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## *ESSAY*

A CRITIQUE OF THE CORPORATE LAW PROFESSORS' AMICUS  
BRIEF IN *HOBBY LOBBY* AND *CONESTOGA WOOD*

*Stephen M. Bainbridge\**

### INTRODUCTION

THE Patient Protection and Affordable Care Act (“ACA”)<sup>1</sup> effected numerous changes in the legal regime governing health care and health insurance.<sup>2</sup> Among the ACA’s more controversial provisions is the so-called employer mandate, which imposes financial penalties on employers with at least fifty full-time employees if (a) the employer fails to offer its employees health insurance plans meeting various statutory requirements and (b) at least one of those full-time employees claims a health insurance premium tax credit for buying an individual policy on an insurance exchange.<sup>3</sup> Among the requirements that must be met for a health insurance plan to satisfy the employer mandate is the so-called contraceptive mandate, which “mandates coverage, without cost-sharing by plan participants or beneficiaries, of ‘preventive care and screenings’

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<sup>1</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

<sup>2</sup> For an overview of the ACA, see *The Patient Protection and Affordable Care Act: Select Elements and Entities* (Otis Cronin & Peter Aponte eds., 2012).

<sup>3</sup> I.R.C. § 4980H (2012).

for women ‘as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [“HRSA”].’<sup>4</sup> In turn, those 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.”<sup>5</sup>

The contraception mandate generated a number of challenges by a wide variety of employers who objected on religious grounds to providing contraceptive coverage.<sup>6</sup> In two of those cases, *Sebelius v. Hobby Lobby Stores*<sup>7</sup> and *Conestoga Wood Specialties Corp. v. Sebelius*<sup>8</sup> the U.S. Supreme Court granted certiorari to determine whether the application of the contraception mandate to for-profit corporations violates the Religious Freedom Restoration Act of 1993 (“RFRA”),<sup>9</sup> which provides that government actions that “substantially burden a person’s exercise of religion” must satisfy the strict scrutiny standard of review.<sup>10</sup>

Among the many amicus briefs filed in these cases<sup>11</sup> was one filed on behalf of forty-four law professors specializing in corporate law and related subjects.<sup>12</sup> As the summary of their argument explains, their brief (“Brief”) makes six points:

1. The essence of a corporation is its “separateness” from its shareholders. It is a distinct legal entity, with its own rights and obli-

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<sup>4</sup> *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013) (citing 42 U.S.C. § 300gg-13(a)(4) (2006)), cert. granted, 134 S. Ct. 678 (2013).

<sup>5</sup> *Id.* at 1123 (quoting 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012)) (internal quotation marks omitted).

<sup>6</sup> See generally HHS Mandate Information Central, Becket Fund for Religious Liberty, <http://www.becketfund.org/hhsinformationcentral/> (last visited Mar. 14, 2014) (providing an overview and summary of challenges to the employer mandate).

<sup>7</sup> 134 S. Ct. 678 (2013).

<sup>8</sup> 134 S. Ct. 678 (2013).

<sup>9</sup> 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

<sup>10</sup> *Id.* § 2000bb-1.

<sup>11</sup> The SCOTUSblog website provides links to all the amicus briefs filed in these cases, see *Conestoga Wood Specialties Corp. v. Sebelius*, SCOTUSblog, <http://www.scotusblog.com/case-files/cases/conestoga-wood-specialties-corp-v-sebelius/> (last visited Mar. 14, 2014) (providing links to amicus briefs filed in *Conestoga Wood*); *Sebelius v. Hobby Lobby Stores*, SCOTUSblog, <http://www.scotusblog.com/case-files/cases/sebelius-v-hobby-lobby-stores-inc/> (last visited Mar. 14, 2014) (providing links to amicus briefs filed in *Hobby Lobby*).

<sup>12</sup> Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners, *Sebelius v. Hobby Lobby Stores*, No. 13-354 and *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (U.S. Jan. 28, 2014), 2014 WL 333889 [hereinafter Brief].

gations, different from the rights and obligations of its shareholders. This Court has repeatedly recognized this separateness.

2. Shareholders rely on the corporation's separate existence to shield them from personal liability. When they voluntarily choose to incorporate a business, shareholders cannot then decide to ignore, either directly or indirectly, the distinct legal existence of the corporation when it serves their personal interests.

3. The separateness between shareholders and the corporation that they own (or, in this case, own and control) is essential to promote investment, innovation, job generation, and the orderly conduct of business. This Court should not adopt a standard that chips away at, creates idiosyncratic exceptions to, or calls into question this legal separateness.

4. On the facts of these cases, there is no basis in law or in fact to disregard the separateness between shareholders and the corporations they control. Hobby Lobby's and Conestoga's attempt to "reverse veil pierce"—that is, to imbue the corporation, either by shareholder fiat or a board resolution, with the religious identity of certain of its shareholders—should be rejected. The concept of "reverse veil piercing" is wholly inapplicable on these facts.

5. Adoption by this Court of a "values pass-through" theory here would be disruptive to business and generate costly litigation. It would encourage intrafamilial and intergenerational disputes. It would also encourage subterfuge by corporations seeking to obtain a competitive advantage.

6. Adoption by this Court of a "values pass-through" theory would also have potentially dramatic and unintended consequences with respect to laws other than [ACA], such as the Public Accommodations and Employment Discrimination provisions of the Civil Rights Act of 1964. Rather than open up such a Pandora's box, the Court should simply follow well-established principles of corporate law and hold that a corporation cannot, through the expedient of a shareholder vote or a board resolution, take on the religious identity of its shareholders.<sup>13</sup>

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<sup>13</sup> Id. at 2–3.

On each point, the Brief either makes errors, overstates its claims, or misses the real issues presented by the cases before the Court.

