ownership are separated, as in a typical public corporation in which a centralized board of directors makes decisions on behalf of passive investors, the interests of shareholders are central to the corporate enterprise.⁴⁰

Second, in close corporations like Hobby Lobby and Conestoga Wood Specialties, the shareholders define the scope and objectives of the business venture. As a practical matter, there is no separation of ownership and control.⁴¹ Thus, it is undisputed and unsurprising that the family owners of Hobby Lobby have been able to run the business “according to a set of Christian principles.”⁴² In this regard, moreover, it is worth noting that family businesses often reflect family value systems and are governed accordingly.⁴³

C. Significant Obstacles

Finally, the Court has limited prudential third-party standing to cases in which the nonparties face a substantial obstacle to litigating their interests

³⁸ FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 90-91 (1991). The extent to which a corporation's board must prioritize shareholder interests in any particular case is debatable, but only to the extent board independence from shareholders maximizes the long-term value of the enterprise for all participants, including shareholders. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 287-319 (1999) (arguing that directors serve the interests of the corporation—“all the individuals who make firm-specific investments and agree to participate in the extracontractual, internal mediation process within the firm”—not just the shareholders).

³⁹ EASTERBROOK & FISCHEL, *supra* note 38, at 90-91.

⁴⁰ Even corporate law scholars who embrace the board's independent power and take a dim view of shareholder participation in management acknowledge that boards must produce value for shareholders. See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003) (“[D]irector accountability for maximizing shareholder wealth remains an important component of director primacy.”).

⁴¹ However, even if a corporation has only a single shareholder, the corporate entity retains a distinct, legal existence. The rights and grievances of shareholders cannot be attributed to the corporation itself. See *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 472, 477, 480 (2006) (holding that alleged racial animus toward a corporation's sole shareholder did not invest the corporation with the right to bring a § 1981 claim).

⁴² *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1120 (10th Cir.), *cert. granted*, 134 S. Ct. 678 (2013).

⁴³ See Means, *supra* note 21 (“Whether organized as partnerships, corporations, or LLCs, family firms are economic institutions embedded in a context of family social roles and values.”).

directly. As the Court has repeatedly recognized, a lack of Article III standing may constitute just such an obstacle. In *Barrows v. Jackson*, for instance, the Court allowed a white seller of property to defend a damages action alleging breach of a racially restrictive covenant by invoking the equal protection rights of nonwhite purchasers.⁴⁴ The Court stated that, because no claim was asserted against the African American buyers of the property, “it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court,”⁴⁵ and concluded that “[t]he relation between the coercion exerted on respondent [seller] and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that *respondent is the only effective adversary* of the unworthy covenant in its last stand.”⁴⁶

The Court again addressed the importance of obstacles to a nonparty’s standing in *Eisenstadt v. Baird*, a case involving the distribution of contraceptives to an unmarried college student.⁴⁷ The defendant, William Baird, was charged with violating a criminal statute that prohibited distribution of contraceptives to unmarried individuals.⁴⁸ The Court allowed Baird to assert the equal protection rights of unmarried persons wishing to obtain contraceptives, relying on the fact that the absent third parties, “unmarried persons denied access to contraceptives in Massachusetts, . . . are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights.”⁴⁹

Similar obstacles to individual standing exist in the contraception mandate cases, in that the challenged regulations require the corporate defendants to provide coverage for all FDA-approved contraceptives but impose no obligations or liabilities of any kind on the individual plaintiffs.⁵⁰ Indeed, the individual plaintiffs’ choice to organize their businesses as corporations protects them from personal liability for the acts or omissions of the

⁴⁴ 346 U.S. 249, 251-52, 255-57 (1953). *Barrows* arose after *Shelley v. Kraemer*, 334 U.S. 1 (1948), in which the Court held that racially restrictive covenants were not enforceable against nonwhite purchasers. *Barrows* raised the question whether, notwithstanding *Shelley*, an action for damages could be brought by a co-covenantor against a breaching co-covenantor. 346 U.S. at 251.

