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Religious Freedom and the Little Corporation That Could: Burwell v. Hobby Lobby Stores, Inc.

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RELIGIOUS FREEDOM AND THE LITTLE CORPORATION THAT COULD: *BURWELL V. HOBBY LOBBY STORES, INC.*

*John Duke**

I. INTRODUCTION

John Winthrop called some of the very first Americans to live as "a city shining on a hill." When we think of Americans who have risen up to that calling, Wall Street is probably not the first image to come to mind. In fact, there are many hard feelings toward the corporate echelon and its apparently insatiable greed. And now, our very own government would be the Robin Hood who plucks from the excessive bounty of today's CEO's and their corporations to provide for the common worker through the passage of the Affordable Care Act ("ACA"). But have they taken too much? One corporation argues just that, that its religious rights have been infringed upon by the ACA. Until recently, the Federal circuit courts were split over whether for-profit corporations have the right to exercise religion. Naysayers claimed that an entity designed for making money cannot possibly be religious, while the yea-sayers found no problem conceptualizing a person or group exercising religion after donning a corporate form for their business. This Note provides an in-depth look at the case granting Hobby Lobby Stores, Inc. the right to exercise religion, and why for-profit corporations, under certain circumstances, should have their Free Exercise rights formally recognized.

Part II will explain the history of Hobby Lobby and its owners as well as how this novel issue was raised in response to the ACA. Part III will examine the background and history of the law of religious freedoms and protections in America, specifically the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act ("RFRA"). Part IV will examine the legal theories that the majority based its decision against the legal theories and reasoning proffered by concurring and dissenting judges. Part V will analyze the decision made in this case and others similar to it. Part V will also discuss why the majority holding in this case sets the law in America on its optimal path. Finally, Part VI will provide a brief conclusion.

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II. FACTS AND PROCEDURAL HISTORY

A. *Hobby Lobby, Its Owners, and Their Collective Beliefs*

David and Barbara Green, with their three children, collectively own and operate Hobby Lobby Stores, Inc. and Mardel, Inc.[1] The Greens have organized these businesses explicitly around fundamental Christian beliefs and practices.[2] For example, Hobby Lobby's statement of purpose includes "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles."[3] One way in which Hobby Lobby carries out its stated purpose is to buy full-page newspaper ads that invite people to "know Jesus as Lord and Savior."[4] They also close all their stores on Sundays.[5] Hobby Lobby is also a large donor to six explicitly Christian ministry outreach organizations.[6]

A part of the Greens' belief system, which is at the heart of this case, is that life begins at conception.[7] The Greens further believe that it would be immoral for them to provide any means that will cause the death of a human embryo.[8]

B. *The ACA's Contraceptive Requirements and Exemptions*

The conflict at issue arose for the Greens because their belief system is in direct opposition to the contraceptive-coverage requirements of the ACA.[9] One provision in the ACA, the "contraceptive mandate," requires employers such as Hobby Lobby, who provide health care to their employees, to include in their offered coverage plans certain contraceptives.[10] Of the twenty approved contraceptives, four function by preventing the implantation of a fertilized egg.[11] The Greens objected to providing these four abortifacient contraceptives.[12]

The ACA provides four exemptions to providing contraceptives to employees: (1) religious employers, (2) religious institutions of higher education, (3) grandfathered plans, and (4) businesses with fewer than 50 employees.[13] Hobby Lobby does not qualify for any of these exemptions.[14]

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1. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013). Throughout this Note, I will reference Hobby Lobby as the plaintiff and expound upon its specific situation as it was the poster child of the case. There are two other business in the case as it appeared before the Supreme Court: Mardel, Inc., and Conestoga Wood, Inc. .

2. *Id.*

3. *Statement of Purpose,* HOBBY LOBBY, http://www.hobbylobby.com/our_company/purpose.cfm/ (last visited Feb. 22, 2015).

4. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1122.

5. *Store Details,* HOBBY LOBBY, http://www.hobbylobby.com/StoreDetail/254 (last visited Feb. 22, 2015). Every store location has identical store hours.

6. *Donations and Ministry Projects,* HOBBY LOBBY, http://www.hobbylobby.com/our_company/ministry.cfm (last visited Feb. 22, 2015).

7. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1122.

8. *Id.*

9. *Id.* at 1122-23.

10. *Id.* at 1123.

11. *Id.*

12. *Id.* at 1123 n.3.

13. *Id.* at 1123-24.

Hobby Lobby is not a religious employer like a church or synagogue. Hobby Lobby is clearly not an institution of higher education. Hobby Lobby's plan cannot be grandfathered because it has been amended within the last few years. Finally, Hobby Lobby employs over 13,000 employees. Therefore, Hobby Lobby falls squarely within the contemplated statutory scheme requiring for-profit corporations to provide contraception to their female employees.

