2013

Section 2: Affordable Care Act

Institute of Bill of Rights Law at The College of William & Mary School of Law

II. Affordable Care Act

In This Section:

CONESTOGA WOOD SPECIALTIES CORPORATION; Norman Hahn; Norman Lemar Hahn; Anthony H. Hahn; Elizabeth Hahn; Kevin Hahn, Appellants

v.

SECRETARY OF the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; Secretary United States Department of Labor; Secretary United States Department of the Treasury; United States Department of Health and Human Services; United States Department of Labor; United States Department of the Treasury.

United States Court of Appeals, Third Circuit

Decided on July 26, 2013

[Excerpt; some footnotes and citations omitted.]

COWEN, Circuit Judge

Appellants Conestoga Wood Specialties Corporation ("Conestoga"), Norman Hahn, Elizabeth Hahn, Norman Lemar Hahn, Anthony Hahn, and Kevin Hahn (collectively, "the Hahns") appeal from an order of the District Court denying their motion for a preliminary injunction. In their Complaint, Appellants allege that regulations promulgated by the Department of Health and Human Services ("HHS"), which require group health plans and health insurance issuers to provide coverage for contraceptives, violate the Religious Freedom Restoration Act, ("RFRA") and the Free Exercise Clause of the First Amendment of the United States Constitution. The District Court denied a preliminary injunction, concluding that Appellants were unlikely to succeed on the merits of their claims. Appellants then filed an expedited motion for a stay pending appeal with this Court, which was denied. Now, we consider the fully briefed appeal from the District Court's denial of a preliminary injunction.

Before we can even reach the merits of the First Amendment and RFRA claims, we must consider a threshold issue: whether a for-profit, secular corporation is able to engage in religious exercise under the Free Exercise Clause of the First Amendment and the RFRA. As we conclude that for-profit, secular corporations cannot engage in religious exercise, we will affirm the order of the District Court.

I.

In 2010, Congress passed the Patient Protection and Affordable Care Act ("ACA"). The ACA requires employers with fifty or more employees to provide their employees with a minimum level of health insurance. The ACA requires non-exempt group plans to provide coverage without cost-sharing for preventative care and screening for women in accordance with guidelines created by the Health Resources and Services Administration ("HRSA"), a subagency of HHS.

The HRSA delegated the creation of guidelines on this issue to the Institute of

Medicine ("IOM"). The IOM recommended that the HRSA adopt guidelines that require non-exempt group plans to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." These recommended guidelines were approved by the HRSA… Appellants refer to this requirement as the "Mandate," and we use this term throughout this opinion. Employers who fail to comply with the Mandate face a penalty of $100 per day per offending employee. The Department of Labor and plan participants may also bring a suit against an employer that fails to comply with the Mandate.

II.

The Hahns own 100 percent of the voting shares of Conestoga. Conestoga is a Pennsylvania for-profit corporation that manufactures wood cabinets and has 950 employees. The Hahns practice the Mennonite religion. According to their Amended Complaint, the Mennonite Church "teaches that taking of life which includes anything that terminates a fertilized embryo is intrinsic evil and a sin against God to which they are held accountable." Specifically, the Hahns object to two drugs that must be provided by group health plans under the Mandate that "may cause the demise of an already conceived but not yet attached human embryo." These are "emergency contraception" drugs such as Plan B (the "morning after pill") and ella (the "week after pill")… Conestoga has been subject to the Mandate as of January 1, 2013, when its group health plan came up for renewal. As a panel of this Court previously denied an injunction pending appeal, Conestoga is currently subject to the Mandate, and in fact, Appellants' counsel represented during oral argument that Conestoga is currently complying with the Mandate.

III.

We review a district court's denial of a preliminary injunction for abuse of discretion, but review the underlying factual findings for clear error and questions of law de novo…

"A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if [] denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief."… We will first consider whether Appellants are likely to succeed on the merits of their claim, beginning with the claims asserted by Conestoga, a for-profit, secular corporation.

IV.
A.

First, we turn to Conestoga's claims under the First Amendment… The threshold question for this Court is whether Conestoga, a for-profit, secular corporation, can exercise religion. In essence, Appellants offer two theories under which we could conclude that Conestoga can exercise religion: (a) directly, under the Supreme Court's recent decision in *Citizens United*, and (b) indirectly, under the "passed

through" method that has been articulated by the Court of Appeals for the Ninth Circuit. We will discuss each theory in turn.

In *Citizens United*, the Supreme Court held that "the Government may not suppress political speech on the basis of the speaker's corporate identity," and it accordingly struck down statutory restrictions on corporate independent expenditure. *Citizens United* recognizes the application of the First Amendment to corporations generally without distinguishing between the Free Exercise Clause and the Free Speech Clause, both which are contained within the First Amendment. Accordingly, whether *Citizens United* is applicable to the Free Exercise Clause is a question of first impression.

…In analyzing whether constitutional guarantees apply to corporations, the Supreme Court has held that certain guarantees are held by corporations and that certain guarantees are "purely personal" because "the 'historic function' of the particular guarantee has been limited to the protection of individuals." The *Bellotti* Court observed:

> Corporate identity has been determinative in several decisions denying corporations certain constitutional rights, such as the privilege against compulsory self-incrimination, or equality with individuals in the enjoyment of a right to privacy, but this is not because the States are free to define the rights of their creatures without constitutional limit. Otherwise, corporations could be denied the protection of all constitutional guarantees, including due process and the equal protection of the laws…Whether or not a particular guarantee is "purely personal" or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.

Thus, we must consider whether the Free Exercise Clause has historically protected corporations, or whether the "guarantee is 'purely personal' or is unavailable to corporations" based on the "nature, history, and purpose of [this] particular constitutional provision."

In *Citizens United*, the Supreme Court pointed out that it has "recognized that First Amendment protection extends to corporations."… The *Citizens United* Court particularly relied on *Bellotti*, which struck down a state-law prohibition on corporate independent expenditures related to referenda issues…

Discussing *Bellotti*'s rationale, *Citizens United* stated that the case "rested on the principle that the Government lacks the power to ban corporations from speaking." …

We must consider the history of the Free Exercise Clause and determine whether there is a [] history of courts providing free exercise protection to corporations. We conclude that there is not. In fact, we are not aware of any case preceding the commencement of litigation about the Mandate, in which a for-profit, secular corporation was itself found to have free exercise rights. Such a total absence of caselaw takes on even greater significance when compared to the extensive list of Supreme Court cases addressing the free speech rights of corporations…

We are unable to determine that the "nature, history, and purpose" of the Free Exercise Clause supports the conclusion that for-profit, secular corporations are protected under this particular constitutional provision. Even if we were to disregard the lack of historical recognition of the right, we simply cannot understand how a for-profit, secular corporation—apart from its owners—can exercise religion…

In urging us to hold that for-profit, secular corporations can exercise religion, Appellants, as well as the dissent, cite to cases in which courts have ruled in favor of free exercise claims advanced by religious organizations. None of the cases relied on by the dissent involve secular, for-profit corporations. We will not draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular corporations can exercise religion…

Appellants also argue that *Citizens United* is applicable to the Free Exercise Clause because "the authors of the First Amendment only separated the Free Exercise Clause and the Free Speech Clause by a semi-colon, thus showing the continuation of intent between the two." We are not persuaded that the use of a semi-colon means that each clause of the First Amendment must be interpreted jointly.

In fact, historically, each clause has been interpreted separately...

Second, Appellants argue that Conestoga can exercise religion under a "passed through" theory, which was first developed by the Court of Appeals for the Ninth Circuit in *EEOC v. Townley Engineering & Manufacturing Company*, and affirmed in *Stormans, Inc. v. Selecky*. In *Townley* and *Stormans*, the Ninth Circuit held that for-profit corporations can assert the free exercise claims of their owners.

In *Townley*, the plaintiff was a closely-held manufacturing company whose owners made a "covenant with God requir[ing] them to share the Gospel with all of their employees." Townley, the plaintiff corporation, sought an exemption, on free exercise grounds, from a provision of Title VII of the Civil Rights Act that required it to accommodate employees asserting religious objections to attending the company's mandatory devotional services. Although the plaintiff urged the "court to hold that it is entitled to invoke the Free Exercise Clause on its own behalf," the Ninth Circuit deemed it "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." Rather, the court concluded that, "Townley is merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs." As "Townley presents no rights of its own different from or greater than its owners' rights," the Ninth Circuit held that "the rights at issue are those of Jake and Helen Townley." The court then examined the rights at issue as those of the corporation's owners, ultimately concluding that Title VII's requirement of religious accommodation did not violate the Townleys' free exercise rights.

The Ninth Circuit subsequently applied *Townley's* reasoning in *Stormans*. There, a pharmacy brought a Free Exercise Clause challenge to a state regulation requiring it to dispense Plan B, an emergency contraceptive drug. In analyzing whether the pharmacy had standing to assert the free exercise rights of its owners, the court emphasized that the pharmacy was a "fourth-generation, family-owned business whose shareholders and directors are made up entirely of members of the Stormans family." As in *Townley*, it "decline[d] to decide whether a for-profit corporation can assert its own rights under the Free Exercise Clause and instead examine[d] the rights at issue as those of the corporate owners."…

Appellants argue that Conestoga is permitted to assert the free exercise claims of the Hahns, its owners, under the *Townley*/*Stormans* "passed through" theory. After carefully considering the Ninth Circuit's reasoning, we are not persuaded. We decline to adopt the *Townley*/*Stormans* theory, as we believe that it rests on erroneous assumptions regarding the very nature of the corporate form. In fact, the Ninth Circuit did not mention certain basic legal principles governing the status of a corporation and its relationship with the individuals who create and own the entity. It is a fundamental principle that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created" the corporation. The "passed through" doctrine fails to acknowledge that, by incorporating their business, the Hahns themselves created a distinct legal entity that has legally distinct rights and responsibilities from the Hahns, as the owners of the corporation… Thus, under Pennsylvania law—where Conestoga is incorporated—"[e]ven when a corporation is owned by one person or family, the corporate form shields the individual members of the corporation from personal liability."

Since Conestoga is distinct from the Hahns, the Mandate does not actually require the Hahns to do anything. All responsibility for complying with the Mandate falls on Conestoga… [I]t is Conestoga that must provide the funds to comply with the Mandate—not the Hahns. We recognize that, as the sole shareholders of Conestoga, ultimately the corporation's profits will flow to the Hahns… "The fact that one person owns all of the stock does not make him and the corporation one and the same person, nor does he thereby become the owner of all the property of the corporation." The Hahn family chose to incorporate and conduct business through Conestoga, thereby obtaining both the advantages and disadvantages of the corporate form. We simply cannot ignore the distinction between Conestoga and the Hahns. We hold—contrary to *Townley* and *Stormans*—that the free exercise claims of a company's owners cannot "pass through" to the corporation.

B.

Next, we consider Conestoga's RFRA claim. Under the RFRA, "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless the

burden] (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." As with the inquiry under the Free Exercise Clause, our preliminary inquiry is whether a for-profit, secular corporation can assert a claim under the RFRA. Under the plain language of the statute, the RFRA only applies to a "person's exercise of religion."

Our conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion. Since Conestoga cannot exercise religion, it cannot assert a RFRA claim. We thus need not decide whether such a corporation is a "person" under the RFRA.

V.

Finally, we consider whether the Hahns, as the owners of Conestoga, have viable Free Exercise Clause and RFRA claims on their own. For the same reasons that we concluded that the Hahns' claims cannot "pass through" Conestoga, we hold that the Hahns do not have viable claims…

Thus, we conclude that the Hahns are not likely to succeed on their free exercise and RFRA claims.

VI.

As Appellants have failed to show that they are likely to succeed on the merits of their Free Exercise Clause and RFRA claims, we need not decide whether Appellants have shown that they will suffer irreparable harm, that granting preliminary relief will not result in even greater harm to the Government, and that the public interest favors the relief of a preliminary injunction. Therefore, we will affirm the District Court's order denying Appellants' motion for a preliminary injunction.

We recognize the fundamental importance of the free exercise of religion. As Congress stated, in passing the RFRA and restoring the compelling interest test to laws that substantially burden religion, "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution." Thus, our decision here is in no way intended to marginalize the Hahns' commitment to the Mennonite faith. We accept that the Hahns sincerely believe that the termination of a fertilized embryo constitutes an "intrinsic evil and a sin against God to which they are held accountable," and that it would be a sin to pay for or contribute to the use of contraceptives which may have such a result. We simply conclude that the law has long recognized the distinction between the owners of a corporation and the corporation itself. A holding to the contrary—that a for-profit corporation can engage in religious exercise—would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners.

JORDAN, Circuit Judge, dissenting.

Having previously dissented from the denial of a stay pending appeal in this case, I now have a second opportunity to consider the government's violation of the religious

freedoms of Conestoga Wood Specialties Corporation ("Conestoga") and its owners, the Hahns, a family of devout Mennonite Christians who believe in the sanctity of human life… My colleagues, at the government's urging, are willing to say that the Hahns' choice to operate their business as a corporation carries with it the consequence that their rights of conscience are forfeit.

That deeply disappointing ruling rests on a cramped and confused understanding of the religious rights preserved by Congressional action and the Constitution… I do not believe my colleagues or the District Court judge whose opinion we are reviewing are ill-motivated in the least, but the outcome of their shared reasoning is genuinely tragic, and one need not have looked past the first row of the gallery during the oral argument of this appeal, where the Hahns were seated and listening intently, to see the real human suffering occasioned by the government's determination to either make the Hahns bury their religious scruples or watch while their business gets buried. So, as I did the last time this case was before us, I respectfully dissent.

I. Background

Five members of the Hahn family—Norman, Elizabeth, Norman Lemar, Anthony, and Kevin—own 100 percent of Conestoga, which Norman founded nearly fifty years… The Hahns are hands-on owners. They manage their business and try to turn a profit, with the help of Conestoga's 950 full-time employees… They feel bound, as the District Court observed, "to operate Conestoga in accordance with their religious beliefs and moral principles." One manifestation of that commitment is the "Statement on the Sanctity of Human Life."…

Accordingly, the Hahns believe that facilitating the use of contraceptives, especially ones that destroy a fertilized ovum, is a violation of their core religious beliefs. Conestoga, at the Hahns' direction, had previously provided health insurance that omitted coverage for contraception. Then came the Patient Protection and Affordable Care Act (the "ACA") and related regulations… Under rules [] corporations like Conestoga must purchase employee health insurance plans that include coverage for "[a]ll Food and Drug Administration [("FDA")] approved contraceptive methods, sterilization procedures, and patient education and counseling."… This is what has been dubbed the "contraception mandate" (the "Mandate"), and it brooks no exception for those, like the Appellants, who believe that supporting the use of certain contraceptives is morally reprehensible and contrary to God's word. If the Hahns fail to have Conestoga submit to the offending regulations, the company will be subject to a "regulatory tax"—a penalty or fine—that will amount to about $95,000 per day and will rapidly destroy the business and the 950 jobs that go with it…

II. Standard of Review

To qualify for preliminary injunctive relief, a litigant must demonstrate "(1) a likelihood of success on the merits; (2) that it will

suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." "We review the denial of a preliminary injunction for an abuse of discretion, an error of law, or a clear mistake in the consideration of proof," and "any determination that is a prerequisite to the issuance of an injunction is reviewed according to the standard applicable to that particular determination."… Highly relevant to this case, "a court of appeals must reverse if the district court has proceeded on the basis of an erroneous view of the applicable law."