⁴⁵ *Barrows*, 346 U.S. at 257.

⁴⁶ *Id.* at 259 (emphasis added).

⁴⁷ 405 U.S. 438, 440 (1972).

⁴⁸ *Id.* at 440-41.

⁴⁹ *Id.* at 446.

⁵⁰ See *Autocam Corp. v. Sebelius*, 730 F.3d 618, 624 (6th Cir. 2013) (reasoning that the decision to comply with, and the consequences associated with the mandate fall solely upon the corporation, not upon individual shareholders or officers).

corporations.⁵¹ Thus, like the African American property buyers in *Barrows*, or the unmarried contraceptive user in *Eisenstadt*, there are forceful arguments that the individual plaintiffs in *Hobby Lobby* and *Conestoga Wood Specialties* lack a personal Article III injury.⁵² The Court has repeatedly held that such standing concerns present a sufficient obstacle to permit third-party standing.⁵³

In sum, the third-party standing doctrine provides a straightforward answer to the threshold question of justiciability in *Hobby Lobby* and *Conestoga*. In both cases, and in others still percolating in the lower courts, a corporation that fails to offer the required healthcare coverage faces direct economic injury, but the religious owners whose constitutional interests are ultimately at stake lack any obvious basis for standing because the mandate does not apply to them. Therefore, the corporation may be “the only effective adversary” able to raise the religious objections of its controlling shareholders. As in *Eisenstadt* and *Barrows*, the economic penalty faced by the corporate litigants is closely intertwined with the religious interests of the third-party shareholders.⁵⁴ Moreover, when shareholders have the ability to control the corporation, as in a family-owned enterprise, the required “close relationship”⁵⁵ is present and there is every reason to believe that the corporation will advocate effectively for the owners’ religious interests, if permitted to do so.

⁵¹ See EASTERBROOK & FISCHER, *supra* note 38, at 11 (“‘Limited liability’ means only that those who contribute equity capital to a firm risk no more than their initial investments . . .”).

⁵² See *Autocam*, 730 F.3d at 624; *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 386-88 (3d Cir.), *cert. granted*, 134 S. Ct. 678 (2013).

⁵³ See *Eisenstadt*, 405 U.S. at 446 (noting the case for third-party standing was strengthened by the fact that the statutory restriction on the sale of contraception did not apply to the potential purchaser/users, such that the users would be “denied a forum in which to assert their own rights”); *Barrows v. Jackson*, 346 U.S. 249, 257 (1953) (granting standing where the suit in question presented the “unique situation . . . in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court”). The D.C. Circuit has recognized this dilemma and offered a pragmatic, if question-begging, standing-by-default argument: individual owners must have standing because the corporations do not, and someone must have the ability to challenge the law. *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208, 1216 (D.C. Cir. 2013). The third-party standing doctrine offers a more grounded solution.

⁵⁴ See *Eisenstadt*, 405 U.S. at 445 (“[M]ore important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests.”); *Barrows*, 346 U.S. at 259 (“The relation between the coercion exerted on respondent and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that respondent is the only effective adversary . . .”).

⁵⁵ See *supra* text accompanying note 27.

II. THE IMPLICATIONS OF STATE CORPORATE LAW

In their response to the government's petition for certiorari, the Hobby Lobby plaintiffs contend that because the family owners are "unanimous in their belief that the contraceptive-coverage requirement violates the religious values they attempt to follow" in their business, the "case is an ideal vehicle for addressing whether a for-profit business and its owners can exercise religion."⁵⁶ In fact, the shareholders' united position only clarifies that prudential third-party standing is the appropriate mode of analysis, because there is no daylight between the corporation's position and the third parties whose interests would be protected.⁵⁷ Only if the shareholders were in disagreement about the religious values at stake would there be any reason for the Court to question the corporation's ability to represent the shareholders' interests and, perhaps, to reach the difficult questions regarding separate corporate or individual standing.