C. *Hobby Lobby's Quest for a New Exemption and the Consequences of Failure*

On September 12, 2012, Hobby Lobby filed a petition in the Western District of Oklahoma.[15] Hobby Lobby's challenge was based on the theories that it was protected by RFRA, the Free Exercise Clause of the First Amendment, and the Administrative Procedure Act.[16] Hobby Lobby simultaneously moved for a preliminary injunction, which the district court denied on the basis that Hobby Lobby had not demonstrated a likelihood of success.[17] Hobby Lobby then appealed to the Tenth Circuit, which also denied the preliminary injunction on a two-judge panel.[18] Hobby Lobby next sought emergency relief from the Supreme Court, which was also denied.[19] Desperately, Hobby Lobby moved for an initial en banc consideration in the Tenth Circuit.[20] The Tenth Circuit reversed on the issue of likelihood to succeed giving Hobby Lobby the relief it had been perseveringly pursuing.[21] Finally, the government appealed to the Supreme Court, and the Supreme Court granted certiorari and affirmed in favor of Hobby Lobby.[22]

In this case, a five court majority gave four specific holdings: (1) Hobby Lobby was a "person" under RFRA and was entitled to its protection; (2) Hobby Lobby was practicing religion; (3) the contraceptive mandate substantially burdened its exercise of religion; and (4) the governmental interest was not narrowly tailored.[23]

III. Background and History of the Law

The question of whether a for-profit corporation has the freedom to exercise religion is a question long put-off by American courts. There has been no need to decide whether such a right exists for these corporations—

14. *Id.* at 1124.
15. *Id.* at 1125.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 1147.
22. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
23. *Id.*

until now. The ACA is a unique and highly controversial piece of legislation that presents never-before-seen problems to corporations. In this section, I will specifically identify and describe the contraceptive mandate in the ACA that is affecting corporate rights and how corporations and the federal courts have responded to this mandate.

A. The Affordable Care Act and the Contraceptive Mandate

The ACA was passed in 2010 and took full effect in January 2014.[24] The goal of this legislation is to provide health care to everyone in the country.[25] In order to help achieve this goal, Congress included a provision requiring certain employers to offer health care plans to their employees.[26] These health care plans must include certain contraceptive coverage, a provision commonly known as the "contraceptive mandate."[27] The contraceptive mandate requires employers to provide its female employees coverage of "preventive care and screenings" without cost sharing.[28] Included in the preventive care are twenty FDA-approved contraceptive methods, four of which operate by preventing a fertilized egg from implanting.[29]

One of the issues surrounding the contraceptive mandate comes from business owners who object to providing contraceptives because of their personal religious beliefs. Noncompliance is not really an option for these business owners because the rod of ACA justice is quite severe.[30] There are two forms of noncompliance: a corporation would be noncompliant if it provided health care coverage that did not meet ACA standards, and a corporation would be noncompliant if it failed to provide health care coverage altogether.[31] If a corporation provides health care benefits that do not meet ACA standards, the "tax" is $100 per day for each employee.[32] Oddly enough, if that same corporation stops providing employee health care insurance altogether, the punishment is less severe, but still crippling.[33] It requires a $2,500 fine per employee per year.[34] The effect of either choice is that no corporation can remain noncompliant with the ACA and stay in business.

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24. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. I, § 1501(a), 124 Stat. 119 (2010).

25. *Id.* § 5001.

26. *Id.* §§ 1511-15.

27. 43 U.S.C. § 300gg-13(a) (2012).

28. *Id.*

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

30. *See e.g.*, I.R.C. §§ 4980D, 4980H (2012); 29 U.S.C. §§ 1332, 1185d (2012).

31. *See* I.R.C. §§ 4980D, 4980H.

32. I.R.C. §4980D(b)(1). Hobby Lobby's tax would total about $475 million per year.

33. *Id.* § 4980H. This penalty would equate to approximately $26 million per year for Hobby Lobby.

34. *Id.* § 4980H(b)(3)(A)(ii).

There are four exceptions to the contraceptive mandate.[35] Congress recognized that this mandate runs counter to historical Catholic and Christian beliefs; thus, Congress carved out a few protections in anticipation of that conflict.[36] First, religious employers—such as churches—are exempt.[37] Second, some nonprofit corporations—such as religious institutions of higher learning—are exempt.[38] Third, businesses that qualify can grandfather in their employee health insurance plans.[39] Fourth, businesses with fewer than fifty employees are exempt.[40] But the question is: What happens when a corporation does not qualify for any of these four exceptions, but its owners' religious beliefs are in direct opposition to the contraceptive mandate? In an attempt to avoid choosing between closing their businesses and abandoning their religious beliefs, some owners have argued that their for-profit corporations are entitled to religious protection under RFRA and the Free Exercise Clause of the First Amendment.[41]

B. The Protection of Religion in America

From the very beginning of this country's foundation, woven into the Constitution, the United States of America has stood proudly as a bastion protecting the right to exercise religion as an individual and in coming together with like-minded individuals.[42] As America grew and developed, the approach to exercising religion progressed for many religious people from the typical concept of church worship services to the field of creating businesses that primarily help others.[43] And so was born the non-profit organization. These organizations are chartered to accomplish a particular, and usually charitable, purpose.[44] Congress granted these organizations tax related benefits for the services they provide the community, so long as the profits made by the organizations are used for continuing their laudable goals and not for making the owners rich.[45] Non-profit organizations were

35. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1123-24 (10th Cir. 2013); Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456,01 (Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54); 42 U.S.C. § 18011 (2012); I.R.C. § 4980H.

36. *See* Jonathan T. Tan, Comment, *Nonprofit Organizations, For-Profit Corporations, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301, 1304-05 (2013) (detailing the proposed legislation comment and revision process).

37. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1123-24.

38. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456,01 (Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54).

39. 42 U.S.C. § 18011(a)(2).

40. I.R.C. § 4980H(c)(2)(A).

41. *See* Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013); Gilardi v. U.S. Dep't. of Health and Human Servs., 733 F.3d 1208 (D.C. Cir. 2013); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (en banc), *cert. granted*, 134 S.Ct. 678 (2013); Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs., 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S.Ct. 678 (2013).

42. U.S. CONST. amend I.

43. Some common examples are hospitals, homeless shelters, soup kitchens, etc. .

44. *See* I.R.C. § 501(c)(3) (2015).

45. *See* STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., DESCRIPTION OF EXEMPT ORGANIZATIONS, (Comm. Print 2005).

deliberately excluded from the ACA's contraceptive mandate.[46] The wrinkle, and the issue at bar, comes when for-profit corporations claim they are also pursuing laudable goals that deserve similar exclusionary treatment.

Until very recently, no court has ever needed to decide the issue of whether a for-profit corporation can in any way be tied to the exercise of religion. The ACA has done something new in the history of America, though. It is not the first piece of legislation that forced reform on business. For example, in 1938 Congress established the first national minimum wage[47] and in 1935 Congress established Social Security.[48] But the ACA is the first piece of legislation passed that requires businesses to do something that runs afoul of some of the major religious tenets in the country. No business ever complained that providing a minimum wage somehow violated a religious belief, but providing birth control, unlike paying workers fair wages, is a hotly debated, morally-charged topic in modern-day America. The arguments businesses made against Social Security and minimum wage are fundamentally different from the argument being made against the contraceptive mandate. The issue in the argument made was whether Congress had the authority to regulate business so intimately. In the latter, the question is whether Congress can burden religion when it regulates business.

In this new arena created by the ACA, a for-profit corporation has only one avenue that stands any chance of success in claiming sanctuary from the contraceptive mandate: RFRA.[49] A for-profit corporation must meet several requirements in order to fall under RFRA's protection. First, a court must find that the corporation is a "person" under RFRA.[50] Second, the corporation must show that the ACA places a substantial burden on the corporation's exercise of religion.[51] Finally, a court must be satisfied that there are no compelling governmental interests that outweigh the corporation's right to the exercise of that religion.[52] None of these are small tasks for a corporation, but the toughest, and the crux of this issue, is whether a corporation should be considered a "person" who can exercise religion.

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46. *Supra* note 34.

47. 29 U.S.C. § 206.

48. 42 U.S.C. §§ 301-1397mm.

49. Plaintiffs who argue that their Free Exercise rights have been infringed upon will usually do so via RFRA because it is Congress's legislative overruling of Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 874 (1990) (hereinafter "*Smith*"). *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133 (10th Cir. 2013) ("RFRA was Congress's attempt to legislatively overrule [*Smith*] . . . ."). In *Smith*, the Supreme Court drastically changed Free Exercise law by holding that the First Amendment does not prohibit the government from burdening religious practices through neutral, generally applicable laws. *Smith*, 494 U.S. at 879-881. In doing so, the Supreme Court rejected the balancing test previously used. *Id.* at 883-84. If the law is neutral, *Smith* would have a court look no further. *Id.*

50. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1128 (citing 42 U.S.C. § 2000bb-(1)(a)).

51. *Id.* at 1137.

52. *Id.* at 1142-43.

C. Corporate Personhood

RFRA provides that the "[g]overnment shall not substantially burden a *person's* exercise of religion . . . ."[53] Congress did not define "person" in this context, so courts have begun the guessing game of congressional intent. In order to determine congressional intent, courts have looked in a few places: (1) the Dictionary Act, (2) the context surrounding the RFRA, and (3) the limited case law interpreting corporations' rights under the Free Exercise Clause.[54]

The Dictionary Act is a statute containing the default definitions of words commonly used in other statutes passed by Congress.[55] It states: "[i]n determining the meaning of any Act of Congress, *unless the context indicates otherwise* . . . the word 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[56] If the Dictionary Act definition of "person" applies, it is clear that corporations are to be considered persons. The battle here is whether the context surrounding RFRA indicates that Congress intended to apply a definition other than the default definition it supplied in the Dictionary Act.

Before the Supreme Court ruling, courts came down on both sides, saying either that the context surrounding RFRA indicates corporations are not persons or that nothing indicates otherwise.[57] The first question is: what counts as context to RFRA's use of the word "person"? One meaningful source of context is the "the texts of other related congressional Acts . . . ."[58] Several similar religious protections are found in Title VII, the Americans with Disabilities Act ("ADA"), and the National Labor Relations Act ("NLRA"). All were enacted before RFRA, and Congress provided exemptions for each to "religious corporations."[59] The fact that Congress did not make specific carve-outs in RFRA, but provided protection generally for all "persons," then, is significant. Either Congress used the word "person" as "extreme shorthand for something like 'natural person' or 'religious organization,'" or these other Acts show that Congress is fully capable of making narrow exemptions, but chose not to in RFRA.[60]

Another "source" of context surrounding RFRA is more of an absence of a source.[61] In other words, there are no cases or statutes that directly support recognizing for-profit corporations' right to exercise religion.[62] Because there is no precedent on point, some would reason that it is

53. 42 U.S.C. 2000bb-1(a) (emphasis added).

