# THE FIRST AMENDMENT CASE FOR CORPORATE RELIGIOUS RIGHTS

By John D. Moore*

*In the wake of the Supreme Court's controversial decision in* Burwell v. Hobby Lobby Stores, Inc.*, this article makes the case for extending First Amendment religious protections to for-profit corporations. It argues that logical application of the First Amendment allows for no other result. The article then proposes a novel framework—deeply rooted in existing First Amendment law—for determining which corporations are actually engaged in religious practice. Rather than focusing on profit motives or ownership structure, courts deciding corporate religious claims should extend First Amendment protection to those corporations that have demonstrated sincere religious beliefs through their corporate charter and practices. By tackling this controversial problem head-on and offering a workable middle-ground approach to resolving the controversy, this article offers valuable tools to courts considering corporate free exercise cases and to scholars discussing these issues.*

TABLE OF CONTENTS



* Thank you to Joel Gora, Sabrina Margret Bierer, McLean Crichton, and David Giller for reading earlier drafts of this work and offering their helpful feedback. Thanks also to the editors and staff of the Nevada Law Journal for their diligent work improving this article. For Faith and Peter.

## INTRODUCTION

From the moment the Supreme Court granted certiorari to hear religious challenges to the Affordable Care Act in the *Hobby Lobby* case, there was little question that this case was going to be the "blockbuster" of the 2013 term.[1] The case brought together issues considered in the Court's controversial *Citizens United* ruling—affirming corporate personhood[2]—and its equally controversial 2012 ruling upholding the constitutionality of the Affordable Care Act (also known as "Obamacare").[3] The Court considered whether a corporation could assert religious rights and decline to provide contraceptive coverage for employees as required under Obamacare. As one commentator wrote in anticipation of the Court's ruling, the case could "prove to be an unholy alliance of corporate personhood doctrine, religious freedom claims, and abortion rights."[4] When the Court ruled—upholding certain religious rights for corporations—public reaction was swift and dramatic. Newspaper editorial boards across the country alternately praised and condemned the decision in sweeping terms.[5]

---

[1] Alan J. Meese & Nathan B. Oman, Hobby Lobby, *Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273, 273 (2014).

[2] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 311 (2010).

[3] *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[4] Dahlia Lithwhick, *Corporations Are People, the Biblical Sequel*, SLATE (Nov. 26, 2013, 3:25 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/supreme_court_and_obamacare_contraception_mandate_are_companies_persons.html.

[5] *Compare* Editorial, *High Court Ruling a Win for Hobby Lobby, Religious Liberty*, DAILY OKLAHOMAN, July 1, 2014, http://newsok.com/high-court-ruling-a-win-for-hobby-lobby-religious-liberty/article/4984227 ("In ruling on the side of Hobby Lobby, the U.S. Supreme Court struck a welcome blow for religious liberty, which the Obama administration put in the cross hairs by inserting a misguided contraceptive mandate in the president's health care law."), Editorial, *"A Victory for Freedom,"* AUGUSTA CHRON., June 30, 2014, http://chronicle.augusta.com/opinion/editorials/2014-06-30/victory-freedom ("If you like your religious freedoms, you can keep them. For now."), *and* Editorial, *Justices Strike A Sound Balance in Hobby Lobby Ruling*, NEWSDAY, June 30, 2014, http://www.newsday.com /opinion/justices-strike-a-sound-balance-in-hobby-lobby-ruling-editorial-1.8619295 ("Abortion and Obamacare are an explosive mix but the U.S. Supreme Court appears to have charted a viable course through this minefield on Monday."), *with* Editorial, *Limiting Rights: Imposing Religion on Workers*, N.Y. TIMES, June 30, 2014, http://www.nytimes.com/2014/07/01/opinion/the-supreme-court-imposing-religion-on-workers.html ("The Supreme Court's deeply dismaying decision on Monday in the Hobby Lobby case . . . grant[s] owners of closely held, for-profit companies an unprecedented right to impose their religious views on employees."), Kevin Horrigan, Editorial, *In Hobby Lobby, Court Rules Some Beliefs Are More Equal Than Others*, ST. LOUIS POST-DISPATCH, June 30, 2014, http://www.stltoday.com/news/opinion/columns/the-platform/editorial-in-hobby-lobby-court-rules-some-beliefs-are-more/.html ("The Supreme Court has decided that the rights of free exercise of religion held by corporate citizens can preempt the beliefs of employees."), *and* Editorial, *Corporations Trump People in*

Beneath the uproar and partisan posturing surrounding the decision, the Court addressed a set of very real and difficult legal questions: Can for-profit corporations exercise religion? Does the contraception mandate substantially burden the exercise of religion? If there is a burden, does the government have the right to impose that burden anyway?

In its decision, the Court largely dodged the question of whether for-profit corporations have a First Amendment right to exercise religion, resting its opinion instead on the statutory rights provided under the Religious Freedom Restoration Act.[6] In doing so, the decision left a jurisprudential gap that this article fills.

I conclude that for-profit corporations do have the ability to exercise religion as understood under the First Amendment. A logical application of First Amendment precedent allows for no other result. But while corporations have the ability to exercise religion, most do not do so. Indeed, recognizing that for-profit corporations *can* exercise religion begs the more difficult question of how we can know when such a corporation actually *is* practicing religion. The difficulties posed by this question require a standard to differentiate between genuine religious claims worthy of protection and sham claims presented only to win some secular benefit.

Thus, I propose a practical framework—deeply rooted in existing First Amendment law—to determine which corporations exercise religion and which do not. I argue that courts considering corporate free exercise claims should evaluate the sincerity of the beliefs underlying that exercise, looking to the overt practices of the corporation as a corporation distinct from its shareholders for clear indications of religious practice. Where a corporation—for-profit or otherwise—has demonstrated a sincere commitment to a particular set of religious practices, it may fairly be said to be exercising religion and ought to fall under the aegis of the First Amendment's religious protections. The test I propose will allow corporations the opportunity to vindicate their religious rights without throwing open the floodgates to all manner of inappropriate claims. The test threads a tricky legal needle and provides a workable basis for courts to decide corporate free exercise claims brought under the First Amendment. Rather than erecting artificial barriers that prevent worthy parties from asserting their rights, I argue that, with appropriate judicial oversight, it is possible to recognize the free and full assertion of rights within our society.

This article will proceed in five parts. In the first part, I explain the statutory background of the Supreme Court's *Hobby Lobby* decision and the dramatic circuit split that brought the case to the Supreme Court. Part II then delves into the Court's *Hobby Lobby* ruling, explaining the opinion's salient points and

*Supreme Court's Hobby Lobby Decision*, BALT. SUN, June 30, 2014, http://articles.baltimoresun.com/2014-06-30/news/bs-ed-hobby-lobby-20140630_1_hobby-lobby-conestoga-wood-specialties-corp-supreme-court ("In allowing for-profit companies to opt out of contraceptive mandate, Supreme Court has extended religion's reach and diminished individual rights.").

[6] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014).

highlighting those areas where the Court erred. In Part III, I argue that First Amendment precedent and policy require recognition of for-profit corporations' free exercise rights. Part IV presents a practical framework, based on judging a corporation's sincerity as evidenced through its overt actions, for determining which corporations actually exercise religion and are thus entitled to constitutional protection for that exercise. In Part V, I address some of the questions and objections raised by my proposed framework and demonstrate that those objections are not strong enough to compel a different result. For-profit corporations, when they have manifested a set of sincere religious beliefs through their corporate practices, ought to enjoy constitutional protection for their religious exercise.

## I. THE ROAD TO *HOBBY LOBBY*

The Court's *Hobby Lobby* decision took place before the backdrop of two significant pieces of legislation and five dramatically conflicting circuit court decisions. This section will set out that backdrop's key features as a means to highlight the points of controversy.

### *A. Legislation*

#### *1. The Patient Protection and Affordable Care Act (Obamacare)*

Congress passed Obamacare in 2010 amid great controversy.[7] Describing the legislative and political fights surrounding the legislation—to say nothing of the multitude of provisions in the statute—is far beyond the scope of this article. The portion relevant for the purposes here relates to the so-called employer mandate.

This provision of Obamacare requires employers to provide certain minimum health coverage at no cost to their employees, including "additional preventative care and screenings" for women.[8] Notably, the law does not define what preventative care and screening is required. Rather, it provides that the Health Resources and Services Administration will issue appropriate guidelines. Thus, in itself, the employer mandate did not engender any more controversy than other aspects of the legislation. But the devil, as always, is in the details.

In adopting the guidelines, the Administration required that employee health plans "include FDA-approved contraceptive methods."[9] This covers a range of methods. In fact,

---

[7] Sheryl Gay Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, with a Flourish*, N.Y. TIMES, (Mar. 23, 2010), http://www.nytimes.com/2010/03/24/health/policy/24health.html?_r=0 ("While Democrats exulted, Republicans, who describe the measure as an example of big government run amok, said it was no day to celebrate.").

[8] 42 U.S.C. § 300gg-13(4) (2012).

[9] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1123 (10th Cir. 2013).

> [t]he FDA has approved twenty such methods, ranging from oral contraceptives to surgical sterilization. Four of the twenty approved methods—two types of intrauterine devices (IUDs) and the emergency contraceptives commonly known as Plan B and Ella—can function by preventing the implantation of a fertilized egg. The remaining methods function by preventing fertilization.[10]

Catholic employers objected, claiming that they were religiously opposed to any form of contraception.[11] Additional objections arose from those who did not necessarily oppose all forms of contraception, but did object to the inclusion of the four methods that allegedly prevent a fertilized egg from implanting in the uterus.[12]

In response to these concerns, particularly those raised by Catholic organizations, the Administration allowed exemptions for "religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services."[13] The regulations define a "religious employer" as one that:

> (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization described in a provision of the Internal Revenue Code that refers to churches, their integrated auxiliaries, conventions or associations of churches, and to the exclusively religious activities of any religious order.[14]

The regulations also allow exemptions for certain non-profit organizations (including religiously affiliated colleges), employers with "grandfathered" plans that make no changes to their policies after the effective date of the law, and employers with fewer than fifty employees.[15] For these exempt organizations, the law provided a mechanism by which insurance providers would offer contraceptive coverage directly to employees without cost to either the employee or the employer.[16] These exceptions, however, did not extend to for-profit corporations, even where shareholders had religious objections to complying with the mandate.

Opponents of the mandate claimed that their constitutional free exercise rights were violated by the coercive penalty they would face for failing to abide

---

[10] *Id*. While the science behind these claims regarding prevention of implantation of a fertilized egg is disputed I include the language here as an indication of the point of controversy in *Hobby Lobby*. *See* Tummino v. Hamburg, 936 F. Supp. 2d 162, 165 (E.D.N.Y. 2013).

[11] *See Love and Sexuality*, U.S. CONF. OF CATHOLIC BISHOPS, http://www.usccb.org/beliefs-and-teachings/what-we-believe/love-and-sexuality/index.cfm (last visited Aug. 24, 2015); Press Release, U.S. Conf. of Catholic Bishops, HHS Final Rule Still Requires Action Congress, By Courts, Says Cardinal Dolan, (July 3, 2013), http://www.usccb.org/news/2013/13-137.cfm.

[12] *Hobby Lobby Stores, Inc*., 723 F.3d at 1124–25.

[13] 45 C.F.R. § 147.130(a)(1)(iv)(A) (2014).

[14] *Hobby Lobby Stores, Inc*., 723 F.3d at 1123 (citing 45 C.F.R. § 147.130(a)(1)(iv)(B)).

[15] *Id*. at 1123–24.

[16] 45 C.F.R. § 147.131(c) (2014).

by the law.[17] Failure to comply with the employer mandate can result in steep fines. The law provides for a fine of $100 per day for each individual who should be receiving the mandated coverage.[18] For large employers, the liability could be huge. According to the Tenth Circuit, Hobby Lobby Stores, Inc., with more than 13,000 employees, could be subject to almost $475 million in fines per year.[19]

*2. The Religious Freedom Restoration Act (RFRA)*

The Religious Freedom Restoration Act of 1993 arose from congressional disapproval of the Supreme Court's decision in *Employment Division v. Smith*.[20] In *Smith*, the Court abandoned the approach announced twenty-seven years previously in *Sherbert v. Verner* requiring that laws imposing a substantial burden on an individual's free exercise of religion pass strict scrutiny to survive constitutional review.[21] The Court in *Smith* overruled the *Sherbert* standard in all but name. Contemplating the religious use of peyote, the Court held that religious freedom does not excuse an individual from the obligation to comply with "valid and neutral law[s] of general applicability" that only incidentally infringe upon the exercise of religion.[22] The Court reasoned that its past application of strict scrutiny under *Sherbert* was limited to circumstances that implicated a separate right or involved unemployment compensation.[23] Therefore, the test did not apply to all other government policies that did not intentionally target religion.[24]

In response to this judicial relaxation of scrutiny, Congress passed RFRA.[25] The law provides that:

> (a) In general
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
> (b) Exception
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
> (1) is in furtherance of a compelling governmental interest; and

---

[17] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

[18] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1125 (citing 26 U.S.C. § 4980D(b)(1) (2012)).

[19] *Id.* Ironically, the employer would only face fines of $26 million per year if it dropped health coverage for its employees altogether. *Id.*

[20] 494 U.S. 872, 879 (1990).

[21] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963); DANIEL A. FARBER, THE FIRST AMENDMENT 251 (3d ed. 2010).

[22] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

[23] *Id.* at 881, 883.

[24] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

[25] FARBER, *supra* note 21, at 255.

> (2) is the least restrictive means of furthering that compelling governmental interest.[26]

In case there was any doubt as to the law's intended goal, the Senate Report on the bill declared that the act was "intended to restore the compelling interest test previously applicable to free exercise cases by requiring that government actions that substantially burden the exercise of religion be demonstrated to be the least restrictive means of furthering a compelling governmental interest."[27] By passing RFRA, Congress statutorily restored the *Sherbert* strict scrutiny test.[28]

In the 1997 case of *City of Boerne v. Flores*, the Supreme Court struck down RFRA as applied to the states because Congress had exceeded its authority to act under the Fourteenth Amendment.[29] But "RFRA still constrains the federal government."[30] In response to *City of Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA).[31] Among other things, the law broadened RFRA's definition of "the exercise of religion" from "the exercise of religion under the First Amendment" to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[32]

Because Obamacare is a federal law, the employer mandate fell within the strictures of RFRA. If the mandate substantially burdened a person's exercise of religion, it would be struck down unless the government could establish that the mandate is the least restrictive means of furthering a compelling government interest.[33] Thus, given the challenges of meeting the strict scrutiny standard, the government had a strong strategic incentive to argue that the Obamacare mandates did not burden a person's religious exercise. Determining who (or what) counts as a person proved to be a more difficult question.

---

[26] 42 U.S.C. § 2000bb-1 (2012).

[27] S. REPORT NO. 103-111, at 8 (1993).

[28] FARBER, *supra* note 21, at 255. The veracity of this statement is a point of contention between the *Hobby Lobby* majority and dissent. The majority opinion in *Hobby Lobby* asserts that RFRA went beyond the *Sherbert* test by adding a "least restrictive" requirement that was absent from the earlier jurisprudence. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 n.3 (2014) (citing City of Boerne v. Flores, 521 U.S. 507, 509 (1997)). In contrast, Justice Ginsburg's dissent contended that the least restrictive means requirement *was* a feature of the *Sherbert* test. *Id.* at 2793. Definitively resolving this dispute is ultimately beyond the scope of this article as I focus primarily on corporations' rights under the First Amendment and not RFRA.

[29] City of Boerne v. Flores, 521 U.S. 507, 508 (1997); FARBER, *supra* note 21, at 255.