Applying third-party standing analysis in *Hobby Lobby* and *Conestoga Wood Specialties* does leave important questions unanswered, but it is far from clear that the Court will ever need to resolve them. There are no circumstances in which controlling shareholders can prioritize their private values, whether religious or otherwise, over the fundamental goal of producing value for all stockholders.⁵⁸ For example, in a recent case involving a conflict between a minority investor that wanted the corporation to monetize its market position and controlling shareholders who sought to provide a community service and keep for-profit activities to a minimum, the Delaware Chancery Court held that "[t]he corporate form . . . is not an appropriate vehicle for purely philanthropic ends, at least not when there

⁵⁶ Brief for Respondents, *supra* note 7, at 20-21 (internal quotation marks and citation omitted). The government agrees that the issue of standing is properly before the Court. *See* Brief for the Petitioners at 26-31, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 678 (2013) (No. 13-354), 2014 WL 173486.

⁵⁷ *See* *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619-20 (9th Cir. 1988) (declining to "address the abstract issue whether a for profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers" because the closely held corporation was "merely the instrument" through which its owners expressed their uniformly held religious beliefs). In contrast, it is unlikely that a shareholder's religious beliefs would be given any weight in a public corporation. Given the diverse corporate congregation, the duty to maximize profits may be the only overarching tenet of the faith.

⁵⁸ *See In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 37 (Del. Ch. 2013) ("[T]he duty of loyalty therefore mandates that directors maximize the value of the corporation over the long-term for the benefit of the providers of equity capital, as warranted for an entity with perpetual life in which the residual claimants have locked in their investment."); *In re Novell, Inc. S'holder Litig.*, C.A. No. 6032-VCN, 2013 WL 322560, at *7 (Del Ch. Jan. 3, 2013) ("There is no single path that a board must follow in order to maximize stockholder value, but directors must follow a path of reasonableness which leads toward that end." (internal quotation marks and citation omitted)).

are other stockholders interested in realizing a return on their investment.”⁵⁹ As the court further observed, “[i]f [the controlling shareholders] were the only stockholders affected by their decisions, then there would be no one to object.”⁶⁰ Thus, absent shareholder unanimity, the Court might never need to decide the difficult questions of first impression regarding the free exercise rights of for-profit corporations.

To be clear, we assume that state corporate law will continue to require unanimous approval for any fundamental departure from the basic profit-seeking function of the corporate form.⁶¹ Under no circumstances can shareholders waive a corporation’s responsibility to comply with existing law; rather, the issue is whether the corporation can engage in costly defiance in order to vindicate a purely religious interest without violating its fiduciary obligation to its shareholders. Most corporate decisions involving religion will fall within the protection of the business judgment rule, so long as the controlling shareholders can articulate a long-term business interest served—for instance, building a brand identity, earning customer loyalty, and the like.⁶² However, to the extent corporate law goes further and permits a corporation to assert a supervening religious interest, even absent shareholder unanimity, the scope of the corporation’s newfound authority would be a matter of state law.

Thus, if the Court were to hold that for-profit corporations or their individual shareholders can object to the ACA mandate based on either statutory or constitutional rights to free exercise of religion, federal and state law principles would intertwine, ceding ultimate control over who may

⁵⁹ *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010).

⁶⁰ *Id.* We do not attempt here an exhaustive survey of state law rules regarding the obligation to maximize profits for shareholders, and we recognize the possibility that fiduciary constraints may vary in other jurisdictions. However, the general proposition that minority shareholder interests cannot be subverted to serve noncorporate purposes does not require precise elaboration. Also, to the extent state laws differ, the lack of uniformity only emphasizes the difficulty the Court would face were it to seek to define standing based upon state law rather than prudential Article III analysis.