54. *See Hobby Lobby Stores. Inc.*, 723 F.3d at 1129, 1131, 1133.

55. 1 U.S.C. § 1 (2012).

56. *Id.* (emphasis added).

57. The 7th, 10th, and D.C. Circuits have held that for-profit corporations are "persons" under RFRA, while the 3d and 6th Circuits have held that for-profit corporations are not "persons" under RFRA. *See supra* note 41.

58. Rowland v. Cal. Men's Colony, 506 U.S. 194, 199 (1993).

59. 42 U.S.C. §§ 2000e-1(a), 12113(d)(1)-(2).

60. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1130 (10th Cir. 2013).

61. *Id.* at 1166-70 (Briscoe, C.J., dissenting).

62. *Id.* at 1168.

better to refrain from judicially creating this right.[63] The absence of relevant context indicates that when Congress used the word "person" in RFRA, it could not have meant to extend religious protections to corporations because no one has ever considered corporations to have religious rights before now.[64] This is not an accurate depiction of the law, however. The Supreme Court left open for future exploration the question of whether for-profit activity might qualify as religious activity.[65] Lower courts, therefore, should have at least addressed the issue rather than skirting it solely because it had not yet been decided.

Lastly, a court may draw on related case law to support the notion that the law has been heading in this direction for some time.[66] For instance, corporations were granted the freedom of politically-expressive speech in *Citizens United v. Federal Election Commission*.[67] In that case, the Supreme Court overturned a line of cases holding that Congress had the authority to prohibit corporations from using corporate funds for "speech expressly advocating the election or defeat of a candidate."[68] By holding that a corporation had a protected right to take political action, the Supreme Court took a huge step toward protecting corporate civil liberties. Although not identical, it is not difficult to see the parallel some courts draw: protecting political acts seems similar to protecting religious acts.[69] At the very least, the Supreme Court has made known its dedication to defend the integrity of the First Amendment.

Along similar lines, some courts note that it has been long-recognized that associations such as churches and other religious non-profits, and not just natural individuals, have the First Amendment right to exercise religion.[70] For example, the Supreme Court recently held that a non-profit corporation was entitled to protection under RFRA in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.[71] In that case, an American sect of Brazilian Christian Spiritualists were using hoasca—a plant containing the controlled substance DMT—to make and drink a ritual tea.[72] The government argued that its interest in applying the Controlled Substances Act universally is compelling enough to burden this act of religion.[73] Nonetheless, the Supreme Court held that the non-profit corporation was entitled

63. *Id.* at 1170.

64. *Id.*

65. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring) (stating "[i]t is . . . conceivable that some for-profit activities could have a religious character . . . ."); *Id.* at 349 (O'Conner, J., concurring) (emphasizing that the question of whether for-profit activities can qualify as also being religious is a question that "remains open").

66. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1131-32.

67. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

68. *Id.* at 318.

69. *See Hobby Lobby Stores, Inc.*, 723 F.3d at 1135.

70. *Id.* at 1133-34.

71. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

72. *Id.* at 423.

73. *Id.*

to seek protection under the First Amendment.[74] The fact that these sect members had adopted a corporate form did not staunch the Supreme Court's vigorous protection of First Amendment rights.[75] The Supreme Court has on several other occasions recognized Free Exercise rights in corporate plaintiffs.[76]

D. Substantial Burden

If a court does decide that a for-profit corporation is a "person" protected under RFRA, the corporation must then prove that the ACA places a substantial burden on the corporation's exercise of religion.[77] A threshold question of substantial burden in this context is the penalty.[78] A mere increased expense does not qualify.[79] A corporation must be faced with a Hobson's choice, a lose-lose that is really no choice at all.[80] The government did not even dispute that the penalty in the ACA is intended to do just that: comply or go out of business.[81]

The pressing question in this case is whether the act of providing controversial coverage is too attenuated or indirect to the claim of burdening one's religion.[82] On the one hand, some courts held that a corporation's right to exercise religion cannot be substantially burdened when the employee, a third party, decides whether to use the coverage to buy contraceptives.[83] Those courts focused on the fact that providing the health care plan is not what actually leads to the use of contraceptives; it is the employee who elects to use or not use the contraceptives, not the corporation.[84] Thus, the corporation's belief prohibiting contraception is not violated.

Other courts, including most recently the Supreme Court, disagreed, relying on *Thomas v. Review Board of the Indiana Employment Security Division*.[85] In that case, the plaintiff, a Jehovah's Witness, worked in a foundry, but was transferred to a factory where weapons of war where assembled.[86] The plaintiff objected to the transfer because his religion did

74. *Id.* at 439.

75. *See id.* The opinion found support from eight of the nine justices. Justice Alito took no part in the consideration or decision of the case.

76. *See e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that city ordinances violated the corporation's and its congregational members' free exercise rights); Bob Jones Univ. v. U.S., 461 U.S. 574, 604 n.29 (1983) (allowing two corporations that operated schools but could not be characterized as "churches or other purely religious institutions" to assert free exercise rights).

77. *See Hobby Lobby Stores, Inc.*, 723 F.3d at 1137-41.

78. *See id.* at 1141.