#### I. THE BRIEF OVERSTATES THE CORPORATION'S SEPARATENESS FROM ITS OWNERS

The Brief's central argument rests on the corporation's status as a legal entity separate from its shareholders. According to the Brief, "[t]he centrality of corporate 'separateness' is well-established in the United States."<sup>14</sup> "Indeed," the Brief asserts, "this legal separateness—sometimes called legal 'personhood'—has been the very basis of corporate law at least since the 18th Century."<sup>15</sup> All of this is true, but hardly dispositive of the issues in this case.

After all, it has long been the law that "the corporate form can be set aside . . . as a means of preventing injustice or inequitable consequences."<sup>16</sup> As far back as 1905, for example, a federal appellate court held that, despite the "general rule" of respect for the corporation's legal personhood, "when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."<sup>17</sup>

The law thus has long recognized William Klein's point that, despite the utility of the fiction of corporate legal personhood, it is critical to

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<sup>14</sup> Id. at 4.

<sup>15</sup> Id. at 5.

<sup>16</sup> Co-Ex Plastics, Inc. v. AlaPak, Inc., 536 So. 2d 37, 38 (Ala.1988).

<sup>17</sup> United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (C.C.E.D. Wis. 1905). In so holding, the court cited several even earlier precedents for the proposition that the corporation's separate legal personality is neither absolute nor inviolate, see id. at 254–55, including *Kansas Pacific Railroad Co. v. Atchison, Topeka & Santa Fe Railroad Co.*, 112 U.S. 414, 415 (1884) ("A private corporation is, in fact, but an association of individuals united for a lawful purpose and permitted to use a common name in their business, and to have a change of members without dissolution."); *Hightower v. Thornton*, 8 Ga. 486, 492 (1850) ("[C]orporations . . . are but associations of individuals . . ."); *Gelpcke, Winslow & Co. v. Blake*, 19 Iowa 263, 268 (1865) ("Who, in law, constitutes the company, if it be not the stockholders?"); *People v. North River Sugar Refining Co.*, 121 N.Y. 582, 621 (1890) ("The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech.").

For other early cases in which the corporate veil was pierced and the corporation's separate legal personhood disregarded, see also *Cheaney v. Ocean Steamship Co.*, 92 Ga. 726 (1893) (discussing alter-ego theory for disregarding corporate form); *Hinkley v. Reed*, 82 Ill. App. 60, 68 (Ill. App. Ct. 1899) ("The court will sometimes ignore the corporate existence in order to do justice."), rev'd on other grounds, 55 N.E. 337 (Ill. 1899).

remember that treating the corporation as an entity separate from the people making it up bears no relation to economic reality.<sup>18</sup> In appropriate cases, courts will set aside the corporation's separate legal personhood and view the corporation as the aggregate of its shareholders.

## II. THE CORPORATION'S SEPARATE EXISTENCE DOES NOT ALWAYS PROTECT SHAREHOLDERS FROM LIABILITY FOR CORPORATE DEBTS

The Brief asserts: "Because the corporation is a separate entity, its shareholders are not responsible for its debts. This 'privilege of limited liability,' as protected by the corporate veil, is 'the corporation's most precious characteristic.'"<sup>19</sup>

The Brief goes on to describe a parade of horrors that would ensue if the Supreme Court failed to rule for the government in the mandate cases:

Allowing a corporation, through either shareholder vote or board resolution, to take on and assert the religious beliefs of its shareholders in order to avoid having to comply with a generally-applicable law with a secular purpose is fundamentally at odds with the entire concept of incorporation. Creating such an unprecedented and idiosyncratic tear in the corporate veil would also carry with it unintended consequences, many of which are not easily foreseen. For example, adopting a "values pass-through" theory or "reverse veil piercing" in this case could make the raising of capital more challenging, recruitment of employees more difficult, and entrepreneurial energy less likely to flourish.<sup>20</sup>

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<sup>18</sup> See William A. Klein, *Business Organization and Finance* 117–22 (11th ed. 2010) (criticizing reification of the corporation); see also G. Mitu Gulati et al., *Connected Contracts*, 47 *UCLA L. Rev.* 887, 891 (2000) ("[I]t is dangerous to ignore the reality that firms transact only through individuals . . .").

<sup>19</sup> Brief, *supra* note 12, at 6 (quoting William W. Cook, *The Principles of Corporation Law* 19 (1925)).

<sup>20</sup> *Id.* at 7–8. The Brief fails to acknowledge that many corporations already reflect the values of their significant shareholders and senior management. This is certainly true of smaller corporations that are family-owned or sole proprietorships, but the same can be said for larger corporations. Think about Apple and Steve Jobs, Martha Stewart Omnimedia and Martha Stewart, Harpo and Oprah Winfrey, Google and Larry Page and Sergey Brin, Ben & Jerry's and Ben and Jerry, and so on.

In fact, however, as the Brief acknowledges only in passing,<sup>21</sup> there is nothing “unprecedented and idiosyncratic” about piercing the corporate veil in appropriate cases. To the contrary, the veil piercing doctrine long has allowed courts to set aside a corporation’s separate personhood. Yet the economy and society somehow have managed to stumble along anyway.

As long ago as 1912, a leading legal scholar of the day was able to gather sufficient legal precedents to conclude that, while “in certain cases and at certain times” a corporation is treated as a separate legal person,”Practically all writers agree . . . that in some cases this entity theory must be disregarded.”<sup>22</sup> Accordingly, he concluded, “Sometimes we look upon the corporation as a unit, at other times we look upon it as a collection of persons.”<sup>23</sup> A little over two decades later, in *New Colonial Ice Co. v. Helvering*, the Supreme Court likewise recognized that the corporate veil can be pierced in appropriate circumstances, holding that “the separate identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights.”<sup>24</sup>

The leading empirical study of corporate veil piercing examined 1583 reported judicial decisions contained in the Westlaw legal database through 1985.<sup>25</sup> Contrary to the Brief’s claim that the “impermeability of the corporate veil” has been confirmed,<sup>26</sup> this study found that courts had pierced the veil in over forty percent of the reported decisions, a percentage that had been more or less constant over many decades.<sup>27</sup> Despite veil piercing thus being a standard and commonly applied legal doctrine, corporations have managed to continue raising capital, hiring employees, and undertaking entrepreneurial ventures.