⁶¹ *See, e.g.*, MODEL BUS. CORP. ACT § 7.32 (2011) (authorizing shareholders in close corporations to substantially modify the rules of corporate governance subject only to public policy limitations, but requiring that any such modifications be approved by all shareholders).

⁶² For example, if a store closes on Sundays it may lose significant business, but an increase in customer loyalty could lead to even greater long-term profitability. Moreover, absent some conflict of interest or serious defect in the decisionmaking process, the managers’ judgment would be protected by the business judgment rule. *See, e.g.*, *Shlensky v. Wrigley*, 237 N.E.2d 776, 777, 781 (Ill. App. Ct. 1968) (affirming, under the business judgment rule, dismissal of derivative shareholder lawsuit to compel “the installation of lights in Wrigley Field and the scheduling of night baseball games”).

litigate corporate free exercise claims to state lawmakers.⁶³ Such entanglement is unavoidable because, even if couched as a matter of federal constitutional law, a holding that for-profit corporations have free exercise rights would immediately raise questions about how to determine the precise content of a corporation's religious beliefs. And, again, because corporations are creatures of state law, these questions could be answered only by reference to state corporate law.

Hobby Lobby is closely held and its shareholders apparently hold uniform religious beliefs.⁶⁴ But easy cases make bad law.⁶⁵ Given a more typical corporation with shareholders of diverse religious beliefs, the method for determining which of those beliefs the corporation can adopt as its own would control the issue of free exercise. And, critically, states could adopt a wide range of approaches. Some states would surely continue to require shareholder unanimity, thereby restricting any right of free exercise to closely held businesses; others might empower even public corporations to declare religious beliefs through a charter amendment subject to a majority shareholder vote. States might also establish a separate business entity form to facilitate investment in a for-profit business defined by its religious identity.⁶⁶ In essence, the difficulty with recognizing corporate free exercise rights, as the Tenth Circuit did in *Hobby Lobby*, is that state control over corporate governance gives state lawmakers the power to determine whether and how those rights may be enforced.

Notably, the Court's previous foray into the First Amendment interests of corporations provides little comfort. Although it has received its fair share of critical commentary, *Citizens United v. FEC*,⁶⁷ a recent case involving campaign finance limitations imposed upon corporations, has not been

⁶³ The overlap of federal and state law is not, of course, unique to this area of corporate law. For instance, federal securities law regulating the inclusion of shareholder proposals in corporate proxy materials defers to state law regarding what matters are appropriate for shareholder action. 17 C.F.R. § 240.14a-8(i)(1) (2013). In the context of free exercise, however, a lack of uniformity would affect a fundamental constitutional right.

⁶⁴ See Brief for Respondents, *supra* note 7, at 20-21.

⁶⁵ See *Marshall v. Marshall*, 547 U.S. 293, 315 (2006) (Stevens, J., concurring in part and concurring in the judgment) ("The familiar aphorism that hard cases make bad law should extend to easy cases as well.").

⁶⁶ In recent years, a number of states have enacted new legislation to authorize the formation of so-called "benefit corporations," in which managers are authorized to pursue stated goals other than profit maximization. See, e.g., Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1008-10 (2013). It would be a relatively small step to include religion in a list of authorized, alternative purposes or to create a new "R-Corp" entity choice.

⁶⁷ 130 S. Ct. 876 (2010).

vulnerable to circumvention at the state level⁶⁸ because the Court's holding concerning the First Amendment right of free expression did not turn on state-specific issues of corporate law. The Court's holding in *Citizens United* relied, in part, on the potential value of corporate speech for listeners in a marketplace of ideas.⁶⁹ From that perspective, corporate speech could have value and thus merit protection regardless of whether corporations speak to participate in a collective deliberation about truth, or to express moral values, or more plausibly, whenever the cost of speaking is exceeded by the expected profits to be gained.⁷⁰ Moreover, the corporation's profit-seeking purposes could be advanced apart from any distinctive ethical values held by individual shareholders.