[30] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133 (10th Cir. 2013) (internal citations omitted).

[31] *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2761.

[32] *Id.* at 2761–62 (citing 42 U.S.C. § 2000bb-2(4) (1994); 42 U.S.C. § 2000-5(7)(A) (2012)).

[33] *See* 42 U.S.C. § 2000bb-1 (2012).

### *B. Circuit Court Decisions*

During oral arguments before the Supreme Court, Justice Sotomayor told Hobby Lobby's attorney, Paul Clement, that he had "picked great plaintiffs" for asserting corporate free exercise rights.[34] To understand that statement and the case's path to the Supreme Court, this section will briefly highlight the factual and procedural history of the cases underlying the circuit split on this issue.

#### *1. Hobby Lobby Stores, Inc. v. Sebelius*

The first of the two consolidated cases heard before the Supreme Court was *Hobby Lobby Stores, Inc. v. Sebelius*, decided in the Tenth Circuit.[35] There, Hobby Lobby, Inc. and Mardel, a related corporation, brought a suit challenging Obamacare under RFRA and the free exercise clause of the First Amendment. The Tenth Circuit briefly described the plaintiffs:

> David Green is the founder of Hobby Lobby, an arts and crafts chain with over 500 stores and about 13,000 full-time employees. Hobby Lobby is a closely held family business organized as an S-corp. Steve Green is president of Hobby Lobby, and his siblings occupy various positions on the Hobby Lobby board. Mart Green is the founder and CEO of Mardel, an affiliated chain of thirty-five Christian bookstores with just under 400 employees, also run on a for-profit basis.[36]

The Greens claimed to "have organized their businesses with express religious principles in mind."[37] For instance, the Hobby Lobby statement of purpose includes honoring God and "operating the company in a manner consistent with Biblical principles," the Greens closed their stores on Sundays, the owners refused to engage in activities that promote alcohol use, and both companies were governed by a management trust that required commitment to religious principles.[38] Over the holidays each year, Hobby Lobby Stores, Inc. "placed, paid for, and signed" ads encouraging readers to "believe in the love that sent Jesus Christ. Accept the hope. Accept the joy. Accept the LIFE!"[39] In addition, Hobby Lobby paid for spiritual counseling and religiously oriented financial courses for its employees.[40]

While the Greens did not object to providing insurance that included contraceptive care in general, they raised religious objections to providing contraceptives that prevent uterine implantation of a fertilized egg.[41] While there was

---

[34] Transcript of Oral Argument at 19, Sebelius v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014) (No. 13-354).

[35] *See generally*, 723 F.3d 1114.

[36] *Id*. at 1122.

[37] *Id*.

[38] *Id*.

[39] Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 79 (2013).

[40] *Id*. at 78.

[41] *Hobby Lobby Stores, Inc*., 723 F.3d at 1125.

no dispute as to the sincerity of the Greens' beliefs,[42] the question was whether those beliefs could fairly be imputed to the corporations the Greens headed, given that those corporations are distinct legal entities from their owners.

Over a vigorous dissent, the Tenth Circuit held that Hobby Lobby, Inc. could assert a religious free exercise claim under RFRA.[43] The court reasoned that RFRA's language protects corporations just as it protects individuals,[44] and that profit-seeking is not a ground to deny religious rights.[45]

### 2. *Conestoga Wood Specialties Corporation v. Secretary of U.S. Department of Health and Human Services*

In the second of the consolidated cases the Supreme Court considered, *Conestoga Wood Specialties Corporation v. Secretary of U.S. Department of Health and Human Services*, the Third Circuit considered facts essentially identical to the *Hobby Lobby* case. There, the Hahn family owned "100 percent of the voting shares of Conestoga."[46] Like the Greens in *Hobby Lobby*, the Hahns operated "Conestoga in accordance with their religious beliefs and moral principles."[47] In this case, that meant following the precepts of the Mennonite religion. "According to [the Hahns'] Amended Complaint, the Mennonite Church 'teaches that taking of life which includes anything that terminates a fertilized embryo is intrinsic evil and a sin against God to which they are held accountable.' "[48] Thus, like the Greens, the Hahns objected to the requirement that they provide health coverage to Conestoga employees that included contraceptive methods to prevent the uterine implantation of a fertilized egg.[49]

The Third Circuit, over another strong dissent, reached a very different result than the Tenth Circuit had in *Hobby Lobby*. Without reaching the question of whether corporations counted as people under RFRA, the Third Circuit held that corporations lack the ability to exercise religion and so cannot bring suit alleging a violation of that right.[50] According to the court, for-profit corporations are barred from claiming protected religious freedoms because the "nature, history, and purpose" of the First Amendment did not support deeming free exercise to be anything other than a purely personal right.[51] The court further based its reasoning on the "total absence of caselaw" in which "a for-profit

---

[42] *Id.*

[43] *Id.* at 1121.

[44] *Id.* at 1129.

[45] *Id.* at 1135.

[46] Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381 (3d Cir. 2013).

[47] *Id.* at 390 (Jordan, J., dissenting).

[48] *Id.* at 381–82 (citation omitted).

[49] *Id.*

[50] *Id.* at 388.

[51] *Id.* at 385 (quoting First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 778 (1978)).

secular corporation was itself found to have free exercise rights."[52] Thus, in the Third Circuit, the Obamacare challenge failed.

***

Given the depth of the circuit split on the issue and the importance of the issues involved, it was, perhaps, inevitable that the Supreme Court would hear the case.[53] On November 26, 2013, the Court announced that it would once more delve into the legal challenges to Obamacare by granting certiorari to the *Hobby Lobby* and *Conestoga* cases as a consolidated appeal.[54]

## II. THE SUPREME COURT DECIDES *BURWELL V. HOBBY LOBBY STORES, INC.*

The first thing to understand about the *Hobby Lobby* decision is that it was not a First Amendment decision. Rather, the Court decided the case entirely on statutory grounds under RFRA and declined to reach the underlying constitutional issues.[55] Nevertheless, the Court's analysis does help shed light on the constitutional matters discussed in this article.

Justice Alito, writing for a five-member majority, held that Obamacare's "contraceptive mandate, as applied to closely held corporations, violates RFRA."[56] As will be discussed below, it is unclear if the holding is actually limited to closely held corporations, but so the Court claimed. Justice Kennedy issued a brief concurrence and Justice Ginsburg wrote a "respectful and powerful dissent."[57]

Although the decision facially appears to offer the now-familiar liberal/conservative split, there was another distinction that is of particular importance for the discussion in this article. While Justices Breyer and Kagan joined the bulk of the Ginsburg dissent, they wrote a brief separate opinion indicating that they "need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act of 1993."[58]

---

[52] *Id.* at 384–85.

[53] In addition to the two cases considered by the Supreme Court, three other circuits decided similar claims. *See* Autocam Corp. v. Sebelius, 730 F.3d 618, 625 (6th Cir. 2013) (ruling against corporation); Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1218 (D.C. Cir. 2013) (allowing suit to be brought by corporate shareholders);.Korte v. Sebelius, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012).

[54] Adam Liptak, *Justices to Hear Contraception Cases Challenging Health Law*, N.Y. TIMES, Nov. 27, 2013, at A13.

[55] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014).

[56] *Id.*

[57] *Id.* (Kennedy, J., concurring).

[58] *Id.* at 2806 (Breyer, J. and Kagan, J., dissenting).

*A. Arguments from RFRA*

To fully understand the Court's analysis, it is worth examining the RFRA-specific arguments on which the Court ruled. First, in interpreting RFRA's statutory language, the Court looked to the Dictionary Act—a kind of meta-statute that provides default definitions for terms used elsewhere in the United States Code. This analysis provided the majority with a "quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard."[59] The Dictionary Act's definition of "person" plainly includes corporations like those bringing challenge here:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . .
>
> . . . .
>
> . . . the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals[60]

Justice Alito wrote that he saw "nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition."[61] Moreover, he noted that the government conceded that non-profit corporations can claim RFRA personhood and that the Court had previously heard RFRA and free-exercise claims raised by non-profit corporations.[62] This essentially decided the matter because, in Justice Alito's view, "no conceivable definition of the term ['person'] includes natural persons and nonprofit corporations, but not for-profit corporations."[63]

Moreover, Justice Alito read RFRA, as amended by RLUIPA, as providing broad protection for rights, extending even beyond what the First Amendment would cover. He read the RLUIPA amendment as "an obvious effort to effect a complete separation from First Amendment case law."[64] Justice Alito found evidence of this desire for complete separation in the fact that "Congress deleted the reference to the First Amendment and defined the 'exercise of religion' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'"[65] Thus, the exercise of religion protected under RFRA was completely divorced from what the First Amendment did or did not protect. According to Justice Alito, the First Amendment's precedents are not necessarily prologue for interpreting RFRA rights.

---

[59] *Id*. at 2768.

[60] 1 U.S.C. § 1 (2012).

[61] *Hobby Lobby Stores, Inc*., 134 S. Ct. at 2768.

[62] *Id*. at 2768–69 (citing Hosanna–Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694 (2012); Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993)).

[63] *Id*. at 2769.

[64] *Id*. at 2761–62.

[65] *Id*. at 2762 (quoting 42 U.S.C. § 2000cc–5(7)(A) (2012)).

### *B. Arguments from Precedent*

After arguing that RLUIPA created a complete separation between RFRA interpretation and pre-*Smith* First Amendment precedent, the majority nonetheless argued that recognizing corporate free exercise rights was consistent with its earlier decisions regarding religious rights under the First Amendment. The majority cited a series of free exercise cases brought by religious and non-profit incorporated parties under the First Amendment and RFRA, in which the Court expressed no hesitation about entertaining the claims.[66] These precedents strongly indicated that the mere fact of incorporation did not warrant disregarding the parties' free exercise rights. While none of those cases explicitly addressed the parties' incorporated status, each case also assumed that it posed no significant hurdle.

The non-profit nature of the corporations in those precedent cases was not dispositive, however, because another line of cases indicated that individuals could exercise their religion while seeking profits. In particular, the majority looked to *Braunfield v. Brown*, where the Court "entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and the Court never even hinted that this objective precluded their claims."[67] This holding reflected the understanding that religious beliefs can compel action across a wide range of contexts, including "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine."[68] Given the breadth of religious practice protected under the First Amendment, the majority reasoned, free exercise rights must extend to incorporated as well as unincorporated businesses.

Moreover, the majority highlighted one case in which the Court seemed to accept that a for-profit corporation had standing to assert a free exercise claim. In *Gallagher v. Crown Kosher Supermarket*, the Court heard a challenge to a Massachusetts Sunday closing law brought "by a kosher market that was organized as a for-profit corporation, by customers of the market, and by a rabbi. [Massachusetts] argued that the corporation lacked 'standing' to assert a free-exercise claim, but not one member of the Court expressed agreement with that argument."[69] Although not explicitly discussed by the *Gallagher* Court at the time, the *Hobby Lobby* majority interpreted this tacit acceptance as indication that for-profit corporations were not necessarily barred from raising free exercise claims.[70]

---

[66] *Id.* at 2768–69 (citing *Gonzales*, 546 U.S. at 418; *Hosanna–Tabor*, 132 S.Ct. at 694; *Lukumi Babalu Aye, Inc.*, 508 U.S. at 520).

[67] *Id.* at 2769–70 (citing Braunfeld v. Braun, 366 U.S. 599 (1961)).

[68] *Id.* at 2770.

[69] *Id.* at 2772 (citing Gallagher v. Crown Kosher Super Market of Mass., Inc., 366 U.S. 617 (1961)).

[70] *Id.* (writing that *Gallagher* "suggests, if anything, that for-profit corporations possess such rights").

Justice Ginsburg's dissent vigorously contested each of these precedential arguments, writing that the majority's position "surely is not grounded in the pre-*Smith* precedent Congress sought to preserve" when it passed RFRA.[71] She once again highlighted the unique nature of the issues raised in the case:

> Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities.[72]

Nor did Justice Ginsburg find the majority's analogies to past cases particularly compelling. While the majority largely elided the distinction between non-profit and for-profit organizations, Ginsburg found that difference crucial. While communal activity was central to religious practice, the Court had only previously protected organizations that were explicitly religious.[73] Such organizations were due "special solicitude," but that solicitude did not traditionally extend to commercial organizations.[74] "Indeed, until [the *Hobby Lobby* decision], religious exemptions had never been extended to any entity operating in the commercial, profit-making world."[75] Ginsburg further dismissed the *Gallagher* case as an inapposite comparison. In her view, the fact that four of the five "challengers were human individuals, not artificial, law-created entities," meant that it was not necessary to determine whether the corporation could bring the suit.[76] Thus, the Court's silence on the matter should be read not as acceptance of a for-profit corporation's free exercise rights so much as the Court declining to reach an irrelevant issue. In sum, Justice Ginsburg viewed the *Hobby Lobby* majority's position as unsound both as a matter of First Amendment and of statutory law.

### *C. Arguments from Policy*

The majority further argued that it was important to protect the religious rights of corporations because those protections actually benefit the individuals behind the corporation.[77] After all, "[a] corporation is simply a form of organization used by human beings to achieve desired ends."[78] Just as extending the takings clause to corporations protects the individuals who have a financial stake in the corporation, "protecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control those compa-

---

[71] *Id*. at 2796.
[72] *Id*. at 2794.
[73] *Id*. at 2794–95.
[74] *Id*.
[75] *Id*. at 2795 (internal quotation marks omitted).
[76] *Id*. at 2794 n.13.
[77] *Id*. at 2768.
[78] *Id*.

nies."[79] This argument is relatively uncontroversial, at least as applied to non-profit religious entities.[80] But Justice Ginsburg would draw the line there, writing that there is a clear "distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs."[81] Clear though this distinction might be, it does not necessarily bear the weight that Ginsburg places on it. The principle of individual rights through corporate protections can apply equally to for-profit corporations.[82] This is why it is uncontroversial to protect corporate property rights as a means of protecting individual interests. Where a corporation, for-profit or otherwise, exists to further the religious beliefs of its shareholders, it seems reasonable to assume that protecting the corporation's free exercise rights will benefit the individuals behind the corporation. Nor does this seem unjust.

Moreover, corporations, as creations of state law, can exist for a broad range of purposes. Under the laws of Pennsylvania and Oklahoma (the plaintiff corporations' states of incorporation), for-profit corporations can be formed "to pursue 'any lawful purpose' or 'act.'"[83] This language would appear broad enough to include "the pursuit of profit in conformity with the owners' religious principles."[84] There seems little basis to interpret the free exercise clause so narrowly as to exclude this practice. As Justice Kennedy wrote in concurrence, free exercise means "the right to express [religious] beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community."[85] Thus, certain shareholders—like the *Hobby Lobby* plaintiffs—may "deem it necessary to exercise their religious beliefs within the context of their own closely held, for-profit corporations."[86] The most obvious objection to this position—that it may lead to internecine religious conflict within a corporation—is easily addressed by reference to state law governing how corporations are to be run.[87] Just as state law articulates how other aspects of corporate identity—name, election of directors, business decisions—are to be determined, it can be used for disputes over religious identity and affiliation.

