CORPORATE PERSONHOOD AND THE FIRST AMENDMENT: A BUSINESS PERSPECTIVE ON AN ERODING FREE EXERCISE CLAUSE

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I. INTRODUCTION

"Corporations are people my friend…."[1] Are they though? Mitt Romney's now infamous remark has been brushed aside by his many other gaffes,[2] but the question remains an important one: are corporations entitled to the same rights as "real people?" What are the limits of corporate personhood? Specifically, should corporations enjoy the same First Amendment rights as natural persons? If not, what speech and religious exercise limitations can the law impose on corporations that it cannot impose on individuals?

A corporation enjoys many, but not all, of the rights granted to natural persons.[3] In addition, a corporation is a separate legal entity apart from those who own and operate it.[4] In this regard, when viewing the corporation and the individual separately, it is easy to distinguish between the First Amendment rights attributed to the corporation and the individual, respectively. Sometimes, however, the distinction between corporate and individual action is less clear.[5] When corporate conduct is attributed to the individ-

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1. Philip Rucker, *Mitt Romney Says "Corporations Are People" at Iowa State Fair*, WASH. POST (Aug. 11, 2011), http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html.

2. *E.g.*, *Mitt Romeny's "47 Percent" Comments*, The Daily Conversation (Sept. 18, 2012), http://www.youtube.com/watch?v=M2gvY2wqI7M (downloaded using YouTube).

3. *See* STEPHEN M. BAINBRIDGE, AGENCY, PARTNERSHIPS & LLCS, 12 (2004). A corporation, for instance, "can own property, enter into contracts, and sue and be sued in its own name." JEFFREY D. BAUMAN, CORPORATIONS LAW AND PUBLIC POLICY, 39 (7th ed. 2010).

4. BAUMAN, *supra* note 3, at 39; BAINBRIDGE, *supra* note 3, at 11.

5. For a comparison of publicly traded corporations such as General Electric and Exxon-Mobil with closely-held corporations, *see* BAUMAN, *supra* note 3, at 332; *see generally* discussion *infra* note 9 (discussing closely held corporations). Because of the liquidity challenges facing close corporations and the resulting difficulty exiting the corporation, shareholders in close corporations are likely to have different expectations than those in publicly traded corporations, who can enter and exit as they wish. BAUMAN, *supra* note 3, at 332; *see also* BAINBRIDGE,

ual under these circumstances, it is as though the corporation is acting, not the individual; therefore, the individual is only granted the rights of the corporation in these instances.[6] First Amendment violations are especially likely to occur in these situations because individuals must forgo certain constitutional rights merely because they act in their corporate capacity.[7]

This article argues that further speech and religion rights need to be extended to corporations in order to protect the same First Amendment rights of the *individuals* who act on its behalf. First, this article provides an overview of corporate personhood and First Amendment rights, ultimately concluding that current legislation and jurisprudence inadequately protects those rights. Next, this article analyzes recent developments in business regulations that infringe on sincerely held religious beliefs, using *Elane Photography, LLC v. Willock*[8] as a case study. Finally, this article calls for additional First Amendment protection for corporations and evaluates possible solutions.

II. BACKGROUND

Close corporations,[9] including family-owned businesses, account for 95% of all U.S. businesses, with family-owned businesses

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supra note 3, at 12 ("Although shares of stock in a closely-held corporation are freely transferable in theory, the lack of a readily available secondary market for such shares means they seldom are easily transferable in practice."). Close corporations, therefore, more likely feature a fixed identity of managers/shareholders. Recognizing this fixed identity, the following problem can be posed: when an individual acts in his corporate capacity, who's rights are at stake?—the corporation's or the individual's?

6. When individuals enter into commerce, they accept certain limitations on their own conduct. United States v. Lee, 455 U.S. 252, 253 (1982). Corporate governing authority is vested in a board of directors. BAUMAN, *supra* note 3, at 315. This authority, however, is only activated when they are assembled *as a board*: "The separate action, individually, of the persons comprising such governing body, is not the action of the constituted body of men clothed with the corporate powers." *Id.* In other words, when acting individually, directors do not implicate corporate conduct. But when directors "clothe themselves with corporate powers," they accept different authority, rights, and obligations. *Id.* This disparity of rights, particularly in the constitutional setting, is the focus of this article.

7. *Lee*, 455 U.S. at 253.

8. Elane Photography, LLC v. Willock, 284 P.3d 428, 433 (N.M. Ct. App. 2012).

9. There is no generally accepted definition of a "close corporation." BAUMAN, *supra* note 3, at 334. General characteristics, however, include few stockholders, no readily available market for buying and selling stock, and substantial shareholder participation in daily operations. *Id.* at 334-35.

accounting for nearly 50% of all U.S. employment.[10] The primary distinguishing characteristic of this form of business is the "integration of ownership and management"—meaning those who own the business are the same people who run its day-to-day operations.[11] As a result, there is a common identity and interest shared between the individuals running the business and the artificial corporate entity through which the individuals act.[12] Under these circumstances it makes less sense to maintain a separate corporate identity in the face of specific and localized individual action.[13]

Nevertheless, the general rule is that corporations are separate legal entities.[14] In certain circumstances, however, a court will disregard this artificial separation and recognize the individual as the actual corporate actor.[15] This implicitly recognizes that sometimes there exists such a "unity of interest and ownership" be-

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10. *Id.* at 334. In addition, there are seventeen million proprietorships in the U.S. BAINBRIDGE, *supra* note 3, at 10 (citing *Statistical Abstract of the United States*, U.S. CENSUS BUREAU 545 (1999)). The sole proprietor "both owns and controls" the business, and therefore features a *complete* integration of ownership and control. *Id.* at 3.

11. BAUMAN, *supra* note 3, at 334

12. *Id.* at 335 (comparing close corporations to partnerships featuring a small number of persons "who contribute their capital, skills, and experience and labor."). In this way, close corporations are characterized by group decision-making by a small number of people who are the same people executing those decisions. This localization lends itself to a common purpose, interest, and identity linked with the corporation. *But see, id.* at 379 ("All too frequently in a closely held business, a day comes when the owners cease to get along with each other."). *Compare id., with* BAINBRIDGE, *supra* note 3, at 4 (describing large corporations spread out across the country over many offices with separate, centralized management).

13. A broader explanation of limited liability and choice of corporate form for small business is outside the scope of this article. *See generally* BAUMAN, *supra* note 3, ch. 5. Without implicating the economic benefits or disadvantages of the limited liability associated with a separate legal entity for business purposes, this article focuses on the constitutional rights implication of holding individuals to the lesser constitutional rights standard attributed to corporations. *See Lee*, 455 U.S. 252.

14. BAUMAN, *supra* note 3, at 39; BAINBRIDGE, *supra* note 3, at 11.

15. *See generally* Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33 (1990). "Piercing the corporate veil" is an equitable remedy allowing creditors or other third parties to beat the limited liability feature of corporations and directly collect from the assets of individual shareholders. *Id.* at 34. This remedy is available when the corporate form is used to defeat public convenience, justify wrong, protect fraud, or defend crime. *Id.* at 35. In short, corporate veil piercing holds individuals responsible for their personal conduct *despite* the corporate shield of limited liability that comes with separate corporate identity.

tween the corporation and its actors that any distinction between the two has ceased.[16] Although this concept is only applied in equitable judgments used to defeat limited liability, discerning whom the actual "corporate actor" is remains instructive in delineating the rights and privileges of corporations, and by extension, those who compose them.

While corporations already enjoy some religious rights, corporations do not enjoy the full religious protections afforded to individuals.[17] This gap in corporate religious rights is exacerbated by business regulations that are in tension or conflict with the religious beliefs of the *individuals* who run the business.[18] This section, therefore, charts the theory of corporate personhood and how First Amendment rights have been extended, although ultimately inadequately, to corporations.

A. Corporate Personhood

Corporate personhood is the doctrine that holds a corporation is entitled to the same treatment as a natural person.[19] A corporation is brought into being by a state's incorporation statute.[20] Obviously, a corporation is not a natural person, but the law does attribute corporations certain legal rights of natural persons that are derived from the Constitution and state law.[21] The term "corporate personhood" does not appear in the Constitution.[22] Neither do the terms "corporation" nor "company" appear.[23] Nevertheless, the idea of corporate personhood dates back to the nineteenth century.[24]

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16. *Id.* at 34.