The Majority gives short shrift to the dispute over the standard of review that emerged during the earlier appeal in this case. My colleagues say simply that "[a] plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." That may be true, but it fails to address the problem that arose from the District Court's erroneous application of a more rigid standard than our case law requires…

It is true that we have not used the label "sliding scale" to describe our standard for preliminary injunctions, as numerous other circuit courts of appeals have. But we have said that, "in a situation where factors of irreparable harm, interests of third parties and public considerations strongly favor the moving party, an injunction might be appropriate even though plaintiffs did not demonstrate as strong a likelihood of ultimate success as would generally be required."… The Court thus erred, and we should say so.

Unlike the Majority, which tacitly endorses the District Court's application of an incorrect and unduly restrictive standard of review, I would apply the standard mandated by our own case law and used in the vast majority of our sister circuits.

III. Discussion

The Majority, like the District Court, evaluates only one of the four preliminary injunction factors: the likelihood of the Hahns' and Conestoga's success on the merits. Holding that the "Appellants have failed to show that they are likely to succeed on the merits of their Free Exercise Clause and RFRA claims," the Majority "[does] not decide whether Appellants have shown that they will suffer irreparable harm, that granting preliminary relief will not result in even greater harm to the Government, [or] that the public interest favors the relief of a preliminary injunction." My colleagues thereby avoid addressing, let alone weighing, the additional factors. I believe that they are wrong about the likelihood of success that both the Hahns and Conestoga should be credited with, and I am further persuaded that the remaining three factors, particularly the showing of irreparable harm, weigh overwhelmingly in favor of relief…

A. Likelihood of Success on the Merits

This case is one of many filed against the government in recent months by for-profit corporations and their owners seeking protection from the Mandate. So far, most of those cases have reached the preliminary

injunction stage only, and a clear majority of courts has determined that temporary injunctive relief is in order. I join that consensus, and note also the recent en banc decision of the United States Court of Appeals for the Tenth Circuit holding that two for-profit companies had "established [that] they are likely to succeed on their RFRA claim" and that the Mandate threatened them with irreparable harm.

…"[L]ikelihood of success" means that a plaintiff has "a reasonable chance, or probability, of winning."… In the sense pertinent here, the term "likelihood" embodies "[t]he quality of offering a prospect of success," or showing some promise. The Appellants have shown the requisite prospect of success.

1. Conestoga's Right to Assert RFRA and First Amendment Claims

I begin where the Majority begins and ends, with the issue of Conestoga's claim to religious liberty…

The Majority declares that there is no "history of courts providing free exercise protection to corporations." As my colleagues see it, " '[r]eligious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely human rights provided by the Constitution' " so religion must be "an inherently 'human' right" that cannot be exercised by a corporation like Conestoga. That reasoning fails for several reasons. First, to the extent it depends on the assertion that collective entities, including corporations, have no religious rights, it is plainly wrong, as numerous Supreme Court decisions have recognized the right of corporations to enjoy the free exercise of religion…

The Majority slips away from its own distinction between for-profit and non-profit entities when it tries to support its holding with a citation to the Supreme Court's observation that the Free Exercise Clause " 'secure[s] religious liberty in the individual by prohibiting any invasions thereof by civil authority.' " If that out-of-context clause really meant, as the Majority argues, that the right was limited to individuals, then all groups would be left in the cold, not just for-profit corporations. But that is manifestly not what the quoted language means…

Religious opinions and faith are in this respect akin to political opinions and passions, which are held and exercised both individually and collectively…. Indeed, the Supreme Court has specifically "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.' " It thus does nothing to advance the discussion to say that the Free Exercise Clause secures religious liberty to individuals. Of course it does. That does not mean that associations of individuals, including corporations, lack free exercise rights.

I am not suggesting that corporations enjoy all of the same constitutionally grounded rights as individuals do….

Contrary to the Majority's conclusion, there is nothing about the "nature, history, and purpose" of religious exercise that limits it to individuals. Quite the opposite; believers have from time immemorial sought strength in numbers. They lift one another's faith and, through their combined efforts, increase their capacity to meet the demands of their doctrine. The use of the word "congregation" for religious groups developed for a reason…

As the government and the Majority see it, religious rights are more limited than other kinds of First Amendment rights. All groups can enjoy secular free expression and rights to assembly, but only "religious organizations" have a right to religious liberty. Of course, that view leaves it to the government to decide what qualifies as a "religious organization," which ought to give people serious pause since one of the central purposes of the First Amendment is to keep the government out of the sphere of religion entirely.

Assuming, however, that the government had the competence to decide who is religious enough to qualify as a "religious organization," there is no reason to suppose that the Free Exercise guarantee is as limited as the government claims or the Majority accepts. Our Constitution recognizes the free exercise of religion as something in addition to other kinds of expression, not because it requires less deference, but arguably because it requires more. At the very least, it stands on an equal footing with the other protections of the First Amendment. The values protected by the religious freedom clauses of the First Amendment "have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance."…

But even if it were appropriate to ignore the Supreme Court's advice and focus on the person asserting the right rather than on the right at stake, there is a blindness to the idea that an organization like a closely held corporation is something other than the united voices of its individual members. The Majority detects no irony in its adoption of the District Court's comment that " '[r]eligious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely human rights provided by the Constitution' " while it is simultaneously denying religious liberty to Conestoga, an entity that is nothing more than the common vision of five individuals from one family who are of one heart and mind about their religious belief. Acknowledging "the Hahns' commitment to the Mennonite faith" on one hand, while on the other acting as if the Hahns do not even exist and are not having their "uniquely human rights" trampled on is more than a little jarring.

And what is the rationale for this "I can't see you" analysis? It is that for-profit corporations like Conestoga were "created to make money." It is the profit-making character of the corporation, not the corporate form itself, that the Majority treats as decisively disqualifying Conestoga from seeking the protections of the First Amendment or RFRA. That argument treats the line between profit-motivated and non-profit entities as much brighter than it actually is, since for-profit corporations

pursue non-profit goals on a regular basis. More important for present purposes, however, the kind of distinction the majority draws between for-profit corporations and non-profit corporations has been considered and expressly rejected in other First Amendment cases…

The forceful dissent of Judge John T. Noonan, Jr., in *EEOC v. Townley Eng'g & Mfg. Co.*, put the point plainly:

> The First Amendment, guaranteeing the free exercise of religion to every person within the nation, is a guarantee that [for-profit corporations may] rightly invoke[ ]. Nothing in the broad sweep of the amendment puts corporations outside its scope. Repeatedly and successfully, corporations have appealed to the protection the Religious Clauses afford or authorize. Just as a corporation enjoys the right of free speech guaranteed by the First Amendment, so a corporation enjoys the right guaranteed by the First Amendment to exercise religion.
>
> The First Amendment does not say that only one kind of corporation enjoys this right. The First Amendment does not say that only religious corporations or only not-for-profit corporations are protected. The First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion. All persons—and under our Constitution all corporations are persons—are free. A statute cannot subtract from their freedom.

Oddly, the government's opposing view, adopted by the Majority, appears to be itself a species of religion, based on the idea that seeking after filthy lucre is sin enough to deprive one of constitutional protection, and taking "[t]he theological position ... that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time." There is certainly in the text of the Constitution no support for this peculiar doctrine, and what precedent there is on the role of religion in the world of commerce is to the contrary. As the Tenth Circuit sitting en banc noted in *Hobby Lobby*, the Supreme Court's decisions establish that Free Exercise rights do not evaporate when one is involved in a for-profit business.

So, to recap, it is not the corporate form itself that can justify discriminating against Conestoga, and it is not the pursuit of profits that can justify it. Yet somehow, by the miracle-math employed by HHS and its lawyers, those two negatives add up to a positive right in the government to discriminate against a for-profit corporation. Thus, despite the Supreme Court's insistence that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," the government claims the right to force Conestoga and its owners to facilitate the purchase and use of contraceptive drugs and devices, including abortifacients, all the while telling them that they do not even have a basis to speak up in opposition. Remarkable.

I reject that power grab and would hold that Conestoga may invoke the right to religious liberty on its own behalf.

2. The Appellants' RFRA Claim

Turning to the merits of the Appellants' RFRA claim, I am satisfied that both Conestoga and the Hahns have shown a likelihood of success. RFRA has been called the "most important congressional action with respect to religion since the First Congress proposed the First Amendment," and it exists specifically to provide heightened protection to the free exercise of religion…

In short, RFRA restores the judicial standard of review known as "strict scrutiny," which is "the most demanding test known to constitutional law." The statute prohibits the Federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," except when the government can "demonstrat[e] that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." The term "exercise of religion" "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." A person whose religious practices are burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief."

a. Substantial Burden

Under RFRA, "a rule imposes a substantial burden on the free exercise of religion if it prohibits a practice that is both sincerely held by and rooted in the religious beliefs of the party asserting the claim." Within the related context of the Religious Land Use and Institutionalized Persons Act of 2000, a "substantial burden" exists where: (1) "a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other [persons] versus abandoning one of the precepts of his religion in order to receive a benefit"; or (2) "the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs."

The substantial burden test derives from the Supreme Court's decisions in *Sherbert* and *Yoder*. In *Sherbert*, the Court held that a state's denial of unemployment benefits to a Seventh–Day Adventist for refusing to work on Saturdays substantially burdened the exercise of her religious belief against working on Saturdays…

And in *Yoder* the Court held that a compulsory school attendance law substantially burdened the religious exercise of Amish parents who refused to send their children to high school. The burden in *Yoder* was a fine of between five and fifty dollars. The Court held that burden to be "not only severe, but inescapable," requiring the parents "to perform acts undeniably at odds with fundamental tenets of their religious belief."

The District Court here failed to appreciate the applicability of those precedents. It held, for two reasons, that the burden imposed by the Mandate on Conestoga and the Hahns was insubstantial. First, it said that

Conestoga, as a for-profit corporation, lacks religious rights and so can suffer no burden on them, and, relatedly, that any harm to the Hahns' religious liberty is "too attenuated to be substantial" because it is Conestoga, not they, that must face the Mandate. That line of argument is fallacious, for the reasons I have just discussed and will not repeat.

Relying on the recently reversed panel decision in *Hobby Lobby*, the District Court's second line of argument was that "the Hahns have not demonstrated that [the Mandate] constitute[s] a substantial burden upon their religion," because "the ultimate and deeply private choice to use an abortifacient contraceptive rests not with the Hahns, but with Conestoga's employees." As the District Court saw it, "any burden imposed by the regulations is too attenuated to be considered substantial" because "[a] series of events must first occur before the actual use of an abortifacient would come into play," including that "the payment for insurance [must be made] to a group health insurance plan that will cover contraceptive services ...; the abortifacients must be made available to Conestoga employees through a pharmacy or other healthcare facility; and a decision must be made by a Conestoga employee and her doctor, who may or may not choose to avail themselves to these services." "Such an indirect and attenuated relationship," the Court held, "appears unlikely to establish the necessary substantial burden."

The problem with that reasoning is that it fundamentally misapprehends the substance of the Hahns' claim. As the Seventh Circuit rightly pointed out when granting an injunction in the Mandate case before it, "[t]he religious-liberty violation at issue here inheres in the coerced coverage of contraception, abortifacients, sterilization, and related services, not—or perhaps more precisely, not only—in the later purchase or use of contraception or related services." In requiring them to provide the offending insurance coverage, the Mandate requires the Hahns and Conestoga to take direct actions that violate the tenets of their Mennonite faith, with the threat of severe penalties for non-compliance…

Even if Conestoga's and the Hahns' only religious objection were the ultimate use of the offending contraceptives by Conestoga employees, however, the fact that the final decision on use involves a series of sub-decisions does not render the burden on their religious exercise insubstantial. Nothing in RFRA suggests that indirect pressure cannot violate the statute. Indeed, even though a burden may be characterized as "indirect," "the Supreme Court has indicated that indirectness is not a barrier to finding a substantial burden." The claimant in *Thomas v. Review Board of Indiana Employment Security Division*, quit his job because, based on his religious beliefs, he could not work in a factory that produced tank turrets. The state denied him unemployment benefits and argued that his objection was unfounded because he had been willing to work in a different factory that produced materials that might be used for tanks. The Supreme Court held that, in determining whether Thomas's religious beliefs were burdened, it could not second-guess his judgment about what connection to

armament production was unacceptably close for him…

Moreover, if the indirectness of the ultimate decision to use contraceptives truly rendered insubstantial the harm to an employer, then no exemptions to the Mandate would be necessary...

It is true, as the Supreme Court cautioned in *United States v. Lee*, that "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs… [T]he Court held that the requirement to pay Social Security taxes substantially burdened a for-profit Amish employer's religious exercise…

Thus, I would hold that the District Court erred in concluding that the Mandate does not substantially burden Conestoga's and the Hahns' free exercise of religion.

b. Strict Scrutiny

If government action "substantially burdens" religious exercise, it will be upheld under RFRA only if it "is in furtherance of a compelling governmental interest," and "is the least restrictive means" of accomplishing that interest. Neither the Majority nor the District Court addressed that strict scrutiny test, because they disposed of the case on other grounds… Only the feeblest application of strict scrutiny could result in upholding the Mandate on this record.

i. Compelling Interest

Compelling interests are those "of the highest order" or "paramount interests." The government maintains that the Mandate advances two compelling governmental interests: "public health and gender equality."…

Preserving public health and ending gender discrimination are indeed of tremendous societal significance. The government can certainly claim "a compelling interest in safeguarding the public health by regulating the health care and insurance markets."…

Assuming for the sake of discussion that the Mandate may actually advance those interests, it must nevertheless be observed that the mere "invocation" of a "general interest in promoting public health and safety [or, for that matter, gender equality] ... is not enough" under RFRA. The government must show that the application of the Mandate to the Hahns and Conestoga in particular furthers those compelling interests…

The government's arguments against accommodating the Hahns and Conestoga are "undermined by the existence of numerous exemptions [it has already made] to the ... mandate." By its own choice, the government has exempted an enormous number of employers from the Mandate, including "religious employers" who appear to share the same religious objection as Conestoga and the Hahns, leaving tens of millions of employees and their families untouched by it… So, when the government's proffered compelling interest applies equally to employers subject to a law and those exempt from it, "it is difficult to see how [the] same findings [supporting the government's interest] alone can preclude

any consideration of a similar exception" for a similarly situated plaintiff…

ii. Least Restrictive Means

Nor can the government affirmatively establish that the Mandate is the least restrictive means of advancing its interests in health and gender equality. Statutes fail the "least restrictive means" test when they are "overbroad" or "underinclusive." The underinclusiveness here is manifest, as just described…

The Hahns and Conestoga argue that the government could directly further its interest in providing greater access to contraception without violating their religious exercise…

In response, the government argues that the Appellants misunderstand the least-restrictive-means test and that their proposed alternatives "would require federal taxpayers to pay the cost of contraceptive services for the employees of for-profit, secular companies."

It is the government that evidently misunderstands the test, for while the government need not address every conceivable alternative, it "must refute the alternative schemes offered by the challenger," ultimately settling on a policy that is "necessary" to achieving its compelling goals. And it must seek out religiously neutral alternatives before choosing policies that impinge on religious liberty. In those responsibilities, the government has utterly failed… Because the government has not refuted that it could satisfy its interests in the wider distribution of contraception through any or all of the means suggested by Conestoga and the Hahns, without burdening their rights to religious liberty, the government has not shown that the Mandate is the least restrictive means of addressing those interests…

Accordingly, the government has not met the burdens of strict scrutiny, and I would hold that Conestoga and the Hahns have established a likelihood of succeeding on the merits of their RFRA claim.