### *D. Problematic Aspects*

While reaching essentially the right result on the standing issue, the majority's decision in *Hobby Lobby* contained several problematic aspects, particularly as similar cases work their way through the courts in the future. Perhaps

---

[79] *Id*.
[80] *See id*. at 2794.
[81] *Id*. at 2796.
[82] *Id*. at 2769 (majority opinion).
[83] *Id*. at 2771 (citations omitted).
[84] *Id*.
[85] *Id*. at 2785 (Kennedy, J., concurring).
[86] *Id*.
[87] *Id*. at 2774–75 (majority opinion).

most notable of those aspects is that the Court based its decision entirely on statutory grounds without reaching the underlying constitutional question.[88] While this is a typical application of the constitutional avoidance doctrine, it leaves a serious question as to the constitutional protections afforded for-profit corporations that wish to exercise religious rights. This question is cast into sharper relief by the majority's insistence that RFRA's definition of "religion" is completely independent of the First Amendment's conception of the term.[89] *Hobby Lobby* decides the issue where the challenge is against a federal law, but it does not suggest a path for courts considering challenges to state laws where RFRA does not apply.[90] Now that *Hobby Lobby* has been decided in favor of corporate rights, it seems just a matter of time before similar suits are brought challenging state laws.[91] The Supreme Court's ruling here will be of only limited help in guiding those state court decisions.

A second weakness in the Court's ruling is the majority's shifting language on just how broadly its opinion should reach. As Justice Ginsburg noted: "Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private."[92] Indeed, the scope the majority seems to have had in mind appears to shift from sentence to sentence. Justice Alito wrote that the government's concession that non-profit corporations could assert free exercise rights "effectively dispatches any argument that the term 'person' as used in RFRA does not reach the closely held corporations involved in these cases. No known understanding of the term 'person' includes *some* but not all corporations."[93] The first sentence appears to focus on the rights of closely held corporations, like the plaintiffs in *Hobby Lobby*. But immediately following that assertion, the Court expands its reasoning to encompass *all* corporations. The majority seems to intend to eliminate the distinction between non-profit and for-profit corporations, but the language just as easily erases the lines between closely held and publicly traded corporations. A massive corporation like Apple fits just as easily within this language as the family-owned *Hobby Lobby*. This is not to say that the Court is incorrect in declining to draw such a distinction. As this article will argue, all corporations,

---

[88] *Id*. at 2785.

[89] *Id*. at 2761–62.

[90] *See generally* City of Boerne v. Flores, 521 U.S. 507 (1997); *see also* FARBER, *supra* note 21, at 255.

[91] Given the host of recent lawsuits brought challenging state laws regarding contraceptive availability and requiring wedding businesses to accommodate gay weddings, the likelihood is that the issue will arise sooner rather than later. *See, e.g*., Nigel Duara, *Appeals Courts Hears Emergency Contraceptives Case*, HERALDNET (Nov. 20, 2014, 4:39 PM), http://www.heraldnet.com/article/20141120/NEWS03/141129855/Appeals-court-hears-emergency-contraceptives-case; Michael Paulson, *Can't Have Your Cake, Gays Are Told, and a Rights Battle Rises*, N.Y. TIMES, Dec. 16, 2014, at A1. The frequency of litigation on this matter is accelerating now that the Supreme Court has ruled that there is a constitutional right to same-sex marriage. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

[92] *Hobby Lobby Stores, Inc*., 134 S. Ct. at 2797 (Ginsburg, J., dissenting).

[93] *Id*. at 2769.

regardless of size, have the right to exercise religion. But the Court here appears to have either been unaware of the breadth of its ruling or intended to obscure that breadth. In either event, it is not an ideal means of resolving serious issues.

In another point of analytical imprecision, the Court regularly conflated the corporate shareholders with the corporation itself. Throughout the opinion, the majority referred to the religious beliefs of the shareholders as the defining inquiry.[94] The Court also acknowledged, however, that it was the corporate entity—which under the law is legally separate from its shareholders—that bore the burden of the health care law.[95] The Court then conflated these two facts and found that the corporation's sincere religious beliefs were violated, completely ignoring the legal separation between a corporation and its shareholders.[96] This separation is one of the primary incentives to incorporate, because it protects individuals from personal liability for corporate debts. As Justice Ginsburg highlighted: "One might ask why the separation should hold only when it serves the interest of those who control the corporation."[97] The majority offers no answer to this question, instead presenting its conflated view of shareholder beliefs and corporate obligations as if there were no separation.

These flaws—the lack of constitutional guidance, the broader-than-indicated reach of the opinion, and the conflation of shareholders and corporations—present potential problems when considering the possibility of larger corporations with more ambiguous religious beliefs challenging a state law on free exercise grounds. After all, the plaintiffs in this case were well-chosen to highlight a certain set of issues.[98] But what happens when plaintiffs who are not so great bring suit? The majority's opinion "does not even begin to explain how one might go about ascertaining the religious scruples of a corporation where shares are sold to the public."[99] What happens when a corporation's religious practices are not as clear as in *Hobby Lobby* or where the corporate shareholders share diverse—even conflicting—religious beliefs?

By failing to address many of these problems because they did not present themselves in the instant case, the majority's opinion provides little to no guidance for how these issues should be resolved. Instead, the majority simply wrote that it was unlikely that large publicly traded corporations would bring free exercise claims and highlighted that no such corporations had yet brought

---

[94] *Id*. at 2775 ("As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception.").

[95] *Id*. at 2775–76 ("If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed $100 per day for each affected individual.").

[96] *See id*. at 2797 (Ginsburg, J., dissenting) ("By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations.").

[97] *Id*.

[98] *See* Transcript of Oral Argument at 19, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354).

[99] *Hobby Lobby Stores, Inc*., 134 S. Ct. at 2797 n.19 (Ginsburg, J., dissenting).

suit asserting religious rights.[100] While true enough, this is a remarkably blinkered view. After all, before the present crop of cases challenging Obamacare, the issue of corporate free exercise rights had never been directly addressed by the Supreme Court or any other court.[101] But according to the Becket Fund for Religious Liberty, within two months of the *Hobby Lobby* decision, there were 102 pending cases opposing the contraception mandate.[102] Of those cases, 49 were filed on behalf of for-profit businesses.[103] Each of those cases was necessarily brought since Obamacare passed in 2010. This veritable explosion of claims made a previously unprecedented issue a relatively frequent cause of action in a mere four-year period. In light of this explosion, it is unpersuasive to say that the issue is unlikely to arise simply because it has not come up yet. Moreover, because the corporate plaintiffs won in *Hobby Lobby*, it seems likely that more frequent and more ambiguous claims will arise challenging a host of state and federal laws. The holes, conflations, and elisions in the majority's reasoning will be cast into even sharper relief as this new set of cases begins to be heard.

The remainder of this article attempts to address those analytical shortcomings head-on to provide a principled and practical approach to corporate free exercise claims under the First Amendment. In doing so, it will provide a path for future courts to follow as they hear and decide questions of the constitutional free exercise rights of for-profit corporations.

## III. THE FIRST AMENDMENT CASE FOR CORPORATE FREE EXERCISE RIGHTS

This section will set out the case for granting free exercise rights to for-profit corporations under the First Amendment. A careful analysis of legal precedents and the policies that underlie them reveals that granting such rights is a logical and necessary extension of the current First Amendment doctrine. Far from being a radical corporate power grab, the recognition of corporate free exercise rights is a rational step based on existing law and lived experience.

---

[100] *Id*. at 2774.

[101] *See* Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers) ("This Court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders alleging that the mandatory provision of certain employee benefits substantially burdens their exercise of religion.").

[102] HHS Mandate Information Central, THE BECKET FUND FOR RELIGIOUS LIBERTY, (Aug. 16, 2014), http://www.becketfund.org/hhsinformationcentral/.

[103] *Id*.

### *A. Corporations Enjoy First Amendment Rights*

There is no question that corporations enjoy certain constitutional rights, though it may be difficult to determine exactly which rights those are.[104] As a result, debates over corporate constitutional rights tend to become passionate. The commentary leading up to and immediately following the *Hobby Lobby* decision provides a clear case in point.[105]

Despite these debates, since the Supreme Court's 1978 decision in *First National Bank of Boston v. Bellotti*, American courts have recognized that corporations have at least some First Amendment rights.[106] In *Bellotti*, the Court addressed a Massachusetts statute criminalizing "expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals" where the referendum was not related to "issues that materially affect [the corporation's] business, property, or assets."[107] The Court rejected the notion that states can statutorily limit corporate speech on matters that do not "materially affect" the corporation.[108] As the Court held, "Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, and the Court has not identified a separate source for the right when it has been asserted by corporations."[109] The Court controversially revisited this holding in its 2010 *Citizens United* decision, where it wrote that "[t]he Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"[110]

In *Bellotti*, the Court focused on the nature of the right to be protected, not the identity of the party exercising the right. "The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect."[111] Thus, provided that the right in question falls within the zone of constitutional protection, the Constitution will protect the exercise of the right regardless of the speaker's identity—be it a natural person or a corporation.

---

[104] Katherine Lepard, Comment, *Standing Their Ground: Corporations' Fight for Religious Rights in Light of the Enactment of the Patient Protection and Affordable Care Act Contraceptive Coverage Mandate*, 45 TEX. TECH L. REV. 1041, 1048 (2013).

[105] *See supra* note 5.

[106] *See generally* First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

[107] *Id.* at 767.

[108] *Id.* at 767–68, 781.

[109] *Id.* at 780 (citations omitted).

[110] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 343 (2010) (citations omitted).

[111] *Bellotti*, 435 U.S. at 776.

This does not mean, however, that all rights afforded natural persons are automatically extended to corporations as well. This results in a puzzling and apparently inconsistent legal thicket:

> Today, corporations possess some First Amendment free speech and press rights, some rights of expressive association, and (perhaps) some right to free exercise. They enjoy Fourth Amendment rights against unreasonable searches but only a limited right to privacy. Corporations possess Fifth Amendment rights against double jeopardy and takings but no rights against self-incrimination. The Sixth Amendment guarantees corporations a right to trial by jury and to counsel but not a right to appointed counsel. Corporations are "citizens" for purposes of Article III jurisdictional powers but not "citizens" for purposes of the Privileges or Immunities Clause. Corporations are "persons" with Fourteenth Amendment rights to equal protection and procedural due process and some, but not all, of the incorporated Bill of Rights. Corporations are also "persons" who may spend money to influence voters, but they cannot themselves become voters under the Fourteenth, Fifteenth, Nineteenth, or Twenty-Fourth Amendments.[112]

As one scholar described it, "[s]orting the Amendments into the boxes 'available to corporations' and 'not available to corporations' appears to require some consideration of each Amendment's purposes. Of course, identifying those purposes is itself complex."[113] The clearest guidance the Supreme Court has given on the matter directs courts to consider whether the right in question is personal in nature. "Certain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals."[114] The inquiry to determine whether a particular right applies to corporations "depends on the nature, history, and purpose of the particular constitutional provision."[115]

In *Bellotti*, the Court had no difficulty rejecting the conclusion that "speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property."[116] Thus, political speech is not a purely personal right. But the Court's decision did not go any further in providing guidance as to whether other First Amendment protections were likewise applicable to corporations as well as natural persons. At a minimum, however, there is no per se legal bar to for-profit corporations exercising First Amendment rights. The question then becomes whether the free

---

[112] Darrell A.H. Miller, *Guns, Inc.:* Citizens United*,* McDonald*, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 910–11 (2011) (footnotes omitted).

[113] Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70, 72 (2013).

[114] *Bellotti*, 435 U.S. at 778 n.14 (citing United States v. White, 322 U.S. 694, 698–701 (1944)).

[115] *Id*.

[116] *Id*. at 784.

exercise clause of the First Amendment is a purely personal right that is inaccessible to corporations.

### *B. Religion Is Not a Purely Personal Right*

In its description of "purely personal" rights, the *Bellotti* Court cited its 1944 decision in *United States v. White*.[117] There, the Court held that the Fourth and Fifth Amendments could not be asserted on behalf of a labor union because those rights were personal and could not be exercised by a corporate entity:

> This conclusion is not reached by any mechanical comparison of unions with corporations or with other entities nor by any determination of whether unions technically may be regarded as legal personalities for any or all purposes. The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.[118]

Interestingly, this test seems to create friction with the Court's opinion in *Bellotti* that the focus should not be on the identity of the party exercising the right, but on the nature of the right itself.[119] Perhaps this is best squared by conceptualizing the inquiry as whether the particular organization is composed in such a way that makes the exercise of a particular right plausible.

Some courts and commentators contend that the exercise of religion fails this test. The Third Circuit held, "We do not see how a for-profit artificial being, invisible, intangible, and existing only in contemplation of law, that was created to make money could exercise such an inherently 'human' right."[120] The court wrote that even if it "were to disregard the lack of historical recognition of the right, [the court] simply cannot understand how a for-profit, secular corporation—apart from its owners—can exercise religion."[121] In this view, corporations are categorically incapable of exercising religion and thus barred from asserting religious rights under the First Amendment.

These critics also point to several instances where the Court has seemed to indicate that the exercise of religion is a right reserved for individuals. For instance, in *Wallace v. Jaffree*, the Court wrote, "[a]s is plain from its text, the First Amendment was adopted to curtail the power of congress to interfere with the *individual's* freedom to believe, to worship, and to express himself in ac-

---

[117] *See generally* United States v. White, 322 U.S. 694 (1944).

[118] *Id.* at 701.

[119] *See supra* note 111 and accompanying text.

[120] Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013) (internal quotations and citations omitted).

[121] *Id.*

cordance with the dictates of his own conscience."[122] Similarly, in *School District of Abington Township v. Schempp*, the Court wrote, "[t]he Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the *individual* by prohibiting any invasions thereof by civil authority."[123] This language, although never essential to the holdings of the cases, is supposed to reflect the understanding that "[r]eligious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely 'human' rights provided by the Constitution."[124]

Despite the common sense appeal of declaring religion something that only individuals can believe and practice, there is a wide range of precedent to the contrary. First, "[i]t is beyond question that associations—not just individuals—have Free Exercise rights . . . ."[125] Any assertion to the contrary "is plainly wrong, as numerous Supreme Court decisions have recognized the right of corporations to enjoy the free exercise of religion."[126] "It is also a brute social fact that people practice religion collectively. To protect religion only within the confines of personal conscience or individual action would do great violence to lived religion."[127] Thus, the Supreme Court's "jurisprudence reflects the foundational principle that religious bodies—representing a communion of faith and a community of believers—are entitled to the shield of the Free Exercise Clause."[128] To name just one instance, in the case *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, an incorporated church brought suit challenging legislative attempts to limit the practice of Santeria in the city.[129] The fact that

---

[122] Wallace v. Jaffree, 472 U.S. 38, 49 (1985) (affirming injunction against prayer services in public schools) (emphasis added).

[123] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222–23 (1963) (holding that mandatory bible readings to start the public school day violated the First Amendment) (emphasis added).

[124] Conestoga Wood Specialities Corp. v. Sebelius, 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013).

[125] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133 (10th Cir. 2013); *see also* Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1306 (11th Cir. 2006) ("easily" concluding that incorporated religious organization had standing to assert free exercise rights under 42 U.S.C. § 1983).

[126] Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 398 (3d Cir. 2013) (Jordan, J., dissenting); *see also* Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 3 (2013) ("Incorporated entities that are religiously affiliated, such as churches and church-run non-profit organizations, unquestionably enjoy the protections of the First Amendment's Free Exercise Clause.").

[127] Meese & Oman, *supra* note 1, at 299.

[128] Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1213 (D.C. Cir. 2013) (citing Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 381 (1990); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter–Day Saints v. Amos, 483 U.S. 327, 330 (1987); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 292 (1985); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 107–08 (1952)).