17. *See* Julie Marie Baworowsky, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious Speech*, 83 NOTRE DAME L. REV. 1713, 1721 (2008) (arguing that the fragmentation and compartmentalization of corporate speech has left a gap in corporate religious speech protection).

18. *Id.* at 1716 (describing direct and indirect violations of speech).

19. BAUMAN, *supra* note 3, at 39.

20. *Id.*

21. *Id.*

22. Harold Anthony Lloyd, *A Right but Wrong Place: Righting and Rewriting Citizens United*, 56 S.D. L. REV. 219, 221 (2011).

23. *Id.* (providing a thorough examination of constitutional language suggesting constitutional rights are intended for natural persons only).

24. Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as inci-

The issue of a separate corporate entity, or "corporate personality," was first raised in *Trustees of Dartmouth College v. Woodward*.[25] In *Dartmouth College*, the Court held a corporate charter was a contract between a corporation and the state; and therefore, under the Contract Clause,[26] a state was prohibited from unilaterally amending a corporate charter.[27] While this ruling strengthened corporate rights by expanding corporate autonomy from state interference, ironically, it would later rein in corporate rights by inviting future state regulation of corporate charters.[28] Specifically, in Justice Story's concurring opinion he added that states could circumvent this ruling by reserving the power to amend or repeal the charters they issue.[29]

The holding in *Dartmouth College* is important because it began the trend for expanding corporate rights and laid the foundation for an evolving theory of corporate personhood. In its reasoning, the Court in *Dartmouth College* adopted the "artificial entity" theory that viewed a corporation as owing "its existence to the state, with its powers limited by its charter of incorporation."[30] In his majority opinion, Chief Justice John Marshall described a corporation as: "an artificial being, invisible, intangible, and existing only in contemplation of the law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."[31] The artificial entity theory, therefore, is characterized by limited power subject to the authority and regulation of the state. *Dartmouth College*'s ruling, however, expanded corporate independence from the state. Thus, although the Court adopt-

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dental to its very existence . . .. Among the most important are immortality, and, if the expression may be allowed, *individuality.*") (emphasis added).

25. BAUMAN, *supra* note 3, at 39; *Trustees of Dartmouth College*, 17 U.S. at 518.

26. U.S. CONST. art. I §10 ("No State shall . . . impair[] the Obligation of Contracts, or grant any Title of Nobility.").

27. Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation.* , 69 (Fall 2005); *Trustees of Dartmouth College*, 17 U.S. at 518.

28. BAUMAN, *supra* note 3, at 40.

29. *Id*. Today, all states include such a provision in corporate charters reserving the right to amend. *Id*.

30. Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 534 (2010) (citing Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 180 (1986)).

31. BAUMAN, *supra* note 3, at 39-40.

ed the artificial entity theory in *Dartmouth College*, its expansion of corporate autonomy signaled an important departure from the traditional artificial entity theory that would continue in future opinions.[32]

A corporation was first held to be a "person" in *Santa Clara County v. Southern Pacific Railroad Co.*[33] In that case, the Court first applied the Fourteenth Amendment Equal Protection Clause[34] to a corporation.[35] In its opinion, however, the Court provided no reasoning or analysis.[36] Instead, it simply stated:

> The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to those corporations. We are all of the opinion that it does.[37]

By applying the Fourteenth Amendment to corporations, *Santa Clara County* marks the beginning of modern corporation law. *Santa Clara County* also signals a shift in the theoretical underpinnings of incorporation theory and began to attribute more "human qualities" to corporations.[38] This would provide the basis for later applying the Bill of Rights to corporations.[39]

This theoretical shift was confirmed in *Pembina Consolidated Silver Min. & Drilling Co. v. Pennsylvania*,[40] which adopted the "aggregate entity theory": "under the designation of 'person' there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose," and quoting Chief Justice Marshall: "The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men."[41]

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32. Krannich, *supra* note 27, at 70.
33. Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394 (1886).
34. U.S. CONST. amend. XIV ("[N]o state shall .... deny to any person within its jurisdiction the equal protection of the laws.").
35. *Santa Clara County*, 118 U.S. at 394.
36. Krannich, *supra* note 27, at 77.
37. *Santa Clara County*, 118 U.S. at 535-36.
38. Rubin, *supra* note 30, at 535-36.
39. *Id.*
40. Pembina Consolidated Silver Min. & Drilling Co. v. Pennsylvania, 125 U.S. 181 (1888).
41. *Id.* at 189; Providence Bank v. Billings, 29 U.S. 514, 562 (1830).

During the twentieth century a new theory arose: the "natural entity"[42] or "real entity"[43] theory. The real entity theory goes beyond the aggregate theory, framing a corporation as "an organic social reality with an existence independent of, and constituting something more than, its changing shareholders."[44] This theory developed in order to more accurately capture the legal and "social reality" of the modern corporation, namely the emergence of large, publicly-held corporations composed of ever-changing shareholders.[45] The aggregate theory, conferring corporate personhood based on the notion that an individual does not sacrifice personal liberty when joining a group, no longer sufficed. While still instructive, the aggregate theory could only at best provide an abstract understanding of the new ephemeral ownership presented by constantly changing shareholders. Therefore, it became necessary to frame a corporation as an entity granted liberty in its own right—that a corporation did not merely derive its constitutional rights from an association of individuals, but that a corporation was an independently protected entity.

B. Corporate Rights under the First Amendment

This recognition of a wholly separate, "real entity" became an underlying rationale in later opinions extending further protections to corporations under the Bill of Rights. *Pacific Gas and Electric Co. v. Public Utilities Comm. of California* held that a corporation could not be forced to include a message in its monthly newsletter that it disagrees with, on the grounds that it violated free speech.[46] In extending the First Amendment to corporations, the Court reasoned: "The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."[47] Regulations infringing upon free

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42. Baworowsky, *supra* note 17, at 1737.

43. Krannich, *supra* note 27, at 80.

44. Phillip I. Blumberg, *The Corporate Entity In an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 295 (1990).

45. Krannich, *supra* note 27, at 61 n.119.

46. Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal., 475 U.S. 1 (1986) [hereinafter *Pacific Gas*].

47. *Pacific Gas*, 475 U.S. at 8 (citing First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)).

speech warrant strict scrutiny.[48] A restriction of speech will only survive this "exacting scrutiny" when the state demonstrates a "compelling government interest" and that the restriction is narrowly tailored to achieve that interest.[49]

The First Amendment not only protects speech, but also expressive conduct.[50] Expressive conduct encompasses a wide range of acts, including "saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red flag, and even marching, walking, or parading in uniforms displaying the swastika."[51] The Court in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston* thus concluded that "a narrow, succinctly articulable message is not a condition of constitutional protection." In addition, freedom of speech applies equally to the right to speak as it does to the right *not* to speak.[52]

Expressive conduct, however, does not enjoy the same protection as direct restrictions on speech: "expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions."[53] These restrictions are valid when they are content neutral, narrowly tailored to serve a *significant* government interest, and alternative channels provide opportunity for the expression of that information.[54]

In addition to speech rights, because corporations are considered persons under the Fourteenth Amendment Due Process and Equal Protections clauses, First Amendment religious liberty is also extended to corporations.[55] Courts have long recognized that freedom of speech and the other liberties granted by the First Amendment are fundamental rights protected by the Due Process

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48. *Bellotti*, 435 U.S. at 786.

49. *Id.*

50. Troster v. Pa. State Dept. of Corr., 65 F.3d 1086, 1089 (3d Cir. 1995) (citing Steirer by Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 994 (3d Cir. 1993) ("[T]he protection granted by the First Amendment is not limited to verbal utterances but extends as well to expressive conduct.").

51. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (internal citations omitted).

52. *Troster*, 65 F.3d at 1089 ("The freedom of speech protected by the First Amendment, though not absolute, includes both the right to speak freely and the right to refrain from speaking at all.") (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977) (citing *Steirer*, 987 F.2d at 993)).

53. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

54. *Id*. at 293.

55. Sterngass v. Bowman, 563 F. Supp. 456, 459 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1440 (2d Cir. 1983).

Clause.[56] Further, these fundamental rights cannot be denied on the basis of the identity of the actor, including whether the actor is a natural person or a corporation.[57]

The Free Exercise Clause, however, does not provide religious expression the same protection afforded under the Free Speech Clause.[58] Where laws are neutral and generally applicable, religious conduct no longer receives the protection of strict scrutiny.[59] Only where a claimant brings a "hybrid claim,"[60] combining a free exercise claim along with another constitutionally protected right, does a First Amendment claim defeat application of a neutral, generally applicable law.[61] Consequently, religious conscience and expressive conduct are generally more successful when argued under speech, rather than religious liberty.[62]

Therefore, there is a gap in the application of the fundamental rights protected by the First Amendment. Namely, religious conscience suffers when it is forced to rely on speech protections that sometimes fail to provide adequate substitute protection. This discrepancy becomes more apparent in the context of expressive reli-

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56. *Bellotti*, 435 U.S. at 780; Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting). *See De Jonge v. Oregon,* 299 U.S. 353, 364 (1937); *Stromberg v. California,* 283 U.S. 359, 368 (1931); *Gitlow,* 268 U.S. at 666.

57. *Bellotti*, 435 U.S. at 777 ("If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.").

58. *See* Baworowsky, *supra* note 17, at 1755-56.

59. Employment Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (citations omitted).

60. *Elane Photography*, 284 P.3d at 442-43. The Tenth Circuit has instituted a "colorability" requirement for hybrid claims requiring a "fair probability, or a likelihood, of success on the companion claim." Axson–Flynn v. Johnson*,* 356 F.3d 1277, 1295 (10th Cir. 2004) (internal quotation marks and citation omitted). The hybrid rights theory has been criticized by many, rejected as *dicta* by some courts, and flat out ignored by others. *Id.* at 1296 n.18; McTernan v. City of York, 564 F.3d 636, 647 n.5 (3d Cir. 2009); Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 440 n.45 (9th Cir. 2008); Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001); Littlefield v. Forney Indep. Sch. Dist.*,* 108 F. Supp. 2d 681, 704 (N.D. Tex. 2000); Warner v. City of Boca Raton, 64 F. Supp. 2d 1272, 1288 n.12 (S.D. Fla. 1999).

61. *Smith*, 494 U.S. at 872. *See*, *e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 304-307 (1940); Wisconsin v. Yoder, 406 U.S. 205 (1972).

62. Baworowsky, *supra* note 17, at 1755-56.

gious conduct falling short of strict scrutiny review for speech under the First Amendment.

C. Corporate Rights under State Law: State Constitutions and Religious Freedom Restoration Acts

On the other hand, states are free to provide additional speech and religious exercise protections above and beyond the First Amendment.[63] The U.S. Constitution is a positive grant of power with the Tenth Amendment reserving all other rights for the states.[64] Therefore, the Bill of Rights provides a floor for the minimum level of protection of rights. States are free to provide additional protection.

After the decision in *Employment Div., Dept. of Human Res. of Oregon v. Smith*, holding that "free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'"[65] a majority of state appellate courts have interpreted their state constitutions to provide broader protection than the First Amendment.[66] For example, in *Humphrey v. Lane*, the Supreme Court of Ohio applied strict scrutiny against a generally applicable, neutral law when deciding a free exercise claim brought under the Ohio State Constitution.[67] Likewise, the Supreme Court of Washington interpreted its State Constitution to protect the right to free exercise of religion even against "a facially neutral, even-handedly enforced statute that….indirectly burdens the exercise of religion."[68]

In addition to broad constitutional provisions, states may implement statutory provisions extending further religious rights.

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63. 12A TEX. JUR. 3D CONSTITUTIONAL LAW § 5 (2012).

64. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

65. *Smith*, 494 U.S. at 879 (citing *Lee*, 455 U.S. at 263).

66. *Elane Photography*, 284 P.3d at 446 ("[P]ost-*Smith* 'a total of 11 states .... have interpreted their state constitutions' free exercise clauses to require strict scrutiny analysis' and '[o]nly three courts …. have explicitly accepted *Smith* as the proper standard for reviewing free exercise questions under their state constitutions.'") (citing W. Cole Durham & Robert Smith, 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 2:63 (2012 Thompson Reuters)).

67. Humphrey v. Lane, 89 Ohio St. 3d 62, 66 (2000) (interpreting a provision in the Ohio State Constitution reading: "[N]or shall any interference with the rights of conscience be permitted."); OHIO CONST. art. I, § 7.

68. First Covenant Church of Seattle v. Seattle, 120 Wash. 2d 203, 226 (1992).

Three years after the *Smith* decision narrowed religious rights under the Free Exercise Clause, Congress passed the Religious Freedom Restoration Act ("RFRA") in 1990.[69] The federal RFRA reasserted strict scrutiny for free exercise claims, essentially overturning the *Smith* decision by statute.[70] Relying on the Fourteenth Amendment Enforcement Clause,[71] Congress applied the RFRA against the states as well. The RFRA, however, was partially overturned five years later in *City of Boerne v. Flores*, holding that application of the RFRA against the states was unconstitutional.[72] The court reasoned that, under the Fourteenth Amendment, Congress only has the power to *enforce* constitutional provisions; it does not have the power to decree their substantive meaning against the states.[73] The portion of *Flores* preserving strict scrutiny for *federal* free exercise claims, however, was upheld.[74]

Therefore, *Flores* reinstated the erosion of religious liberty at the state level that was first introduced in *Smith*. That was not the end of RFRAs, however. Beginning the same year the federal RFRA was passed, states began passing their own RFRAs.[75] Modeled after the federal RFRA, state RFRAs reapplied strict scrutiny for state free exercise claims, requiring a compelling government interest and narrowly tailored means.[76] Therefore, working together, the federal and state versions of the RFRA repudiated *Smith* and *Flores* and maintain strict scrutiny for free exercise claims. Sixteen states have RFRAs.[77] Other states lacking RFRAs have broader religious expression provisions in their state constitu-

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69. *See generally* Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 471-72 (2010) (arguing that free exercise rights have deteriorated after *Smith* and that state RFRA's fail to provide the necessary protection for religious liberty at the state level); Religious Freedom Restoration Act of 1993, PL 103–141, 107 Stat 1488 (1993).

70. Lund, *supra* note 69, at 471-72. Note that although Congress cannot overrule Supreme Court decisions by statute, they can "compensate" for such decisions by modifying or narrowing their reach. Ivan E. Bodensteiner, *Congress Needs to Repair the Court's Damage to § 1983*, 16 TEX. J. C.L. & C.R. 29, 64 (2010). *Katzenbach v. Morgan*, 384 U.S. 641 (1966), upheld the Voting Rights Act, "despite the fact that it effectively overturned the result in an earlier decision." *Id.*

71. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

72. City of Boerne v. Flores, 521 U.S. 507 (1997).

73. *Id.* at 519.

74. *Id.* at 507.

75. Lund, *supra* note 69, at 475.

76. *Id.*

77. *Id.* at 479.

tions.[78] However, that still leaves roughly half the states subject to the *Smith* precedent.

III. A CASE STUDY IN CORPORATE RELIGIOUS EXPRESSION: *ELANE PHOTOGRAPHY, LLC. V. WILLOCK.*

Even in states that do have either heightened First Amendment protection under their state constitutions or state RFRAs or both, free exercise claims may still fall through the cracks that are the legacy of *Smith*. As seen in *Elane Photography*, New Mexico, a state with both forms of religious protection, nevertheless failed to protect Elane Photography's claim pursuant to these heightened standards. *Elane Photography*, therefore, not only illustrates the religious dilemma faced by small businesses[79] but also exposes the fragmentation and recession of free exercise rights generally.[80]

A. Facts

Elaine Huguenin is the head photographer and co-owner of Elane Photography, LLC along with her husband Jonathan.[81] Elane Photography is a commercial business offering photography services to the public for weddings, graduations, and other events.[82] Elane Photography advertises its business to the public and solicits customers on its website, and is willing to travel to customers' events.[83] Elaine Hugeunin is also a Christian and only photographs events consistent with her religious beliefs.[84]

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78. W. Cole Durham & Robert Smith, 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 2:63 (2012 Thompson Reuters).