3. The Appellants' First Amendment Claim

Conestoga and the Hahns also bring a separate claim under the First Amendment. As previously discussed, the Supreme Court in *Smith* held that the Free Exercise Clause is not implicated when the government burdens a person's religious exercise through laws that are neutral and generally applicable…

In my view, the Mandate is not generally applicable, and it is not neutral. "A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." Here, as already noted, the government has provided numerous exemptions, large categories of which are unrelated to religious objections… And it seems less than neutral to say that some religiously motivated employers—the ones picked by the

government—are exempt while others are not… Under the First Amendment, therefore, the Mandate is to be subjected to strict scrutiny. As discussed above in relation to the RFRA claim brought by Conestoga and the Hahns, the Mandate does not pass that daunting test, and, accordingly, they have demonstrated a reasonable likelihood of succeeding on their First Amendment claim.

B. Irreparable Harm

Focusing only on the question of likelihood of success on the merits, neither the District Court nor the Majority evaluated whether Conestoga and the Hahns have demonstrated irreparable harm…

"Irreparable harm is injury for which a monetary award cannot be adequate compensation."… Threats to First Amendment rights are often seen as so potentially harmful that they justify a lower threshold of proof to show a likelihood of success on the merits.

Because the government demanded that the Hahns and Conestoga capitulate before their appeal was even heard, and because the District Court denied preliminary injunctive relief, the severe hardship has begun. Faced with ruinous fines, the Hahns and Conestoga are being forced to pay for the offending contraceptives, including abortifacients, in violation of their religious convictions, and every day that passes under those conditions is a day in which irreparable harm is inflicted…

C. The Remaining Injunction Factors

Conestoga and the Hahns have also met the remaining preliminary injunction factors. A preliminary injunction would not result in greater harm to the government but would merely restore the status quo between the parties…. [T]he harm to Conestoga and the Hahns caused by the denial of the preliminary injunction vastly outweighs the harm to the government were an injunction to be granted… Although a preliminary injunction in this case might "temporarily interfere[ ] with the government's goal of increasing cost-free access to contraception and sterilization," that interest "is outweighed by the harm to the substantial religious-liberty interests on the other side."

In addition, a preliminary injunction would not harm the public interest… An injunction would simply put Conestoga's employees in the same position as the tens of millions of employees and their families whose employers have already been exempted from the Mandate.

IV. Conclusion

This is a controversial […] but in the final analysis it should not be hard for us to join the many courts across the country that have looked at the Mandate and concluded that the government should be enjoined from telling sincere believers in the sanctity of life to put their consciences aside and support other people's reproductive choices. The District Court's ruling should be reversed and a preliminary injunction should issue.

HOBBY LOBBY STORES, INC.; Mardel, Inc.; David Green; Barbara Green; Mart Green; Steve Green; Darsee Lett, Plaintiffs–Appellants,

v.

Kathleen SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; United States Department of Health and Human Services; Hilda Solis, Secretary of the United States Department of Labor; United States Department of Labor; Timothy Geithner, Secretary of the United States Department of Treasury; United States Department of the Treasury, Defendants–Appellees.

United States Court of Appeals, Tenth Circuit

Decided on June 27, 2013

[Excerpt; some footnotes and citations omitted.]

TYMKOVICH, Circuit Judge

This case requires us to determine whether the Religious Freedom Restoration Act and the Free Exercise Clause protect the plaintiffs—two companies and their owners who run their businesses to reflect their religious values. The companies are Hobby Lobby, a craft store chain, and Mardel, a Christian bookstore chain. Their owners, the Greens, run both companies as closely held family businesses and operate them according to a set of Christian principles. They contend regulations implementing the 2010 Patient Protection and Affordable Care Act force them to violate their sincerely held religious beliefs. In particular, the plaintiffs brought an action challenging a regulation that requires them, beginning July 1, 2013, to provide certain contraceptive services as a part of their employer-sponsored health care plan. Among these services are drugs and devices that the plaintiffs believe to be abortifacients, the use of which is contrary to their faith.

We hold that Hobby Lobby and Mardel are entitled to bring claims under RFRA, have established a likelihood of success that their rights under this statute are substantially burdened by the contraceptive-coverage requirement, and have established an irreparable harm. But we remand the case to the district court for further proceedings on two of the remaining factors governing the grant or denial of a preliminary injunction…

Accordingly, for the reasons set forth below and exercising jurisdiction under 28 U.S.C. § 1292(a)(1), we reverse the district court's denial of the plaintiffs' motion for a preliminary injunction and remand with instructions that the district court address the remaining two preliminary injunction factors and then assess whether to grant or deny the plaintiffs' motion.

I. Background & Procedural History

A. The Plaintiffs

The plaintiffs in this case are David and Barbara Green, their three children, and the businesses they collectively own and operate: Hobby Lobby Stores, Inc. and Mardel, Inc. David Green is the founder of

Hobby Lobby, an arts and crafts chain with over 500 stores and about 13,000 full-time employees. Hobby Lobby is a closely held family business organized as an S-corp… Mart Green is the founder and CEO of Mardel, an affiliated chain of thirty-five Christian bookstores with just under 400 employees, also run on a for-profit basis.

As owners and operators of both Hobby Lobby and Mardel, the Greens have organized their businesses with express religious principles in mind…

Furthermore, the Greens allow their faith to guide business decisions for both companies….

The Greens operate Hobby Lobby and Mardel through a management trust (of which each Green is a trustee), and that trust is likewise governed by religious principles. The trust exists "to honor God with all that has been entrusted" to the Greens and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries." The trustees must sign "a Trust Commitment," which among other things requires them to affirm the Green family statement of faith and to "regularly seek to maintain a close intimate walk with the Lord Jesus Christ by regularly investing time in His Word and prayer."

As is particularly relevant to this case, one aspect of the Greens' religious commitment is a belief that human life begins when sperm fertilizes an egg…

B. The Contraceptive–Coverage Requirement

Under the Patient Protection and Affordable Care Act (ACA), employment-based group health plans covered by the Employee Retirement Income Security Act (ERISA) must provide certain types of preventive health services. One provision mandates coverage, without cost-sharing by plan participants or beneficiaries, of "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA] ." HRSA is an agency within the Department of Health and Human Services (HHS).

When the ACA was enacted, there were no HRSA guidelines related to preventive care and screening for women. As a result, HHS asked the Institute of Medicine [] to develop recommendations to help implement these requirements. In response, the Institute issued a report recommending [] that the guidelines require coverage for " '[a]ll Food and Drug Administration [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed by a provider."

HRSA and HHS adopted this recommendation, meaning that employment-based group health plans covered by ERISA now must include FDA-approved contraceptive methods… Four of the twenty approved methods—two types of intrauterine devices (IUDs) and the emergency contraceptives commonly known as Plan B and Ella—can function by preventing the implantation of a fertilized egg. The remaining methods function by preventing fertilization.

C. Exemptions from the Contraceptive–Coverage Requirement

A number of entities are partially or fully exempted from the contraceptive-coverage requirement.

First, HHS "may establish exemptions" for "group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services...."

HHS regulations currently define a "religious employer" as an organization that: (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization described in a provision of the Internal Revenue Code that refers to churches, their integrated auxiliaries, conventions or associations of churches, and to the exclusively religious activities of any religious order.

This definition of religious employer might change, however, as the federal agencies responsible for implementing the preventive services portion of the ACA have proposed a new rule that would eliminate the first three requirements above and clarify that the exemption is available to all non-profit organizations falling within the scope of a certain Internal Revenue Code provision.

Second, the government has proposed an accommodation for certain other non-profit organizations, including religious institutions of higher education, that have maintained religious objections to contraceptive coverage yet will not fall within the amended definition of a religious employer…

Third, if a business does not make certain significant changes to its health plans after the ACA's effective date, those plans are considered "grandfathered" and are exempt from the contraceptive-coverage requirement. Grandfathered plans may remain so indefinitely.

Fourth, businesses with fewer than fifty employees are not required to participate in employer-sponsored health plans…

Relying on information released by the White House and HHS, the plaintiffs estimate that at least 50 million people, and perhaps over a 100 million, are covered by exempt health plans. The government argues that the number of grandfathered health plans will decline over time, that grandfathered plans may already cover the objected-to contraceptives, and that financial incentives exist to push small businesses into the health insurance market, in which case they would have to comply with the contraceptive-coverage requirement…

No exemption, proposed or otherwise, would extend to for-profit organizations like Hobby Lobby or Mardel. And the various government agencies responsible for implementing the exceptions to the contraceptive-coverage requirement have announced that no proposed exemption will extend to for-profit entities under any

circumstances because of what the government considers an important distinction, discussed further below, between for-profit and non-profit status.

D. The Expected Effect of the Contraceptive–Coverage Requirement

The Greens run the Hobby Lobby health plan, a self-insured plan, which provides insurance to both Hobby Lobby and Mardel employees. Hobby Lobby and Mardel cannot qualify for the "grandfathered" status exemption because they elected not to maintain grandfathered status prior to the date that the contraceptive-coverage requirement was proposed.

Nevertheless, the Greens object to providing coverage for any FDA-approved contraceptives that would prevent implantation of a fertilized egg. Because the Greens believe that human life begins at conception, they also believe that they would be facilitating harms against human beings if the Hobby Lobby health plan provided coverage for the four FDA-approved contraceptive methods that prevent uterine implantation (Ella, Plan B, and the two IUDs). The government does not dispute the sincerity of this belief.

The Greens present no objection to providing coverage for the sixteen remaining contraceptive methods…

According to the plaintiffs, the corporations' deadline to comply with the contraceptive-coverage requirement is July 1, 2013. If the Hobby Lobby health plan does not cover all twenty contraceptive methods by that date, the businesses will be exposed to immediate tax penalties, potential regulatory action, and possible private lawsuits.

The most immediate consequence for Hobby Lobby and Mardel would come in the form of regulatory taxes: $100 per day for each "individual to whom such failure relates." The plaintiffs assert that because more than 13,000 individuals are insured under the Hobby Lobby plan (which includes Mardel), this fine would total at least $1.3 million per day, or almost $475 million per year… If the corporations instead drop employee health insurance altogether, they will face penalties of $26 million per year.

E. Procedural History

The plaintiffs filed suit on September 12, 2012, challenging the contraceptive-coverage requirement under RFRA, the Free Exercise Clause of the First Amendment, and the Administrative Procedure Act. The plaintiffs simultaneously moved for a preliminary injunction on the basis of their RFRA and Free Exercise claims. The district court denied that motion.

The plaintiffs then appealed the denial of the preliminary injunction and moved for injunctive relief pending appeal. A two-judge panel denied relief pending appeal, adopting substantially the same reasoning as the district court. The plaintiffs then sought emergency relief under the All Writs Act from the Supreme Court, which also denied relief.

The plaintiffs subsequently moved for initial en banc consideration of this appeal, citing the exceptional importance of the questions presented. We granted that motion. And

given Hobby Lobby and Mardel's July 1 deadline for complying with the contraceptive-coverage requirement, we granted the plaintiffs' motion to expedite consideration of this appeal.

II. The Religious Freedom Restoration Act

Hobby Lobby and Mardel's central claims here arise under the Religious Freedom Restoration Act. A plaintiff makes a prima facie case under RFRA by showing that the government substantially burdens a sincere religious exercise. The burden then shifts to the government to show that the "compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."…

The principal questions we must resolve here include: (1) whether Hobby Lobby and Mardel are "persons" exercising religion for purposes of RFRA; (2) if so, whether the corporations' religious exercise is substantially burdened; and (3) if there is a substantial burden, whether the government can demonstrate a narrowly tailored compelling government interest.

III. Subject–Matter Jurisdiction

Before turning to the preliminary injunction standard, we must resolve two issues that bear on our subject-matter jurisdiction—standing and the Anti–Injunction Act.

A. Standing

We begin by examining whether Hobby Lobby and Mardel have standing to sue in federal court. Article III of the Constitution limits federal judicial power to "Cases" and "Controversies."…

We conclude that Hobby Lobby and Mardel have Article III standing. Both companies face an imminent loss of money, traceable to the contraceptive-coverage requirement. Both would receive redress if a court holds the contraceptive-coverage requirement unenforceable as to them…

B. The Anti–Injunction Act

A second possible impediment to our subject-matter jurisdiction is the Anti–Injunction Act (AIA). Although the plaintiffs and the government agree that the AIA does not apply here, "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."…

The AIA dictates, with statutory exceptions inapplicable to this case, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."…

In this case, the corporations' challenge relates to the government's authority under 26 U.S.C. § 4980D, which imposes a "tax" on any employer that does not meet the ACA's health insurance requirements, including the contraceptive-coverage requirement… If an employer fails to provide health insurance, the employer is subject to a tax under § 4980H. And, as the

Supreme Court recently instructed, when Congress uses the term "tax," it is a strong indication that Congress intends the AIA to apply.

Still, the AIA does not apply to every lawsuit "tangentially related to taxes," and the corporations' suit is not challenging the IRS's ability to collect taxes… [Rather,] Hobby Lobby and Mardel are not seeking to enjoin the collection of taxes or the execution of any IRS regulation; they are seeking to enjoin the enforcement, by whatever method, of one HHS regulation that they claim violates their RFRA rights.

Indeed, a regulatory tax is just one of many collateral consequences that can result from a failure to comply with the contraceptive-coverage requirement.

And just as the AIA does not apply to any suit against the individual mandate, which is enforced by the IRS, so too does the AIA not apply to any suit against the contraceptive-coverage requirement, even though it also may be enforced by the IRS…

Both sides agree that the AIA should not apply for essentially these same reasons. We are convinced by this reasoning and proceed to resolve the merits of the RFRA claim.

IV. Preliminary Injunction Standard

…We review the denial of a preliminary injunction for abuse of discretion…

Under the traditional four-prong test for a preliminary injunction, the party moving for an injunction must show: (1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-moving party; and (4) an injunction is in the public interest.

Hobby Lobby and Mardel urge that we apply a relaxed standard under which it can meet its burden for a preliminary injunction by showing the second, third, and fourth factors "tip strongly in [its] favor."… But we need not resolve whether this relaxed standard would apply here, given that a majority of the court holds that Hobby Lobby and Mardel have satisfied the likelihood-of-success prong under the traditional standard.

The district court ruled that the corporations failed the likelihood-of-success element because even closely held family businesses like Hobby Lobby and Mardel are not protected by RFRA.

We disagree with this conclusion and determine that the contraceptive-coverage requirement substantially burdens Hobby Lobby and Mardel's rights under RFRA. And at this stage, the government has not shown a narrowly tailored compelling interest to justify this burden.

V. Merits

A. Hobby Lobby and Mardel Are "Persons Exercising Religion" Under RFRA

RFRA provides, as a general rule, that the "Government shall not substantially burden a person's exercise of religion." The parties dispute whether for-profit corporations, such as Hobby Lobby and Mardel, are persons exercising religion for purposes of RFRA.

We thus turn to the question of whether Hobby Lobby, as a family owned business furthering its religious mission, and Mardel, as a Christian bookstore, can take advantage of RFRA's protections.