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<sup>21</sup> See *id.* at 7 (“[T]he corporate veil cannot be pierced absent significant misconduct or fraud on the part of the shareholder.”).

<sup>22</sup> I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 *Colum. L. Rev.* 496, 496 (1912).

<sup>23</sup> *Id.*

<sup>24</sup> 292 U.S. 435, 442 (1934).

<sup>25</sup> Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 *Cornell L. Rev.* 1036 (1991).

<sup>26</sup> Brief, *supra* note 12, at 7.

<sup>27</sup> Thompson, *supra* note 25, at 1048–49. These, of course, are just reported decisions; most cases are settled and one would expect that when a court would clearly pierce the veil, the shareholder-defendants would not even bother to contest the case.

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In sum, the Brief's effort to imply that the corporation's legal personhood is something approaching absolute or inviolate is simply wrong, as is the parade of horribles it posits.

### III. THE BRIEF'S ATTACK ON REVERSE VEIL PIERCING IS OVERSTATED AND INACCURATE

In *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*,<sup>28</sup> this author argued:

Reverse veil piercing (RVP) is a corporate law doctrine pursuant to which a court disregards the corporation's separate legal personality, allowing the shareholder to claim benefits otherwise available only to individuals. The thesis of this article is that RVP provides the correct analytical framework for vindicating certain constitutional rights.

Assume that sole proprietors with religious objections to abortion or contraception are protected by the free exercise clause of the First Amendment and the Religious Freedom Restoration Act (RFRA) from being obliged to comply with the government mandate that employers provide employees with health care plans that cover sterilizations, contraceptives and abortion-inducing drugs. Further assume that incorporated employers are not so protected. This article analyzes whether the shareholders of such employers can invoke RVP so as to vindicate their rights.

At least one court has recognized the potential for using RVP in the mandate cases, opining that these cases "pose difficult questions of first impression," including whether it is "possible to 'pierce the veil' and disregard the corporate form in this context." The court further

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<sup>28</sup> Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 *Green Bag* 2d 235 (2013) [hereinafter Bainbridge, *Using RVP*]. Familiarity with that article's analysis of the law governing reverse veil piercing ("RVP") and its application to the contraceptive mandate cases is assumed. As noted in that article, I have elsewhere criticized veil piercing, arguing for its abolition. See, e.g., Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 *U. Ill. L. Rev.* 77, 97-106; Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 *J. Corp. L.* 479, 514-35 (2001). I have likewise criticized RVP, arguing for its rejection. See, e.g., Stephen M. Bainbridge, *Corporation Law and Economics* 166 (2002). Obviously, however, both veil piercing and RVP remain the law. The analysis herein assumes that the Supreme Court will not use *Hobby Lobby* and *Conestoga Wood* as vehicles for adopting my abolition proposals and thus apply that law as it stands today.

opined that that question, among others, merited “more deliberate investigation.” This article undertakes precisely that investigation.

Invoking RVP in the mandate cases would not be outcome determinative. Instead, it would simply provide a coherent doctrinal framework for determining whether the corporation is so intertwined with the religious beliefs of its shareholders that the corporation should be allowed standing to bring the case. Whatever demerits RVP may have, it provides a better solution than the courts’ current practice of deciding the issue by mere fiat.<sup>29</sup>

Much of the Brief is a response to this argument<sup>30</sup>:

When they voluntarily choose to incorporate a business, shareholders cannot then decide to ignore, either directly or indirectly, the distinct legal existence of the corporation when it serves their personal interests.

....

On the facts of these cases, there is no basis in law or in fact to disregard the separateness between shareholders and the corporations they control. Hobby Lobby’s and Conestoga’s attempt to “reverse veil pierce”—that is, to imbue the corporation, either by shareholder fiat or a board resolution, with the religious identity of certain of its shareholders—should be rejected. The concept of “reverse veil piercing” is wholly inapplicable on these facts.<sup>31</sup>

The Brief concludes that the present author’s “argument fundamentally misunderstands the reverse piercing remedy.”<sup>32</sup> In reply, this Part argues that it is the Brief that misunderstands reverse veil piercing (“RVP”).

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<sup>29</sup> Stephen M. Bainbridge, Abstract of Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers, SSRN.com (Mar. 6, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2229414](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229414).

<sup>30</sup> Brief, *supra* note 12, at 16 (“One corporate law scholar has recently suggested that the practice of ‘reverse veil-piercing’ might justify a ‘religious values pass-through’ from controlling shareholders to the corporation.”) (citing Bainbridge, Using RVP, *supra* note 28).

<sup>31</sup> *Id.* at 2-3.

<sup>32</sup> *Id.* at 16.

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*A. The Brief Misrepresents Hobby Lobby's and Conestoga Wood's Argument*

The Brief claims:

Hobby Lobby and Conestoga want to argue, in effect, that the corporate veil is only a one-way street: its shareholders can get protection from tort or contract liability by standing behind the veil, but the corporation can ask a court to disregard the corporate veil on this occasion.<sup>33</sup>

To the best knowledge of this author, that claim is false. No one arguing on behalf of Hobby Lobby or Conestoga Wood has claimed that they are somehow immune to the ordinary rules of corporate veil piercing. They are not asking for a one-way street. Rather, they are asking that the law as it stands be applied to them, both forward and in reverse.<sup>34</sup>

*B. Reverse Veil Piercing is an Established Doctrine*

Numerous other jurisdictions have recognized the validity of RVP.<sup>35</sup> It is true that courts are less likely to pierce in a RVP case than in a forward veil piercing case, but they nevertheless pierce in 13.41% of RVP cases.<sup>36</sup> As the author of the leading empirical study of veil piercing acknowledges: “[T]he willingness of courts to pierce the veil in one out of every eight of these cases shows the contextual nature of the corporate form. The form is preserved in some situations but not others, and judicial decisions are required to determine the appropriate contexts for preservation.”<sup>37</sup>

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<sup>33</sup> Id. at 14.