79. *Lee*, 455 U.S. at 253 (holding that religious adherents accept certain limitations on their conduct when they enter the marketplace). For a discussion of the chilling effect public accommodation laws have on First Amendment rights, *see* James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 968 (2011) (providing a detailed analysis of how the expansion of public accommodation laws violate First Amendment expressive speech rights).

80. Baworowsky, *supra* note 17.

81. *Elane Photography*, 284 P.3d at 432.

82. *Id.*

83. *Id.*

84. *Id.* In the biography section of her website, Elaine Huguenin states, "I think God gave me this gift to show you just how beautiful you are to Him." *About Sharon Elaine*, SHARON ELAINE PHOTOGRAPHY, http://www.sharonelainephotography.com/index2.php (last visited Jan. 7, 2013).

This suit arose when Vanessa Willock sent Elaine an E-mail inquiring about photographing her same-sex marriage.[85] Elaine thanked her for her interest, but responded that she only photographs "traditional weddings."[86] When Willock sent a follow-up E-mail[87] asking if, by "traditional wedding," Elaine meant she did not offer her photography services to same-sex ceremonies, Elaine responded yes. Willock then filed a discrimination claim with the New Mexico Human Rights Commission ("NMHRC") alleging Elane Photography refused to offer its services to her on account of Willock's sexual orientation.[88]

The NMHRC found that Elane Photography was a public accommodation according to N.M. Stat. Ann. section 28-1-2(H).[89] As a public accommodation, Elane Photography is subject to the New Mexico Human Rights Act ("NMHRA") which provides in pertinent part: "It is unlawful discriminatory practice for . . . any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of . . . sexual orientation . . . "[90] Based on the evidence, the NMHRC found Elane Photography violated the anti-discrimination provision of the NMHRA and awarded Willock $6,637.94 in attorney's fees.[91]

On appeal to the District Court, Elane Photography argued the NMHRC's interpretation of the NMHRA violated Elane Photography's rights under: (1) the Free Speech Clause of the First Amendment; (2) the Free Exercise Clause of the First Amendment; (3) the New Mexico Constitution; and (4) the New Mexico RFRA.[92] The District Court upheld the NMHRC's determination that Elane

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85. *Elane Photography*, 284 P.3d at 432.

86. *Id.*

87. Willock's partner also sent an E-mail the next day, without specifying her relationship with Willock or her sexual orientation, mentioning she was getting married. *Id*. Presumably, the purpose was to "trap" Elaine, or otherwise confirm that service was previously denied on account of sexual orientation (although it was pretty clear from the first communication). *See infra* text accompanying note 129.

88. *Elane Photography*, 284 P.3d at 433.

89. *Id.*; N.M. STAT. ANN. § 28-1-2(H) (West 1978). Public accommodations legislation arose out of the Civil Rights era to proscribe discrimination in public businesses. Gottry, *supra* note 79, at 965.

90. N.M. STAT. ANN. § 28-1-7(F) (West 1978).

91. *Elane Photography*, 284 P.3d at 433. Willock did not seek monetary damages. *Id*.

92. *Id.*

Photography was a public accommodation and violated the anti-discrimination clause of the NMHRA.[93]

Under N.M. Stat. Ann. section 28-1-2(H) a "'public accommodation' means any establishment that provides or offers its services, facilities, accommodations or goods to the public."[94] The designation of public accommodation traditionally applied only to businesses such as inns, restaurants, or public entertainment.[95] Elane Photography specifically argued that these traditional designations are meant only to apply to "standardized products or ministerial services that are essential to the public at large."[96] Therefore, because Elane Photography provides "nonessential, discretionary, unique, and expressive services to the public," its business falls outside the designation of "public accommodation." Such an interpretation would spare Elane Photography from compliance with the NMHRA and eliminate the speech and religion conflicts.

The Court of Appeals of New Mexico, however, rejected this argument and broadly interpreted the public accommodation designation.[97] As public accommodation regulations expand and compel conduct to a wider range of non-essential, discretionary, and unique services, free speech and religious conscience conflicts become unavoidable. Furthermore, because public accommodation laws are state issues, federal legislation is unavailing.[98] States must therefore turn to their own RFRAs, broad state constitutional protections, or the U.S. Constitution to support their speech and religious liberty claims against expanding public accommodation regulations.[99]

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93. *Id.*

94. N.M. STAT. ANN. § 28-1-2(H) (West 1978).

95. Human Rights Comm'n of N.M. v. Board of Regents of Univ. of N.M., 95 N.M. 576, 578 (1981). Note, however, the court narrowly construed its opinion to the facts of the case. *Id.*

96. *Elane Photography*, 284 P.3d at 434.

97. *Id.* at 436.

98. Jennifer Ann Abodeely, *Thou Shall Not Discriminate: A Proposal for Limiting First Amendment Defenses to Discrimination in Public Accommodations*, 12 SCHOLAR 585, 595 (2010). In *Romer v. Evans*, 517 U.S. 620 (1996), the Court held the Fourteenth Amendment does not allow Congress to legislate anti-discrimination provisions regarding public accommodations at the state level. *Id.*

99. *See generally* Gottry, *supra* note 79, at 968 (providing a detailed analysis of how the expansion of public accommodation laws violate First Amendment expressive speech rights).

B. STATUTORY ANALYSIS: RFRAS

State RFRA's are a piecemeal response to the *Smith* decision.[100] The fragmented and non-uniform effort by states in this regard thus provides a lackluster solution to watered-down religious expression rights at the state level.[101] Moreover, many RFRAs feature exclusions denying coverage for certain categories of religious claims.[102] For example, some state RFRAs exclude claims challenging laws pertaining to prisons, health and safety, drugs, motor vehicle use, weapons possession, and other civil rights claims.[103] The result is a further narrowing of an already fractured effort to restore religious exercise claims.

New Mexico's RFRA provides a similar restriction: "A *government agency* shall not restrict a person's free exercise of religion…."[104] This proves a particularly devastating limitation in that, rather than restricting the subject matter of claims, it excludes all religious exercise interferences between private parties.

As applied in *Elane Photography*, the exclusion seems especially superficial. Here, New Mexico's public accommodation laws limit the discretion of businesses falling within its broad scope. Constitutional tensions arise when *these laws* mandate business conduct contrary to sincerely held beliefs. It seems a failure of logic, therefore, to assert that the religious exercise infraction arises in the vacuum of private action, without recognizing that New Mexico law provides standing to sue in the first place. The *Elane Photography* court dismissed the New Mexico RFRA claim because it was brought against a private party rather than a government agency.[105] This result cannot be correct, however, when the underlying issue is not what Elane Photography did, but rather what New Mexico's law *requires it to do*.

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100. *See generally* Lund, *supra* note 69. After *Smith*, a "multi-exemption regime" emerged characterized by uneven religious rights laws at the federal, state, and local level. *Id*. at 474. Making matters worse for religious adherents, they must win claims at *each* level; to fail at one is to fail completely. *Id*.

101. *Id.*

102. *Id.* at 491-92.