The government makes two arguments for why this is not the case. First, it cites to civil rights statutes and labor laws that create an exemption for religious organizations…The government [] argues that, as a matter of statutory interpretation, RFRA should be read to carry forward the supposedly preexisting distinction between non-profit, religious corporations and for-profit, secular corporations. Second, the government asserts that the for-profit/non-profit distinction is rooted in the Free Exercise Clause. It suggests Congress did not intend RFRA to expand the scope of the Free Exercise Clause. The government therefore concludes RFRA does not extend to for-profit corporations.

We reject both of these arguments. First, we hold as a matter of statutory interpretation that Congress did not exclude for-profit corporations from RFRA's protections. Such corporations can be "persons" exercising religion for purposes of the statute. Second, as a matter of constitutional law, Free Exercise rights may extend to some for-profit organizations.

1. Statutory Interpretation
a. The Dictionary Act

We begin with the statutory text. RFRA contains no special definition of "person." Thus, our first resource in determining what Congress meant by "person" in RFRA is the Dictionary Act, which instructs: "In determining the meaning of any Act of Congress, unless the context indicates otherwise * * * the word[ ] 'person' ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Thus, we could end the matter here since the plain language of the text encompasses "corporations," including ones like Hobby Lobby and Mardel.

In addition, the Supreme Court has affirmed the RFRA rights of corporate claimants, notwithstanding the claimants' decision to use the corporate form.

b. Other Statutes

Given that no one disputes at least some types of corporate entities can bring RFRA claims, the next question is whether Congress intended to exclude for-profit corporations, as opposed to non-profit corporations, from RFRA's scope. Notably, neither the Dictionary Act nor RFRA explicitly distinguishes between for-profit and non-profit corporations; the Dictionary Act merely instructs that the term "persons" includes corporations.

At the same time, we acknowledge the Dictionary Act definition does not apply if "the context indicates otherwise." Generally, "context" here "means the text of the Act of Congress surrounding the word at issue, or the text of other related congressional Acts." The government contends that RFRA's "context" points to exemptions for religious employers in other statutes, and in particular it directs us to the religious exemptions

contained in Title VII, the Americans with Disabilities Act (ADA), and the National Labor Relations Act (NLRA). But rather than providing contextual support for excluding for-profit corporations from RFRA, we think these exemptions show that Congress knows how to craft a corporate religious exemption, but chose not to do so in RFRA…

In short, the government believes Congress used "person" in RFRA as extreme shorthand for something like "natural person or 'religious organization' as that term was used in exemptions for religious organizations as set forth in Title VII, the ADA, and the NLRA."

This reading strikes us as strained. Indeed, the exemptions present in Title VII, the ADA, and the NLRA suggest the opposite inference from what the government draws. Rather than implying that similar narrowing constructions should be imported into statutes that do not contain such language, they imply Congress is quite capable of narrowing the scope of a statutory entitlement or affording a type of statutory exemption when it wants to. The corollary to this rule, of course, is that when the exemptions are not present, it is not that they are "carried forward" but rather that they do not apply…

c. Case Law

The government nonetheless points to *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, for the idea that the for-profit/non-profit distinction was well-established in Congress's mind before it enacted RFRA. We disagree with the government's interpretation of *Amos*.

Amos involved employees of non-profit and arguably non-religious businesses run by the Mormon Church. These businesses had fired certain Mormon employees who did not follow church behavioral standards, and the employees sued under Title VII. The Church moved to dismiss based on Title VII's exemption for "religious corporation[s]."…

The plaintiffs countered "that if construed to allow religious employers to discriminate on religious grounds in hiring for nonreligious jobs, [the exemption] violates the Establishment Clause." The district court agreed, reasoning in part that Title VII's exemption unlawfully advanced religion because it could "permit churches with financial resources impermissibly to extend their influence and propagate their faith by entering the commercial, profit-making world."

The Supreme Court reversed. It concluded this particular part of the district court's reasoning was incorrect because it assumed the existence of for-profit activities yet none of the Mormon businesses at issue operated on a for-profit basis. The Court never reached the question of how for-profit activity might have changed its analysis…

From these references to non-profit status in *Amos*, the government concludes that the for-profit/non-profit distinction matters a great deal. But we do not see what the government sees in *Amos*… At best [] *Amos* leaves open the question of whether for-

profit status matters for Title VII's religious employer exemption…

Nor do the other post-RFRA circuit cases on which the government relies provide more guidance…

In conclusion, the government has given us no persuasive reason to think that Congress meant "person" in RFRA to mean anything other than its default meaning in the Dictionary Act—which includes corporations regardless of their profit-making status.

2. Free Exercise

The government further argues that the "[t]he distinction between non-profit, religious organizations and for-profit, secular companies is rooted in the text of the First Amendment." It claims this understanding of the First Amendment informed what Congress intended by "person" in RFRA. Undoubtedly, Congress's understanding of the First Amendment informed its drafting of RFRA, but we see no basis for concluding that such an understanding included a for-profit/nonprofit distinction.

a. RFRA's Purpose

RFRA was Congress's attempt to legislatively overrule *Employment Division v. Smith*. *Smith* had abrogated much of the Supreme Court's earlier jurisprudence regarding whether a neutral law of general application nonetheless impermissibly burdened a person's Free Exercise rights. The pre-*Smith* test exempted such a person from the law's constraints unless the government could show a compelling need to apply the law to the person. *Smith* eliminated that test on the theory that the Constitution permits burdening Free Exercise if that burden results from a neutral law of general application.

Congress responded to *Smith* by enacting RFRA, which re-imposed a stricter standard on both the states and the federal government…

Congress, through RFRA, intended to bring Free Exercise jurisprudence back to the test established before *Smith*. There is no indication Congress meant to alter any other aspect of pre-*Smith* jurisprudence—including jurisprudence regarding who can bring Free Exercise claims. We therefore turn to that jurisprudence.

b. Corporate and For–Profit Free Exercise Rights

It is beyond question that associations—not just individuals—have Free Exercise rights…

Accordingly, the Free Exercise Clause is not a " 'purely personal' guarantee[ ] ... unavailable to corporations and other organizations because the 'historic function' of the particular [constitutional] guarantee has been limited to the protection of individuals." As should be obvious, the Free Exercise Clause at least extends to associations like churches—including those that incorporate…

In short, individuals may incorporate for religious purposes and keep their Free Exercise rights, and unincorporated

individuals may pursue profit while keeping their Free Exercise rights…

This position is not "rooted in the text of the First Amendment," and therefore could not have informed Congress's intent when enacting RFRA. As an initial matter, the debates in Congress surrounding the adoption of the First Amendment demonstrate an intent to protect a range of conduct broader than the mere right to believe whatever one chooses…

We [] believe that a constitutional distinction would conflict with the Supreme Court's Free Exercise precedent. First, we cannot see why an individual operating for-profit retains Free Exercise protections but an individual who incorporates—even as the sole shareholder—does not, even though he engages in the exact same activities as before… Religious associations can incorporate, gain those protections, and nonetheless retain their Free Exercise rights.

Moreover, when the Supreme Court squarely addressed for-profit individuals' Free Exercise rights in *Lee* and *Braunfeld*, its analysis did not turn on the individuals' unincorporated status. Nor did the Court suggest that the Free Exercise right would have disappeared, using a more modern formulation, in a general or limited partnership, sole professional corporation, LLC, S-corp, or closely held family business like we have here.

In addition, sincerely religious persons could find a connection between the exercise of religion and the pursuit of profit…

We are also troubled—as we believe Congress would be—by the notion that Free Exercise rights turn on Congress's definition of "non-profit."…

[T]he government cites to the Supreme Court's recent *Hosanna–Tabor* decision, where the Court recognized a ministerial exception that foreclosed review of the propriety of the decision of a "church" (understood in a broad sense that includes all religions) to hire or retain a "minister" (with the same broad meaning). In recognizing this ministerial exception, the Court found the exception precluded a claim brought under the Americans with Disabilities Act by a former employee of a school run by a denomination of the Lutheran church. The Court reiterated the uncontroversial proposition that "the text of the First Amendment ... gives special solicitude to the rights of religious organizations." From this language, the government draws a narrow application of the Free Exercise Clause.

We do not share this interpretation. The main point of the Court was that the Religion Clauses add to the mix when considering freedom of association. But it does not follow that because religious organizations obtain protections through the Religion Clauses, all entities not included in the definition of religious organization are accorded no rights…

The government [also] raises the specter of future cases in which, for example, a large publicly traded corporation tries to assert religious rights under RFRA. That would certainly seem to raise difficult questions of

how to determine the corporation's sincerity of belief. But that is not an issue here…

[We find that] Hobby Lobby and Mardel [] qualify as "persons" under RFRA.

B. Substantial Burden

The next question is whether the contraceptive-coverage requirement constitutes a substantial burden on Hobby Lobby and Mardel's exercise of religion.

The government urges that there can be no substantial burden here because "[a]n employee's decision to use her health coverage to pay for a particular item or service cannot properly be attributed to her employer."…

This position is fundamentally flawed because it advances an understanding of "substantial burden" that presumes "substantial" requires an inquiry into the theological merit of the belief in question rather than the intensity of the coercion applied by the government to act contrary to those beliefs…

No one disputes in this case the sincerity of Hobby Lobby and Mardel's religious beliefs. And because the contraceptive-coverage requirement places substantial pressure on Hobby Lobby and Mardel to violate their sincere religious beliefs, their exercise of religion is substantially burdened within the meaning of RFRA.

1. The Substantial Burden Test

Our most developed case discussing the substantial burden test is *Abdulhaseeb v. Calbone*. In Abdulhaseeb, we were required to resolve a RFRA claim brought by [] a Muslim prisoner who raised a religious objection to the prison's failure to provide him a halal diet. Abdulhaseeb alleged that the prison cafeteria's failure to serve halal food violated his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), a statute that adopts RFRA's "substantial burden" standard.

In analyzing *Abdulhaseeb's* claim, we held that a government act imposes a "substantial burden" on religious exercise if it: (1) "requires participation in an activity prohibited by a sincerely held religious belief," (2) "prevents participation in conduct motivated by a sincerely held religious belief," or (3) "places substantial pressure on an adherent ... to engage in conduct contrary to a sincerely held religious belief." Our analysis in *Abdulhaseeb* only concerned the third prong of this test, related to "substantial pressure." [T]he same is true here.

The substantial pressure prong rests firmly on Supreme Court precedent, in particular: *Thomas v. Review Board of the Indiana Employment Security Division*.

The plaintiff in *Thomas* was a Jehovah's Witness who had worked for a company that owned both a foundry and factory… Although he had no objection to working in the foundry, he raised a religious objection to his factory job, claiming that "he could not work on weapons without violating the principles of his religion." He quit his job and was [] denied unemployment benefits. He then challenged this decision as

improperly burdening his right to exercise his religion…

In considering the Free Exercise claim, the Court noted that the plaintiff could not clearly articulate the basis for the difference between processing steel that might be used in tanks and manufacturing the turrets themselves. [The Court held that] "[p]articularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner ... correctly perceived the commands of [his] faith. Courts are not arbiters of scriptural interpretation."…

Accepting the plaintiff's religious beliefs as sincere, the Court then examined "the coercive impact" upon him… On that score, the Court found a substantial burden:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

United States v. Lee similarly demonstrates that the burden analysis does not turn on whether the government mandate operates directly or indirectly, but on the coercion the claimant feels to violate his beliefs…

Given the foregoing, our first step in *Abdulhaseeb* was to identify the belief in question [] and to determine if the belief was sincerely held. Finding it was, we stated that "the issue is not whether the lack of a halal diet that includes meats substantially burdens the religious exercise of any Muslim practitioner, but whether it substantially burdens Mr. Abdulhaseeb's own exercise of his sincerely held religious beliefs." We concluded that the prison cafeteria's "failure to provide a halal diet either prevents Mr. Abdulhaseeb's religious exercise, or, at the least, places substantial pressure on Mr. Abdulhaseeb not to engage in his religious exercise by presenting him with a Hobson's choice—either he eats a non-halal diet in violation of his sincerely held beliefs, or he does not eat." Thus, the plaintiff faced a substantial burden.

2. Applying the Substantial Burden Test

…First, we must identify the religious belief in this case. The corporate plaintiffs believe life begins at conception. Thus, they have what they describe as "a sincere religious objection to providing coverage for Plan B and Ella..." And they allege a "sincere religious objection to providing coverage for certain contraceptive [IUDs]..."

Second, we must determine whether this belief is sincere. The government does not dispute the corporations' sincerity, and we see no reason to question it either.

Third, we turn to the question of whether the government places substantial pressure on the religious believer. Here, it is difficult to characterize the pressure as anything but substantial…

[W]e believe that Hobby Lobby and Mardel have made a threshold showing regarding a substantial burden. Ordinarily, the question

of substantial burden would involve subsidiary factual issues. But in the district court, the government did not question the significance of the financial burden… Thus, the district court record leaves only one possible scenario: Hobby Lobby and Mardel incurred a substantial burden on their ability to exercise their religion because the law requires Hobby Lobby and Mardel to:

• compromise their religious beliefs,
• pay close to $475 million more in taxes every year, or
• pay roughly $26 million more in annual taxes and drop health-insurance benefits for all employees.

This is precisely the sort of Hobson's choice described in *Abdulhaseeb*, and Hobby Lobby and Mardel have established a substantial burden as a matter of law.

…

C. Compelling Interest and Least Restrictive Means

As noted above, even at the preliminary injunction stage, RFRA requires the government to demonstrate that mandating a plaintiff's compliance with the contraceptive-coverage requirement is "the least restrictive means of advancing a compelling interest."…

The interest must also be narrowly tailored. "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'..."

1. Compelling Interest

The government asserts two interests here: "the interests in [1] public health and [2] gender equality." We recognize the importance of these interests. But they nonetheless in this context do not satisfy the Supreme Court's compelling interest standards.

First, both interests as articulated by the government are insufficient under *O Centro* because they are "broadly formulated interests justifying the general applicability of government mandates."…

Second, the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people…

2. Least Restrictive Means

Even if the government had stated a compelling interest in public health or gender equality, it has not explained how those larger interests would be undermined by granting Hobby Lobby and Mardel their requested exemption…

3. Hobby Lobby and Mardel Employees

Finally, we note a concern raised both at oral argument and in the government's briefing that Hobby Lobby and Mardel are, in effect, imposing their religious views on their employees or otherwise burdening their employees' religious beliefs. But Hobby Lobby and Mardel do not prevent employees from using their own money to purchase the four contraceptives at issue here…

In sum, for all of these reasons, Hobby Lobby and Mardel have established they are likely to succeed on their RFRA claim.

VI. Remaining Preliminary Injunction Factors

Having concluded that Hobby Lobby and Mardel are likely to succeed on the merits, we turn to the remaining preliminary injunction factors: whether Hobby Lobby and Mardel face irreparable harm; whether the balance of equities tips in Hobby Lobby and Mardel's favor; and whether an injunction is in the public interest. The district court did not analyze these factors [] but Hobby Lobby and Mardel nonetheless ask that we reach them.

A. Propriety of Reaching the Remaining Factors

"If the district court fails to analyze the factors necessary to justify a preliminary injunction, this court may do so [in the first instance] if the record is sufficiently developed." The record we have is the record the parties chose to create below—it is the record they deemed sufficient for the district court to decide the preliminary injunction question. For each element, we believe this record suffices for us to resolve each of the remaining preliminary injunction factors…

[T]he government nowhere contested the factual adequacy or accuracy of Hobby Lobby and Mardel's allegations, and given that those allegations were established through a verified complaint, they are deemed admitted for preliminary injunction purposes.