[129] 508 U.S. 520 (1993).

the petitioner in the case was clearly an incorporated entity seeking vindication of its religious rights—as indicated in the very caption of the case—did not give the Court any apparent pause. Religious rights are not reserved solely for individuals.[130]

This recognition of broader free exercise rights comports with the notion of religion as a communal experience. In the words of the D.C. Circuit: "Because the word religion connotes a community of believers, the prohibition against the impingement on religious free exercise must be understood to cover the activities of both individuals and religious bodies."[131] The Supreme Court's jurisprudence on the issue reflects that understanding:

> [T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, *and the exercise of religion*. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.[132]

Recognizing religion as a communally expressed right is consistent with tradition and Court jurisprudence. Given this, "there is nothing about the 'nature, history, and purpose' of religious exercise that limits it to individuals. Quite the opposite; believers have from time immemorial sought strength in numbers."[133] The reality of religious practice in America is that it is often a communal activity.[134]

Even so, critics contend that the communal nature of religious practice does not necessarily mean that corporations are entitled to religious protections. "Courts have afforded free exercise rights to religious organizations and associations because they are a way in which individuals exercise their religion. In doing so, however, the Supreme Court has limited this extension to *religious* organizations and associations and has retained the personal aspect of exercising religion."[135] Under this view, the religious rights of incorporated churches were extended to the corporations "*as churches*, not (necessarily) as corporations."[136] If this is true, the corporate nature of some churches was immaterial and all that mattered was that a church asserted a religious claim. But even if we assume that churches do get special solicitude under the First Amendment,

---

[130] Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U.L. REV. 589, 653 (2014) ("But if the exercise of religion is a 'purely personal' right as the district courts contend, then how can religious non-profits but not for-profit corporations exercise religion?").

[131] *Gilardi*, 733 F.3d at 1212 (internal quotation marks omitted).

[132] Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (emphasis added).

[133] Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 400 (3d Cir. 2013) (Jordan, J., dissenting).

[134] Meese & Oman, *supra* note 1, at 299.

[135] Zachary J. Phillipps, Note, *Non-Prophets: Why For-Profit, Secular Corporations Cannot Exercise Religion Within the Meaning of the First Amendment*, 46 CONN. L. REV. ONLINE 39, 63–64 (2014).

[136] Tushnet, *supra* note 113, at 76.

it does not necessarily follow that for-profit corporations enjoy no rights at all.[137] After all, while political speech is often deemed to be the core of the First Amendment's speech clause,[138] the clause extends to cover much more than that narrow category of utterances.[139]

Moreover, reasoning based on corporate identity runs counter to *Belotti*'s instruction that courts should focus on the particular right being asserted—be it speech or religious activity—and not on the identity of the party asserting the right.[140] After all, "if non-natural persons (religious non-profit corporations) can exercise religion, Bellotti's reasoning instructs that for-profit corporations can also exercise religion."[141] Once it is acknowledged that religion is practiced collectively, there can be no going back and claiming that it remains a purely personal right when a for-profit corporation asserts a claim. And once a right is found to fall outside those purely personal rights, the focus appropriately turns to "whether [a statute] abridges [rights] that the First Amendment was meant to protect."[142] Because religion cannot properly be construed as a "purely personal" right, religious practice satisfies the *Bellotti* test and thus can be exercised by corporations as well as by individuals.

### *C. Individuals Can Practice Religion in a For-Profit Context*

Further extending the scope of protected religious practice, the Supreme Court has recognized the right of individuals to exercise religion in a for-profit context.[143] The Court's "free exercise jurisprudence seem[s] to preclude the argument that profit-making barred a party from making a free exercise claim."[144] Thus, the mere intention to make a profit is not enough to defeat a free exercise claim.[145]

For instance, in *United States v. Lee*, the Court accepted the right of an Amish employer to assert that paying Social Security taxes burdened his religious beliefs.[146] The Court accepted the employer's contention that compulsory

---

[137] Gaylord, *supra* note 130, at 610; Tushnet, *supra* note 113, at 76.

[138] *See* Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 334 (1995).

[139] *See generally* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (striking down, on First Amendment grounds, law that criminalized "virtual" child pornography made without using actual children).

[140] Gaylord, *supra* note 130, at 626.

[141] *Id*. at 627–28.

[142] First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978).

[143] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1134 (10th Cir. 2013) ("In addition, the Supreme Court has settled that *individuals* have Free Exercise rights with respect to their *for-profit businesses*.") (citing United States v. Lee, 455 U.S. 252 (1982); Braunfeld v. Brown, 366 U.S. 599 (1961)).

[144] Alan E. Garfield, *The Contraception Mandate Debate: Achieving A Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1, 9 (2014).

[145] Gaylord, *supra* note 130, at 623.

[146] *See generally* United States v. Lee, 455 U.S. 252 (1982).

participation in the Social Security program burdened his free exercise rights.[147] But the Court ultimately held that there was no First Amendment violation because the intrusion on religious practice was minimal and justified by the government interests involved.[148] Despite ruling for the government on the merits, the Court's underlying assumption allowed for the individual employer to assert a claim based on his religious objections exercised in a for-profit context. The Court made a similar assumption in *Braunfeld v. Brown*.[149] There, the Court entertained a suit by an Orthodox Jewish business owner challenging a mandatory Sunday closing law on the grounds that his religion required he close on Saturday.[150] Although the Court, as in *Lee*, ruled against the plaintiff, that ruling did not undermine the essential right of the individual to practice his religion in a for-profit context. Indeed, a "for-profit/non-profit distinction is . . . absent from the [Free Exercise] Clause's history."[151] The distinction is absent from any avenue of constitutional analysis:

> Courts repeatedly reject the notion that any categorical rules about for-profits and nonprofits should be applied to control constitutional analysis. Instead of relying on the profit distinction, courts focus on the nature of the activity at issue, which governs the availability of constitutional rights. Thus, any argument to invest the profit distinction with determinative force in the religious liberty context would need to explain why a distinction that apparently carries no weight in other parts of the First Amendment—even elsewhere within the Religion Clause—should be viewed as categorical and dispositive where religious exercise rights are concerned.[152]

At least in the context of the First Amendment, there is no basis for concluding that profit motive is determinative of a party's rights.

In the Supreme Court's *Hobby Lobby* decision, Justice Ginsburg's dissent disparaged the significance of *Braunfeld* and *Lee* as "hardly impressive authority" because the claims were "promptly rejected on the merits."[153] While true that the claims were not ultimately successful, Justice Ginsburg's attack is irrelevant to the present discussion. Whether a party will ultimately be successful in asserting its rights in a particular challenge does not speak to whether the rights exist in the first place. The plaintiffs' lack of ultimate success in *Braunfeld* and *Lee* may have relevance to the discussion of merits in *Hobby Lobby*, but it says nothing about the threshold question of whether for-profit corporations can exercise religious rights. For that issue, the relevant feature of the cases is that Court's willingness to entertain individuals' claims of religious practice for activities that were embedded in profit-seeking undertakings. Be-

---

147 *Id*. at 257.
148 *Id*. at 261.
149 366 U.S. 599 (1961).
150 *Id*.
151 Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d at 1214. (D.C. Cir. 2013).
152 Rienzi, *supra* note 39, at 102.
153 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2797 (2014) (Ginsburg, J., dissenting).

cause the Court expressed no hesitation in allowing such cases to proceed, the profit motive cannot be deemed dispositive of the challenge here.

At least for individuals, the Court's unwillingness to distinguish between for-profit and non-profit activities reflects the practical realities of the world:

> Perhaps profit-making is not a religious enterprise, but those who engage in profit-making enterprises can still have religious convictions that require them to do or refrain from doing certain things in their businesses. The Constitution does not require compartmentalization of the psyche, saying that one's religious persona can participate only in nonprofit activities.[154]

In many instances it may be impossible to distinguish between people's personal beliefs and their business activities. "In addition, sincerely religious persons could find a connection between the exercise of religion and the pursuit of profit. Would an incorporated kosher butcher really have no claim to challenge a regulation mandating non-kosher butchering practices?"[155] The same question could be asked about a Christian publishing house that devotes the vast majority of its profits to religious activities.[156] As the Supreme Court's precedents indicate, the mere fact that a party—be it an individual or a corporation—is organized as a profit-seeking entity does not render it categorically incapable of exercising religion.

### *D. Logical Application of Precedent Requires That Free Exercise Protections Extend to For-Profit Corporations*

Because incorporated entities can assert free exercise rights and individuals can practice their religion in a profit-seeking context,[157] there seems little logical reason to deny free exercise rights to for-profit corporations. Yet in *Hobby Lobby*, the government seemed to argue that "Free Exercise rights somehow disappear" when these two elements are combined.[158] This position is simply unsupportable given the weight of precedent to the contrary. The government never offered a cogent argument for why the combination of two typically irrelevant factors would suddenly become dispositive.[159]

The recognition of religious rights for non-profit corporations is particularly damning for those who oppose acknowledging the rights of for-profit corporations. This was a necessary concession because, as the Tenth Circuit wrote, it

---

[154] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1148 (10th Cir. 2013) (Hartz, J., concurring).

[155] *Id*. at 1135.

[156] John B. Stanton, Comment, *Keeping the Faith: How Courts Should Determine "Sincerely-Held Religious Belief" in Free Exercise of Religion Claims by For-Profit Companies*, 59 LOY. L. REV. 723, 744 (2013).

[157] Rienzi, *supra* note 39, at 60.

[158] *Hobby Lobby Stores, Inc*., 723 F.3d at 1134.

[159] Gaylord, *supra* note 130, at 609–10 ("Yet these courts have not explained why the two types of corporations—for-profit and non-profit—should be treated differently for free exercise purposes.").

is "beyond question" and "obvious [that] the Free Exercise Clause at least extends to associations like churches—including those that incorporate."[160] Eliminating a corporation's rights simply because it seeks profit would be unjustified when the Supreme Court has acknowledged that profit-seeking behavior does not obviate religious rights for individuals.

Thus, opponents of corporate religious rights fall back on arguing that there is just something about corporations that render them incapable of exercising religion. Perhaps it is the "lack [of] anthropomorphic qualities" that prevents corporations from taking and observing religious action separate and apart from their individual members.[161] But this argument would completely negate any recognition of corporate constitutional rights. After all, corporations cannot engage in First Amendment speech activities apart from their membership, yet corporations enjoy speech rights.[162] Further, it would negate any recognition of religious rights for non-profit corporations, a position that no court or reasoned commentator has yet adopted.

> Religious organizations . . . do not pray, worship, observe sacraments, or take other religious actions as a corporation. All such activities are conducted by the individuals who are part of that non-profit organization—the priests, religious, and lay members of the faith. The same holds true with respect to for-profit corporations.[163]

A corporation's lack of humanity does not mean that it must also necessarily lack constitutional rights.

To the extent that we want to honor legal precedent and the strong policy reasons underlying it, there is a nearly inescapable logical conclusion that for-profit corporations ought to enjoy protected religious rights. To find otherwise would be to engage in reasoning that attempts to cabin its conclusions to one context without a principled basis for distinguishing from other accepted contexts. Rather than engage in artificial line-drawing, courts should recognize that for-profit corporations can, in fact, exercise religion and are thus entitled to protection under the First Amendment.

### *E. Lack of Previous Recognition Not Dispositive*

As just discussed, there is a strong argument from analogies to past cases that for-profit corporations retain a constitutionally protected right to exercise religion. But the inescapable fact is that the Supreme Court has never explicitly recognized this right.[164] Nor, apparently, had any federal court before the pre-

---

[160] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1133–34.

[161] *See* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 398 n.14 (3d Cir. 2013) (Jordan, J., dissenting).

[162] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 343 (2010); First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 780 (1978).

[163] Gaylord, *supra* note 130, at 645.

[164] Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers); Micah Schwartzman & Nelson Tebbe, *Obamacare and Religion and Arguing Off*

sent round of litigation.[165] Indeed, "during the 200-year span between the adoption of the First Amendment and RFRA's passage, the Supreme Court consistently treated free exercise rights as confined to individuals and non-profit religious organizations."[166] The challenges to the Obamacare mandate were uncharted legal territory.

This lack of precedent becomes more striking when compared to the recognition of other corporate rights, even within the First Amendment.[167] For instance, in *Citizens United*, where the Supreme Court reaffirmed the free speech rights of corporations, it cited more than twenty cases where the Court had recognized the free speech rights of corporations.[168] The Court in *Hobby Lobby* had no similar string of precedent from which to draw. But it is an error to assume that the lack of any previous recognition of the corporate right to free exercise indicates that the right just does not exist.

First, the obvious counter to this argument is that there is no precedent stating that for-profit corporations *lack* free exercise rights.[169] The mandate challenges presented a truly novel legal issue in that there was no direct precedent either way. Everything had to be argued by analogy. The inability of proponents of corporations' right to exercise religion to point to definitive precedent is counterbalanced by the inability of opponents to point to precedent directly supporting their position. Given the arguments from analogy discussed above, this precedential draw favors those who support corporate religious rights.

Moreover, as discussed throughout this section, recognition of corporate religious rights is consistent with the Court's broader interpretation of corporate rights,[170] even if the Court has never held that corporations can exercise religion. Analogizing prior cases favors recognition of corporate religious rights under the First Amendment.

Still, the lack of precedent does beg the question of why, if the right actually exists, it has not been asserted and litigated previously. Two factors may be at issue. The first is that government regulation is becoming increasingly pervasive in American life, causing it to touch on more areas than in previous eras.[171]

---

*the Wall*, SLATE (Nov. 26, 2013, 2:32 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/obamacare_birth_control_mandate_lawsuit_how_a_radical_argument_went_mainstream.html ("Never has the Supreme Court suggested that profit-seeking companies may exercise religious freedom rights."). Even the Court's *Hobby Lobby* decision did not squarely address this point given that the Court based its decision on statutory RFRA grounds. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014).

[165] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1166 (Briscoe, C.J., concurring in part, dissenting in part); *Conestoga Wood Specialties Corp.*, 724 F.3d at 384.

[166] *Hobby Lobby Stores, Inc.*, 723 F.3d at 1168 (Briscoe, C.J., concurring in part, dissenting in part).

[167] *Conestoga Wood Specialties Corp.*, 724 F.3d at 384–85.

[168] *Id.* at 384.

[169] *Id.* at 399 (Jordan, J., dissenting).

[170] *See supra* Part III.D.

[171] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring); *Conestoga Wood Specialties Corp.*, 724 F.3d at 399 (Jordan, J., dissenting).

One judge has suggested that "there has never before been a government policy that could be perceived as intruding on religious liberty as aggressively as the Mandate, so there has been little reason to address the issue."[172] If it is true that government regulation is affecting avenues of religious practice that simply had not been implicated before, there should be no surprise that court challenges are increasing. After all, there is no point (nor standing) in litigating to assert rights that have not been infringed. Second, at least one scholar has described the "rise of the 'religiously expressive corporation.'"[173] He writes that an increase in religious and spiritual beliefs and practices in American society has correspondingly increased the religious practices of American corporations.[174] This would naturally lead to greater religious practice from ostensibly secular and profit-seeking entities. Combined with increasing government regulation, this creates an almost inevitable conflict as rising government regulations collide with increased religious practices. That these two trends seem to be occurring simultaneously provides a reasonable explanation for why litigation would arise now and never before.

At bottom, the novelty of a constitutional claim has only limited worth in evaluating its merits. Here, the lack of precedent in favor of granting corporations free exercise rights is offset by the lack of precedent denying those rights. Further, the gap in the jurisprudential record is explained by concurrent trends in American society and governmental regulation. Even without direct precedent, there is sufficient analogous precedent to establish that corporate free exercise rights are consistent with the constitutional tradition. At the very least, the lack of direct precedent does not dispositively negate the existence of such rights. Doing so would freeze the law—and the rights it recognizes—in its present state, which would work to the detriment of constitutional liberties.