79. *See id.*

80. *See id.*

81. *See supra* notes 30-34.

82. *See Hobby Lobby Stores*, 723 F.3d at 1137-40.

83. *See, e.g.*, Conestoga Wood Specialities Corp. v. Sebelius, 917 F. Supp. 2d 394, 414 (E.D. Pa. 2013), *aff'd sub nom.* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

84. *Id.*

85. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981).

86. *Id.* at 709.

not allow him to help create weapons due to the violence they can cause.[87] The Supreme Court held that the plaintiff's beliefs allowed him to work in the foundry, one step isolated from making weapons, but not in the actual factory.[88] The plaintiff "drew a line, and it is not for us to say that the line he drew was an unreasonable one."[89] The Supreme Court went on to say that "while the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."[90] In applying this case to corporations providing health care plans, the job of the court is to determine if the corporation's religious beliefs are sincere.[91] Whether they are seemingly reasonable or attenuated is irrelevant.[92]

E. Compelling Interests

Finally, if a corporation proves that the ACA places a substantial burden on its exercise of religion, the burden shifts to the Government to show that there are compelling governmental interests that outweigh the corporation's right to exercise its religion.[93] Under RFRA, these interests will be subject to strict scrutiny and must utilize the least restrictive means of advancing these interests.[94]

The Government argued that it had two compelling interests: (1) public health, especially for women and children; and (2) gender equality in the workplace.[95] While these interests are compelling generally, the Government must show that they are so compelling as to preclude granting a specific exemption for one corporation.[96] Neither of these interests are compelling in light of the fact that the exemptions Congress explicitly provided already cause tens of millions of people to not receive contraceptive benefits.[97] The Supreme Court has stated that "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited."[98] No court that reached this stage of the argument found that the Government met its burden of showing a compelling interest.[99]

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87. *Id.* at 710-11.

88. *Id.* at 715.

89. *Id.*

90. *Id.* at 718.

91. *See id.* at 726.

92. *See id.* at 715.

93. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1143.

94. *Id.*

95. Kathryn S. Benedict, *When Might Does Not Create Religious Rights: For-Profit Corporations' Employees and the Contraceptive Coverage Mandate*, 26 COLUM. J. GENDER & L. 58, 97 (2013).

96. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1143-44.

97. *Id.* at 1144.

98. *Id.*

99. Benedict, *supra* note 95, at 97.

IV. INSTANT CASE

The Supreme Court held 5-4 in this case that a closely held, for-profit corporation is a "person" entitled to protection under RFRA.[100] In reaching that conclusion, the majority, authored by Justice Alito, relied on the broad protection offered by RFRA, the Dictionary Act, First Amendment arguments, and some arguments of policy.[101] Justice Kennedy wrote a brief concurrence to emphasize that ruling for Hobby Lobby in this case was a win-win because a mechanism already exists to provide women cost-free access to contraceptives, even to those women who work for exempted businesses.[102] The principal dissent, authored by Justice Ginsburg, argued: (1) women's rights are generally more important than the exercise of religion; (2) this case doesn't meet the standards of *Smith*; (3) this right should not be extended because that's the way it has always been; and (4) making money is antipathetic to the exercise of religion.[103] Finally, Justices Breyer and Kagan wrote a one-paragraph dissent.[104]

A. The Majority for Personhood

The majority held that a for-profit corporation is a "person" under RFRA, but the Court's holding was deliberately authored narrowly.[105] The Court only held that a closely held corporation could exercise religion.[106] It did not attempt to answer whether a publicly traded corporation could exercise religion.[107] The majority offered several arguments in support of its conclusion that a closely held, for-profit corporation is a "person" under RFRA that can exercise religion.

First, it is helpful to understand the Court's starting point. One of the major themes in the Court's opinion was to repeatedly reference the long-standing, general policy which gives broad protection to the exercise of religion.[108] Further, the Court pointed to RFRA's broad protection[109] and

100. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). The other three holdings of the Court, that Hobby Lobby was exercising religion, that the contraceptive mandate was a substantial burden to the exercise of that religion, and that the governmental interests were not narrowly tailored, are important insofar as they relate to Hobby Lobby in particular. However, those holdings do not add anything new to the legal analysis, and therefore will not be the focus of this Note. As the law in this area develops, it may be of interest to report on how courts have gone about determining the second issue—when is a corporation exercising religion? Though that question is simply beyond the scope of this Note.

101. *Id.*

102. *Id.* at 2785-87 (Kennedy, J., concurring).

103. *Id.* at 2787-2807 (Ginsburg & Sotomayor, JJ., dissenting).

104. *Id.* at 2807 (Breyer & Kagan, JJ., dissenting).

105. *Id.* at 2785 (stating "the contraceptive mandate, *as applied to closely held corporations*, violates RFRA") (emphasis added).

106. *Id.*

107. *Id.* at 2774 (stating "[t]hese cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which [the government] refers will often assert RFRA claims"). The Court explained why it considered publicly traded companies to be unlikely to assert RFRA claims. *Id.* It reasoned that there is a high improbability that "unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs . . . ." *Id.*

108. *See id.* at 2769-72.

the Religious Land Use and Institutionalized Persons Act of 2000's ("RUILPA") even more broadening expansion of that protection.[110] When Congress passed RUILPA, it included a provision that amended RFRA.[111] RUILPA broadened the definition of what it means to exercise religion under RFRA.[112] The first RFRA definition of "exercise of religion" defined it as "the exercise of religion under the First Amendment."[113] The new definition added "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[114] Congress instructed that this concept "be construed in favor of a broad protection of religious exercise . . . ."[115] The majority took that principle to heart and gave great deference to the practice of religion, no matter the form in which it appeared.