103. *Id.*

104. N.M. STAT. ANN. § 28-22-3 (West 1978).

105. *Elane Photography*, 284 P.3d at 444-45. Seemingly, to comply with the law as written, Elane Photography would be forced to first photograph the ceremony in order to establish standing, and *then* sue the New Mexico government infringing its religious liberty. *See id.*

The better decision, dismissed by the *Elane Photography* court, is *Hankins v. Lyght*.[106] The *Hankins* court interpreted the federal RFRA, containing similar language, to apply to actions between private parties. The federal RFRA contains language analogous to New Mexico's RFRA, and provides: "*Government* shall not substantially burden a person's exercise of religion . . . " and "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a *judicial proceeding* and obtain appropriate relief *against a government*."[107]

In ruling that this language applied to actions between private parties, the *Hankins* court reasoned, albeit creatively, that the contested language actually *broadened* RFRA protection.[108] The key limiting provisions are: (1) "*government* shall not," and (2) "obtain appropriate relief *against a government*." The court fleetingly addressed this, saying that "if such a limitation was intended, Congress chose a most awkward way of inserting it."[109]

The *Elane Photography* court, when interpreting New Mexico's RFRA, refused to follow this holding, relying instead on the express language of the Act.[110] The court stated simply, "[we] will not read into a statute….language which is not there, particularly if it makes sense as written."[111]

Notwithstanding the shaky reasoning in *Hankins*, the outcome is decidedly better as a matter of policy and highlights the twofold need for: (1) comprehensive legislation recognizing these protective gaps and remedying them; and (2) judicial decisions such as *Hankins,* willing to develop new jurisprudence to protect these religious liberties that fall through "legislative cracks." In support of its understanding, the *Hankins* court pointed to the statutory language asserting that the RFRA "applies to all Federal law, and the implementation of that law."[112] Both the courts and legislative bodies need to recognize that even private actions invoke the "implementation of law." In *Elane Photography*, absent public accommodation laws mandating business conduct, there *would be no pri-*

106. *Id.*; Hankins v. Lyght, 441 F.3d 96, 103 (2d Cir. 2006).

107. Religious Freedom Restoration Act of 1993, PL 103–141, 107 Stat 1488 (1993) (emphasis added).

108. *Hankins*, 441 F.3d at 103.

109. *Id.*

110. *Elane Photography*, 284 P.3d at 444-45; *Hankins*, 441 F.3d at 103. *See generally* Lund, *supra* note 69 (arguing that RFRAs are frequently misinterpreted).

111. *Elane Photography*, 284 P.3d at 444-45.

112. *Hankins*, 441 F.3d at 103; 42 U.S.C.A. § 2000bb-3 (West 2000).

vate action. Therefore, by virtue of a private party bringing suit under such laws, it is the laws themselves that provide foundation for the substantial burdening of religious exercise.

With this understanding, RFRA exclusions limiting protection only against governmental bodies seem shallow. This example is illustrative of the broader point: there are not enough RFRAs and those that do exist are inadequate, and often misinterpreted.[113]

C. Constitutional Analysis

When statutory provisions fail to guard religious rights, a party may turn to constitutional protections. Both the U.S. and state constitutions provide safeguards for religious liberty.[114] The U.S. Constitution, however, merely sets a floor—state constitutions are free to provide additional protection.[115] The two essential questions, therefore, are: (1) whether the First Amendment protects the conduct at issue; and (2) if not, does the State Constitution provide additional coverage *that does* protect that conduct?

1. The First Amendment

Pursuant to the First Amendment, a party may premise religious protection under either the Speech or Free Exercise clauses. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." As noted above, religious claims are generally more successful under the Free Speech Clause rather than the Free Exercise Clause.[116] In this case, Elane Photography asserts religious exemption under each.

While free speech claims usually enjoy strict scrutiny protection, at issue in *Elane Photography* is expressive conduct, as opposed to actual *speech*, the former enjoying lesser protection.[117] In addition, where the law at issue is neutral and generally applicable, free exercise claims are not reviewed under strict scrutiny either.[118] Therefore, neither of Elane Photography's claims warrant-

113. *See generally* Lund, *supra* note 69.
114. *See Elane Photography*, 284 P.3d at 445 (Wechsler, J., specially concurring).
115. *See Humphrey*, 89 Ohio St. 3d at 62.
116. Baworowsky, *supra* note 17, at 1755-56.
117. *Clark*, 468 U.S. at 293.
118. *Smith*, 494 U.S. at 879.

ed strict scrutiny on their face. Under this lessened protection, the court in *Elane Photography* found that photographing a same-sex marriage was not protected conduct.

The NMHRA prohibits public businesses from discriminating against whom they offer services.[119] If a public business offers its services publicly, it is required to *render* those services publicly—no exception. The court ruled this law was generally applicable and therefore did not require a compelling government interest.[120] Further, because the court found there was a "rational basis" for the NMHRA, there was no free exercise violation.

The court also rejected free speech protection. It found that commercial photography was not expressive enough to warrant First Amendment protection.[121] Moreover, the court ruled that Elane Photography was not a speaker conveying a message—there was no speech meriting protection.[122]

This illustrates the attrition of religious protection under the First Amendment. A party imploring the religious safeguards of the First Amendment fights an uphill battle: conform your First Amendment claim to a free speech issue or lose strict scrutiny review in exchange for the "rational basis" standard for free exercise claims under laws that are "generally applicable," pursuant to *Smith*.[123] The First Amendment, therefore, seems increasingly unbalanced. Speech is protected, but religious beliefs suffer.

The court is correct when it says that the NMHRA is neutral and "does not selectively burden any religion or religious belief."[124] After all, the NMHRA is a business regulation prohibiting discrimination. Public accommodation laws have traditionally mandated

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119. N.M. STAT. ANN. § 28-1-7(F) (West 1978).

120. *Elane Photography*, 284 P.3d at 442.

121. *Id.* at 339 ("[The] First Amendment does not apply when a law regulates conduct, rather than expression."). *See* Rumsfeld v. F. for Acad. and Institutional Rts., Inc., 547 U.S. 47, 66 (2006).

122. *Elane Photography*, 284 P.3d at 440. The court also rejected Elane Photography's argument that it was "more than a mere conduit for another's expression." *Id.* at 339. On the other hand, by studiously avoiding finding a free speech expression issue in a case involving photography, a religious conscience claim (regarding a politically energized issue splitting half the country), and a same-sex marriage, the court seems to be walking between raindrops. Mackenzie Weinger, *Poll: Sharp Split over Gay Marriage*, POLITICO (May 8, 2012), http://www.politico.com/news/stories/0512/76027.html.

123. Baworowsky, *supra* note 17, at 1755-56 (arguing, for this reason, religious rights claims are usually more successful when brought as speech claims); *Smith*, 494 U.S. at 872.

124. *Elane Photography*, 284 P.3d at 442.

equality of service for businesses such as "inns, restaurants, or public carrier[s]."[125] Although public accommodation laws have expanded in application[126] to cover *services* as well (and are essentially universally applicable as a result), policy and common sense suggest that this universal treatment cannot always be appropriate.

There was a shameful period in our history when certain persons in our country were prohibited from patronizing certain restaurants, theaters, inns, and other public places.[127] The Civil Rights Act of 1866, in response, was an important step toward racial equality.[128] Likewise, public accommodation laws ensure decency and equality of access to businesses. However, when unique business circumstances make enforcing public accommodation laws impractical, unnecessary, or even offensive to religious beliefs, public accommodation laws stray from their original purpose and lend themselves to senseless litigation.[129]

In this case, Elane Photography's unique business not only falls outside the appropriate scope of public accommodation laws, as applied, they also infringe on its First Amendment rights. Elaine Huguenin does not sell cheeseburgers. Nor does she rent a bed to sleep in or sell a movie to watch on a large screen. She takes photographs. One can schedule a session with her at her studio or

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125. *Id.* at 435.

126. *Id. E.g.*, Nat'l Org. for Women v. Little League Baseball, Inc., 127 N.J. Super. 522, 530 (App. Div. 1974) ("[T]he hallmark of a place of public accommodation [is] that 'the public at large is invited.'").

127. *Jim Crow Law*, ENCYCLOPEDIA BRITANNICA (Dec. 2012), http://www.britannica.com/EBchecked/topic/303897/Jim-Crow-law. *See also* Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964) (holding that refusal to rent motel rooms to African Americans interfered with interstate commerce).

128. Laura Hunter Dietz, et al., *Civil Rights Act of 1866*, 3B AM. JUR. 2D § 1915 (Nov. 2002) (prohibiting discrimination by private parties in some jurisdictions at the time).