### *F. Corporate Conscience Is Recognized in Other Contexts*

One of the most powerful arguments against recognizing the rights of corporations to exercise religion is that corporations lack the capacity to believe anything at all beyond the imperative to earn a profit. This seems particularly true when a corporation has a diverse set of shareholders who are not necessarily bound by any common spiritual or moral beliefs.[175] This view, however,

---

[172] *Conestoga Wood Specialties Corp.*, 724 F.3d at 399 (Jordan, J., dissenting).

[173] Colombo, *supra* note 126, at 16.

[174] *Id.* Colombo notes that this trend toward increased religiosity is seemingly at odds with statistics showing an increase in the number of Americans who do not identify as members of a particular religion. Studies show, however, that belief in God, attendance at religious services, frequency of prayer, and individuals who say that religion is "very important" to their lives have remained steady. Thus, it appears that Americans remain just as religious or "spiritual" as they have been, even if they do not align themselves with a particular organized religion. *Id.* at 17.

[175] *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2795–96 (Ginsburg, J., dissenting) ("The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention.").

overlooks the fact that socially responsible corporations regularly demonstrate commitments to ideals beyond pure profit. Indeed, corporate values "are of increasing concern to investors" who "screen their investment decisions with recourse to factors that are moral and ethical in nature."[176]

Examples of corporate conscience are legion. Some of the most prevalent corporations in our society take on issues far broader than merely turning a profit:

> Take, for example, Starbucks, a publicly traded for-profit corporation, which frequently campaigns for same-sex equality, promoting cases and initiatives that support that cause. Not all Starbucks employees, customers, or shareholders may agree with the views of the corporation, but in our corporate world it is an accepted fact that corporations can assert their viewpoints on religion, politics, environmental issues, and civil rights.[177]

Ben & Jerry's Ice Cream provides another clear example. The Ben & Jerry's website provides a link called "Values" where customers can learn about the corporation's product, economic, and social missions.[178] The website details the corporation's work across multiple causes—including climate justice, marriage equality, and "peace building"—that have little to do with business profits from selling ice cream.[179] "A shopping trip to Whole Foods or a lunch at Chipotle confirms that businesses frequently have ethical, moral, or philosophical commitments beyond mere profit maximizing."[180]

All of these examples highlight the fundamental flaw of insisting that secular for-profit corporations are required to focus exclusively on profits. They demonstrate that such corporations "are regularly understood as being capable of acting on a wide range of subjective beliefs or intentions: ethical views, philosophical views, criminal intentions, anti-religious animus, etc."[181] This is a socially desirable outcome and one that the law often encourages.[182]

But if corporations can form and act upon subjective ethical and philosophical beliefs—as corporations like Ben & Jerry's inarguably do—what stops them from forming and acting upon religious beliefs? Drawing such a line would seem to be the very soul of caprice. Indeed, "[t]here is no basis in law or

---

[176] Colombo, *supra* note 126, at 22.

[177] Elissa Graves, *The Corporate Right to Free Exercise of Religion: The Affordable Care Act and the Contraceptive Coverage Mandate*, 18 TEX. REV. LAW & POL. 199, 219 (2014).

[178] BEN & JERRY'S, http://www.benjerry.com (last visited Aug. 3, 2015).

[179] *Issues We Care About*, BEN & JERRY'S, http://www.benjerry.com/values/issues-we-care-about (last visited Aug. 3, 2015). That Ben & Jerry's has registered as a benefit corporation (or "B Corp") does not undermine this argument. *See* BEN & JERRY'S HOMEMADE ICE CREAM, http://www.benjerry.com/about-us/b-corp (last visited Aug. 3, 2015). Regardless of the organizing law, it is indisputable that Ben & Jerry's—as a corporation—has demonstrated philosophical and ethical commitments. A review of its website indicates that these commitments pre-dated the corporation's decision to establish itself as a "B Corp." *Id*.

[180] Rienzi, *supra* note 39, at 110.

[181] *Id*.

[182] *Id*.

logic to say that corporations can form moral views about ethics, philosophy, and the environment, but not about religion."[183] If a corporation is capable of forming one set of beliefs, it is equally capable of forming the other. "One way for corporations to increase their corporate social responsibility is through the adoption of a religious identity."[184] Moreover, any attempt to cabin corporate actions to exclude religious practice in favor of profit-seeking would likewise limit individuals' ability to advance their values through the corporate form.[185] Americans accept and, perhaps, expect that corporations will take on causes and issues broader than the mere sale of coffee, ice cream, and burritos.[186] It is a small step from recognizing a corporation's secular ethical beliefs to recognizing its religious beliefs. Just as we would not balk at the first, we should not reject the second.

Further, other areas of the law treat corporations as capable of forming specific mental intent. For instance, holding a corporation liable in criminal prosecutions necessarily requires the recognition that the corporation can possess the *mens rea* necessary for a crime.[187] Likewise, "discrimination law recognizes that a for-profit business can have a religious identity when it is discriminated against, and can form and act on beliefs about religion when it is found guilty of religious discrimination."[188] Once we accept that corporations have the power to form intent, identity, and ethical beliefs, there is no reason to draw an arbitrary line that excludes religious beliefs. There is nothing so inherently unique about religious belief that it cannot fit within the practices we already commonly associate with corporations. Logic and common sense will not allow it.

### *G. Religion and Commerce Overlap in Meaningful Ways*

It is a mistake to assume that because for-profit corporations are formed with the primary intent of earning a profit they cannot also serve a religious purpose. But this is a common argument. After all, the Bible commands that "[y]ou cannot serve both God and money."[189] Certainly, most for-profit corporations do not have a religious component. But the fact that most corporations

---

[183] *Id*.

[184] 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, 1714 (2008) (indicating that corporations are seemingly expected to take on certain social responsibilities).

[185] Gaylord, *supra* note 130, at 633–34.

[186] Rienzi, *supra* note 39, at 84.

[187] *Id*. at 86.

[188] *Id*. at 94 (hypothesizing that a corporation would have standing to sue if a state declined to do business with it because of its religious actions and that a company could be found liable for discriminating against individuals based on their religion).

[189] *Matthew* 6:24 (New International).

are secular does not mean that the minority of corporations who do exercise religion should not be protected.[190]

Reducing corporate purpose to a single factor ignores the reality of the world in which people often act from a mixed variety of motivations.[191] For many individuals, religious faith "permeates all aspects of their lives" and carries over into business associations and practices.[192] This should not be surprising. Despite the Bible's admonition about not serving two masters, nearly all of the major religions practiced in America describe some rules and practices for dealing with commerce.[193] In reality, there is not an unbridgeable gulf between the religious and the secular worlds, even when it comes to commerce. Nor does the law set up an impermeable barrier between these two domains.[194] Certain financial and business laws touch on what is otherwise religious activity.[195] Likewise, the law should allow religious protections to touch on what is otherwise commercial activity.

Acknowledging the reach of religion into the realm of commerce reflects an understanding of reality and properly recognizes individual rights. After all, "if America stands by its historically robust religious pluralism, all individuals and groups—including corporations—should be able to bring religion not only to the public square, but also to the market square."[196] A variety of authors addressing the subject have indicated that business corporations could (or even should) adopt religious thinking and attitudes into their corporate practices.[197] The introduction of religion into the market square is underway. Professor Colombo has described the rise of the "religiously expressive corporation."[198]

---

[190] Baworowsky, *supra* note 184, at 1723.

[191] Meese & Oman, *supra* note 1, at 296.

[192] Gaylord, *supra* note 130, at 621.

[193] *See* Rienzi, *supra* note 39, at 67–73 (illustrating the interactions between commerce and religion in the Jewish, Christian, and Muslim traditions).

[194] Bernadette Meyler, *Commerce in Religion*, 84 NOTRE DAME L. REV. 887, 889 (2008) ("Although the Supreme Court opinions demonstrate a willingness to treat apparently commercial activities as falling outside the purview of the financial immunity accorded to religious activity under taxation and other regulatory schemes, they tend not to separate out religious from commercial activity per se.").

[195] *Id*. at 912.

[196] Baworowsky, *supra* note 184, at 1777.

[197] *See, e.g.*, *id*. at 1714 ("One way for corporations to increase their corporate social responsibility is through the adoption of a religious identity."); Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U.L. REV. 1, 3 (2006) ("A business corporation, however, is not, and need not be, inherently secular in nature. Rather, in various ways, its affairs can reflect religious views of both the larger society in which it functions and the senior decision-makers who direct its activities."); Susan J. Stabile, *Using Religion to Promote Corporate Responsibility*, 39 WAKE FOREST L. REV. 839, 846 (2004) ("I propose here an alternative view of the person and her relation to the world, one rooted in religion, in an effort to influence how academics and others think and talk about the social obligations of corporations and to suggest a broader notion of the appropriate role of law in regulating corporate entities.").

[198] Colombo, *supra* note 126, at 16.

Among the factors giving rise to such corporations are increased religiosity in general American society, a growing number of "religious entrepreneur[s]," and growing religiosity among business executives.[199] These religious individuals, in turn, "impose religiously motivated policies on corporations all the time."[200]

The factors just described are having a discernible effect on business practices throughout the country. "Religion infuses much of American commerce, including a $4.6 billion Christian products industry, a $12.5 billion kosher food market, and a growing share of an $800 billion global sharia-compliant finance market. Moreover, numerous mutual funds confine investments to firms whose activities reflect investors' religious precepts."[201] Professors Meese and Oman have assembled numerous examples of corporations demonstrating a high degree of religious practice in their corporate activities.[202] For instance, a Virginia supermarket chain closed on the Sabbath, refused to sell alcohol, and encouraged weekly employee worship.[203] Similarly, the authors refer to numerous kosher butcher shops and delis that exemplify religious belief infusing economic practice.[204] In each of the examples, the corporation has adopted a set of religious beliefs into its fundamental practices, often with no clear link to increased profits. It blinks reality to claim that a for-profit corporation is incapable of religious exercise. These corporations have demonstrably adopted some degree of religious identity and act in accordance with it. In such contexts, legal recognition of the rights that come with religious practice is both just and proper.

### *H. Protecting Corporations Vindicates Individual Rights*

Although corporations and their shareholders must be kept analytically distinct for purposes of determining corporate beliefs and actions,[205] "we should not be seduced by the fiction of corporate personality into imagining that when we regulate corporations we are not regulating individuals."[206] In reality, restricting corporate rights in turn limits the rights available to individuals:

> Depriving corporations of religious liberty simultaneously deprives individuals of the right to freely exercise their religion by means of a for-profit, corporate undertaking. It relegates their career choices to the non-profit world and restricts the opportunities they might otherwise have to invest in and patronize estab-

---

[199] *Id*. at 16, 20–21.

[200] Meese & Oman, *supra* note 1, at 274.

[201] *Id*. at 278 (internal footnotes omitted).

[202] *Id*. at 278–79; *see also* Rienzi, *supra* note 39, at 75 (describing Afrik Grocery and Halal Meat, which operates in accordance with Muslim religious beliefs).

[203] Meese & Oman, *supra* note 1, at 278.

[204] *Id*. at 278–79.

[205] *See infra* Part IV.B.1.

[206] Meese & Oman, *supra* note 1, at 295.

> lishments that are wholly consistent with their most deeply-held principles and beliefs.[207]

In this sense, for-profit corporations can be viewed as associations formed "around a common vision or shared set of goals, values, or beliefs."[208] Just as the First Amendment protects such associations when they are non-profit entities, so too should it protect associations whose primary purpose is seeking profit.

Viewed in this light, the recognition of corporate religious rights in broad contexts—including the for-profit setting—is but another valuable means to protect individual rights. Protecting religious expression by for-profit corporations in addition to purely religious entities such as churches and religious non-profit organizations permits another avenue for people to live their religious faith. Conversely, limiting corporate rights limits individuals' abilities to practice religion in the full scope of their lives.[209] This is not to say that corporations and the individuals behind them should be treated as one and the same. Rather, it simply recognizes that corporations do not exist in a vacuum. Denying corporations rights is not without effect on the individuals who formed and operate those corporations. Where those individuals intended the corporation to act as a means of religious expression—and where the corporation itself actually demonstrates a degree of religious commitment—protecting the corporation's rights redounds to the benefit of the individuals, thus complying with the general purpose of the First Amendment.[210]

### *I. Recognizing Corporate Rights Does Not Necessarily Determine Case Outcomes*

Finally, it is important to note that recognizing for-profit corporations' religious rights does not automatically provide exemptions from general laws or give corporate employers unfettered power to impose their religious beliefs on employees. Rather, recognizing these rights merely allows a corporation the opportunity "to have its day in court, to litigate through the competing interests of the company and those of the government, and to have the matter resolved by a neutral judge in accordance to whatever standard is applicable under the circumstances."[211] This is a more appropriate and just means to decide such

---

[207] Colombo, *supra* note 126, at 36.

[208] *Id*. at 53.

[209] Meese & Oman, *supra* note 1, at 295 ("When we regulate corporations we in fact burden the individuals who use the corporate form to pursue their goals.").

[210] Graves, *supra* note 177, at 215 ("The corporation's free exercise right must be protected in order to protect the free exercise right of its owners."); *but see generally* Jennifer Jorczak, Note, *"Not Like You and Me":* Hobby Lobby*, the Fourteenth Amendment, and What the Further Expansion of Corporate Personhood Means for Individual Rights*, 80 BROOK. L. REV. 285 (2014) (arguing that recognition of corporate rights will harm the rights of corporate employees who do not share the corporation's beliefs).

[211] Colombo, *supra* note 126, at 68; *see also* Gaylord, *supra* note 130, at 654 ("To recognize that corporations . . . can raise a free exercise claim is not to determine that a particular cor-

cases than simply denying corporations the opportunity to assert their rights. Rather than manipulate legal definitions or engage in dubious line drawing between who (or what) can assert particular beliefs, my proposal allows for a consideration of the merits of the question raised, allowing courts to consider the significance of the religious burden, the nature and intent of the burden, and the interests involved on both sides.

Moreover, most free exercise claims brought by corporations under the First Amendment are unlikely to be successful given the Supreme Court's jurisprudence since *Smith*. [212] Under this standard, the only laws that anyone could successfully challenge as free exercise violations are those that intentionally targeted religious belief and practices. Those blatantly unconstitutional laws and regulations *should* be challenged, and there is no injustice in allowing challenges from all who are adversely affected. Even under the more challenger-friendly strict scrutiny regime established by RFRA, there are multiple devices to defeat non-meritorious claims that do not involve categorically barring worthy parties from bringing suit.[213] It could be found that the regulations do not substantially burden religion, or that the government has a compelling interest in the regulation.[214] Recall that in the *Hobby Lobby* decision, the four dissenting justices would have held that the contraception mandate survived RFRA's compelling interest standard, assuming that for-profit corporations could bring the suit.[215]

Additionally, there have been a series of interesting proposals regarding how corporate religious rights—once recognized—ought to be balanced against competing governmental and individual interests. One proposal calls for a reconceived standard for corporate claims to parallel the commercial speech doctrine. Under this model, where a corporation exercises religion in a commercial context, the government must demonstrate a substantial (rather than compelling) interest for the law, and the law's fit must be reasonably related (rather than least restrictive).[216] This would reflect the "difference between practicing one's religious beliefs in the personal sphere—an area traditionally protected

---

poration's free exercise claim has merit. Rather, acknowledging that corporations can invoke the Free Exercise Clause simply permits corporations to litigate their claims and to have a neutral court apply the appropriate standard under the circumstances—be that rational basis, strict scrutiny, or something else.").