Second, the Court held that the Dictionary Act definition of Congress's use of the word "person" was intended to apply to RFRA's use of the word "person."[116] The Court implied that it is not a novel or last-ditch legal argument to look to the Dictionary Act to supply definitions.[117] It is not even novel to look there for the definition of the word "person."[118] The Court stated that Congress knows how to indicate when it wants a peculiar definition to apply.[119] For example, Title VII expressly exempts from its scheme nonprofit religious institutions, but not for-profit corporations.[120] Congress made no such attempt to narrowly define the word "person" in RFRA.[121] The Court emphasized that if the Dictionary Act should apply, there ought not to be any twisting of its definition without clear direction to do so: "[t]he term 'person' sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations."[122]

Third, the Court held that the corporate form cannot, by itself, prevent the exercise of religion.[123] It noted that for-profit corporations are chartered for any legal purpose, not for the sole purpose of returning the largest profit margin possible per quarter.[124] The Court also took note that

109. *Id.* at 2767 (stating "RFRA was designed to provide very broad protection for religious liberty").

110. *Id.* at 2761-62.

111. *Id.*; *see* 42 U.S.C. § 2000bb-2(4).

112. *Burwell*, 134 S. Ct. at 2761-62.

113. *Id.*; *see* 42 U.S.C. § 2000bb-2(4) (1994).

114. *Burwell*, 134 S. Ct. at 2762; *see* 42 U.S.C. § 2000cc-5(7)(A) (2012).

115. *Burwell*, 134 S. Ct. at 2762; *see* 42 U.S.C. § 2000cc-3(g).

116. *Burwell*, 134 S. Ct. at 2769.

117. *See id.* at 2768 (stating "we therefore look to the Dictionary Act, *which we must consult*") (emphasis added).

118. *See id.* (quoting FCC v. AT&T Inc., 131 S. Ct. 1177, 1182-83 (2011) (slip op., at 6)) ("We have no doubt that 'person,' in a legal setting, often refers to artificial entities. The Dictionary Act makes that clear.").

119. *Id.* at 2773-74.

120. *Id.*

121. *Id.*

122. *Id.* at 2769.

123. *Id.*

124. *Id.* at 2770-71.

a corporation may have more than one legal purpose.[125] A business may make money, and it also may be charitable.[126] By way of examples, the Court pointed to two cases involving for-profit businesses that were also exercising religion.[127] The first was *Braunfeld v. Brown*;[128] the second was *United States v. Lee*.[129] In both of these cases, the plaintiffs were found to be exercising religion while operating a business, but both lost their cases on the merits.

In *Braunfeld*, the City of Philadelphia passed a Sunday closing law to which several Jewish merchants objected since their religious faith already required them to close on Saturdays. The Court entertained their claim and ruled against them on the merits. In *Lee*, an Amish employer objected to paying Social Security tax for his employees because his faith required other means of supporting the community. In this case too, the Court found that the law burdened the plaintiff's religion, but ruled against him on the merits. The point the Court made in this case was that exercising religion in the for-profit business arena is not a new concept. It just so happens that Hobby Lobby was the first business to assert these rights after incorporating.[130]

Finally, the Court spent a considerable amount of time addressing the arguments of the dissent.[131] Particularly, the Court spent time on two issues raised by the dissent: (1) the no-precedent argument; and (2) the curbing of women's rights argument.[132]

1. The No-Precedent Argument

The dissent argued that cases brought under RFRA should be constrained to the case-law prior to the enactment of RFRA, none of which specifically granted free-exercise rights to a for-profit corporation.[133] The Court stated, however, that in ruling on a RFRA claim, a court is not bound solely to the body of pre-*Smith* case law.[134] Congress has enacted legislation that did bind courts to a particular set of case law;[135] but in this situation, it bound the courts only to the "exercise of religion under the First Amendment."[136] This means a RFRA claim is taken in the light of

125. *Id.*

126. *Id.*

127. *Id.* at 2767, 2769-70.

128. Braunfeld v. Brown, 366 U.S. 599 (1961) (plurality opinion).

129. United States v. Lee, 455 U.S. 252 (1982).

130. As will be discussed later in the Note, it is the second, a fact which the dissent plainly ignores.

131. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (addressing "the dissent" or the "principal dissent" twenty-four times throughout the opinion).

132. *See id.* at 2772, 2760.

133. *Id.* at 2772.

134. *Id.* (stating "nothing in the text of RFRA . . . was meant to be tied to this Court's pre-*Smith* interpretation of [the First] Amendment").

135. *Id.* (citing as an example the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1)).