To be sure, our concerns about the interplay of federal and state law involve a fair bit of speculation. We do not know how the Court might rule in the first instance, and we do not purport to envision all possible responses that inventive state legislatures might devise. For our purposes, it suffices to observe that a wide range of outcomes is possible—and perhaps even likely—at the state level, given the intense controversy surrounding the religious issues at stake and the difficulty of addressing corporate standing without relying upon state law definitions of the corporation.

Therefore, to avoid these concerns and to better conserve the Court's reputational capital, we respectfully submit that prudential third-party standing provides the most successful solution to the general issue of justiciability. Our recommended approach is grounded principally in federal law and is based on prudential principles that rest upon constitutional law considerations within the Court's core area of expertise.

CONCLUSION

Unless the Court holds that the claims pursued by Hobby Lobby, Conestoga Wood Specialties, and other similarly situated businesses are

⁶⁸ To date, the Court has faced only one effort by a state court to circumvent *Citizens United*. In *American Tradition Partnership v. Bullock*, the Court reversed a Montana Supreme Court decision that held that the rationale of *Citizens United* did not apply in Montana. 132 S. Ct. 2490, 2491 (2012). The *Bullock* case underscores the desirability of basing any decision in *Hobby Lobby* and other pending cases on federal justiciability law, and not state corporate law. Cf. Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1264-65 (2011) (discussing the Founders' concern with the "truly deplorable" mischiefs that would ensue from nonuniform application of federal laws in different states).

⁶⁹ See 130 S. Ct. at 896; Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1052-53 (2011).

⁷⁰ Cf. C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 985-87 (2009) (arguing against the marketplace metaphor for speech protection and, concomitantly, against corporate speech rights).

nonjusticiable, thereby affirming the substantive provisions of the mandate by default, the Court faces an unpalatable choice: either inflate the fiction of corporate personhood to include the most uniquely human of traits—the ability to worship—or, no less problematic, flatly disregard the distinct legal personhood of corporate litigants so that individual owners can challenge laws that do not apply directly to them as infringements of their own religious liberty.

We have argued that these cases can be resolved more simply, and more appropriately, under the existing doctrine of prudential third-party standing. Rather than attributing injury to individuals not subject to the mandate or endowing a legal fiction with religious beliefs, third-party standing doctrine permits corporate plaintiffs to challenge the mandate by asserting the constitutional interests of others—that is, the religious beliefs of their shareholders.⁷¹

Reliance upon third-party standing doctrine to resolve *Hobby Lobby* and *Conestoga Wood Specialties* would be consistent with the Court's usual practice of proceeding cautiously and incrementally. Although other litigants have invited it to do so, the Court has studiously avoided defining the full scope of corporate constitutional rights⁷²—often by relying on the concept of third-party standing.⁷³ Even if there may come a time when the Court must decide whether a for-profit corporation can assert religious objections to governmental regulation, it is not necessary to decide that difficult question on the facts presented here. As Chief Justice Roberts wrote during his tenure on the D.C. Circuit, “if it is not necessary to decide more, it is necessary not to decide more.”⁷⁴

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⁷¹ Alternatively, one could take the position that the business owners' choice to incorporate for profit precludes their religious objection to the ACA mandate. However, not only would this approach rest upon malleable state law conceptions of the shareholder's role, but it would also require the Court to decide, as a matter of first impression, whether a for-profit corporation has an independent free exercise right.

⁷² See, e.g., *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978) (refusing to “address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment” and resolving the case on narrower grounds); see also Garrett, *supra* note 20, at 9-15.

⁷³ Cf. WRIGHT ET AL., *supra* note 27, at 712 (“The very difficulty of determining whether a litigant has a personal right, whether derived from the rights of others or standing independently, may justify direct reliance on the rights of others.”).

⁷⁴ *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).