129. The litigation in *Elane Photography* seems particularly hawkish given the circumstances. Realizing the traditionally narrow scope of public accommodation laws, Gottry, *supra* note 79 (including "inns, theaters, restaurants, and 'other places of public amusement'"), it seems incredible that public accommodation laws would reach so far as to capture a brief exchange of outwardly polite E-mails regarding photography services *on location*, of all things. Elaine's conciliatory E-mail response declined taking pictures of the ceremony only; importantly, she did not refuse to photograph Willock *categorically*. *Elane Photography*, 284 P.3d at 437. At a time when Willock was preparing for her wedding, moreover, it is curious that she would be inclined to engage in litigation. It does not appear that New Mexico has a shortage of other photographers who would appreciate the business.

she will travel and shoot on location.[130] This is what separates her from other businesses, what makes classification as a public accommodation inappropriate, and what gives rise to a First Amendment issue.

The court in *Elane Photography* characterized any religious burden imposed by the NMHRA as "incidental and uniformly applied to all citizens."[131] In this case, however, the NMHRA imposes an unusually intrusive burden unique to Elane Photography's business. The Free Assembly Clause[132] mandates that a citizen is free to associate with whom she wishes, or *not* to associate.[133] In addition, by focusing more on the photography/speech issue and less on the *attendance* at the ceremony, the *Elane Photography* court misjudged the nature of the violation at hand (in no small part, presumably because Elane Photography likely cast their claim in the fashion of a free speech claim in attempt to get strict scrutiny).[134]

In conjunction, these multifaceted claims weaving free speech, free assembly, and free exercise rights implicate strict scrutiny under a hybrid rights theory. In *Smith*, the Supreme Court abandoned strict scrutiny for generally applicable, neutral laws affecting religion; however, it did provide for what has proved to be a nebulous constitutional exception: the hybrid rights theory.[135]

First, the hybrid rights theory provides that strict scrutiny may be warranted when a free exercise claim is coupled with another constitutional right.[136] The theory has received disparate treatment ranging from confusion to skepticism to outright dismissal.[137] In the wake of these discordant reactions, the Tenth Cir-

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130. *Session Details and Tips*, *Investment*, SHARON ELAINE PHOTOGRAPHY, http://www.sharonelainephotography.com/index2.php (last visited January 7, 2013).

131. *Elane Photography*, 284 P.3d at 442.

132. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people to peaceably assemble.").

133. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) ("[F]reedom of association therefore plainly presupposes a freedom not to associate.").

134. Baworowsky, *supra* note 17, at 1755-56 (religious claims more likely to receive strict scrutiny when brought under speech rights).

135. *Axson-Flynn*, 356 F.3d at 1294.

136. *Smith*, 494 U.S. at 881. *See, e.g., Yoder*, 406 U.S. at 682 (applying strict scrutiny when a free exercise claim was coupled with the constitutional rights of parents).

137. *See supra* text accompanying note 60. *See also* William L. Esser IV, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 216-17 (1998) (arguing that few understand

cuit developed a "middle-ground" approach: the "colorability" threshold, requiring a "fair probability, or a likelihood, of success on the companion claim."[138] Noting, however, that by addressing the hybrid rights theory it does not formally recognize its validity, the court in *Elane Photography* addressed the theory anyway.[139] By prefacing its colorability analysis with this dismissive introduction, the court barely nods at the theory as a viable foundation of constitutional protection.

Having already addressed both the substantive claims relating to free speech and free exercise, a fleeting mention of the hybrid rights theory is mere formality at this point, signaling desperation on behalf of the claimant and a shrinking arsenal of constitutional arguments.[140] Elane Photography's free speech claim was rejected as not expressive enough to warrant strict scrutiny under the Free Speech Clause, and its free exercise claim failed under *Smith's* watered-down rational basis standard for generally applicable laws.[141] It comes as no surprise, therefore, that when neither claim proves sufficient on its own, the court concludes they are equally insufficient when combined. When the claimant attempts to latch

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what constitutes a hybrid claim or what the limits are) (citation omitted). Indeed, the theory threatens to swallow the *Smith* decision, fueling the confusion of its application. *Id.*; Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring). After all, if the hybrid claim merely combines "losing rights," why do they become successful when combined? On the other hand, if either claim is sufficient on its own, then the theory proves superfluous. Esser, *supra*, at 217. Regardless, the mere discussion of a "hybrid claim" as a necessary boost to achieve strict scrutiny underscores the waning influence of free exercise rights, further supporting the proposition that free exercise claimants increasingly must rely on other constitutional provisions *in lieu* of the Free Exercise Clause. Baworowsky, *supra* note 17, at 1755-56 (religious claims are more likely to receive strict scrutiny when brought under speech rights).

138. *Elane Photography*, 284 P.3d at 442 (citing *Axson–Flynn,* 356 F.3d at 1295) (internal quotation marks and citation omitted).

139. *Id.* at 443.

140. A structured analysis first addressing the merits of each constitutional claim in turn (and concluding strict scrutiny applies to neither) forecasts the conclusion that two losing constitutional claims, combined together, do not equal a winning constitutional claim. Esser, *supra* note 136, at 242. Instead, the two claims are usually weighed independently, and whether the party is ultimately successful is determined by the merits of either one standing alone. *Id.* Indeed, a hybrid rights claim necessarily implicates that success under the free exercise claim is untenable, thereby hinging the claim on the alternative right asserted. *Id.* (citing Richard M. Paul III & Derek Rose, Comment, *The Clash Between the First Amendment and Civil Rights: Public University Nondiscrimination Clauses*, 60 MO. L. REV. 889, 919 (1995)).

141. *Elane photography*, 284 P.3d at 438-39, 441.

its religious rights to other constitutional protections because of the inadequacy of their religious rights alone, the waning coverage of the Free Exercise Clause becomes clear. Consequently, when statutory provisions and the Constitution fail to safeguard religious rights, claimants must turn to state constitutions for protection.

2. The New Mexico Constitution

Elane Photography argues that the New Mexico Constitution provides broader protection than the First Amendment, and therefore, its conduct is protected by the former.[142] The New Mexico Constitution contains a two-sentence provision devoted to religious freedom.[143] The court in *Elane Photography* focused on the second sentence, which provides: "[n]o person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship."[144] Elane Photography contends that, under this provision, the court should not apply the federal standard under *Smith*, discussed above, but rather insists this provision warrants strict scrutiny.[145]

The court rejected a deviation from the federal standard, citing lack of precedent and failure to provide an interstitial analysis.[146] In addition, the court concluded that both the New Mexico Free Exercise Clause and its federal companion speak to the same matter: "compulsory participation in religious worship or observance."[147] Consequently, absent a showing to the contrary, the

142. *Id.* at 440
143. N.M. CONST. art. II, § 11.
144. *Id.*
145. *Elane Photography*, 284 P.3d at 440.
146. Under an interstitial approach, a court may only diverge from the federal standard "for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." State v. Gomez, 932 P.2d 1, 7 (N.M. 1997) (citing *Developments in the Law-The Interpretation of State Constitutional Rights,* 95 HARV. L. REV. 1324, 1359 (1982)). Some have called this "the worst approach to state constitutional analysis--abdication of all responsibility to analyze independently the state constitution." Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of* Employment Division v. Smith, 67 TEMP. L. REV. 1017, 1037 (1994).
147. *Elane Photography*, 284 P.3d at 441 (citation omitted).

court ruled the New Mexico provision is co-extensive with the federal Free Exercise Clause.[148]

Conspicuously and extraordinarily absent from Elane Photography's brief is a claim under the *first* sentence of the New Mexico Constitution.[149] The second sentence is a "negative power" prohibiting laws compelling worship or favoring a particular form of worship.[150] The first sentence, on the other hand, is a powerful declaration in the form of a "positive grant of power" guaranteeing New Mexico citizens freedom of religious conscience: "Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship."[151] Why Elane Photography would not include a claim pursuant to this expansive guarantee is perplexing.

In his concurring opinion, Judge Wechsler zeroes in on this language as the animating provision that "may provide broader protection than the First Amendment."[152] While New Mexico is free to "provide more liberty than is mandated by the United States Constitution,"[153] the interstitial approach, on the other hand, imposes limits on when state constitutions may amplify or exceed their federal counterpart:

> Where a state constitutional provision has previously been interpreted more expansively than its federal counterpart, trial counsel must develop the necessary factual base and raise the applicable constitutional provision in trial court. Where the provision has *never before been addressed* under our interstitial analysis, trial counsel *additionally must argue* that the state constitutional provision should provide greater protection, and suggest reasons as to why, for example, a flawed federal analysis, structural dif-

148. *Id.*

149. *Id.* at 445 (Wechsler, J., specially concurring) (Elane Photography only asserts a claim under the *second* sentence).