In short, the record before us is enough to resolve the remaining preliminary injunction factors. Given Hobby Lobby and Mardel's July 1 deadline, prudence strongly counsels in favor of reaching those factors. Thus, we would reach them and find that they favor Hobby Lobby and Mardel…

B. Analysis of Remaining Factors

1. Irreparable Harm

Hobby Lobby and Mardel have established a likely violation of RFRA. We have explicitly held [] that establishing a likely RFRA violation satisfies the irreparable harm factor…

2. Balance of Equities

Nor is there any question about the balance of equities. A preliminary injunction would forestall the government's ability to extend all twenty approved contraceptive methods to Hobby Lobby and Mardel's 13,000 employees…

3. Public Interest

Finally, as stated above, "it is always in the public interest to prevent the violation of a party's constitutional rights."… [A]ccommodating the two companies in this case does not undermine the application of the contraceptive-coverage requirement to the vast number of employers without religious objections…

In sum, all preliminary injunction factors tip in favor of Hobby Lobby and Mardel, and we would therefore remand to the district court with instructions to enter a preliminary injunction.

VII. Conclusion

For the reasons set forth above, we reverse the district court's denial of the plaintiffs' motion for a preliminary injunction and remand with instructions that the district court address the remaining two preliminary injunction factors and then assess whether to grant or deny the plaintiffs' motion. The Clerk is directed to issue the mandate forthwith.

HARTZ, Circuit Judge, concurring:

I join Judge Tymkovich's opinion but write separately to [express that] I think (1) that all corporations come within the protection of the Free Exercise Clause and RFRA and (2) that the substantial-burden analysis here is a simple one.

…

GORSUCH, joined by KELLY and TYMKOVICH, Circuit Judges, concurring.

…I write to explain why the Greens themselves, as individuals, are also entitled to relief and why the Anti–Injunction Act does not preclude us from supplying that relief…

No doubt, the Greens' religious convictions are contestable. Some may even find the Greens' beliefs offensive. But no one disputes that they are sincerely held religious beliefs…

I write to emphasize that, even if the parties are wrong and the AIA does apply to this case, it still wouldn't allow us to avoid reaching the merits. It wouldn't because the government has expressly waived any reliance on the AIA: not only did it fail to raise the AIA as a defense in the district court, it discouraged us from applying the statute when we invited additional briefing on the matter. So long as the AIA affords the government only a waivable defense—so long as it doesn't impose on the courts a jurisdictional limit on our statutory authority to entertain this case—we are bound to reach the merits. And a waivable defense, we are persuaded, is all the AIA provides…

In the end, the AIA shows none of the hallmarks of a jurisdictional restriction, and has many features that collectively indicate otherwise. The government can waive its application, and it has done so before us. Given that, we can be sure, perhaps doubly sure, that reaching the merits of this case is appropriate and indeed our duty.

BACHARACH, J., concurring.

…I believe that Hobby Lobby Stores, Inc. and Mardel, Inc. are "persons" under the Religious Freedom Restoration Act. I write separately to:

• discuss the need for a remand so that the district court can address the balancing elements of the preliminary-injunction inquiry and
• address prudential standing and conclude that we should instruct the district court to dismiss the Greens' claims.

I. The Need for Remand to the District Court on the Balancing Elements

I respectfully decline to join Parts VI(A), (B)(2), and (B)(3) of the plurality opinion because I believe that the required balancing of interests should be conducted by the district court rather than the court of appeals…

The district court did err, as the plurality concludes, by holding that Hobby Lobby and Mardel are unlikely to succeed on the merits. Still, Hobby Lobby and Mardel can obtain a preliminary injunction only if they persuade a court of three additional elements: (1) irreparable injury; (2) avoidance of injury to the public interest; and (3) greater injury to themselves, if a preliminary injunction were to be denied, than to the defendants if a preliminary injunction were to be granted. These elements have not been addressed by the district court…

In urging that we allow the district court to balance the remaining elements, I am mindful of the time pressures on the courts—and on Hobby Lobby and Mardel—as the deadline of July 1, 2013, approaches. Still, I do not think these time pressures should induce us to step outside of our institutional limits and usurp a role better suited to the district court.

II. The Greens' Standing to Sue in their Personal Capacities

[T]he plurality opinion states that we need not address the Greens' standing. I believe, however, that we should do so. In addressing the Greens' standing, we should consider whether Congress abrogated prudential restrictions in RFRA and, if not, whether the Greens' alleged injuries derive solely from the injuries sustained by Hobby Lobby and Mardel.

In my view, Congress did not abrogate prudential-standing restrictions in RFRA, and the Greens' claims derive solely from the alleged injuries sustained by Hobby Lobby and Mardel. As a result, I would direct the district court to dismiss the Greens' claims based on the shareholder-standing rule.

…

BRISCOE, Chief Judge, concurring in part and dissenting in part, joined by LUCERO, Circuit Judge.

…I [] dissent from the majority's conclusion that Hobby Lobby and Mardel have established a substantial likelihood of success on the merits of their RFRA claims, and the majority's concomitant decision to reverse the district court's denial of plaintiffs' motion for preliminary injunctive relief.

I. The Anti–Injunction Act

…I [] concur in the conclusion that the AIA does not bar the RFRA claims at issue in this appeal.

II. The Record on Appeal

…I fail to see how plaintiffs could reasonably be said to have carried their burden of establishing their entitlement to a preliminary injunction. And, relatedly, I am concerned, given these evidentiary deficiencies, about the majority's eagerness

to issue seemingly definitive rulings on the merits of plaintiffs' novel claim that for-profit corporations are entitled to coverage under RFRA.

III. Are Hobby Lobby and Mardel Persons Exercising Religion Under RFRA?

In the first part of its merits analysis, the majority addresses the question of whether Hobby Lobby and Mardel qualify as "persons exercising religion for purposes of RFRA." [T[he majority makes a number of critical mistakes in doing so. And its ultimate holding, which is unprecedented, is sufficiently ambiguous that neither the majority nor anyone else can confidently predict where it may lead, particularly when one considers how easily an "exercise of religion" could now be asserted by a corporation to avoid or take advantage of any governmental rule or requirement.

…

I conclude on that basis that Hobby Lobby and Mardel have failed to carry their burden of establishing a likelihood of success on the merits of their RFRA claims.

IV. Substantial Burden

In the second part of its merits analysis, the majority addresses the question of "whether the contraceptive-coverage requirement constitutes a substantial burden on plaintiffs' exercise of religion."…

[P]laintiffs presented no evidence at all during the hearing on their motion for preliminary injunction. That failure is not entirely fatal to their claims, because there appears to be agreement among the parties and amici that certain intrauterine devices actually have, as a matter of scientific fact, the potential to prevent implantation of a fertilized egg. But there is no such consensus with respect to the contraceptive drugs challenged by the plaintiffs. Consequently, plaintiffs' tactical decision to present no evidence on this point appears, to me, to prevent them from establishing that the regulatory requirement to provide healthcare coverage encompassing these drugs substantially burdens their exercise of religion.

V. Remaining Preliminary Injunction Factors

I also believe that the plurality errs in its consideration of the three remaining preliminary injunction factors, i.e., whether Hobby Lobby and Mardel face irreparable harm, whether the balance of equities tips in favor of Hobby Lobby and Mardel, and whether an injunction is in the public interest.

…

MATHESON, J., concurring in part and dissenting in part.

…

I. THE CORPORATIONS' RFRA CLAIM

…I do not think the corporate plaintiffs have demonstrated they can so easily disregard the corporate form and assume the Greens' religious beliefs. Accordingly, I do not think

the district court abused its discretion in holding that Hobby Lobby and Mardel failed to show they are substantially likely to succeed on the merits of their RFRA claim.

Nevertheless, I would stop at concluding that the plaintiffs have not met their preliminary injunction burden and would not foreclose the issue of RFRA coverage for secular, for-profit corporations from future consideration. Prudential considerations of judicial restraint take me to this position.

A. Plaintiffs' Failure to Meet Preliminary Injunction Burden on Law and Facts

Chief Judge Briscoe raises serious concerns about the majority's analysis and conclusions. These concerns are sufficient to conclude that the district court did not abuse its discretion in denying a preliminary injunction to Hobby Lobby and Mardel…

The allegations in the complaint suggest that Hobby Lobby and Mardel have features that could set them apart from other for-profit businesses and even from each other, but the plaintiffs provide no evidence in support. The record does not allow meaningful consideration of whether RFRA applies to either of the two plaintiff corporations.

B. Disregarding the Corporate Form

…Perhaps Hobby Lobby, Mardel, and the Greens can make a successful argument for disregarding the corporate form and sharing religious beliefs. But courts require evidence to disregard the corporate form, and the plaintiffs have presented none. Yet they filed their suit and immediately asked the district court to relieve the corporations of their legal obligations to their employees under the Regulation, even when we have repeatedly said that "a preliminary injunction is an extraordinary remedy, and thus the right to relief must be clear and unequivocal."

C. Judicial Restraint

Although I conclude that the district court did not abuse its discretion in denying the corporate plaintiffs' RFRA claim, I do not think we need to decide as a final matter whether for-profit, secular corporations have RFRA or Free Exercise Clause rights. The corporate plaintiffs' failure to meet their burden of showing they are substantially likely to succeed on the merits is a sufficient basis to affirm the district court's order…

II. THE GREENS' RFRA CLAIM

Unlike Hobby Lobby and Mardel, the Greens do not have to convince us that they have RFRA rights. It is clear they do. The obstacle they must overcome is whether they can claim that the Regulation violates their RFRA rights even though the Regulation applies to the corporate plaintiffs.

I would hold that the Greens have standing to pursue their RFRA claim because they have shown the Regulation injures them in a direct, personal way. I would then remand to the district court with instructions to reconsider their request for a preliminary injunction in light of a proper understanding of the Greens' claim that the Regulation substantially burdens their religious beliefs.

…

III. FREE EXERCISE CLAUSE CLAIM

The district court did not abuse its discretion in denying a preliminary injunction for the plaintiffs' Free Exercise claim because they have not clearly and unequivocally shown that they are substantially likely to succeed on the merits….

CONCLUSION

I would (1) affirm the district court's denial of a preliminary injunction for Hobby Lobby and Mardel on their RFRA claim; (2) conclude that the Greens have standing to assert their RFRA and Free Exercise claims; (3) reverse the district court's holding that the Greens' RFRA claim is not substantially likely to succeed and remand for reconsideration; and (4) affirm the district court's denial of a preliminary injunction on the plaintiffs' Free Exercise Clause claim.

Finally, I concur that the Anti–Injunction Act does not apply to this case.

"Contraceptive Mandate Divides Appeals Courts"

The Washington Post
Robert Barnes
July 26, 2013

A federal appeals court ruling on Friday increased the chances that the Supreme Court in its coming term will need to settle whether secular, for-profit corporations must provide contraceptive coverage to employees despite the owners' religious objections.

A divided panel of the U.S. Court of Appeals for the 3rd Circuit ruled that a Pennsylvania cabinet-making company owned by a Mennonite family must comply with the contraceptive mandate contained in the Affordable Care Act.

The majority said it "respectfully disagrees" with judges in the U.S. Court of Appeals for the 10th Circuit in Denver, who recently narrowly found just the opposite. A split in interpreting federal statutes is usually an invitation for the Supreme Court to resolve the issue.

This one is novel: The justices have never said whether a secular corporation is protected by the Constitution or federal statute from complying with a law because of religious objections from its owners.

The 3rd Circuit majority noted that the court has numerous times — most recently in *Citizens United v. Federal Election Commission* — found that corporations have free speech rights. But it said there was a "total absence of caselaw" to support the argument that corporations are protected by the Constitution's guarantee of free exercise of religion.

"Even if we were to disregard the lack of historical recognition of the right, we simply cannot understand how a for-profit, secular corporation — apart from its owners — can exercise religion," wrote Circuit Judge Robert E. Cowen, who was joined by Circuit Judge Thomas I. Vanaskie.

Cowen said it did not seem plausible that an entity "created to make money could exercise such an inherently 'human' right."

Circuit Judge Kent A. Jordan said in a dissent twice as long as the majority opinion that if there is a lack of case law establishing a corporation's religious rights, "that is in all probability because there has never before been a government policy that could be perceived as intruding on religious liberty as aggressively as the mandate."

The mandate requires companies with 50 or more employees to provide insurance that covers federally approved birth control measures. Conestoga Wood Specialties Company, which has 950 employees, is owned by the Hahn family, who say their Mennonite religion teaches that life begins at conception. They particularly object to having to cover the "morning-after" and "week-after" pills.

The lawsuit is among more than 60 filed across the country objecting to the contraceptive mandate. Some are filed by companies such as Conestoga and others by nonprofit groups and organizations with religious connections.

In a decision by the entire 10th Circuit, the closely divided judges ruled that the chain store Hobby Lobby was likely protected by the Constitution and the Religious Freedom Restoration Act from having to provide contraceptive coverage that violated the owners' religious beliefs.

"It looks like we're heading for a Supreme Court review," said Kyle Duncan, general counsel of the Becket Fund for Religious Liberty, which is active in opposing the contraceptive mandate.

Marcia Greenberger of the National Women's Law Center, which supports the law, agreed, and noted that other appeals courts will likely soon be deciding other cases on the issue.

"ObamaCare Birth Control Mandate on Fast Track to Supreme Court"

The Hill
Sam Baker
August 22, 2013

ObamaCare's birth control mandate is putting the president's signature legislative issue on a fast track back to the Supreme Court.

Lawyers on both sides of the issue say the high court will almost certainly have to rule on the controversial policy, possibly as early as its next term.

Two federal appeals courts have come down with opposite rulings on an important question related to the policy: whether for-profit businesses and their owners have the right to challenge in court the requirement that businesses provide contraception as part of their insurance coverage.

"I think it's likely the Supreme Court is going to end up deciding this thing, and the question is when," said Mark Rienzi, senior counsel at the Becket Fund for Religious Liberty, which has organized many of the 60-plus lawsuits challenging the contraception mandate.

The different rulings by the two federal appeals courts significantly increase the likelihood the mandate will end up with the Supreme Court, possibly with a ruling just two years after the justices ruled ObamaCare's insurance mandate was constitutional.

Louise Melling, deputy legal director at the American Civil Liberties Union, which supports the contraception mandate, said it's "likely" the Supreme Court could hear oral arguments in its next term, depending on the timing of appeals.

"I would anticipate, when there's this much activity … that the court will hear one of these," Melling said.

Last month, a panel of judges on the 3rd Circuit Court of Appeals ruled against the owners of a for-profit corporation who sued to block the mandate.

Members of the Hahn family, which owns a cabinet-making firm called Conestoga, said complying with the contraception requirement would violate their Mennonite faith.

But the 3rd Circuit said the family could not sue over a policy that applies to its company.

"Since Conestoga is distinct from the Hahns, the Mandate does not actually require the Hahns to do anything," the court said. "All responsibility for complying with the Mandate falls on Conestoga."

The owners' religious beliefs do not "pass through" to the corporation they own, the court said in its ruling.

"The Hahn family chose to incorporate and conduct business through Conestoga, thereby obtaining both the advantages and disadvantages of the corporate form. We

simply cannot ignore the distinction between Conestoga and the Hahns," the court said.

The ACLU's Melling said the 3rd Circuit got it right. The Constitution guarantees freedom of religion to individuals, she said, not businesses.