[212] *See generally* Emp't Div. v. Smith, 494 U.S. 872 (1990) (holding that religious freedom does not excuse an individual from the obligation to comply with valid and neutral laws of general applicability that only incidentally infringe upon the exercise of religion); *see also* Storman's, Inc. v. Wiesman, No. 12-35221, 2015 WL 4478084, at *13 (9th Cir. July 23, 2015) (holding that religious challenge brought by pharmacy owner and two pharmacists to rules requiring that they sell emergency contraceptives failed under rational basis review).

[213] Meese & Oman, *supra* note 1, at 289.

[214] *Id*.

[215] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2797–803 (2014) (Ginsburg, J., dissenting).

[216] Danieli Evans, *Commercial Religious Exercise: Translating the Commercial Speech Doctrine to the Free Exercise Clause*, 103 GEO. L.J. ONLINE 50, 51 (2014).

from government regulation—and practicing one's beliefs during the course of a commercial relationship—an area traditionally subject to government regulation."[217] Another proposal calls for granting preference to individual rights in instances where they come into conflict with corporate religious rights.[218] According to this conception, "where the rights of a corporate person would be in direct conflict, yet of equal and balanced weight, with those of natural persons, such a tie should go to the natural persons, by virtue of the natural person's humanity."[219] Both authors present provocative ideas, though full consideration of them falls outside the scope of this article. I mention them here merely to indicate that there are multiple mechanisms for properly weighing corporate religious rights short of totally denying that those rights exist.

Recognition of corporate free exercise rights does not mean that those rights will always be upheld in court any more than recognizing individuals' religious rights ensures that every one of those challenges will be successful. Rather, recognizing that for-profit corporations can exercise religion allows those corporations to have their day in court and assert their rights through our legal system. Despite the hyperbole surrounding the issues here, allowing the free and full assertion of rights will benefit our society and the individuals within it. We should not use artificial limitations to prevent worthy parties from asserting their rights.

***

This section has laid out the case for why the First Amendment's guarantee of the right to freely exercise religion protects for-profit corporations. Fair-minded application of the Supreme Court's precedents and consideration of policy allow for no other result. There is no principled basis for distinguishing for-profit corporations from the individuals and organizations with undisputed First Amendment rights. Recognizing corporate free exercise rights ensures the full expression of religious liberty for organizations and the individuals behind them.

## IV. A PRACTICAL APPLICATION OF CORPORATE FREE EXERCISE RIGHTS

Having laid out the case for why for-profit corporations ought to enjoy free exercise rights under the First Amendment, this article will now discuss what recognition of that right should look like as a practical matter. This section will explain how courts faced with a corporate free exercise claim should evaluate that claim. I argue that courts ought to apply a sincerity test like that already applied to individuals asserting free exercise claims. For corporations, however, the operative question is whether the corporation, as a corporation, has demonstrated sincere religious beliefs. Only those corporations that have demonstrat-

---

[217] *Id*. at 52.
[218] *See generally* Jorczak, *supra* note 210.
[219] *Id*. at 316.

ed through their own corporate actions a commitment to a particular set of religious beliefs would be able to successfully assert a free exercise claim under the First Amendment.

### *A. The Need for and Benefits of a Threshold Sincerity Test*

A threshold test is necessary for any assertion of constitutional rights to prevent the First Amendment from becoming "a limitless excuse for avoiding all unwanted legal obligations."[220] While courts are barred from questioning the underlying truth of religious beliefs, the Supreme Court "has consistently maintained that some judicial scrutiny of these assertions is nevertheless required, for laws cannot effectively bind if judges are willing to grant exemptions under the Free Exercise Clause to those whose asserted motives are insincere or nonreligious."[221] The First Amendment is not a blank check to ignore valid laws.

More pointedly, using sincerity as a gatekeeping device prevents corporations (and individuals) from asserting sham religious claims designed to obtain preferential treatment and exemptions from laws. Simply put, "[r]eligion-based exemptions create incentives for people to feign religiosity."[222] These feigned beliefs are not properly entitled to protection under the free exercise clause.[223] Thus, there must be some framework to differentiate between parties with genuine beliefs worthy of protection and those who seek exemptions under the mere guise of religiosity. As the Second Circuit has realized, this is the true value of employing a sincerity test to parties claiming religious exemptions:

> Sincerity analysis seeks to determine an adherent's good faith in the expression of his religious belief. This test provides a rational means of differentiating between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud. The latter variety, of course, must be subject to governmental invasion, lest our society abjure from distinguishing between the incantation of "sincerely held religious beliefs" as a talisman for self-indulgence or material gain and those beliefs genuinely dictated by conscience.[224]

In providing a rational method for separating actual religious claims from opportunistic parties seeking only "self-indulgence or material gain," a sincerity test offers a vital tool for analyzing free exercise claims.

Religious sincerity is the appropriate inquiry here because the free exercise clause only protects religious activities. An action that is not motivated by reli-

---

[220] 2 RIGHTS OF PRISONERS § 7:15 (4th ed. 2014) (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 859 (1978)).

[221] Andy G. Olree, *The Continuing Threshold Test for Free Exercise Claims*, 17 WM. & MARY BILL RTS. J. 103, 108 (2008).

[222] Kevin L. Brady, Comment, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431, 1450 (2011).

[223] Stephen Senn, *The Prosecution of Religious Fraud*, 17 FLA. ST. U. L. REV. 325, 335 (1990) ("Sham claims of religious faith are not entitled to first amendment protection.").

[224] Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984) (internal citation omitted).

gious belief is not a religious exercise.[225] Where actors lack sincere religious beliefs, their actions cannot truly be motivated by those alleged beliefs. The free exercise clause does not extend so far. "Unlike freedom of speech, freedom of conscience does not protect the insincere."[226] Fair application of a sincerity test runs no risk of infringing religious liberty because, when applied correctly, it only excludes from protection actions by individuals who are not truly exercising religion. Exclusion of insincere religious beliefs does not—and cannot—violate the First Amendment.

Moreover, focusing on sincerity offers a flexible and universally applicable rule to determine eligibility for religious exemptions. The test is not contingent upon immaterial distinctions such as profit motive, ownership structure, or tax status.[227] Rather, an inquiry into sincerity can be undertaken in a broad range of contexts for a broad range of actors. Thus, it appears to be "the most promising approach for separating bona fide claims from spurious ones."[228] Further, sincerity is "akin to good faith and other mental states that the law has for years made relevant to a wide variety of questions."[229] Determining sincerity falls well within the bounds of judicial competence.

The adaptability and flexibility of the sincerity test likely explains its wide use and acceptance in a wide range of free exercise claims. Sincerity is generally regarded as the threshold test for such claims.[230] Thus, courts typically read "sincerity requirements into federal statutes granting religious exemptions."[231] For instance, courts applying RFRA have regularly rejected claims where they found the challenger's religious beliefs to be insincere.[232] Beyond RFRA, courts have employed sincerity review to cases "examining whether to grant a tax exemption, an exemption from school immunization programs, or protection of prisoners' religious practices. Other cases addressing religious sincerity include actions for unemployment benefits, defamation, child support, con-

---

[225] Rienzi, *supra* note 39, at 66.

[226] Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1450 (2012); *see also* Forest Hills Early Learning Ctr., Inc. v. Lukhard, 728 F.2d 230, 240 (4th Cir. 1984) ("[O]nly those laws that impede the holding or active expression of sufficiently sincere and central religious beliefs impinge upon free exercise rights.").

[227] *See* Rienzi, *supra* note 39, at 116 ("Whether the law protects a particular act as religious exercise turns not on the type of tax return the actor files, but on whether the action is based on a sincere religious belief.").

[228] Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 954 (1989).

[229] *Id*.

[230] Olree, *supra* note 221, at 105 ("First, claimants who wish to challenge government action under the Free Exercise Clause must satisfy a threshold test: they must show that the government action imposed a burden on the exercise of their sincerely held religious beliefs."); Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 60–64 (2014).

[231] Brady, *supra* note 222.

[232] Meese & Oman, *supra* note 1, at 294 n.134 (collecting cases).

tempt of court, and civil fraud."[233] Even the Army's regulations reflect a focus on sincerity when considering the claims of conscientious objectors.[234] The broad application of sincerity review across this wide range of contexts demonstrates both the general acceptance of the test and its ability to provide helpful guidance when weighing free exercise claims. Just as it is a nearly indispensable device for considering individuals' free exercise claims, so too can it provide meaningful assistance when considering the claims of corporations—both religious and for-profit.

### *B. The Process for Determining Corporate Religious Beliefs*

#### *1. Focus Must Be on the Corporation Itself*

The first, and perhaps most important, step in assessing the religious beliefs of corporations is determining what exactly is being assessed. Much of the analysis of corporate religiosity in cases and academic literature conflates the religious beliefs of corporations with the religious beliefs of their shareholders.[235] This is a mistake. "The first principle of corporate law is that for-profit corporations are entities that possess legal interests and a legal identity of their own—one separate and distinct from their shareholders."[236] Any test looking to determine the religious rights of a corporation is bound to consider the beliefs of the corporation alone. The beliefs of the corporation's owners—who are legally separate entities—is essentially irrelevant for these purposes. Arguing otherwise makes corporate protections "a one-way street: [the corporation's] 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" when the shareholders seeks to assert a religious right through the corpo-

---

[233] Senn, *supra* note 223, at 334–35 (internal footnotes omitted).

[234] *See* Aguayo v. Harvey, 476 F.3d 971, 979 (D.C. Cir. 2007).

[235] *See* Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2d 235, 239 (2013) (". . . courts have asked whether a corporation has standing to assert its owner's free exercise rights.").

[236] Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners at *3, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 333889 [hereinafter Professors' Amicus Brief]; *see also* Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001) ("After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."); Bainbridge, *supra* note 235 ("A corporation is a legal person separate and distinct from its shareholders."); Thomas E. Rutledge, *A Corporation Has No Soul—The Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1, 19–21 (2014) ("The law of business organizations is replete with examples of the separateness of the organization from its owners."); Colombo, *supra* note 126, at 48 (identifying "separation of ownership from control" as among the five distinguishing characteristics of corporations).

ration.[237] If the corporation itself seeks to assert religious rights, it must be the corporation itself that has rights to assert.

Recognizing the essential separateness of corporate and shareholder rights is well-established in Supreme Court law.[238] For instance, in *Domino's Pizza, Inc. v. McDonald*, the plaintiff alleged that Domino's Pizza had broken its contracts with the plaintiff's corporation (of which he was the sole shareholder) because of racial animus directed at him personally.[239] McDonald alleged that he had the right to bring suit personally against the company because, as sole shareholder, he "negotiated, signed, performed, and sought to enforce" the contract against Domino's.[240] But the Court rejected this claim because the Domino's contract was with McDonald's corporation, not him personally.[241] That a sole shareholder who demonstrated nearly complete identity with the corporation could not assert his own rights in this context indicates the degree of separation with which the Court usually treats corporations and their shareholders. This separation should not be lessened simply because the asserted claims are religious as opposed to racial.

The essential separateness of corporations and their shareholders is crucial for properly analyzing the religious rights of corporations. It prevents purely secular corporations from asserting claims to religious exemptions based solely on the strong religious feelings among the corporation's ownership. Further, this recognition indicates the proper focus where corporate and shareholder beliefs are in conflict. Consider, for example, a devout Muslim individual who runs a corporation—perhaps a Christian bookstore—according to Christian tenets. "In such a scenario, nobody could reasonably argue that a law requiring the corporation to act in a way contrary to the Islamic beliefs of the owner—but in accordance with the Christian beliefs by which the corporation is run—violates the *corporation's* free exercise rights."[242] Similarly, a Christian shareholder of a kosher butcher shop could assert a violation of Judaism on behalf of the corporation, but not Christianity. If corporations are themselves exercising religion, "the religious beliefs of the owners are inapposite."[243]

Importantly, this conceptual framework is unlikely to have any effect on the analysis of religious and religiously affiliated non-profit corporations. For

---

[237] Professors' Amicus Brief, *supra* note 236, at *14; Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2797 (2014) (Ginsburg, J., dissenting) ("By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation.").

[238] *See, e.g.*, Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001) (holding that the president and sole shareholder of corporation was a "person" distinct from the enterprise subject to liability under RICO).

[239] Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 473 (2006).

[240] *Id.* at 477.

[241] *Id.*

[242] Phillipps, *supra* note 135, at 59–60.

[243] *Id.* at 60.

those institutions, it is clear that the corporation itself is engaging in religious exercise. Further, those institutions tend to have a high degree of identification between the individuals behind the corporation and the corporation itself. While the test set out here is intended primarily as a means to determine the religious beliefs of for-profit corporations, the test would apply with equal ease and force to non-profit corporations.

*2. Holistic Analysis*

When looking to the sincerity of a corporation's religious beliefs as a corporation, the analysis should look to the corporation in its entirety. The proper analysis is holistic, considering the corporation's "formation, operation, and production all as parts pointing to one separate entity and that entity's identity."[244] This type of analysis is not foreign to our legal system. For instance, holistically analyzing the party asserting a claim is consistent with the military's approach when considering applications for conscientious objector status. According to Department of Defense regulations, "[s]incerity is determined by an impartial evaluation of the applicant's thinking and living in its totality, past and present."[245] Significantly, there is no single factor or practice that automatically decides the issue in all instances. Rather, when determining the sincerity of corporations' religious beliefs, each corporation must be considered in its entirety.

*3. The Analysis Is Focused on Fact-Finding Based on External Facts*

Determining whether a corporation sincerely holds religious beliefs is essentially a fact-finding task, necessarily focused on external facts. Determining sincerity necessarily requires inquiring into a party's state of mind, which is "an awesome problem, capable of resolution only by reference to a panoply of subjective factors."[246] The analysis is "exceedingly amorphous" because the factfinder must rely on the available external evidence "to delve into the claimant's most veiled motivations."[247] Thus, objective facts are relevant to the extent that they shed light on the essentially subjective sincerity of the claimant.[248] A court must determine the subjective beliefs of a party based on the "extrinsic and objective evidence concerning the claimant's actions, statements, and demeanor."[249] Through this, courts can determine "whether the religious

---

[244] Stanton, *supra* note 156, at 766.

[245] Aguayo v. Harvey, 476 F.3d 971, 979 n.3 (D.C. Cir. 2007) (quoting 32 C.F.R. § 75.5(c)(2)).

[246] Patrick v. LeFevre, 745 F.2d 153, 159 (2d Cir. 1984) (internal quotation marks omitted).

[247] *Id*. at 157.

[248] Witmer v. United States, 348 U.S. 375, 381 (1955).

[249] Lupu, *supra* note 228, at 954.

views the claimant offers in support of the claim are consistent with other manifestations of the claimant's beliefs."[250]

*4. Sources of Information to Consider*

Understanding that the assessment of a corporation's sincerity depends on a holistic analysis of external facts about the corporation, the question then turns to what sources should be considered in this analysis. Simply, "any action or documentation that can fairly be ascribed to the corporate entity acts as evidence of a sincerely-held religious belief."[251] The following list—which is by no means comprehensive—is designed to give some indication of the types of sources that would prove helpful to courts in examining a corporation's religious sincerity:[252]

- Corporate charter, articles of incorporation, bylaws, and mission statement
- Manner in which the corporation conducts its day-to-day operations
- Employee manuals and handbooks
- Contracts
- The corporation's hours of operations (*e.g.*, closing on the Sabbath)
- The clientele or customers to whom the corporation markets its business

To reiterate, none of these sources is alone determinative and where there is conflicting evidence, those pieces of evidence must be weighed against each other. Further, other appropriate sources of information that could indicate the sincerity of the corporation's beliefs ought to be considered. The above list, however, highlights some of the most fruitful points of focus for determining a corporation's beliefs.