<sup>34</sup> Brief for Petitioners at 16-32, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (U.S. Jan. 10, 2014); Brief for Respondent at 28-32, *Sebelius v. Hobby Lobby Stores*, No. 13-354 (U.S. Feb. 10, 2014).

<sup>35</sup> See, e.g., *In re Boyd*, No. 11-51797, 2012 WL 5199141, at \*4 (Bankr. W.D. Tex. Oct. 22, 2012) (“Reverse veil-piercing, which is a common-law doctrine recognized in Texas, counts the assets of a corporation or other entity as the assets of its shareholder.”); *In re Zhang*, 463 B.R. 66, 79 (Bankr. S.D. Ohio 2012) (“[C]ourts have recognized that in the context of Bankruptcy Code § 727(a)(2) and (4), corporate distinctions may be disregarded under alter ego and reverse veil piercing theories.”); *In re Am. Int’l Refinery*, 402 B.R. 728, 744 (Bankr. W.D. La. 2008) (“Nevada courts have recognized reverse veil-piercing based upon the alter ego doctrine.”).

<sup>36</sup> Thompson, *supra* note 25, at 1057 (summarizing data in Table 8).

<sup>37</sup> Id. at 1058. The Supreme Court touched on RVP in *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006), which raised the ability of a “shareholder and contracting officer of a corporation” to raise claims under 42 U.S.C. § 1981 in connection with the termination of

*C. The Law Does Not “Strongly Oppose” Reverse Veil Piercing*

The Brief claims:

Hobby Lobby and Conestoga seek in these cases . . . to engage in a discredited variation on reverse veil piercing, known as “insider reverse piercing.” In a “typical” insider reverse piercing case, “a corporate insider, or someone claiming through such individual, attempt[s] to pierce the corporate veil from within so that the corporate entity and the individual will be considered one and the same.”<sup>38</sup>

The Brief goes on to claim that, “[t]he law strongly opposes insider reverse veil piercing.”<sup>39</sup>

The Brief is correct insofar as the form of RVP potentially at issue in *Hobby Lobby* and *Conestoga Wood* is the insider reverse veil piercing version (“RVP-I”).<sup>40</sup> But the Brief misstates the case when it claims RVP-I is “discredited” and “strongly oppose[d].”<sup>41</sup>

In *Wells v. Firestone Tire & Rubber Co.*, for example, the Michigan Supreme Court allowed an interesting variation of RVP to enable a corporate parent to assert the exclusive remedy provision of a workers’ compensation statute as a defense to an action by an injured employee of a subsidiary (a defense that otherwise would have been available only to

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contracts between Domino’s Pizza and the corporate franchisee. A § 1981 claim requires that plaintiff first establish the existence of a contractual relationship to which the plaintiff is a party or otherwise has rights. *Id.* at 476. The Court ruled that plaintiff was unable to do so because “it is fundamental corporation and agency law—indeed, it can be said to be the whole purpose of corporation and agency law—that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation’s contracts.” *Id.* at 477. *McDonald*, however, is not dispositive of the issues raised in the present case. First, the Court made no effort to analyze the issues raised by RVP, but simply dismissed it out of hand. There is no citation of authority, no justification of the claims made, and no effort to address any of the points made herein in defense of the doctrine, all of which makes *McDonald* a weak precedential reed. Second, the case involved solely contractual and statutory rights as opposed to the fundamental First Amendment concerns presented here. Third, the Court relied on the plain text of § 1981 to hold that “plaintiffs must identify injuries flowing from a racially motivated breach of their own contractual relationship, not of someone else’s.” *Id.* at 480. No such statutory limitation is at issue here.

<sup>38</sup> Brief, *supra* note 12, at 17 (quoting *Postal Instant Press, Inc. v. Kaswa Corp.*, 77 Cal. Rptr. 3d 96, 101 (Cal. Ct. App. 2008)).

<sup>39</sup> *Id.*

<sup>40</sup> For a discussion of the distinction between outsider and insider RVP, see Bainbridge, *Using RVP*, *supra* note 28, at 245.

<sup>41</sup> Brief, *supra* note 12, at 17.

the subsidiary).<sup>42</sup> In so holding, the court explained that, “[a]lthough traditionally the doctrine of ‘piercing the corporate veil’ has been applied to protect a corporation’s creditors, . . . Michigan courts have recognized that it may be appropriate to invoke the doctrine for the benefit of a shareholder where the equities are compelling.”<sup>43</sup> In so holding, of course, the court validated RVP-I.

In *Roepke v. Western National Mutual Insurance Co.*, to cite another example, the Minnesota Supreme Court allowed a corporate insider to invoke RVP-I in an insurance case.<sup>44</sup> Under applicable law, an individual could stack—that is, redeem—multiple insurance policies with respect to a single claim, instead of being limited to the benefits of only one policy.<sup>45</sup> A corporation could not stack such policies. The court allowed the insider to disregard the separate existence of the corporation and stack the policies.<sup>46</sup> In so holding, moreover, the court noted that several other states had recognized RVP-I in probate cases as far back as 1941.<sup>47</sup>

While it is true that some other courts have denied RVP-I claims, the opinions in those cases “generally emphasized the fact-specific nature of the rulings and left open the possibility of applying the doctrine under appropriate circumstances.”<sup>48</sup> Accordingly, the Brief’s claim that RVP-I is “discredited” and “strongly opposed” is erroneous.