"Corporations don't pray and have values," Melling said.

Alliance Defending Freedom, the group representing Conestoga and the Hahns, has vowed to appeal the ruling to the Supreme Court. Matt Bowman, the alliance's legal director, said the group will file its appeal as soon as possible.

"We are hopeful that the court will take this because whether families can exercise religion in their daily lives is an extremely important issue, and it can't be an issue that has a different answer based on what part of the country you live in," Bowman said in an interview.

ObamaCare's birth control mandate requires most employers to include contraception in their employees' healthcare plans without charging a co-pay or deductible.

Churches and houses of worship are completely exempt. Religious-affiliated employers, like Catholic schools and hospitals, don't have to offer or pay for the coverage themselves, but their insurance companies still have to make it available without cost-sharing.

Most lawsuits against the mandate have been filed by religious-affiliated institutions, but some for-profit corporations without a religious mission have also sued, citing the religious beliefs of their owners.

Critics of the mandate won an important victory in June, when the 10th Circuit Court of Appeals ruled in June that the owners of Hobby Lobby, a chain of arts-and-crafts stores, could sue to block the mandate from applying to their company.

"Would an incorporated kosher butcher really have no claim to challenge a regulation mandating non-kosher butchering practices?" the 10th Circuit asked. "The kosher butcher, of course, might directly serve a religious community … But we see no reason why one must orient one's business toward a religious community to preserve Free Exercise protections."

It's possible the court could simply agree to hear the Conestoga case, but legal experts said they're primarily keeping an eye on the Hobby Lobby suit.

How quickly the mandate makes it to the Supreme Court will likely depend on whether and when the Justice Department files an appeal in the Hobby Lobby case, they said.

"I assume they are eager to get this thing resolved," the Becket Fund's Rienzi said. His organization represents Hobby Lobby.

Justice could forego a quick appeal and let the issue continue to play out in lower courts. Neither the 3rd Circuit nor the 10th Circuit actually ruled on the merits of whether the contraception policy is constitutional, and similar lawsuits are still pending in two more circuits.

For either case to make it onto the docket in the court's next term, Justice would need to file its appeal by about Sept. 25, legal observers said.

If the court agrees to hear the case, oral arguments would likely take place early next year and a decision would come by next summer — about two years after the court's landmark ruling upholding the law's central provisions.

"I'm just assuming that the court is going to hear one of these cases," the ACLU's Melling said.

“Hobby Lobby Wins a Stay Against Birth Control Mandate”

Reuters
Jonathan Stempel
July 19, 2013

A federal judge has temporarily exempted Hobby Lobby Stores Inc from a requirement in the 2010 healthcare law that it offer workers insurance coverage for birth control, which the retailer said violated its religious beliefs.

The preliminary injunction issued by U.S. District Judge Joe Heaton in Oklahoma City, where Hobby Lobby is based, covers the arts and crafts chain and its affiliated Mardel Christian bookstore chain.

He put the case on hold until October 1, giving the federal government time to decide whether to appeal a June 27 decision by a federal appeals court in Denver to let Hobby Lobby challenge the mandate on religious grounds.

A U.S. Department of Justice spokesman had no immediate comment. The government has said contraception coverage is needed to promote public health and gender equality.

The Becket Fund for Religious Liberty, a nonprofit law firm representing Hobby Lobby, said there are 63 lawsuits nationwide challenging the mandate.

It said Hobby Lobby is the largest company to be excused, at least temporarily, from having to comply. Hobby Lobby has 556 stores in 45 U.S. states, and has about 13,000 employees.

The Green family, which owns Hobby Lobby, had argued that providing coverage to workers for the morning-after pill and similar contraceptives violated its Christian beliefs.

It also said it could have under Obamacare faced $1.3 million in daily fines by not providing such coverage.

In a written order, Heaton said the size of those penalties, the "substantial" public policy issues involved, and the amount of similar litigation justified an injunction for Hobby Lobby.

"There is a substantial public interest in ensuring that no individual or corporation has their legs cut out from under them while these difficult issues are resolved," Heaton said at a hearing, according to the Becket Fund.

In its June 27 ruling, the Denver appeals court said there was a good chance that Hobby Lobby would ultimately prevail.

It said Hobby Lobby had "drawn a line at providing coverage for drugs or devices they consider to induce abortions, and it is not for us to question whether the line is reasonable."

Lori Windham, senior counsel for the Becket Fund, said in an interview that Heaton's decision "shows that companies can be protected from the mandate, and

continue to exercise their religious beliefs in the way they run their businesses."

The case is *Hobby Lobby Stores Inc et al v. Sebelius et al*, U.S. District Court, Western District of Oklahoma, No. 12-01000.

"Obama Contraceptive Mandate Upheld by U.S. Appeals Court"

Bloomberg
Tom Schoenberg
July 27, 2013

The Obama administration won an appeals court victory in a challenge to its 2010 health-care law by a for-profit company seeking a religious exemption to a mandate that employers provide insurance coverage for contraceptives.

In a 2-1 decision, the U.S. Court of Appeals in Philadelphia yesterday rejected a challenge to the Affordable Care Act requirement brought by Conestoga Wood Specialties Corp., a cabinet maker owned by Mennonite Christians who argued the mandate violates their religious beliefs.

"We simply conclude that the law has long recognized the distinction between the owners of a corporation and the corporation itself," U.S. Circuit Judge Robert Cowen wrote in the majority decision. "A holding to the contrary -- that a for-profit corporation can engage in religious exercise -- would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners."

The ruling sets up a split between federal appeals courts that makes it more likely the U.S. Supreme Court will eventually consider the dispute. On June 27, a federal appeals court in Denver ruled that Hobby Lobby Stores Inc. was likely to win on the merits of its argument that the mandate violates the rights of the company and its owners under the Religious Freedom Restoration Act and the First Amendment of the Constitution.

Hobby Lobby

A federal judge on July 19 issued a ruling blocking enforcement of the mandate against Hobby Lobby and put the case on hold until October.

Conestoga and other companies challenged the government over the provision of the 2010 U.S. health law requiring employers and insurers to provide preventive health services without charge to their workers, a category of service the administration said includes birth control.

Thirty-six lawsuits have been filed by for-profit companies challenging the Affordable Care Act's contraceptive coverage mandate, according to the National Women's Law Center. In at least 24 cases the plaintiffs have won rulings allowing them not to provide the coverage while the litigation is pending. In seven cases, the court has ruled against the companies' request, according to the group.

"Most courts agree that all Americans have religious freedom even when trying to earn a living and we think this decision will eventually be reviewed and that religious freedom will be vindicated," Matt Bowman, a lawyer for Conestoga at the Washington-based Alliance for Defending Freedom, said in an interview.

'**Grievous Harm'**

In a 66-page dissent, Circuit Judge Kent Jordan said the majority's ruling "guarantees grievous harm" as Conestoga's owners are forced to pay for the "offending contraceptives, including abortifacients," in violation of their religious convictions or face "ruinous fines."

"It should not be hard for us to join the many courts across the country that have looked at the mandate and its implementation and concluded that the government should be enjoined from telling sincere believers in the sanctity of life to put their consciences aside and support other people's reproductive choices," Jordan said.

The case is *Conestoga Wood Specialties Corp. v. Secretary of the Department of Health and Human Services*, 13-1144, U.S. Court of Appeals for the Third Circuit (Philadelphia).

LIBERTY UNIVERSITY, INCORPORATED, a Virginia Nonprofit Corporation; Michele G. Waddell; Joanne V. Merrill, Plaintiffs–Appellants,
and
Martha A. Neal; David Stein, M.D.; Pausanias Alexander; Mary T. Bendorf; Delegate Kathy Byron; Jeff Helgeson, Plaintiffs,
v.
Jacob LEW, Secretary of the Treasury of the United States, in his official capacity; Kathleen Sebelius, Secretary of the United States Department of Health and Human Services, in her official capacity; Seth Harris, Acting Secretary of the United States Department of Labor, in his official capacity; Eric H. Holder, Jr., Attorney General of the United States, in his official capacity, Defendants–Appellees.

United States Court of Appeals, Fourth Circuit

Decided on July 11, 2013

[Excerpt; some footnotes and citations omitted.]

MOTZ, DAVIS, and WYNN, Circuit Juges:

Liberty University and certain individuals (collectively, "Plaintiffs") brought this action challenging two provisions of the Patient Protection and Affordable Care Act: the "individual mandate," which requires individuals to purchase a minimum level of health insurance coverage, and the "employer mandate," which requires certain employers to offer such coverage to their employees and their dependents. The district court dismissed the lawsuit, upholding the constitutionality of both mandates. On appeal we held that the Anti–Injunction Act barred us from considering Plaintiffs' claims and remanded the case to the district court with instructions to dismiss for lack of jurisdiction. The Supreme Court granted Plaintiffs' petition for certiorari, vacated our judgment, and remanded for further consideration in light of *National Federation of Independent Business v. Sebelius*. After careful consideration of that case, we affirm the judgment of the district court.

I.

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act ("Affordable Care Act" or "the Act") into law. Liberty and two unaffiliated individuals challenge the individual mandate, which will become effective in 2014, and the employer mandate, which will become effective in 2015. Before resolving the legal questions, we summarize the requirements of the mandates and the relevant facts and procedural history of this case.

A.
1.

With limited exceptions, the individual mandate imposes a "penalty" on any taxpayer who is an "applicable individual" and fails to obtain "minimum essential coverage."…

Any individual who does not qualify for a listed exemption is an "applicable individual." The Act provides two religion-based exemptions. The "[r]eligious conscience exemption" applies to an individual who is "a member of a recognized religious sect or division thereof," and "an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any [life, disability, old-age, retirement, or medical] insurance."]…

The penalty for failing to obtain minimum essential coverage is tied to the individual's income but cannot exceed the cost of "the national average premium for qualified health plans" meeting a certain level of coverage…

2.

If an "applicable large employer" fails to provide affordable health care coverage to its full-time employees and their dependents, the employer mandate may require an "assessable payment" by the employer. The Act defines an "applicable large employer" as an employer who employed an average of at least fifty full-time employees during the preceding year.

Such an employer must make an assessable payment if at least one of its full-time employees qualifies for "an applicable premium tax credit or cost-sharing reduction" to help pay for health care coverage. An employee is eligible for an "applicable premium tax credit" or "cost-sharing reduction" if the employer fails to offer the employee "affordable" coverage providing "minimum value" and the employee's income falls between 100% and 400% of the poverty line.

The amount of the assessable payment that an employer required to make such a payment must pay depends on whether the employer offers "minimum essential coverage" to its full-time employees and their dependents. If the employer fails to offer such coverage, the assessable payment is calculated by multiplying $2000 by the number of full-time employees (less thirty), prorated over the number of months the employer is liable. If the employer does offer such coverage, the assessable payment is calculated by multiplying $3000 by the number of employees receiving an applicable premium tax credit or cost-sharing reduction, prorated on a monthly basis…

"Minimum essential coverage" includes coverage under an "eligible employer-sponsored plan," other than coverage of only certain excepted benefits (like limited scope dental or vision benefits), which does not qualify. An "eligible employer-sponsored plan" includes a "group health plan," which is a plan established or maintained by an employer for the purpose of providing medical care to employees and their dependents. Thus, employer-provided health care coverage would seem to qualify as minimum essential coverage unless that coverage applies only to excepted benefits. In effect, then, § 4980H(a) imposes an assessable payment on an applicable employer who fails to offer coverage to its full-time employees and their dependents,

while § 4980H(b) imposes an assessable payment on an applicable employer who provides coverage that does not satisfy the mandate's affordability criteria.

B.

On March 23, 2010, the day the President signed the Affordable Care Act into law, Plaintiffs filed this action against the Secretary of the Treasury and other officials (collectively, "the Secretary"). Plaintiffs sought a declaration that the individual and employer mandates are invalid and an order enjoining their enforcement.

1.

In their second amended complaint, the individual plaintiffs, Michele G. Waddell and Joanne V. Merrill, assert that they have "made a personal choice not to purchase health insurance coverage and [do] not want to" do so… They also assert that they are Christians "who have sincerely held religious beliefs that abortions, except where necessary to save the life of the pregnant mother, are murder and morally repugnant" and that "they should play no part in such abortions, including no part in facilitating, subsidizing, easing, funding, or supporting such abortions since to do so is evil and morally repugnant complicity."

Liberty alleges that it employs approximately 3900 full-time faculty and staff, and that it is self-insured and offers "health savings accounts, private insurance policies and other health care reimbursement options to qualified employees." Liberty asserts that "depending upon how the federal government defines 'minimum essential coverage' and the affordability index," the University could be found to offer coverage insufficient "to satisfy the federal definition of minimum essential coverage or coverage that is deemed unaffordable ... and therefore could be subjected to significant penalties" and "substantial financial hardship."…

Finally, Liberty asserts that it "is a Christian educational institution whose employees are Christians who have sincerely held religious beliefs that abortions, except where necessary to save the life of the pregnant mother, are murder and morally repugnant." It further explains that its religious beliefs bar it from "play[ing][any] part in abortions, including [any] part in facilitating, subsidizing, easing, funding, or supporting abortions since to do so is evil and morally repugnant complicity."

2.

Before the district court, Plaintiffs asserted that the individual and employer mandates exceeded Congress's Article I powers and violated the Tenth Amendment, the Establishment and Free Exercise Clauses of the First Amendment, the Religious Freedom Restoration Act, the Fifth Amendment, the right to free speech and free association under the First Amendment, the Article I, Section 9 prohibition against unapportioned capitation or direct taxes, and the Guarantee Clause. The Secretary moved to dismiss the second amended complaint for lack of jurisdiction, arguing that Plaintiffs lacked standing and that the Anti–Injunction Act barred the suit. Alternatively, the Secretary moved to dismiss all counts for failure to state a claim upon which relief

could be granted. The district court concluded that it possessed jurisdiction but granted the Secretary's motion to dismiss for failure to state a claim. Plaintiffs appealed only as to the Article I, Establishment Clause, Free Exercise Clause, Religious Freedom Restoration Act, and Fifth Amendment claims.

When we considered the case on appeal, we did not reach the merits of those claims because we concluded that the Anti–Injunction Act deprived us of jurisdiction…

On remand, we must decide whether the Anti–Injunction Act bars this pre-enforcement challenge to the employer mandate, and whether Plaintiffs have standing to challenge the mandates. If neither jurisdictional hurdle prevents our consideration of the merits of the case, we must determine whether Congress acted within the scope of its constitutionally delegated powers when it enacted the employer mandate. Finally, if we find that the mandates are a valid exercise of Congress's Article I powers, we must address Plaintiffs' religion-based arguments. Our review is de novo.

II.

The Anti–Injunction Act ("AIA") provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." Where it applies, the AIA thus deprives courts of jurisdiction to entertain pre-enforcement suits seeking to enjoin the collection of federal taxes.

Liberty's challenge to the employer mandate is a pre-enforcement suit to enjoin the collection of an exaction that is codified in the Internal Revenue Code, and which the Secretary of the Treasury is empowered to collect in the same manner as a tax. In *NFIB*, however, the Supreme Court made clear that […] the AIA applies only where Congress intends it to.

When concluding that Congress did not intend to bar pre-enforcement challenges to the individual mandate, the Court in *NFIB* found it most significant that Congress chose to describe the shared responsibility payment as a "penalty" rather than a "tax." Thus, we begin our AIA inquiry with particular attention to how Congress characterized the exaction set forth in the employer mandate.