136. *Id.*; 42 U.S.C. § 2000bb-2(4) (1994). As discussed earlier, RUILPA broadened this definition of exercising religion, marking a clear departure from any strict reading of the pre-*Smith* case law.

anything the First Amendment is or can be.[137] If RFRA had "merely restored this Court's pre-*Smith* decisions in ossified form," it would leave resident non-citizens without protection of their religious exercises as well because no case before RFRA addressed their rights in a First Amendment context—a result surely unintended by the dissent.[138]

The Court then proceeded to find and discuss a pre-*Smith* case where a for-profit corporation challenged a law on First Amendment religious claims—*Gallagher v. Crown Kosher Super Market of Mass., Inc.*[139] Although a plurality ruled against the corporation on the merits, none of the justices questioned the corporation's standing to bring the claim, and several of the justices implicitly recognized the corporation's standing and would have held for the corporation.[140] In this manner did the Court address and dispel the no-precedent argument.

2. The Curbing of Women's Rights Argument.

The Court banished any notion that it was upholding the right to exercise religion at the expense of curbing women's rights.[141] It pointed to a solution already in place for female workers in businesses already excluded from the contraceptive mandate.[142] Through the agencies designated to facilitate its operation, the ACA developed a mechanism by which women who work for companies that may opt out of the contraceptive coverage requirements can still receive cost-free access to contraceptives.[143] In those instances, the insurer is required to pay for the contraceptive coverage.[144] Those insurance companies will not experience any increased costs, according to the agency that established this mechanism, because "costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women's health."[145] Under this accommodation, women seeking contraceptive care will continue to face "minimal logistical and administrative obstacles."[146] The

137. The text of the statute states that it should be construed "in favor of a broad protection . . . to the maximum extent permitted by . . . the Constitution." 42 U.S.C. § 2000cc-3(g) (2012).

138. *Burwell*, 134 S. Ct. at 2773. It is doubtful that the dissenters would make the argument that Congress has the power to fossilize a constitutional interpretation short of a constitutional amendment if a politically liberal issue were on the line.

139. Gallagher v. Crown Kosher Super Market of Mass., Inc., 366 U.S. 617 (1961) (plurality opinion). The dissent plainly ignores this case: "There is in [the pre-*Smith*] case law no support for the notion that free exercise rights pertain to for-profit corporations." *Burwell*, 134 S. Ct. at 2794 (Ginsburg & Sotomayor, JJ., dissenting).

140. *Burwell*, 134 S Ct. at 2772-73.

141. *Id.* at 2760 (declaring that "the effect of the . . . accommodation on the women employed by Hobby Lobby . . . would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing").

142. *Id.* at 2763, 2781-83.

143. *Id.*

144. *Id.*

145. *Id.* at n.38 (citing 78 Fed. Reg. 39877).

146. *Id.* at 2782.

Court stated that these obstacles are far less burdensome than if the corporation dropped its health care completely or closed shop altogether because of its religious principles.[147]

The Court ultimately identifies the dissent's underlying problem with this case.[148] It is not that women are being shunted by another patriarchic and domineering scheme; clearly they are not. The dissent's true issue here is "its fundamental objection . . . to RFRA itself."[149] The dissent would rather take up the banner of *Smith* and keep courts out of the business of dealing with "the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[150] The Court, though, stated that Congress, via the enactment of RFRA, made these very determinations the obligation of the courts.[151]

B. Kennedy's Concurrence

Justice Kennedy played the role of peacekeeper in this decision. He wrote separately to emphasize the importance of both issues at stake. He spent the first half of his concurrence speaking to the gravity of protecting religious freedom in America.[152] Then he made sure to frame up exactly the breadth of the Court's opinion as he saw it.[153] He pointed out that a key assumption the Court did not spend much time addressing is that the interests the government asserted to justify the burden on religion were legitimate and compelling interests.[154] He simply clarified that these interests were not being carried out in the least restrictive way, identifying the mechanism the government had already developed for already exempted employers.[155] In Kennedy's view, the interests in protecting the exercise of religion in this case did not impinge on the interests of promoting equality in the workplace: a win-win.[156]

C. Ginsburg's Dissent

In her dissent, Justice Ginsburg focuses her attacks on the Court to four major categories: (1) women's rights generally deserve more protection than the exercise of religion; (2) this case does not meet the standards of *Smith*; (3) free exercise rights in for-profit corporations should not be recognized because that is the way it has always been; and (4) incorporating into a for-profit corporation cannot be reconciled with exercising religion.[157] This section will look at her arguments one-by-one.

147. *Id.*
148. *Id.* at 2784-85.
149. *Id.* at 2784.
150. *Id.* at 2784-85 (quoting Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 874 (1990)).
151. *Id.* at 2785.
152. *Id.* at 2785-87 (Kennedy, J., concurring).
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 2787-2806 (Ginsburg & Sotomayor, JJ., dissenting).

First, Justice Ginsburg is known for relentlessly arguing for gender equality in the law.[158] Her dissent in this case started from the viewpoint that a ruling for Hobby Lobby puts a chink in the armor of women's rights. Accordingly, she set the tone of her dissent with a quote from *Planned Parenthood of Southeastern Pennsylvania v. Casey*: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[159] She then stated that Congress embodied these reproductive interests in the contraceptive mandate of the ACA.[160] With the premise clearly laid out, she went about bolstering it and arguing for its severe importance.[161] When referring to these reproductive interests, Justice Ginsburg said that they "are concrete, specific, and demonstrated by a wealth of empirical evidence."[162] In comparison, her tone toward protecting religious rights was skeptical.[163] After going through a list of cases involving free exercise claims that she found distasteful, she stated: "Would RFRA require exemptions in cases of this ilk?"[164] So the dissent started from the opposite viewpoint of the majority. While the majority started with the premise that free exercise rights are of the highest order, the dissent placed the protection of free exercise rights somewhere down the line, at least lower than protecting gender equality and reproductive interests.