#### *D. The Brief’s Sleight of Hand Should Not Obscure the Important Policy Issues at Stake*

The Brief attempts to further its argument in a passage that can only be described as employing sleight of hand:

Hobby Lobby’s and Conestoga’s position is not supported by cases that pierce the corporate veil in order to fulfill a federal or state directive. In such cases, federal and state courts may invoke veil piercing because a corporation was created for the transparent purpose of

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<sup>42</sup> 364 N.W.2d 670, 672, 674–76 (Mich. 1984).

<sup>43</sup> Id. at 674 (citations omitted).

<sup>44</sup> 302 N.W.2d 350 (Minn. 1981).

<sup>45</sup> Id. at 353.

<sup>46</sup> Id. at 351–53.

<sup>47</sup> See id. at 352 (citing *State v. North*, 32 So. 2d 14 (Fla. 1947); *In re Burr’s Estate*, 24 N.Y.S.2d 940 (Sur. Ct. 1941); *In re Estate of Greenfield*, 321 A.2d 922 (Pa. 1974)).

<sup>48</sup> Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. Corp. L. 33, 38 (1990).

evading state or federal policy. See, e.g., *Anderson v. Abbott*, 321 U.S. 349, 362–63 (1944); *Ill. Bell Tel. Co. v. Global NAPS Ill., Inc.*, 551 F.3d 587, 598 (7th Cir. 2008); *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 26–27 (1st Cir. 2001). By contrast, there is no allegation that Hobby Lobby's or Conestoga's shareholders created their respective corporations as a contrivance in order to evade a federal or state directive. Thus, these facts are different from, for example, cases in which state usury laws limited to individuals are evaded by the borrower purposely incorporating so as to obtain a loan at rates usurious if applied to individuals. See, e.g., *Atlas Subsidiaries of Fla., Inc. v. O & O, Inc.*, 166 So. 2d 458 (Fla. Dist. Ct. App. 1964).<sup>49</sup>

This paragraph, however, is replete with red herrings and misdirection.

First, the claim made by this author was not that the Supreme Court should “pierce the corporate veil in order to fulfill a federal or state directive.” The claim was that RVP in these cases would advance “significant public policies.”<sup>50</sup> Hence, the fact that this is not a case in which “a corporation was created for the transparent purpose of evading state or federal policy” is simply irrelevant and the reference to those cases is a red herring.

Second, the cases listed in the Brief's first string cite are not RVP-I cases. They are run-of-the-mill forward veil piercing cases.<sup>51</sup> Hence, they are irrelevant to the argument at hand.

Third, RVP is not limited to cases in which the corporation was created “as a contrivance in order to evade a federal or state directive.” Instead, RVP can be—and has been—used in cases in which the separate legal personhood of legitimate *de jure* corporations was set aside so as to advance some public policy goal. The Brief acknowledges this point only by implication, only in a footnote, and only in a way that seems intended to trivialize the issues:

This is also not a case where the decision to incorporate a family farm has threatened a shareholder's homestead exemption. See, e.g., *Cargill, Inc. v. Hedge*, 375 N.W.2d 477 (Minn. 1985) (ignoring the fact

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<sup>49</sup> Brief, *supra* note 12, at 17–18.

<sup>50</sup> Bainbridge, *Using RVP*, *supra* note 28, at 246, 248.

<sup>51</sup> *Anderson v. Abbott*, 321 U.S. 349, 354 (1944); *Ill. Bell Tel. Co. v. Global NAPS Ill., Inc.*, 551 F.3d 587, 597–99 (7th Cir. 2008); *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 22, 25 (1st Cir. 2000).

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that a farm had been incorporated in order to permit the sole owner of the corporation to keep her homestead exemption); *State Bank in Eden Valley v. Euerle Farms, Inc.*, 441 N.W.2d 121 (Minn. Ct. App. 1989) (same).<sup>52</sup>

But so what? RVP is not limited to cases involving the application of homestead exemptions to incorporated family farms, despite the self-evident attempt by the Brief to so cabin it.<sup>53</sup>

Instead, those cases stand as examples of the role considerations of public policy play in RVP-I cases.<sup>54</sup> In any case, if the “sanctuary” of the family home is a sufficiently grave policy consideration to justify reverse piercing of the corporate veil, is not vindicating the free exercise rights of the owners of an incorporated business equally important or, indeed, of far greater importance? As this author has explained:

Conduct that is motivated by religious belief is accepted as one of the ways in which people exercise their religious freedom, . . . even when the conduct occurs in a commercial setting. As such, the strength of the public policy issues at stake in the mandate cases go far beyond the homestead policy at issue in the seminal Minnesota cases. The issues at stake here arise out of the First Amendment, not a mere statute.

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.” Accordingly, “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or

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<sup>52</sup> Brief, *supra* note 12, at 18 n.6.

<sup>53</sup> See, e.g., *Wells v. Firestone Tire & Rubber Co.*, 364 N.W.2d 670, 674 (Mich. 1984) (“Our disregard of the separate corporate entities of Firestone and its wholly owned subsidiary is premised upon our recognition of the important public policies underlying the Michigan Worker’s Disability Compensation Act and our belief that a contrary determination would be inequitable under the facts of this case.”); *Gelber v. Kugel’s Tavern, Inc.*, 89 A.2d 654, 657 (N.J. 1952) (allowing shareholder to claim the protection of a usury statute even though the disputed loan had been made to the entity); see also Robert Laurence, *Swimming Upstream: A Final Attempt at Persuasion on the Issue of Corporate Pro Se Representation in Arkansas State Court*, 54 Ark. L. Rev. 475, 512 (2001) (“The question of pro se representation by a closely-held corporation seems perfectly suited to an application of the insider reverse pierce doctrine, and a few courts have agreed.”).

<sup>54</sup> See, e.g., *Cargill, Inc. v. Hedge*, 375 N.W.2d 477, 479 (Minn. 1985) (noting that “we have strong policy reasons for a reverse pierce” in that case); *State Bank in Eden Valley v. Euerle Farms, Inc.*, 441 N.W.2d 121, 124 (Minn. Ct. App. 1989) (“Furtherance of the homestead exemption is a strong policy reason for a reverse pierce of the corporate veil.”).