In maintaining that the AIA bars this challenge to the employer mandate, the Secretary relies heavily on the fact that the Act twice refers to the employer mandate exaction as a "tax." In doing so, the Secretary virtually ignores the fact that the Act does not consistently characterize the exaction as a tax. Rather, the Act initially identifies the employer mandate exaction as an "assessable payment." The Act then proceeds to characterize the exaction as an "assessable payment" six more times…

Because Congress initially and primarily refers to the exaction as an "assessable payment" and not a "tax," the statutory text suggests that Congress did not intend the exaction to be treated as a tax for purposes of the AIA.

Furthermore, Congress did not otherwise indicate that the employer mandate exaction qualifies as a tax for AIA purposes, though of course it could have done so…

Finally, we note that to adopt the Secretary's position would lead to an anomalous result. The Supreme Court has expressly held that a person subject to the individual mandate can bring a pre-enforcement suit challenging that provision. But, under the Secretary's theory, an employer subject to the employer mandate could bring only a post-enforcement suit challenging that provision. It seems highly unlikely that Congress meant to signal—with two isolated references to the term "tax"—that the mandates should be treated differently for purposes of the AIA's applicability. Tellingly, the Government has pointed to no rationale supporting such differential treatment.

For these reasons, we hold that the employer mandate exaction, like the individual mandate exaction, does not constitute a tax for purposes of the AIA. Therefore, the AIA does not bar this suit.

III.

The Secretary argues that another jurisdictional hurdle—standing—prevents our consideration of the merits of this case. To establish standing at the motion to dismiss stage, a plaintiff must plausibly allege that: "(1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." The Secretary contends that all plaintiffs lack standing because they allege no actual or imminent injury. We address first Liberty's standing and then that of the individual plaintiffs.

A.

Liberty has more than fifty full-time employees, and the Secretary does not contest that it is an "applicable large employer" subject to the employer mandate... [T]he Secretary contends that the health care coverage Liberty acknowledges it already provides to its employees qualifies as minimum essential coverage that may also satisfy the employer mandate's affordability criteria.

The Secretary's argument may well be correct—as far as it goes. But Liberty need not show that it will be subject to an assessable payment to establish standing if it otherwise alleges facts that establish standing. In this case, in addition to alleging that it "could" be subject to an assessable payment, Liberty alleges that the employer mandate and its "attendant burdensome regulations will ... increase the cost of care" and "directly and negatively affect [it] by increasing the cost of providing health insurance coverage."…

[T]o establish standing, Liberty need not prove that the employer mandate will increase its costs of providing health coverage; it need only plausibly allege that it will.

Liberty's allegation to this effect is plausible. Even if the coverage Liberty currently provides ultimately proves sufficient, it may well incur additional costs because of the administrative burden of assuring compliance with the employer mandate, or due to an increase in the cost of care.

Moreover, Liberty's injury is imminent even though the employer mandate will not go into effect until January 1, 2015, as Liberty must take measures to ensure compliance in advance of that date. Thus, Liberty has standing to challenge the employer mandate.

B.

The individual plaintiffs, after alleging that they do not have or want to purchase health insurance coverage, assert that the individual mandate "will create a financial hardship in that [they] will have to either pay for health insurance coverage ... or face significant penalties."

The Secretary maintains that the individual plaintiffs lack standing because they may be exempt from the individual mandate penalty, either because their income is below the mandate's threshold level or because they qualify for a proposed hardship exemption. But, again, at this early stage, plaintiffs need only provide "general factual allegations of injury."

The individual plaintiffs allege the individual mandate will obligate them to buy insurance or pay a penalty, and their alleged lack of insurance provides sufficient support for that allegation at this stage of the proceedings. Further, the individual plaintiffs' injury is imminent because they must make preparations to obtain insurance before the mandate goes into effect.

Thus, we conclude that the individual plaintiffs have standing to challenge the individual mandate. We therefore proceed to the merits.

IV.
A.

Liberty argues that the employer mandate exceeds Congress's commerce power because Congress does not have "the power to order employers to provide government-defined health insurance to their employees." This is so, Liberty contends, because the employer mandate "compel[s] employers to engage in particular conduct or purchase an unwanted product," contrary to the dictates of *NFIB*…

The Secretary counters that the employer mandate is a valid exercise of Congress's authority under the Commerce Clause because "[h]ealth coverage benefits form part of an employee's compensation package, and 'it is well-established in Supreme Court precedent that Congress has the power to regulate the terms and conditions of employment." '..

[The Secretary argues that] "[t]he provision of health coverage substantially affects commerce just as other forms of compensation and terms of employment do, and the businesses run by large employers likewise substantially affect commerce." We think the Secretary has the better argument.

B.

"[T]he determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is commerce which concerns more States than one and has a real and substantial relation to the national interest ." "The power of Congress in this field is broad and sweeping ...." "[T]he power to regulate commerce is the power to enact all appropriate legislation for its protection or advancement; to adopt measures to promote its growth and insure its safety; to foster, protect, control, and restrain."…

To be sure, Congress's authority under the Commerce Clause is not without limits… Although "[t]here has been considerable debate about whether the statements [in *NFIB*] about the Commerce Clause are dicta or binding precedent," these five justices agreed that the Commerce Clause does not grant Congress the authority to "compel" or "mandate" an individual to enter commerce by purchasing a good or service. Rather, these justices concluded that the Commerce Clause permits Congress to regulate only existing activity.

Chief Justice Roberts's—and, to a large degree, the joint dissenters'—analysis focused on the text of the Commerce Clause, the Court's cases interpreting that clause, and the practical effect and operation of the individual mandate. As to the text, Chief Justice Roberts noted that the Commerce Clause "grants Congress the power to 'regulate Commerce.'"…

As to the Court's prior cases, the Chief Justice noted that "all have one thing in common: They uniformly describe the power as reaching 'activity.' "The joint dissenters similarly distinguished the Commerce Clause cases on which the government relied as "involv[ing] commercial activity," and "not represent[ing] the expansion of the federal power to direct into a broad new field,"

Finally, both Chief Justice Roberts and the joint dissenters expressed substantial concern about the practical and operational effects of the individual mandate. Chief Justice Roberts suggested that construing the commerce power to allow Congress to mandate the purchase of health insurance would "permit Congress to regulate individuals precisely because they are doing nothing," and "would bring countless decisions an individual could potentially make within the scope of federal regulation ...."

C.

For the reasons set forth within, we find that the employer mandate is no monster; rather, it is simply another example of Congress's longstanding authority to regulate employee compensation offered and paid for by employers in interstate commerce. To begin, we note that unlike the individual mandate (as construed by five justices in *NFIB*), the employer mandate does not seek to create commerce in order to regulate it. In contrast to individuals, all employers are, by their very nature, engaged in economic activity. All employers are in the market for labor. And to the extent that the employer mandate compels employers in interstate commerce to do something, it does not compel them to "become active in commerce." Liberty fails

to recognize the distinction between individuals not otherwise engaged in commerce and employers necessarily so engaged…

Having found that the provision regulates existing economic activity (employee compensation), and therefore stands on quite a different footing from the individual mandate, we further conclude that the employer mandate is a valid exercise of Congress's authority under the Commerce Clause. It has long been settled that Congress may impose conditions on terms of employment that substantially affect interstate commerce. Here, Congress did both.

First, the employer mandate regulates a term of employment (compensation) that substantially affects interstate commerce…

"[E]mployers who do not offer health insurance to their workers gain an unfair economic advantage relative to those employers who do provide coverage," and perpetuate a "vicious cycle,": "uninsured workers turn to emergency rooms for health care" they cannot afford; "health care providers pass on the cost [of the uncompensated care] to private insurers;" and insurers "pass on the cost to families" through premium increases, making it more expensive—and thus, more difficult—for employers to insure their employees…

Second, the employer mandate regulates an activity (employee compensation) that substantially affects workers' interstate mobility. The availability and breadth of employer-sponsored health coverage varies, and "[t]he availability of health insurance options can affect people's incentives to enter the labor force, work fewer or more hours, retire, change jobs, or even prefer certain types of firms or jobs."… Thus, health insurance provided as part of employee compensation substantially affects interstate mobility, and thereby interstate commerce.

Our recognition of Congress's authority to enact the employer mandate does not "open a new and potentially vast domain to congressional authority," or "enable the Federal Government to regulate all private conduct." Requiring employers to offer their employees a certain level of compensation through health insurance coverage is akin to requiring employers to pay their workers a minimum wage, or "time and a half for overtime." Thus, our conclusion fits squarely within the existing core of the Supreme Court's jurisprudence, including the admonition of five justices in *NFIB* that Congress may not, through its commerce power, seek to create commerce in order to regulate it.

D.

For all these reasons, we conclude that Congress had a rational basis for finding that employers' provision of health insurance coverage substantially affects interstate commerce, and Congress's regulation of this activity does not run afoul of *NFIB's* teachings. Accordingly, we hold that the employer mandate is a valid exercise of Congress's authority under the Commerce Clause.

V.
A.

Plaintiffs contend that "[t]he Taxing and Spending or General Welfare Clause does not vest Congress with the authority to enact the [individual and employer] mandates." But in *NFIB*, the Supreme Court held that the individual mandate exaction constituted a tax and that Congress acted well within the scope of its constitutionally granted authority in imposing it. Clearly, then, Plaintiffs' contention fails with regard to the individual mandate. And although *NFIB* did not present the Supreme Court with an opportunity to address the constitutionality of the employer mandate, we are convinced that the *NFIB* taxing power analysis inevitably leads to the conclusion that the employer mandate exaction, too, is a constitutional tax.

B.

…The Supreme Court has defined a tax as a "pecuniary burden laid upon individuals or property for the purpose of supporting the government," and described Congress's taxing power as "very extensive."

In *NFIB*, the Supreme Court gleaned from precedent a "functional approach" for determining whether an exaction, whatever Congress calls it, constitutes a tax. Under that approach, the "essential feature" of any tax is that "it produces at least some revenue for the Government."…

The Court did [] attempt to distinguish taxes from penalties, explaining that "if the concept of penalty means anything, it means punishment for an unlawful act or omission."

C.

First, we examine the factors the Supreme Court considered in upholding the individual mandate exaction as a constitutional tax. In applying its "functional approach" to that exaction, the Supreme Court concluded that it "looks like a tax in many respects." First and foremost, it will produce "at least some revenue for the Government"—namely "about $4 billion per year by 2017." Further attributes that convinced the Supreme Court that the individual mandate exaction constitutes a tax include: its "pa [yment] into the Treasury by taxpayers when they file their tax returns"; the fact that "its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status"; and its inclusion "in the Internal Revenue Code and enforce[ment] by the IRS, which ... must assess and collect it in the same manner as taxes." The Supreme Court also distinguished the individual mandate tax from an exaction the Court invalidated as an impermissible penalty in *Bailey v. Drexel Furniture Co*. The Court noted that the individual mandate, unlike the provision at issue in Drexel, contains no scienter requirement and does not constitute "prohibitory financial punishment."…

Finally, the Supreme Court swiftly dispelled any notion that the individual mandate constituted a direct tax subject to the constitutional apportionment requirement. Having recognized only two types of direct taxes—those on individuals as individuals

and those on property—the Supreme Court held that the individual mandate payment fits into neither category.

At the end of the day, the Supreme Court concluded that when an exaction "need not be read to do more than impose a tax[,]" "[t]hat is sufficient to sustain it." The Court held that because the Affordable Care Act's individual mandate could be read simply as imposing a tax, Congress had the power to enact it. The Supreme Court thus squarely rejected Plaintiffs' contention that the individual mandate exaction is not a constitutional tax.

D.

Turning now to the employer mandate, it is clear from the provision's face that it possesses the "essential feature" of any tax: "it produces at least some revenue for the Government." Indeed, the Congressional Budget Office estimated that the employer mandate exaction will generate $11 billion annually by 2019.

Looking beyond the "essential feature" to other "functional" characteristics, the exaction the Affordable Care Act imposes on large employers "looks like a tax in many respects." The exaction is paid into the Treasury, "found in the Internal Revenue Code[,] and enforced by the IRS," which "must assess and collect it in the same manner as" a tax. Further, the employer mandate lacks a scienter requirement, does not punish unlawful conduct, and leaves large employers with a choice for complying with the law—provide adequate, affordable health coverage to employees or pay a tax. And finally, because the exaction taxes neither individuals as such nor property, it is not a direct tax subject to the apportionment requirement.

Relying exclusively on *Drexel*, Liberty contends that the employer mandate exaction nevertheless "cross[es] the line" from a reasonable payment to a "potentially destructive" unconstitutional penalty. Fatally for Liberty's argument, *Drexel* is easily distinguishable from the case at hand.

In *Drexel*, the Supreme Court invalidated a "so-called tax on employing child laborers" as an impermissible penalty. The Supreme Court did so ostensibly because the penalty: (1) carried a scienter requirement "typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law"; (2) imposed an "exceedingly heavy" financial burden—10 percent of an offender's net income—even if the offender employed only one child laborer for only one day of the year; and (3) was enforced at least in part by the Department of Labor, an agency responsible not for collecting revenue but rather for punishing labor law violations. In stark contrast to the penalty the Court struck down in *Drexel*, the employer mandate exaction is devoid of any scienter requirement and does not punish unlawful behavior. Further, the exaction is collected by the Secretary of the Treasury in the same manner as a tax…

We therefore reject Liberty's argument that the employer mandate imposes a penalty rather than a tax.

E.

In conclusion, the Supreme Court has already upheld the individual mandate exaction as a constitutional tax. Similarly, the employer mandate exaction "need not be read to do more than impose a tax." Accordingly, Congress had the power to enact it, and we must uphold it. For these reasons, as well as those provided supra in Part IV, we reject Plaintiffs' contention that Congress lacked authority under Article I of the Constitution to enact the employer mandate.

VI.

Finally, Plaintiffs challenge the Act on various religion-based grounds. In their second amended complaint, Plaintiffs allege that the Act violates their rights under the First and Fifth Amendments and the Religious Freedom Restoration Act ("RFRA"). For the first time on this appeal, they also seek to challenge on religious grounds certain regulations implementing the Act. We initially consider the claims alleged in the second amended complaint and then those raised for the first time on this appeal.

A.
1.

Plaintiffs maintain that both the employer mandate and the individual mandate violate their free exercise rights under the First Amendment and RFRA. Specifically, they allege that the mandates unlawfully force them to violate their religious belief that "they should play ... no part in facilitating, subsidizing, easing, funding, or supporting ... abortions."

The Free Exercise Clause provides that "Congress shall make no law ... prohibiting the free exercise" of religion. However, the Clause does not compel Congress to exempt religious practices from a "valid and neutral law of general applicability."…

A neutral law of general applicability thus does not violate the Free Exercise Clause. The Act is just such a law. It has no object that "infringe[s] upon or restrict[s] practices because of their religious motivation," and imposes no "burden[ ] only on conduct motivated by religious belief."…

[B]y its own terms, RFRA directs application of strict scrutiny only if the Government "substantially burden[s]" religious practice. A substantial burden, in turn, requires "substantial pressure on an adherent to modify his behavior and to violate his beliefs."

Plaintiffs present no plausible claim that the Act substantially burdens their free exercise of religion, by forcing them to facilitate or support abortion or otherwise. The Act specifically provides individuals the option to purchase a plan that covers no abortion services except those for cases of rape or incest, or where the life of the mother would be endangered… Furthermore, the Act allows an individual to obtain, and an employer to offer, a plan that covers no abortion services at all, not even excepted services.