A holistic focus on the external and demonstrable aspects of a corporation's beliefs—as evidenced by the actions of the corporation itself—offers courts the best means to determine the requisite sincerity of a corporation asserting a free exercise claim. In doing so, the sincerity test provides an important gatekeeping function that helps weed out sham religious claims by opportunistic corporations. Rather than erroneously focusing on the religious beliefs of corporate shareholders, this test addresses the rights of the party actually asserting the religious claim.

---

[250] *Id.*

[251] Stanton, *supra* note 156, at 768.

[252] The following list is derived in large part from the amicus brief submitted by the Knights of Columbus on behalf of the non-governmental parties in the *Hobby Lobby* case. *See* Brief for the Knights of Columbus as *Amici Curiae* Supporting the Private Parties at 24, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354) 2014 WL 333883.

### *C. Factors to Consider When Assessing Corporate Free Exercise Claims*

Drawing on the literature and jurisprudence surrounding religious sincerity tests for individuals, this section sets out a variety of factors for courts to consider when determining the sincerity of a corporation's religious beliefs. Each of the factors should be weighed in combination with the others with no single element being wholly determinative.

#### *1. Demonstrated Religiosity in Corporate Practice*

This is perhaps the most obvious of the factors for a court to consider: namely, has the corporation demonstrated a general "pattern of conduct" through its corporate practices indicating a commitment to religious beliefs?[253] Again, the corporate entity itself must engage in this conduct, not merely its shareholders.

Corporate religious practice can take many forms. Most basic would be inclusion of religious beliefs and goals in the corporation's articles of incorporation or statement of purpose.[254] It could also take the form of religious practices such as prayers or worship services during work hours or at corporate meetings.[255] Likewise, religious literature made available in the workplace, chaplain services, or placement of religious objects and iconography on the corporation's property would also help satisfy this standard.[256] The more widespread the availability of religious services to employees of the corporation, the stronger the case for corporate practice. Closing the corporation's business for the Sabbath and religious holidays could also be an indication of religious beliefs.[257] Finally, where the corporation donates a significant portion of its profits to religious charities, it can also be said to be evincing a degree of religious conviction.[258] Where there is a complete absence of religious expression on the part of a corporation, its claims must be viewed more skeptically.

Significantly, though directed by the officers (and perhaps shareholders) of the corporation, the above actions must be taken by the corporation itself. For instance, the amount a shareholder—even a sole shareholder—donates of his own money to religious charities does not matter to the corporation's identity or

---

[253] *See* Aguayo v. Harvey, 476 F.3d 971, 979 (D.C. Cir. 2007) (quoting AR 600-43 ¶ 1-7.a.(5)(b)).

[254] Bainbridge, *supra* note 235, at 247; Stanton, *supra* note 156, at 769.

[255] Bainbridge, *supra* note 235, at 247; Stanton, *supra* note 156, at 769.

[256] Stanton, *supra* note 156, at 769.

[257] *Id.*; Brief for Azusa Pacific University, et al. as *Amici Curiae* Supporting Neither Party at 20–21, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354). This, however, would be a weaker sign of corporate beliefs because without a broader context it would be difficult to tell whether the corporation was expressing its own beliefs or merely accommodating the beliefs of its employees. The federal government, for instance, closes on Christmas, though it can hardly be called a religiously active entity.

[258] Bainbridge, *supra* note 235, at 247; *see also* Stanton, *supra* note 156 (citing Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 111 (D.D.C. 2012)).

beliefs. But when corporate money becomes involved, it is a different story. Where the corporation itself is donating money with a religious purpose, that action reflects upon the apparent beliefs adopted by the corporation. Only such explicitly corporate actions bear upon the sincerity of the corporation's religious beliefs.

*2. Public Displays of Religion*

Just as people do not "light a lamp and put it under a bowl,"[259] the most effective indicators of corporate religiosity are those that are made publicly. If nothing else, these present the easiest elements to determine because they are put forth in the public sphere for all to see. The analysis necessarily focuses on the "outward manifestation of the beliefs asserted."[260] The more outwardly those beliefs are asserted, the simpler they are to ascertain.

Public statements and those made to the media on behalf of the corporation present clear examples of the kind of public displays that might be useful to courts.[261] These statements would represent clear articulations of belief against which later claims of belief could be judged. Courts often look to an individual's statements—and the strength of those statements—when seeking to determine sincerity.[262] There is no reason that a similar inquiry would not serve the analysis of corporate beliefs.

*3. The Length and Consistency of the Corporation's Averred Beliefs*

Related to the public expression of a corporation's religious beliefs is the length and consistency with which it has expressed those beliefs.[263] Particularly relevant would be evidence of beliefs before the imposition of the burden from which the party is seeking to be exempted.[264] Those beliefs that have been previously and consistently asserted by the corporation are more likely to be sincere and not a mere sham.[265]

The focus on length and consistency of beliefs has been particularly prevalent in cases brought by prisoners challenging prison conditions under

---

[259] *Matthew* 5:15 (New International).

[260] Aguayo v. Harvey, 476 F.3d 971, 979 (D.C. Cir. 2007) (quoting AR 600-43 ¶ 1-7.*a*.(5)(*a*)).

[261] Stanton, *supra* note 156, at 768–69.

[262] Brady, *supra* note 222, at 1454; Senn, *supra* note 223, at 341–42.

[263] Callahan v. Woods, 658 F.2d 679, 684 (9th Cir. 1981) ("The existence of a longstanding philosophical belief which has only recently, and to the claimant's advantage, taken on theological overtones could certainly give rise to reasonable suspicion of dissimulation."); Brady, *supra* note 222, at 1453; Senn, *supra* note 223, at 347.

[264] *See* Brady, *supra* note 222, at 1453.

[265] Brief for Azusa Pacific University, et al. as *Amici Curiae* Supporting Neither Party at 20–21, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354) 2014 WL 316717.

RLUIPA.[266] In that context, the focus on consistency is helpful to prevent an inmate from "adopt[ing] a religion merely to harass the prison staff with demands to accommodate his new faith."[267] While such concerns may not be as prevalent outside of the corrections system, the emphasis on length and consistency is nonetheless helpful. Common sense tells us that longstanding religious beliefs that have been scrupulously followed are more likely to be sincere than recent—and perhaps opportunistic—conversions without a similar track record of adherence.

That said, "sincerity does not require perfect adherence to beliefs."[268] After all, "even the most sincere practitioner may stray from time to time."[269] Just as an individual is not required to demonstrate perfect faith and adherence to religious dictates from the moment they are born until the moment they assert a free exercise claim, for-profit corporations should not be held to such an unrealistic standard. Nonetheless, the length and consistency with which particular beliefs have been held and demonstrated provides an insight into the sincerity with which those beliefs are held. Where a for-profit corporation has demonstrated a commitment to religious beliefs—as weighed in consideration of the other factors discussed in this section—consistently over an extended time period, its sincerity ought to receive more credit.

#### *4. The Corporation's Secular Interest and/or Willingness to Accept Hardship*

Another factor courts should consider when assessing corporate free exercise claims is the corporation's secular interest in obtaining the claimed religious benefit. This holds a certain common sense appeal. It is certainly conceivable that an individual or a corporation thwarted in pursuing a particular result might "decide to mask the cause in religious garb in order to bring it under First Amendment protection."[270] For instance, in the context of conscientious objector claims, the military instructs that "[i]nformation presented by the claimant should be sufficient to convince that the claimant's personal history reveals views and actions strong enough to demonstrate that expediency or avoidance of military service is not the basis of his claim."[271] Where a corporation stands to enjoy significant secular gains, courts should take into account the possibility of "strategic behavior" from the corporation and grant less def-

---

[266] *See, e.g.*, Patrick v. LeFevre, 745 F.2d 153, 159 (2d Cir. 1984) (considering, among other factors, the "short-lived nature" of the plaintiff's affiliation with his claimed religion).

[267] Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988).

[268] Moussazadeh v. Tex. Dep't of Criminal Justice, 703 F.3d 781, 791 (5th Cir. 2012).

[269] *Id.*

[270] Callahan v. Woods, 658 F.2d 679, 684 (9th Cir. 1981).

[271] Aguayo v. Harvey, 476 F.3d 971, 979 n.3 (D.C. Cir. 2007) (citing 32 C.F.R. § 75.5(c)(2)).

erence to claims where such behavior is likely to occur.[272] This is not to say that such claims should be rejected as a matter of course. Rather, it reflects the fundamental understanding that secular benefits create an incentive to dissimulate that ought to be guarded against.

Conversely, where a corporation has demonstrated a "willingness to bear adverse consequences of the religious belief," the claim has a greater right to be taken at face value.[273] Kent Greenawalt, among others, has posited that claims of conscience that seem to bring no practical benefit to the claimant, yet risk invoking the ire of others, are more likely to be sincere than those claims that have a clear and unalloyed benefit for the claimant.[274] "A person who has submitted to great hardship rather than deviate from a professed religious doctrine is unlikely to be feigning belief."[275] In the individual context, such statements generally refer to some form of persecution. While outright persecution may be possible in the corporate context, a more likely adverse consequence would be lost profits. For instance, refusing to sell certain profitable items or closing for business during what would otherwise be profitable times in the name of religious observance indicate a commitment to religion that supersedes secular interests. Willingness to accept such hardships indicate a corporation's sincere commitment to a set of religious beliefs and minimize the risk that the corporation is engaging in opportunistic behavior by asserting a religious claim.

*5. Corporation's Governance Structure*

Finally, courts looking to determine the sincerity of a corporation's religious beliefs should conduct a limited inquiry into the corporation's governance structure. This is emphatically a different inquiry than looking into the religious beliefs of its owners.[276] Nor is the appropriate inquiry the size or ownership structure of the corporation. After all, both for-profit and non-profit corporations are capable of exercising religion regardless of their size. Rather, the question to ask is whether "the ownership structure of the corporation [is] designed to ensure continuity of its religious purposes even after the original founders have retired or died . . . ."[277]

The purpose of this inquiry is to create additional separation between the sincerity of the corporation itself and the sincerity of the owners and shareholders behind the corporation. Where the corporation's religious purpose is designed to transcend the current owners, the corporation's beliefs are more likely to belong to the corporation itself as opposed to the ownership. In such a situa-

---

[272] Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 327 (1986).

[273] Senn, *supra* note 223, at 341–42.

[274] Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 J. L. & POL. 91, 103–04 (2013).

[275] Senn, *supra* note 223, at 343.

[276] *See supra* Part IV.B.1.

[277] Bainbridge, *supra* note 235, at 247.

tion, the corporation's beliefs would endure even if shareholders have since adopted diametrically opposite religious views. When such a structure is built into the framework of the corporation itself, it becomes much easier to say that the corporation as an entity has demonstrated a sincere religious belief.

## V. CORPORATE FREE EXERCISE RIGHTS: OBJECTIONS AND RESPONSES

To this point, this article has argued that courts ought to recognize the religious free exercise rights of for-profit corporations and explained how courts should go about evaluating such claims. Nevertheless, there are certain questions and objections that must be considered when recognizing this right. This section will highlight a few of those objections and offer brief responses.

### *A. Corporations Cannot Form Sincere Beliefs*

Perhaps the most frequently asserted contention against recognition of corporate free exercise rights is that corporations lack the capacity to form religious beliefs. As such, critics assert that protecting the free exercise rights of corporations "would protect a null set. Being only creatures of positive law with defined and limited powers, corporations lack a spiritual element; as it has been observed numerous times, a corporation has no soul."[278] Because the free exercise clause protects the expression of religious belief, the alleged inability of corporations to form such beliefs, if true, would be fatal to their assertion of a protected right to exercise religion.[279]

This line of argument, however, overlooks a crucial reality: the legal system already protects the religious rights of incorporated (and unincorporated) entities that may themselves be incapable of forming religious beliefs. Consider the Catholic Church. As a church, it inarguably is engaged in the exercise of religion and would have standing to assert a violation of its tenets of faith.[280] The same holds true for religiously affiliated non-profit organizations. If we take seriously the claim that organizations are categorically incapable of forming religious beliefs, we must conclude that churches and other religious organ-

---

[278] Rutledge, *supra* note 236, at 28 (internal quotation omitted); *see also* Phillipps, *supra* note 135, at 61 ("While a corporation may be *run in accordance with* a particular religious belief system, the corporation itself believes nothing.").

[279] Rutledge, *supra* note 236, at 25; *but see* Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, 21 J. CONTEMP. LEGAL ISSUES 369, 377–78 (2013) ("A corporation clearly 'speaks,' but can a corporation 'believe?' Perhaps not, but the question may be misdirected, for the First Amendment does not protect religious belief; it protects the exercise of religious belief. Exercise, belonging in the world of action, is within the ambit of corporate capacity.").

[280] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); *see also* Tushnet, *supra* note 113, at 76 ("Churches, including those organized as corporations, have such rights *as churches* . . . ."); *but see* Lupu, *supra* note 228, at 955–56 (positing that use of the sincerity test would prohibit religious institutions from making religious claims in their own right because "as artificial persons, they are no more capable of feeling commitment than they are of feeling love, fear, or anger.").

izations are similarly barred. Yet even the most strident opponents of corporate religious rights do not seem to go so far as to say that these organizations ought to lack free exercise rights. This presents an insurmountable obstacle for proponents of the argument that corporations cannot exercise religion because they cannot themselves form religious beliefs. Proponents of this argument may then try to argue that there is a difference between religious and secular organizations. To the extent that contention is true, it is a different argument. The inability of corporations (or any collective entity) to form "belief" in the same way as individuals does not by itself totally negate the legal rights afforded the entity.

### *B. Sincerity Is Difficult to Discern*

Although the sincerity test is accepted in cases where individuals assert a free exercise claim, it can be a difficult test to implement. As Kent Greenawalt has observed, "[t]he main problem about sincerity is the practical problem of assessing it by those who decide on the applications of an exemption."[281] This difficulty perhaps explains why courts and the government tend to avoid challenging the sincerity of an individual's religious beliefs.[282] "Determinations of sincerity are inherently uncertain; the question is internal to the claimant rather than external, and objective indicia can therefore only be suggestive, not determinative, of sincere belief."[283] These difficulties do not, however, render the sincerity test unworkable for assessing corporate free exercise claims.

While determining sincerity can be a difficult task, courts certainly have the "institutional competence" to distinguish between sincere beliefs and those advanced out of animus or some other purpose.[284] Indeed, "[j]udging credibility is a staple of the adjudicatory and administrative processes . . . ."[285] This core adjudicatory task is the root of the inquiry by courts applying the sincerity test to free exercise claims brought by individuals or by corporations. As the previous section indicated, there are clear, judicially manageable tools available for making such determinations.[286]

Moreover, the difficulties of judging sincerity have not defeated the use of the test for individuals who assert free exercise claims. If the test is valid when applied to individual claims, it can only be invalid when applied to corporate claims if there is something ineradicably distinctive about corporations that render the test inoperative. Thus, the question turns to the difficulties in determining the beliefs of a collective entity.

---

[281] Greenawalt, *supra* note 274, at 103.
[282] Pepper, *supra* note 272, at 326.
[283] *Id.*
[284] Wilson, *supra* note 226, at 1453.
[285] Pepper, *supra* note 272, at 328.
[286] *See supra* Part IV.