150. N.M. CONST. art. II, § 11.

151. *Id.*

152. *Elane Photography*, 284 P.3d at 445-46 (Wechsler, J., specially concurring) ("This language, which focuses on a person's freedom to act in accordance with one's conscience concerning one's religious opinion or worship, seems broader than the First Amendment language that focuses on preventing federal laws that "prohibit" a person's free exercise of religion").

153. *Gomez*, 932 P.2d at 6.

> ferences between state and federal government, or distinctive state characteristics.[154]

Because New Mexico adopted this approach, and interpreting its Religious Protection Clause differently than the First Amendment is a matter of first impression, interstitial analysis is required.[155]

On its face, the first sentence of New Mexico's religious freedom provisions clearly goes beyond the First Amendment. Many state constitutions contain similar language interpreted to provide broader protection than the First Amendment. For example, the Ohio Constitution provides "nor shall any interference with the rights of conscience be permitted"; the Minnesota Constitution provides "nor shall any control of or interference with the rights of conscience be permitted"; the Washington Constitution provides "[a]bsolute freedom of conscience in all matters of religious sentiment, belief[ ] and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion."[156]

Under the interstitial approach, however, it is not enough to argue the merits of such an interpretation; counsel must additionally argue reasons in support of such an understanding.[157] Under this approach, a court may find additional protection exists only when "federal analysis is unpersuasive either because we deem it flawed . . . or because of distinctive state characteristics . . . or because of undeveloped state analogs."[158] When presented with language such as New Mexico's Constitution and related state constitutional provisions, "flawed federal analysis" provides viable grounds for adopting more expansive protection under this standard.

At issue is the rational basis test mandated by *Smith*.[159] In order to argue that strict scrutiny is warranted in this case, Elane

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154. State v. Leyva, 250 P.3d 861, 877 (N.M. 2011) (emphasis added) (emphasis, internal quotation marks, and citation omitted).

155. *Elane Photography*, 284 P.3d at 446 (Wechsler, J., specially concurring).

156. *Id.* (internal quotation marks and citation omitted).

157. Some argue that this approach undermines the development of state constitutional law when it is never analyzed outside the framework of federal law: "The effect [of this approach] is to make independent state grounds appear not as original state law, but as a kind of supplemental rights that require an explanation." Levy, *supra* note 146, at 1040.

158. *Gomez*, 932 P.2d at 7.

159. *Smith*, 494 U.S. 872 (abandoning a "compelling government interest"). *See also* Miller v. Reed, 176 F.3d 1202, 1206 (9th Cir. 1999).

Photography necessarily must argue *Smith's* detrimental narrowing of free exercise protection.[160] What makes independent state constitutional interpretation difficult in this case, however, is the federal hurdle Elane Photography must meet before the New Mexico constitutional provisions can be considered. Elane Photography must *first* show either flawed federal analysis or some other recognized foundation. This requires Elane Photography to justify its understanding of the New Mexico Constitution in the *context of federal precedent* which interprets *different statutory language*.[161] This creates a barrier to giving the proper interpretation to constitutional provisions deliberately crafted for a specific effect; in this case, a repudiation of *Smith* and a reinstatement of strict scrutiny for free exercise claims.

Nevertheless, there is no shortage of negative commentary on the *Smith* decision.[162] Therefore, Elane Photography has a strong claim to expanded religious protection under the New Mexico Constitution on its face, *combined with* a credible argument that *Smith* is unpersuasive and therefore flawed. This argument is spe-

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160. To show flawed federal analysis in this case, Elane Photography must show that *Smith* has allowed substantial burdening of religion. *See generally* Lund, *supra* note 68, at 471-72 (arguing that free exercise rights have deteriorated after *Smith* and that state RFRAs fail to provide the necessary protection for religious liberty at the state level). *See also* Levy, *supra* note 146, at 1050 (arguing that independent state constitutional interpretation is necessary to protect the rights of citizens and preserve the integrity of federalism).

161. In order to assert strict scrutiny for a neutral, generally applicable law, Elane Photography must necessarily contest the *Smith* decision. *Smith*, however, interpreted the First Amendment, whereas Elane Photography is seeking protection under the New Mexico Constitution. The interstitial approach, it seems, requires Elane Photography to dispute *Smith* on the merits (assert a flawed federal analysis, premised on the First Amendment) *before* it can argue under the New Mexico Constitution, therefore impeding Elane Photography from reaching grounds for state protection.

162. *See generally* Janet V. Rugg & Andria A. Simone, *The Free Exercise Clause:* Employment Division v. Smith*'s Inexplicable Departure from the Strict Scrutiny Standard*, 6 ST. JOHN'S J. LEGAL COMMENT. 117, 141 (1990) ("[U]niform application of the strict scrutiny standard is also imperative to fairly and equitably preserve first amendment rights for all citizens both inside and outside the mainstream."). *See also* Lund, *supra* note 69, at 471-72 (arguing that free exercise rights have deteriorated after *Smith* and that state RFRAs fail to provide the necessary protection for religious liberty at the state level); Sandra Ashton Pochop, *Employment Division,* Department of Human Resources of Oregon v. Smith*: Religious Peyotism and the "Purposeful" Erosion of Free Exercise Protections*, 36 S.D. L. REV. 358, 381 (1991) ("It is likely that the Court's decision in *Smith II* will continue to permit and even encourage governments to further encroach upon religious rights.").

cifically invited by Judge Wechsler in his concurring opinion, and thus has a promising likelihood of success.[163] The main problem remains, however, that Elane Photography is procedurally barred from directly arguing the New Mexico Constitution on its merits. Instead, it is forced to conform its argument to the interstitial approach requiring a further showing of proof. This obstructs the proper development and interpretation of the New Mexico Constitution as intended by its drafters.

IV. SOLUTIONS: PUTTING THE PIECES BACK TOGETHER—UNIFORM RELIGIOUS FREEDOM PROTECTION

Smith burst the religious freedom dam once guaranteeing strict scrutiny.[164] In reaction, federal and state statutes,[165] along with state constitutional provisions,[166] attempted to plug these leaks, albeit hopelessly (and in practice, sporadically).[167] These gaps demand a return to pre-*Smith* strict scrutiny protection for religious claims.[168] However, because *Smith* interprets the First Amendment rather than a statute, the only recourse available is a Constitutional amendment or the Supreme Court overruling *Smith* itself.[169]

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163. *Elane Photography*, 284 P.3d at 447 (Wechsler, J., specially concurring) ("Although the language of Article II, Section 11 is different from that of the First Amendment and may provide broader protection, determination of its scope remains for another day.").

164. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (requiring a compelling government interest); *Yoder*, 406 U.S. 205 (generally applicable laws, neutral on their face, may still violate the First Amendment).

165. *See supra* Part II.C (federal and state RFRAs).

166. *See supra* Part III.C.2 (state constitutional provisions interpreted broader than the First Amendment).

167. *See supra* text accompanying note 99 (a multi-exemption regime requiring religious rights claimants to win at each level). Approximately half the states are without either a state RFRA or state constitutional protection reinstating strict scrutiny for free exercise claims after *Smith*. Lund, *supra* note 69, at 479; Durham, et. al., *supra* note 66.

168. *See Sherbert*, 374 U.S. 398 (requiring a compelling government interest); *see Yoder*, 406 U.S. 205 (explaining that generally applicable laws, neutral on their face, may still violate First Amendment).