Given that the mandates themselves impose no substantial burden, the option of paying a

tax to avoid the mandates' requirements certainly imposes no substantial burden. On the contrary, this option underscores the "lawful choice" Plaintiffs have to avoid any coverage they might consider objectionable.

To the extent Plaintiffs contend that the tax payment itself is a substantial burden, as the district court explained, the Act "contains strict safeguards at multiple levels to prevent federal funds from being used to pay for [non-excepted] abortion services."…

Accordingly, Plaintiffs' free exercise claims—both under the Constitution and under RFRA—fail.

2.

Plaintiffs also allege that the two religious exemptions in the Act violate the Establishment Clause and their Fifth Amendment equal protection rights. Of course, the mere existence of religious exemptions in a statute poses no constitutional problem. Rather, the Constitution freely permits exemptions that will allow "religious exercise to exist without sponsorship and without interference." Permissible benevolence morphs into impermissible sponsorship only when the "proposed accommodation singles out a particular religious sect for special treatment." Thus, a court applies strict scrutiny only to statutes that "make [ ] explicit and deliberate distinctions between different religious organizations."

A statute without such distinctions, even one that has a disparate impact on different denominations, need only satisfy the less rigorous test set forth in *Lemon v. Kurtzman*. The *Lemon* test requires "a secular legislative purpose," a "principal or primary effect ... that neither advances nor inhibits religion," and no "excessive government entanglement with religion."

The first exemption Plaintiffs challenge is the individual mandate's religious conscience exemption. Plaintiffs maintain that this exemption discriminates against their religious practice by applying only to sects that conscientiously oppose all insurance benefits, provide for their own members, and were established before December 31, 1950. The religious conscience exemption adopts an exemption of the Social Security Amendments of 1965 under 26 U.S.C. § 1402(g), which courts have consistently found constitutional under the Establishment Clause and the Fifth Amendment. As the Supreme Court explained with respect to the § 1402(g) exemption, "Congress granted an exemption ... [to] a narrow category which was readily identifiable," i.e., "persons in a religious community having its own 'welfare' system."…

The exemption passes the *Lemon* test because it has a secular purpose: "to ensure that all persons are provided for, either by the [Act's insurance] system or by their church." The exemption's principal effects also neither advance nor inhibit religion, but only assure that all individuals are covered, one way or the other…

The second individual mandate exemption challenged by Plaintiffs is the health care sharing ministry exemption. Plaintiffs maintain that it unconstitutionally selects an

arbitrary formation date of December 31, 1999 as the eligibility cutoff. But even if the exemption's cutoff date is arbitrary, it is not unconstitutional. For neither the cutoff's text nor its history suggests any deliberate attempt to distinguish between particular religious groups. Accordingly, the cutoff need only satisfy the *Lemon* test.

Applying *Lemon*, the date serves at least two "secular legislative purpose[s]." First, the cutoff ensures that the ministries provide care that possesses the reliability that comes with historical practice. Second, it accommodates religious health care without opening the floodgates for any group to establish a new ministry to circumvent the Act. The "primary effect" of the cutoff accordingly "neither advances nor inhibits religion." Further, given that it applies only secular criteria, the cutoff does not "foster an excessive government entanglement with religion."

Plaintiffs additionally contend that both the religious conscience exemption and the health care sharing ministry exemption violate their Fifth Amendment equal protection rights. In furtherance of this argument they maintain that both exemptions are subject to the heightened scrutiny that applies "if the plaintiff can show the basis for the distinction was religious ... in nature." Here, the distinction made between sects that oppose insurance and provide for themselves in their own welfare system and those that do not, and the distinction made between ministries formed before 1999 and those formed after, are secular and thus subject only to rational basis review. Both distinctions are rationally related to the Government's legitimate interest in accommodating religious practice while limiting interference in the Act's overriding purposes.

We therefore conclude that Plaintiffs have failed to state any plausible claim that the Establishment Clause or the Fifth Amendment provide a basis for relief.

B.

In their recent post-remand briefs, Plaintiffs argue at length that certain regulations implementing neither the individual nor the employer mandate but another portion of the Act- § 1001 violate their religious rights. These new regulations require group health plans to cover all FDA-approved contraceptive methods.

Plaintiffs' second amended complaint mentions neither § 1001 of the Affordable Care Act nor 42 U.S.C. § 300gg–13. Further, the complaint does not mention contraception. To be sure, the complaint specifies that Plaintiffs have "sincerely held religious beliefs that abortions ... are murder and ... they should play ... no part in facilitating, subsidizing, easing, funding, or supporting ... abortions." But the complaint gives no notice that Plaintiffs challenge methods of contraception or include within their challenge to "abortion" all the forms of contraception they now label "abortifacients."

Moreover, Plaintiffs did not challenge these regulations, or make any argument related to contraception or abortifacients, in the district court, in their first appeal before us, or in their Supreme Court briefs. The Supreme

Court in turn ordered a limited remand […] which did not discuss this issue.

Nevertheless, for the first time in their post-remand briefs, Plaintiffs seek to challenge these regulations. Generally, "a federal appellate court does not consider an issue not passed upon below."

Of course, in our discretion, we can make "[e]xceptions to this general rule" but we do so "only in very limited circumstances." The Supreme Court has explained that we are "justified" in making such an exception when the "proper resolution is beyond any doubt" or "injustice might otherwise result." We have also recognized that certain other "limited circumstances" may justify such action, e.g., when refusal to do so would constitute plain error or result in a fundamental miscarriage of justice, or where there is an intervening change in the case law.

Plaintiffs do not contend that any of these "limited circumstances" apply here. There is good reason for this; none does…

Finding no circumstance justifying a premature resolution of Plaintiffs' new arguments and compelling reasons for refusing to do so in this case, we decline to reach Plaintiffs' challenge to the new regulations.

VII.

In sum, in light of the Supreme Court's teachings in *NFIB*, we hold that we have jurisdiction to decide this case. On the merits, we affirm the judgment of the district court dismissing the complaint in its entirety for failure to state a claim upon which relief can be granted.

AFFIRMED

“Court Rejects Obamacare Challenge by Christian College”

Reuters
Jonathan Stempel
July 11, 2013

A U.S. appeals court on Thursday rejected a Christian university's challenge to President Barack Obama's 2010 healthcare overhaul, which the school said unconstitutionally imposes costly burdens on large employers and infringes religious liberty.

The 4th U.S. Circuit Court of Appeals in Richmond, Virginia, rejected Liberty University's argument that the law violated the constitution's Commerce Clause by forcing large employers to provide health insurance to full-time workers and violated First Amendment religious protections by subsidizing abortions.

The 3-0 panel decision addressed issues that the U.S. Supreme Court did not take up in June 2012, when by a 5-4 vote it upheld most of the healthcare law known as "Obamacare."

In that case, the court upheld the individual mandate requiring people to buy insurance or pay a tax. It said the mandate was a valid exercise of Congress' taxing power, though it exceeded Congress' power under the Commerce Clause.

Mathew Staver, the dean of Liberty's law school, said in a phone interview that the university plans to appeal the decision to the Supreme Court this month.

"It goes against the principle that the Supreme Court laid down that Congress cannot force individuals to buy an unwanted product," he said. "We believe the same principle applies to employers. If we win on the employer mandate, then the mandate would be gone for religious and non-religious employers."

The U.S. Department of Justice, which defended the law at the 4th Circuit, was not immediately available for comment.

Dozens of groups and individuals supported either Liberty or the federal government during the appeals process.

Liberty, based in Lynchburg, Virginia, was founded by the late U.S. evangelist Jerry Falwell. It had filed its lawsuit shortly after Obama signed the healthcare law in 2010.

EMPLOYER MANDATE NOT A "MONSTER"

In its decision, the 4th Circuit said the employer mandate does not require employers to buy a product they do not want, saying that employers are free to and often do self-insure.

It also said Congress had a rational basis for the mandate because it substantially affects how easily workers can move from state to state. The court also rejected the argument that the mandate imposes a penalty rather than a tax.

"The employer mandate is no monster; rather, it is simply another example of

Congress's longstanding authority to regulate employee compensation offered and paid for by employers in interstate commerce," the panel said.

In finding that the law did not violate the right to freely exercise religion, the 4th Circuit said the law let individuals and employers use plans that do not cover abortion services except in cases of rape or incest or to protect a mother's life.

Circuit Judges Diana Gribbon Motz, Andre Davis and James Wynn, all appointed by Democratic presidents, co-wrote the decision. Most federal appeals court decisions are written by one judge or are unsigned.

"It is unusual," Staver said. "I think there was tension among the panel in terms of the direction it wanted to go, and it needed a joint decision to get a consensus."

The 4th Circuit had in 2011 dismissed Liberty's case, saying it lacked jurisdiction, but was ordered by the Supreme Court to revisit the matter.

Before the Supreme Court sent the case back, the Obama administration said Liberty's lawsuit lacked merit, but that it had no objection to letting the appeals court consider it.

Obamacare has spawned many other lawsuits. More than 60 oppose a requirement that employers provide birth control coverage, according to the Becket Fund for Religious Liberty, a nonprofit law firm.

The case is *Liberty University Inc et al v. Lew et al*, 4th U.S. Circuit Court of Appeals, No. 10-2347.

"Fourth Circuit's *Liberty* Ruling Deals a Hidden Blow to Obamacare"

Cato Institute
Michael F. Cannon
July 12, 2013

Obamacare had a rough day in court yesterday. In *Liberty University v. Lew*, the Court of Appeals for the Fourth Circuit ruled against Liberty University's challenge to various aspects of the law. One might think, as SCOTUSblog reported, this was a victory for the Obama administration.

In the process, however, the Fourth Circuit undercut three arguments the administration hopes will derail two lawsuits that pose an even greater threat to Obamacare's survival, *Pruitt v. Sebelius* and *Halbig v. Sebelius*.

The plaintiffs in both *Pruitt* and *Halbig* claim, correctly, that Obamacare forbids the administration to issue the law's "premium assistance tax credits" in the 34 states that have refused to establish a health insurance "exchange." The *Pruitt* and *Halbig* plaintiffs further claim that the administration's plans to issue those tax credits in those 34 states anyway, contrary to the statute, injures them in a number of ways. One of those injuries is that the illegal tax credits would subject the employer-plaintiffs to penalties under Obamacare's employer mandate, from which they should be exempt. (The event that triggers penalties against an employer is when one of its workers receives a tax credit. If there are no tax credits, there can be no penalties. Therefore, under the statute, when those 34 states opted not to establish exchanges, they effectively exempted their employers from those penalties.)

The Obama administration has moved to dismiss *Pruitt* and *Halbig* on a number of grounds. First, it argues that those penalties are a tax, and the Anti-Injunction Act (AIA) prevents taxpayers from challenging the imposition of a tax before it is assessed. Second, the administration argues that the injuries claimed by the employer-plaintiffs are too speculative to establish standing. Third, shortly after announcing it would effectively repeal the employer penalties until 2015, the administration wrote the *Liberty*, *Pruitt*, and *Halbig* courts to argue that the delay should (at the very least) delay the courts' consideration of those cases. In Liberty, the Fourth Circuit rejected all of those claims.

In discussing whether the "assessible payment" that the employer mandate imposes on non-compliant employers falls under the AIA, the court writes:

> Because Congress initially and primarily refers to the exaction as an "assessable payment" and not a "tax," the statutory text suggests that Congress did not intend the exaction to be treated as a tax for purposes of the AIA.
>
> Furthermore, Congress did not otherwise indicate that the employer mandate exaction qualifies as a tax for AIA purposes, though of course it could have done so. As the Supreme Court pointed out in *NFIB*, 26 U.S.C. § 6671(a) provides that the

> "penalties and liabilities" found in subchapter 68B of the Internal Revenue Code are "treated as taxes" for purposes of the AIA. The employer mandate, like the individual mandate, is not included in subchapter 68B, and no other provision indicates that we are to treat its "assessable payment" as a tax.
>
> Finally, we note that to adopt the Secretary's position would lead to an anomalous result. The Supreme Court has expressly held that a person subject to the individual mandate can bring a pre-enforcement suit challenging that provision. But, under the Secretary's theory, an employer subject to the employer mandate could bring only a post-enforcement suit challenging that provision. It seems highly unlikely that Congress meant to signal–with two isolated references to the term "tax"–-that the mandates should be treated differently for purposes of the AIA's applicability. Tellingly, the Government has pointed to no rationale supporting such differential treatment.
>
> For these reasons, we hold that the employer mandate exaction, like the individual mandate exaction, does not constitute a tax for purposes of the AIA. Therefore, the AIA does not bar this suit.

It is worth mentioning that the *Pruitt* and *Halbig* plaintiffs aren't even asking the courts to enjoin the collection of the penalties. The penalties are merely one of the injuries they suffer. The relief they seek is to block the illegal tax credits, without which no penalty can be assessed. But even if we pretend (as the government does) that they are trying to block the collection of a tax, the federal district courts for the Eastern District of Oklahoma (*Pruitt*) and the District of Columbia (*Halbig*) may now rely on the Fourth Circuit's opinion in Liberty to reject the argument that the AIA applies to the employer mandate.

As in *Pruitt* and *Halbig*, the administration also argued that Liberty University could not challenge the employer mandate because the university hadn't proved it would be assessed a penalty. The court responded:

"[T]o establish standing, Liberty need not prove that the employer mandate will increase its costs of providing health coverage; it need only plausibly allege that it will."

Liberty's allegation to this effect is plausible. Even if the coverage Liberty currently provides ultimately proves sufficient, it may well incur additional costs because of the administrative burden of assuring compliance with the employer mandate, or due to an increase in the cost of care.

Finally, the Fourth Circuit rejected the administration's argument that the delay of the employer mandate should delay challenges to the mandate:

> Liberty's injury is imminent even though the employer mandate will not go into effect until January 1, 2015, as Liberty must take measures to ensure compliance in advance of that date.

If anything the delay may increase the likelihood that the *Pruitt* and *Halbig* employer-plaintiffs will establish standing. In response to the government's employer-mandate-delay argument in Pruitt, Oklahoma's solicitor general argued that the delay actually validates the State of Oklahoma's claim that it is injured by the mandate:

> The federal government's decision to delay implementation of the reporting and other regulatory requirements it seeks to impose on large employers in Oklahoma confirms what the State has been saying all along: those reporting and other requirements are burdensome, onerous, and injurious to it and every other large employer in the state. In fact, the IRS has justified the delay by noting that large employers nationwide are finding it impossible to understand and comply with the baffling array of new requirements…
>
> The State has argued it has standing in this case as a result of having to comply with the very reporting and other requirements that caused this delay. Despite having apparently known about the severity of the problems for "several months," to this Court the federal government has downplayed the burden imposed by those reporting requirements, and has argued that those requirements do no harm to large employers like the State. Now, however, they have publically acknowledged that the requirements are so "complex" that large employers need a full year to figure out how to comply. The delay is at least an implicit admission by the federal government that the reporting requirements and other large employer mandate requirements are in fact injuring large employers such as the State.

So the administration could find that its employer-mandate delay has the opposite of the desired effect.

In sum, the administration threw everything it had at Liberty, but still couldn't prevent Liberty University's challenge to the employer mandate from reaching the merits. That's very good for *Pruitt*, *Halbig*, and taxpayers, but very bad for Obamacare.