### *C. Judging Corporate Sincerity Poses Distinctive Challenges*

The more relevant challenge posed by recognizing corporate free exercise rights is determining whose individual beliefs matter when looking at the collective whole. "For example, when we talk about a corporation's free exercise rights, are we really just talking about the owners', directors', shareholders', or employees' beliefs in some circuitous fashion, or are we talking in some ways about the institution itself?"[287] As I explain in Part IV, the operative beliefs must relate to the institution itself.[288] But that then begs the question of how one determines who speaks on behalf of the institution.[289] This problem would be exacerbated when—unlike what appeared to be the case in *Hobby Lobby*—there is a difference of religious beliefs among the various corporate stakeholders. The Jewish Social Policy Action Network's amicus brief in *Hobby Lobby* addressed this issue head-on, posing a series of provocative questions, including:

> - Who determines the beliefs of a for-profit corporation owned by family members who share the same faith but adhere to different levels of observance and follow different practices?
> . . . .
> - Whose beliefs constitute the beliefs of a private for-profit corporation owned by unrelated individuals of different faiths?
> - Can a simple majority of shareholders of a for-profit corporation determine the [religious] claims to be asserted by the corporation?[290]

These problems, however, are just as present in churches and religious non-profit organizations as they are in for-profit corporations. As Professor Corbin has written, there is a potential problem, even in the realm of churches, when the stated religious beliefs of the church's hierarchy are at odds with the practiced faith of many of the church's members.[291] A court wading into the controversy to determine the beliefs of the organization "risks resolving a theological dispute about what qualifies as a central tenet of the faith."[292] Moreover, deference to the church's leadership structure "means the courts always favor the most powerful members of the religious community, sometimes at the ex-

---

[287] Stanton, *supra* note 156, at 746.

[288] *See supra* Part IV.B.1.

[289] Garfield, *supra* note 144, at 11 ("Does the Board of Directors, the CEO, or the shareholders holding a majority of the stock decide what the corporation's religious values are?").

[290] Brief for the Jewish Social Policy Action Network as *Amici Curiae* Supporting the Government at 13–15, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354) 2014 WL 356644.

[291] Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. 1469, 1475–76 (2013).

[292] *Id*. at 1476. Although Professor Corbin refers to the centrality of a particular belief, the Supreme Court has held that centrality is an irrelevant consideration. *See* Emp't Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 886–87 (1990). Her argument, then, is perhaps better read as counseling against court involvement in simply determining the actual beliefs of the church.

pense of less powerful members and definitely at the expense of the people who will be burdened by the accommodation."[293] These are serious concerns and warrant pause.

The concerns do not, however, require that we reject any form of organizational religious identity. Following Professor Corbin's argument to its logical end would require rejection of any organization's religious claims—including those brought by churches. This is simply an untenable position in a society that aims to broadly protect religious exercise. Perhaps courts ought not entirely defer to organizations asserting religious beliefs. But courts should not reject all claims where there may be some dissension among an organization's various stakeholders and members. Rather, as discussed in more detail above, courts should look to the actual practices of the corporation as a corporation—its governing charter and overt actions—to determine the existence and extent of its religious beliefs. Certainly this does not entirely answer the objections that Professor Corbin raises, but in light of the inescapable requirement that certain collective religious claims be recognized, it does provide a principled, practical framework for courts as they wade into such controversies.

Moreover, evaluating corporate sincerity could actually be an easier proposition than determining a natural person's sincerity. Because corporate entities lack a mind or intentionality in the traditional sense, the sincerity evaluation is necessarily focused entirely on external factors and actions.[294] This external focus can offer a more straightforward of an inquiry than the evaluations a court must make when considering the hidden and often obscure motivations of an individual actor. To the extent that corporate and individual minds differ, the sincerity analysis may actually work better for corporations.

### *D. Corporations Will Be Incentivized to Manipulate the System*

Another concern raised by the recognition of corporate religious rights is that corporations will be incentivized to fake purported religious beliefs as a means of avoiding legal responsibilities. Or, as one group of scholars wondered, "what would prevent a corporation from invoking religion essentially at will in order to obtain exemptions from generally applicable laws and regulations that the corporation finds too costly?"[295] This concern stands in sharp relief given the "massive influence" that corporations possess over individuals' daily lives.[296] While a legitimate concern, it is not determinative of the question here. The possibility of individuals falsely claiming religious beliefs to escape legal responsibility in their private lives is not used as an argument against

---

[293] Corbin, *supra* note 290, at 1476.

[294] *See supra* Part IV.C.

[295] Professors' Amicus Brief, *supra* note 236, at 26–27.

[296] Vischer, *supra* note 279, at 397.

granting free exercise rights to individuals.[297] Rather, this concern counsels in favor of careful consideration of purportedly religious corporations' sincerity.

This, too, is not without problems. A group of corporate and criminal law professors writing an amicus brief in favor of the government's position in *Hobby Lobby* argued that determining a corporation's sincerity would "entangle" courts in adjudicating "complex (and potentially intrusive) questions" about a corporation's beliefs.[298] The professors paint this inquiry as judicially inappropriate, if not impossible.[299] That, however, is an overstatement of the problems involved. First, courts already engage in inquiries to determine the sincerity of individuals' beliefs with the Supreme Court's blessing.[300] The inquiry involved here is no more inappropriate than what would be involved when dealing with individuals' beliefs. Moreover, the professors underestimate the amount of probative evidence on the subject. They claim that the evidence will typically consist of no more than "the views of shareholders that the regulation burdens their personal beliefs and a board resolution adopting those beliefs as the corporation's own."[301] This overlooks, however, what should be the central point of inquiry: the religious practices of the corporation as an entity.[302] When the inquiry is properly conceived in this way, the judicial task becomes more manageable because it is focused on observable external factors. The focus on sincerity as determined by demonstrated corporate practice offers a practical framework to negate the possibility of corporations falsely claiming religious beliefs to escape legal responsibilities. Instead of looking to the words of the corporate shareholders, courts will be able to assess a corporation's sincerity of belief based on the totality of the corporation's actions and statements. As discussed above, the myriad evidence available to courts conducting this inquiry will provide a firm grounding for sincerity determinations beyond merely taking corporate shareholders at their word.

### *E. Not Every Corporation Does or Will Practice Religion*

Just because corporations can exercise religion, it does not mean that all will. Indeed, it is unquestioned that all individuals can exercise religion, but there are still many who do not.[303] Given the realities of corporate ownership

---

[297] *See, e.g.*, United States v. Ballard, 322 U.S. 78 (1944) (upholding individuals' rights to assert religious beliefs as defense against criminal mail fraud charges).

[298] Professors' Amicus Brief, *supra* note 295, at 26–27.

[299] *Id.* at 26–28.

[300] *See generally* United States v. Seeger, 380 U.S. 163 (1965); *see also supra* Part IV.A.

[301] Professors' Amicus Brief, *supra* note 295, at 28.

[302] *See supra* Part IV.B.1.

[303] According to a 2015 report from the Pew Forum on Religion and Public Life, 22.8 percent of Americans identify themselves as religiously unaffiliated. *Religious Landscape Survey*, PEW FORUM ON RELIGION & PUBLIC LIFE, (May 12, 2015), http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

and the pressures of the marketplace, it is likely that most corporations will opt not to exercise religion:

> In the real world, of course, reliance on such mechanisms may be relatively rare. Shareholders of publicly held firms are likely quite diverse in their religious views (or lack thereof), and market pressure may deter large firms with diverse consumers and employees from adopting a particular religious stance. Still, while rare, we do not believe that such assertions are impossible.[304]

In light of these considerations, one cannot assume that all corporations will exercise religion even if such a right is recognized. But it would be a non sequitur to jump from there to the conclusion that *no* corporation can or will exercise religion. Even if the majority of American citizens did not exercise religion, the First Amendment would still protect the rights of the minority who did practice religion. So too, the lack of religiosity in most corporations cannot be validly deemed to undermine constitutional protections for those corporations that do practice religion.

Rather, the lack of universal religiosity points to the need for a means to determine whether a corporation actually exercises its religion or whether the corporation is purely secular. Just as the First Amendment does not protect the religious exercise of individuals who do not exercise religion, it will not protect corporations without religious beliefs. As explained more fully above, focusing on the sincerity of a corporation's beliefs, as manifest in its practices, provides just such a mechanism.[305]

### *F. Only Small, Closely Held Corporations Should Be Able To Assert Religious Rights*

Much of the discussion in the literature around corporate free exercise rights focuses on closely held corporations. This may be because most of the corporate free exercise claims so far have been brought by corporations "owned by one or just a few shareholders, and their shares do not trade in public markets."[306] The ease of identifying such small corporations and their ownership allows courts to seamlessly conflate individual and corporate beliefs.[307] This conflation was apparent throughout the Supreme Court's opinion in *Hobby Lobby*.[308] This focus on smaller corporations likely reflects "our intuitions . . . that publicly held corporations are different from privately held ones, and that privately held corporations with a relatively small number of shareholders are different from those with a large number."[309]

---

[304] Meese & Oman, *supra* note 1, at 288.

[305] *See supra* Part IV.C.

[306] Meese & Oman, *supra* note 1, at 279.

[307] Stanton, *supra* note 156, at 742.

[308] *See supra* notes 94–97 and accompanying text.

[309] Tushnet, *supra* note 113, at 83.

This focus on smaller corporations throughout the literature and jurisprudence then begs the question of how much the size of a corporation and the diversity of its ownership matter. Even among those who support corporate free exercise rights, there may be a sense that, at some point, a corporation is simply too big to exercise religion.[310] The extent to which we give credence to that sense will define the scope of free exercise rights afforded to corporations.

Careful consideration, however, indicates that corporate size should not matter because the appropriate focus is on the actions of the corporation, not who stands behind the corporate veil.[311] Certainly a religiously diverse body of corporate shareholders is less likely than a unified shareholder body to exercise religion. This makes sense because shareholders' varying religious voices will likely prevent any definite religious action in support of one particular religious perspective. But that does not mean that the beliefs of corporate stakeholders should enter the judicial considerations. For instance, it is not inconceivable that a religiously diverse corporate ownership could operate a kosher deli. Provided the corporation operated in accordance with religious stricture, there is no basis for denying it protection based on the diverse nature of its shareholders. Similarly, in the case of a Christian bookstore overtly dedicated to promoting religious ideals, why should it matter if the business is family-held or publicly traded? So long as the actions of the corporation itself are consistent with religious practice, the First Amendment's protections ought to apply. Thus, while it may be tempting to distinguish between corporations based on their size and ownership structures, courts should resist that temptation and focus instead on the actions of the corporation itself.

### *G. Sincerity Inquiries Cannot Create Definitive, Generalizable Rules*

Despite the acceptance and use of sincerity as the operative analysis for evaluating free exercise claims, courts have never developed a universal and formal sincerity test.[312] This is not surprising given that the Supreme Court has not even provided "a comprehensive account of what 'religion' means within the context of the First Amendment."[313] The lack of such formally stated rules and definitions does not mean that the entire endeavor must fail. The Supreme Court's failure to define "religion" has hardly destroyed all free exercise claims, nor has the lack of a unifying test for sincerity rendered that test inoper-

---

[310] *See, e.g.*, Stephen M. Bainbridge, *A Critique of the Corporate Law Professors' Amicus Brief in* Hobby Lobby *and* Conestoga Wood, 100 VA. L. REV. ONLINE 1, 21 (2014) ("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.").

[311] *See* Vischer, *supra* note 279, at 374 ("For purposes of the Free Exercise Clause, though, why should it matter whether the corporation is closely held or publicly traded?"); *see also* Meese & Oman, *supra* note 1, at 288 (writing that, for RFRA purposes, there is no basis for distinguishing publicly traded corporations from closely held corporations).

[312] Wilson, *supra* note 226, at 1453; Brady, *supra* note 222, at 1433.

[313] Meyler, *supra* note 194, at 888.

able.[314] The lack of clarity simply means that courts must exercise their judgment and discretion when applying the sincerity test. Moreover, the lack of clear guidance from the Supreme Court does not mean that lower courts are operating in the dark. As the previous section demonstrates, there are a variety of established factors that courts can look to in determining the sincerity of corporate religious actors.[315]

A related problem arises, however, because "[s]incerity operates only at retail. When a court or other decisionmaker rejects a claim as insincere, this will rarely have any precedential effect for other free exercise claims."[316] While true, this does not fatally undermine the use of sincerity as an assessment tool for free exercise claims. Courts frequently engage in fact-specific inquiries that may not create a generalizable bright-line rule for all contexts. A lack of general applicability does not mean that those inquiries produce the incorrect result in the individual cases under consideration. Further, as more challenges are brought and more cases are decided, general trends begin to emerge from the case law. This is the common law system at work. A practical, common sense approach that will decide cases justly should not be rejected simply because it does not immediately create a bright-line rule applicable in all cases.

### *H. Sincerity Determinations Discriminate Against Minority Beliefs*

Another criticism leveled against the use of a sincerity test in general is that it opens the door for possible discrimination against unusual or minority religious beliefs. "The more unusual a claimant's religion, the easier it will be for decisionmakers to conclude, on the basis of an unarticulated view that 'no one could really believe this,' that the claimant's beliefs are not sincerely held."[317] Thus, adherents of well-established religious organizations are likely to have greater success establishing evidence of sincerity than those who subscribe to less well-known beliefs.[318]

Certainly this pitfall is problematic for those who advocate the sincerity test, but it is not fatal. First, while it may be easier for adherents to mainstream religions to demonstrate their sincerity, the test has been appropriately applied to a host of individual religious beliefs and believers. At a certain point, it becomes necessary to trust the courts and juries that make such determinations. Second, this objection applies not only to corporate religious claims, but also to

---

[314] *See, e.g.*, Tagore v. United States, 735 F.3d 324, 328 (5th Cir. 2013); United States v. Quaintance, 608 F.3d 717, 721 (10th Cir. 2010); Aguayo v. Harvey, 476 F.3d 971, 979 (D.C. Cir. 2007); Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984); Forest Hills Early Learning Ctr., Inc. v. Lukhard, 728 F.2d 230, 240 (4th Cir. 1984).

[315] *See supra* Part IV.C.

[316] Lupu, *supra* note 228, at 956.

[317] *Id.* at 954 (footnote omitted).

[318] Olree, *supra* note 221, at 118 (explaining that in *Wisconsin v. Yoder*, the Amish "were widely known sincerely to believe that segregation from the world was an intrinsic requirement of their faith.").

claims brought by individuals. Accepting the objection would require rejecting the sincerity test in all cases. But then the question becomes: what replaces it? Accepting the need for some sort of gatekeeping mechanism in free exercise claims,[319] sincerity is the best option available. Even if imperfect, sincerity provides the most fair and effective means for sorting valid religious claims from mere sham claims designed to obtain some other, non-religious, end.

## CONCLUSION

Despite the controversy surrounding the Supreme Court's *Hobby Lobby* decision that for-profit corporations could assert religious exercise rights, the Court, for the most part, got it right. For-profit corporations do have the ability and the right to exercise religion. Indeed, in some ways, the Court did not go far enough. Corporate free exercise rights extend beyond the congressionally granted statutory rights in RFRA and are guaranteed by the First Amendment of the Constitution. A logical application of First Amendment precedent and policy demands such a result.

In other ways, however, the Court's analysis was off-base, particularly its apparent focus on the closely held nature of the corporations at issue and on the beliefs of the corporate shareholders. The proper analysis would focus on the sincere beliefs of the corporation itself. While not a simple endeavor, such beliefs can be determined through evaluation of the corporation's overt actions as a corporation. Where those actions indicate a sincere commitment to a clear set of religious beliefs, the corporation can rightfully assert a free exercise claim under the First Amendment. Whether that claim will be successful is an entirely separate matter. But the mere fact that a corporation seeks to turn a profit should not be grounds to deny the corporation its day in court. Corporations, like individuals, have the power and right to exercise religion. In *Hobby Lobby*, the Supreme Court took the first step. This article has articulated the framework needed to fully vindicate corporate free exercise rights under the Constitution.

---

[319] *See supra* Part IV.A.