169. Marbury v. Madison, 5 U.S. 137 (1803), gives the Supreme Court final authority to interpret the Constitution. Ivan E. Bodensteiner, *Congress Needs to Repair the Court's Damage to § 1983*, 16 TEX. J. C.L. & C.R. 29, 63-64 (2010). Congress alone can never overturn a Supreme Court decision interpreting the Constitution. *Id*. *But see supra* text accompanying note 70 (Congress can circumscribe Supreme Court rulings by statute). Although a constitutional amendment can overrule a Supreme Court interpretation, this has rarely occurred. *Id. See also*

Grimly, neither of these possibilities is likely,[170] making the fragmentation of free exercise protection seemingly irreversible. Nevertheless, the states are not without options. Recalling *Flores*, however, a federal statute would be unavailing.[171] Therefore, states must turn to their own statutory or constitutional remedies.

Properly constructed state RFRAs present the first viable solution to repair free exercise protection. When constructing these legislative provisions, however, states need to recognize their limitations.[172] The first step is to craft them to provide meaningful coverage. This means abandoning the coverage exclusions that render some RFRAs without bite.[173] In addition, unless religious rights are vigorously and earnestly litigated under these provisions, they become empty statutes. To make state RFRAs meaningful, they must be accorded independent, substantive religious rights.[174]

Second, states could introduce religious exemptions into public accommodation laws.[175] This would prove to be an especially limited solution, however, as remedying public accommodation laws would fail to address the broader issue: the erosion of religious rights under the Constitution. In addition, public accommodation laws regulate business conduct, and therefore are uniquely relevant only to business-oriented religious claims such as those presented in *Elane Photography*. Rather, comprehensive reform is

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Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1261 (1984) (stating that only four constitutional amendments were enacted to specifically overturn a Supreme Court decision).

170. Chemerinsky, *supra* note 169.

171. Congress can only enforce the Constitution against the states; it cannot *interpret* it. *Flores*, 521 U.S. 507. The portion of the federal RFRA applied against the states, therefore, it was overturned. *Id.*

172. State RFRA claims are rarely asserted. Lund, *supra* note 69. Lund argues this is because attorneys bring religious rights claims under other protections, or even because they are unaware of state RFRA legislation, improperly adjudicated at the federal level, misinterpreted or conflated with the *Smith* standard, or too narrowly constructed to provide meaningful coverage. *Id.*

173. *See* discussion *supra* Part III.B (discussing RFRA coverage limitations).

174. Confusion and lack of precedent under state RFRAs discourage lawsuits, or leave them susceptible to misinterpretation. Lund, *supra* note 69.

175. *See generally* Kelly Catherine Chapman, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783, 1790 (2012) (devising an exemption scheme based on type of entity and its size).

necessary; another nuanced, abstruse exception to the interwoven and overlapping state of free exercise law will not be as helpful.[176]

Third, states may amend their constitutions to include heightened religious protection, or else interpret standing provisions (as in *Elane Photography*) to amplify or expand First Amendment protection. Absent federal legislation specially qualifying *Smith* or *Flores*, this is the best course for bolstering free exercise coverage. A state constitutional protection would presumably be more "visible" than lesser-known RFRA statutes and more familiar, therefore encouraging claims brought pursuant to them.[177] Although Federalism provides for several methods of state constitutional interpretation,[178] there is a familiar avenue for the assertion of such claims. And while they place additional hurdles before claimants seeking relief under such theories, successful claims hold the promise of establishing important, substantive precedent.[179]

Fourth, courts can chip away at *Smith* and public accommodation laws extending its reach by factually distinguishing cases, or by broadly interpreting state RFRAs[180] and state constitutions.[181] As seen in *Elane Photography*, however, courts are dismissive of unsupported or adventurous court rulings deviating from established precedent,[182] therefore severely limiting the dependability of this solution as an independent mechanism for expanding religious rights.

Fifth and finally, businesses can take steps to avoid classification as a public accommodation and therefore evade the compelled conduct at issue in *Elane Photography*. This certainly constitutes a sad concession to the state of free exercise protection and would

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176. *See supra* text accompanying note 100 (multi-exemption regime requiring religious rights claimants to win at each level).

177. To make RFRAs more effective, they need to provide sufficiently broad coverage and substance that lay the foundation for meaningful precedent. *See supra* text accompanying note 172.

178. *See Gomez*, 932 P.2d at 7 (describing the lock-step, primacy, and interstitial approach).

179. *E.g.*, the interstitial approach to state constitutional interpretation is necessary only on matters of first impression. *Leyva*, 250 P.3d at 877. After precedent for broader interpretation is established, interstitial analysis is no longer required. *Id.*

180. *E.g.*, *Hankings*, 441 F.3d 96. *See* discussion *supra* Part III.B.

181. *Elane Photography*, 284 P.3d at 446 (Wechsler, J., specially concurring) (citing several state constitutional provisions interpreted to exceed First Amendment protection).

182. *Elane Photography*, 284 P.3d at 444-45 (citing lack of precedent and instead relying on the express language of the statute).

confirm the "chilling effect"[183] public accommodation laws have on religious exercise. When a business markets its service "to the public at large and invite[s] them to solicit services offered by [it],"[184] it accepts certain limitations on its religious exercise.[185] In this case, public accommodation laws force an individual to choose between adherence to their religious beliefs or entrance into the public market. In *Elane Photography*, the court explains why Elane Photography is classified as a public accommodation:

> Elane Photography takes advantage of these available resources to market to the public at large and invite them to solicit services offered by its photography business. As an example, Elane Photography advertises on multiple internet pages, through its website, and in the Yellow Pages. *It does not* participate in *selective advertising*, such as telephone solicitation, nor does it in any way seek to *target a select group* of people for its internet advertisements.[186]

The court suggests that if Elane Photography did not advertise its business to the public at large, it would not be classified as a public accommodation.

If Elane Photography instead *selectively advertised* or specially *targeted a select group*, perhaps it would escape application of the public accommodation law. This dynamic "chills" either Elane Photography's religious exercise, or their capability to effectively advertise—cold comfort for religious individuals engaged in public business.

V. CONCLUSION

Close corporations represent most of American businesses, with family-owned businesses accounting for almost 50% of all U.S. employment.[187] Individuals are particularly vulnerable in these situations because, even though they are closely associated with their business and its conduct by virtue of its limited size, First Amendment coverage stops short of full protection for these indi-

183. BLACK'S LAW DICTIONARY 274 (9th ed. 2009) ("The result of a law or practice that seriously discourages the exercise of a constitutional right, such as the right to appeal or the right of free speech….Broadly, the result when any practice is discouraged.").

184. *Elane Photography*, 284 P.3d at 436.

185. *Id.* at 443 (citing *Lee*, 455 U.S. at 253).

186. *Id.* at 436 (emphasis added).

187. *See* BAUMAN, *supra* note 3, at 334.

viduals when acting in their corporate capacity.[188] This gives rise to First Amendment violations when individuals must forgo their religious rights simply because they enter the market.[189]

In reaction to these religious rights discrepancies introduced by *Smith*, Congress and the states implemented a patchwork of legislation and constitutional amendments.[190] These efforts, however, proved to be a shallow and complicated substitute for pre-*Smith* religious rights, and have dogged religious adherents ever since.[191] Although states may enact RFRA provisions or rely on their constitutions, these solutions hardly restore the foundation of religious rights prior to *Smith*.[192]

Mitt Romney's answer to the now almost 200 year-old question[193]—are corporations people?—is partially true: corporations *do* have many of the same rights as individuals, but not *all* of them.[194] Economic theory and corporate rights will continue to develop, but amidst changing interpretations of constitutional protections, perhaps asking whether corporations should have the same rights as individuals is the wrong question. Instead, in light of cases such as *Elane Photography*, maybe we should ask what are the rights of *individuals* involved in corporations; and further: what rights are they willing to forgo to be a part of them?

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188. Individuals accept certain limitations on their conduct when they enter commerce. *Lee*, 455 U.S. at 253.

189. *Id.*

190. *See supra* Part II.C (federal and state RFRAs).

191. *See supra* text accompanying note 100 (multi-exemption regime where religious rights claimants must win at each level).

192. Lund, *supra* note 69 (arguing that free exercise rights have deteriorated after *Smith* and that state RFRAs fail to provide the necessary protection for religious liberty at the state level).

193. *Trustees of Dartmouth College*, 17 U.S. 518 (raising the issue of corporate "individuality" and its autonomy from the State).

194. BAINBRIDGE, *supra* note 3.