*force citizens to confess by word or act their faith therein.*” Because that is precisely what the plaintiffs in the mandate cases claim the government is forcing them to do, the policy prong of the RVP-I standard strongly favors the plaintiffs.<sup>55</sup>

*E. The Supreme Court Should Invoke RVP-I to Prevent the Government from Continuing its “Shell Game”*

Douglas Laycock observes:

The threshold issue in *Sebelius v. Hobby Lobby Stores and Conestoga Wood Specialties Corp. v. Sebelius* is whether any plaintiff’s free exercise of religion is substantially burdened within the meaning of the Religious Freedom Restoration Act. . . .

On that issue, the government’s argument is a shell game. Only the individuals have religious-liberty rights; only the corporations are regulated. And more: Even the individuals have no rights when they act or refuse to act as directors, officers, or managers of the corporation. Not only are the individuals separate persons from the corporation, but the individuals are divided into additional separate persons, depending on the capacity in which they act. This is formalism in the extreme.<sup>56</sup>

By advancing the same sort of extreme formalism, the Brief provides academic cover for the government shell game.

In *Barium Steel Corp. v. Wiley*, the Pennsylvania Supreme Court allowed an RVP-I claim so as to prevent just such a shell game.<sup>57</sup> In that case, the court allowed the plaintiff shareholder (itself a corporation) to pierce the veil in reverse to recover damages suffered by a later-created subsidiary due to a breach of warranty, on the grounds that absent RVP, the defendants would never be liable for their breach due to lack of privity with the subsidiary and the fact that the sub was not an intended third-party beneficiary.<sup>58</sup> The Supreme Court likewise should use RVP-I in this case to prevent just such a shell game.

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<sup>55</sup> Bainbridge, Using RVP, *supra* note 28, at 248 (footnotes omitted).

<sup>56</sup> Douglas Laycock, Symposium: Congress Answered this Question: Corporations Are Covered, SCOTUSblog (Feb. 19, 2014, 11:27 AM), <http://www.scotusblog.com/2014/02/symposium-congress-answered-this-question-corporations-are-covered/>.

<sup>57</sup> 108 A.2d 336 (Pa. 1954).

<sup>58</sup> *Id.* at 341–43.

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*F. Applying RVP-I in the Contraception Mandate Cases Would Not Be  
"Disruptive to Business"*

In one of the Brief's more hyperbolic passages, it offers a parade of horrors that might ensue if RVP were to be recognized here:

Shareholders in closely-held and family-owned businesses often find themselves in disputes over values. Factions emerge; majority shareholders gang up on minority shareholders; dissenters lose their jobs and are excluded from decision-making; dividends previously paid and relied upon are discontinued; etc. In such circumstances, minority shareholders find themselves with no economic return on their share ownership. Corporate law casebooks are filled with these dramas.

....

Running a family business is difficult enough, even without infusing disruptive and personal issues such as religion into the mix. Under a values pass-through theory, one can imagine majority shareholders "freezing out" family members who do not adhere to the majority's religious beliefs.<sup>59</sup>

The problems with this line of argument are many and obvious.

First, as we have seen, RVP is neither novel nor all that unusual. Courts presently pierce in about one out of eight RVP cases,<sup>60</sup> yet family businesses somehow manage to muddle along.<sup>61</sup> Why should allowing

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<sup>59</sup> Brief, *supra* note 12, at 19–20. Corporate law expert Keith Paul Bishop conducted a thought-provoking analysis of the Brief by substituting "social responsibility" for "religious" in some of the Brief's most breathless passages. He notes that, "if the transfer of stockholder religious beliefs to the corporation would be 'overwhelming,' why wouldn't the same be true of beliefs regarding climate change, the environment, or other beliefs animating the corporate social responsibility movement?" Keith Paul Bishop, 44 Law Professors Make a Case Against Corporate Social Responsibility, Cal. Corp. & Sec. L. Blog (Feb. 10, 2014), <http://calcorporatelaw.com/2014/02/44-law-professors-make-a-case-against-corporate-social-responsibility/>. He concludes that, "[i]f corporations can't have religious beliefs, then it follows that they can't believe in climate change, sustainable investment or any other beliefs embraced by the corporate social responsibility movement." *Id.*

<sup>60</sup> See *supra* notes 36–377 and accompanying text.

<sup>61</sup> Indeed, it is worth noting that courts seem to be more willing to grant RVP-I claims where necessary to effectuate important public policies with respect to family-owned corporations such as those at bar in these cases. See 1 Phillip I. Blumberg et al., Blumberg on Corporate Groups § 14.07[B], at 14-23 (2d ed. Supp. 2007) (noting that "some courts in some cases (typically involving family shareholders) have permitted reverse piercing to more ef-

RVP-I to vindicate cherished constitutional rights suddenly change the dynamics of such businesses?

Second, oppressive conduct by majority shareholders is something corporate law devotes much of its effort to preventing even outside of the context of religion. Indeed, the problem of corporations exercising religion in a way the minority dislikes is trivial compared to the problem of minority discontent with strategic business decisions, deciding what share of profit should be issued as dividends, self-dealing by the majority shareholders, etc., and the law provides numerous doctrines to protect the minority, ranging from fiduciary duties<sup>62</sup> to dissolution of the corporate entity.<sup>63</sup> In addition, the law permits shareholders of close corporations substantial freedom to protect themselves and organize their decision-making processes via private ordering.<sup>64</sup> Minority shareholders are thus not without protection from the parade of horrors the Brief claims a decision favoring Hobby Lobby and Conestoga Wood would visit upon them.

Third, even if some minority shareholders are unhappy with the decisions made by controlling shareholders, so what? Even states highly protective of minority shareholder rights recognize that the majority shareholder has rights of “selfish ownership” and “must have a large measure of discretion” in running the corporation.<sup>65</sup> Indeed, courts have gone so far as to hold that the “selfish ownership” rights of controlling shareholders should “not be stymied by a minority stockholder’s grievances if the controlling group can demonstrate a legitimate business purpose and the minority stockholder cannot demonstrate a less harmful alternative” for their conduct.<sup>66</sup>

Finally, and most fundamentally, the Brief assumes, without justification, that speculative considerations of potential friction among shareholders should weigh more heavily than considerations of free exercise of religion.

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fectively implement the policies of the statutory program involved in the litigation,” albeit noting that some other courts have declined to do so).

<sup>62</sup> See generally Stephen M. Bainbridge, *Corporate Law* § 14.3, at 460–69 (2d ed. 2009).

<sup>63</sup> See generally *id.* § 14.4, at 470–76 (discussing such remedies).

<sup>64</sup> See generally *id.* § 14.2, at 444–60 (discussing private ordering in close corporations).

<sup>65</sup> *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976).

<sup>66</sup> *Daniels v. Thomas, Dean & Hoskins, Inc.*, 804 P.2d 359, 366 (Mont. 1990).

*1. Protecting the Minority Shareholders' Interests Is Straightforward*

In *Wilkes v. Springside Nursing Home, Inc.*, the Massachusetts high court held that the controlling shareholders of a close corporation “have certain rights to what has been termed ‘selfish ownership’ in the corporation which should be balanced against the concept of their fiduciary obligation to the minority.”<sup>67</sup> The *Wilkes* court then elaborated a test by which a court must ask “whether the controlling group can demonstrate a legitimate business purpose” for a challenged action, with due regard for the majority’s need for “room to maneuver” and “a large measure of discretion” in setting corporate policy.<sup>68</sup> Under this test, if the majority asserts such a business purpose, the minority must demonstrate that the objectives of the challenged action could have been achieved in a manner less detrimental to the minority’s interests. The court will then “weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative.”<sup>69</sup>

In applying this test to the issues at hand, it does not seem too much of a stretch to find a reasonable business purpose for a corporation asserting a religious identity, even in the Brief’s highly speculative scenario in which all interested parties anticipate a loss of customers.<sup>70</sup> Moreover, even in the states most protective of minority shareholders, instances where courts have found breaches of fiduciary duty by controlling shareholders toward minority shareholders tend to be linked by certain broad factual commonalities: majority power used to obtain economic advantage at the expense of the minority, especially (though not always) underhandedly; majority power used for actions that do not benefit all the shareholders (qua shareholders) proportionately; majority power used to frustrate reasonable minority expectations that are com-

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<sup>67</sup> 353 N.E.2d at 663.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* Many states have essentially adopted the *Wilkes* court’s balancing approach. See, e.g., *G & N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 240 (Ind. 2001) (“[T]here must be a balance struck between the majority’s fiduciary obligations and its rights.”); *Daniels*, 804 P.2d at 366 (noting that due regard for “selfish ownership” rights requires that controlling shareholders “not be stymied by a minority stockholder’s grievances if the controlling group can demonstrate a legitimate business purpose and the minority stockholder cannot demonstrate a less harmful alternative”); see also *Connolly v. Bain*, 484 N.W.2d 207, 211 (Iowa Ct. App. 1992); *Berremans v. W. Publ’g Co.*, 615 N.W.2d 362, 370 (Minn. Ct. App. 2000); *Walta v. Gallegos Law Firm*, 2002-NMCA-015, 131 N.M. 544, 552, 40 P.3d 449, 457. Delaware has not, but in practice its test usually reaches the same result. See Bainbridge, *supra* note 62, § 14.3, at 467.

<sup>70</sup> See Brief, *supra* note 12, at 22 (setting out this hypothetical).

mon or customary in close corporations (such as continued participation in the business, the ability to get money out of their investment through dividends or employment, etc.). Does anyone really see potential shareholder disputes over expressions of corporate religious identity as being particularly susceptible to analysis in these terms?

2. *The Brief's Use of Cede & Co. v. Technicolor, Inc. is Misleading*

In making the arguments discussed in this section, the Brief relies on the Delaware Supreme Court's decision in *Cede & Co. v. Technicolor, Inc.*,<sup>71</sup> for the proposition that "[m]any states hold that controlling shareholders owe an absolute duty of loyalty to minority shareholders."<sup>72</sup> As we have just seen, however, that statement is problematic in that many states qualify that duty of loyalty by recognizing the selfish ownership rights of controlling shareholders.

In doing so, the Brief cites some general and insufficiently nuanced language in the *Cede* opinion that, in isolation from a more comprehensive understanding of Delaware law on the subject, is misleading.<sup>73</sup> In fact, Delaware does not hold controlling shareholders to an absolute duty of loyalty. Instead, under Delaware law, "A controlling shareholder is not required to give up legal rights that it clearly possesses . . . ."<sup>74</sup> Nothing in *Cede*, fairly read, holds to the contrary.

G. *RVP is not Outcome Determinative*

In yet another parade of horrors, the Brief argues:

These cases raise not only questions of contraceptive and related women's health care. Allowing, or even compelling, corporations to adopt the religious beliefs of their shareholders could result in challenges to scores of other medical products or procedures that shareholders might deem objectionable. . . .

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<sup>71</sup> 634 A.2d 345, 361 (Del. 1993).

<sup>72</sup> Brief, supra note 12, at 22 n.9.

<sup>73</sup> For an overview of Delaware law on the fiduciary duties of controlling shareholders of close corporations, see Bainbridge, supra note 62, § 14.3, at 466–67.

<sup>74</sup> *Odyssey Partners, L.P. v. Fleming Cos.*, 735 A.2d 386, 414 (Del. Ch. 1999) (quoting *Solomon v. Pathe Commc'ns Corp.*, No. CIV. A. 12563, 1995 WL 250374, at \*5 (Del. Ch. Apr. 21, 1995)).

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This case, moreover, raises not only questions under PPACA but also under the Civil Rights Act of 1964.<sup>75</sup>

The self-evident problem with this argument is that all RVP-I does is allow the shareholder standing to sue if the court is unwilling to allow the corporation to do so. As this author has noted: “Invoking RVP-I in the mandate cases would not be outcome determinative. Instead, it would simply provide a coherent doctrinal framework for determining whether the corporation is so intertwined with the religious beliefs of its shareholders that the corporation should be allowed standing to bring the case.”<sup>76</sup>

*H. Even Assuming RVP-I Would Give Hobby Lobby and Conestoga Wood a “Competitive Advantage,” They Would Not Be Alone*

The Brief argues:

Hobby Lobby and Conestoga are asking to be relieved from providing a standard of health care coverage that their competitors are required to provide. Regardless of the companies’ purpose, the effect of their legal arguments would be to skew the level playing field of the market, giving an advantage to companies claiming regulatory exemptions.<sup>77</sup>

The most obvious defect in this argument is that it assumes that providing insurance to employees will put employers at a competitive disadvantage with competitors that do not provide such coverage. But the cost to the employer brings a benefit to the employee, which might well result in a competitive advantage to the employer.<sup>78</sup>

*I. RVP-I Will Not Lead to “Disruptive Proxy Contests”*

In another red herring, the Brief argues that: “If this Court were to accept the arguments being advanced by Hobby Lobby and Conestoga, it

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<sup>75</sup> Brief, supra note 12, at 23.

<sup>76</sup> Bainbridge, Using RVP, supra note 28, at 249.

<sup>77</sup> Brief, supra note 12, at 26.

<sup>78</sup> Another difficulty with the argument is that the contraception mandate—and the ACA in general—is replete with regulatory exemptions. Bainbridge, Using RVP, supra note 28, at 248.

would . . . invite . . . disruptive proxy contests . . . regarding whether the corporation should adopt a religion and, if so, which one.”<sup>79</sup>

Proxy contests are principally an issue for public corporations, while RVP-I—like forward veil piercing—is exclusively an issue for close corporations.<sup>80</sup> The claim is thus disingenuous, at best. Nevertheless, this claim—while false—does provide a valuable opportunity for reminding the reader that the Brief’s concern for minority shareholders with diverse interests is largely irrelevant.<sup>81</sup> As this author has noted: “[A] public corporation with many shareholders holding diverse views is a poor candidate for RVP-I. In contrast, a closely held corporation – even if quite large by metrics such as assets or employees – with a small number of shareholders holding common religious beliefs is a good candidate.”<sup>82</sup>

Courts routinely differentiate cases for piercing the veil from cases in which the veil should not be pierced based on, *inter alia*, the number of shareholders in the corporation.<sup>83</sup> There is no reason why they could not do the same in cases like those brought by Hobby Lobby and Conestoga Wood.<sup>84</sup>

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<sup>79</sup> Brief, *supra* note 12, at 9.

<sup>80</sup> Bainbridge, *Using RVP*, *supra* note 28, at 246 (“Veil piercing is a close corporation doctrine.”).

<sup>81</sup> In general, the Brief suggests that RVP could result in corporations using it to evade the mandate and other laws. While smaller corporations may attempt to use RVP to do this (not necessarily with success), it is hard to imagine that larger corporations and public corporations could plausibly do this without significant public and legal pushback.

<sup>82</sup> Bainbridge, *Using RVP*, *supra* note 28, at 246.

<sup>83</sup> Thompson, *supra* note 25, at 1054 (“The number of shareholders makes a difference in the propensity of courts to pierce the veil of corporations.”).

<sup>84</sup> Matthew Hall and Benjamin Means point out that Hobby Lobby and Conestoga Wood are “family-owned businesses” and, as such, those “corporations are ‘extension[s] of family relationships.’” Matthew I. Hall & Benjamin Means, *The Prudential Third Party Standing of Family-Owned Corporations*, 162 U. Pa. L. Rev. Online 151, 154 (2014) (alteration in original) (quoting Benjamin Means, *Nonmarket Values in Family Businesses*, 54 Wm. & Mary L. Rev. 1185, 1194 (2013)). They make that point in the context of arguing:

[U]nder well-established exceptions to the prudential rule against third-party standing, one party can sometimes assert the interests of a third party. Allowing Hobby Lobby and Conestoga Wood Specialties to litigate religious objections to the mandate on behalf of their shareholders obviates the need for the Court to venture into uncharted territory. The crucial insight is that the corporation’s injury need not be religious in nature for the religious objections to the ACA regulations to be adjudicated.

*Id.* at 153–54 (internal citations omitted). That argument is beyond the scope of this paper, but the family-owned nature of these businesses provides another means by which the Supreme Court could cabin the application of RVP-I so as to minimize the parades of horrors offered by the Brief.

## CONCLUSION

The end result of the Brief's argument is that a person who incorporates a business in order to limit liability thereby loses his or her First Amendment protection. That is a non sequitur, a wholly conclusory claim. Consider by analogy a person who has a purchase-money mortgage on the home in which he lives. Under California law he is not personally liable for the debt; it is, by law, nonrecourse. He enjoys limited liability. Does it follow that he cannot claim protection under the Constitution against unlawful search and seizure? Of course not. Suppose further that, for estate-planning reasons, he transfers title to a revocable inter vivos trust, as many homeowners have done. Does this result in the loss of protection against unlawful search and seizure? Again, of course not. Courts, and lawyers who think clearly, recognize that substance must prevail over form. Similarly, when a person or a group of people elect to incorporate, by no means does it follow that they sacrifice their First Amendment rights. It may be that at some point, for prudential reasons, as, for example, the number of people involved in the business rises, First Amendment protection becomes inappropriate. But that conclusion should not turn on the simple fact of the adoption of the corporate form.

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." <sup>85</sup> There is nothing to suggest that in applying that bedrock principle form should prevail over substance.

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<sup>85</sup> U.S. Const. amend. I.