Second, in stride with its starting viewpoint, the dissent preferred to analyze this case through the more restrictive lens of *Smith*, asserting that "any First Amendment Free Exercise Clause claim Hobby Lobby . . . might assert is foreclosed by this Court's decision in [*Smith*]."[165] Even when viewing the case through the proper lens of RFRA, the dissent artfully squished RFRA into a box that looked more like *Smith*. For instance, the dissent stated that the Court was "misguided by its errant premise that RFRA moved beyond the pre-Smith case law."[166] The dissent criticized the majority because the Court used RFRA for more than its original purpose—restoring the balance of substantially burdened exercise of religion versus compelling governmental interest—the balancing test previously rejected by *Smith*.[167] According to the dissent, RFRA cannot be used if any new or modified interpretation of the constitution is involved.[168]

158. *Maker's Profile: Ruth Bader Ginsburg*, MAKERS, http://www.makers.com/ruth-bader-ginsburg (containing a video interview with Justice Ginsburg and an accompanying written overview of Justice Ginsburg's biography).

159. *Burwell*, 134 S. Ct. at 2787-88 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856 (1992)).

160. *Id.*

161. *Id.*

162. *Id.* at 2799.

163. *Id.*

164. *Id.* at 2804-05.

165. *Id.* at 2790.

166. *Id.* at 2793.

167. *Id.*

168. *Id.*

Third, just as the dissent argued that RFRA cannot be used in a fresh interpretation of the constitution, the dissent further argued that a new and more expansive interpretation of free exercise rights is unwise precisely because it is new.[169] The dissent's statement here is illustrative: "The Court's 'special solicitude to the rights of religious organizations,' however, is just that. No such solicitude is traditional for commercial organizations. Indeed, until today, religious exemptions had never been extended to any entity operating in 'the commercial, profit-making world.'"[170] This statement concerning the Court's lack of historical concern for commercial entities provided the basis for the dissent's conclusion that certain exemptions have never been and should not be granted to commercial entities.

Lastly, the dissent argued that a for-profit corporation is un-redeemably polar in form and mission to exercising religion.[171] In making this argument, the dissent made a key assumption that "religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill."[172] Certainly, it is not impossible to form a corporation whose business is to serve a community of similarly faithed people,[173] but the assumption the dissent makes exposes a fatal misunderstanding of many religions. Namely, that in-reach is only one mission of a religion. Outreach is an equal function of religion, a function that a self-supporting corporation may be uniquely fitted to do.

D. Breyer's and Kagan's Dissent

These two justices wrote to agree with Justice Ginsburg on the point that Hobby Lobby's claim should fail on the merits.[174] They would rather have reserved judgment, however, on whether a for-profit corporation can bring a claim under RFRA.[175]

V. ANALYSIS

In this section, I suggest that it is right for corporations to be considered persons under RFRA so that a corporation may at least get its day in court. Organizing into a for-profit corporation should not be a death sentence to exercising religion. Rather, it should serve as one of the evidentiary components in showing whether religious activity has taken place. In reality, this recognition of Free Exercise rights would have a very narrow application. Not many corporations could argue that they exercise religion while keeping a straight face (at least not successfully), and not all of those

169. *Id.*

170. *Id.* at 2794-95 (citations omitted).

171. *Id.*

172. *Id.* at 2796. This idea was central to the dissent's argument, and reiterated that "religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations." *Id.* at 2795.

173. In fact, in this very case the Greens own a Christian bookstore chain, which arguably does just that, serves a community of other Christians.

174. *Burwell*, 134 S. Ct. at 2806 (Breyer & Kagan, JJ., dissenting).

175. *Id.*

that could will find occasion to assert that their right to exercise religion is being infringed. But to those whose rights are at stake, it is of the utmost importance to afford protection.

At its heart, this issue deals with a tension between two sets of rights. It seemingly pits the exercise of religion against gender equality. Many of those that oppose recognizing religious rights in for-profit corporations do so for fear that this new legal argument represents an additional excuse to burden women in the workplace. On the other hand, many of those that would see these rights recognized are concerned that the trend in America over the last several decades has been to corrode religious liberties. There is no point in hiding the fact that these viewpoints are often couched in terms of left- and right-wing dogma and slathered in mutual distrust and cynicism. This section aspires to bridge the gap in our quickly polarizing melting pot and show that these rights can coexist in harmony.

To be clear, I am not arguing that all corporations exercise religion. I am also not suggesting that corporations are somehow underdogs in need of champions who will wink at the inequities that tend to appear in the wake of the concentrated power of the Fortune 500. Instead, I am arguing that there are people who live and work in the secular business arena who are themselves deeply religious. Some of these people start their own businesses, and many times for more reasons than to simply make a profit. It would be a true injustice to deny them the right to exercise religion just because they have ventured into a world dominated by a secular mindset. In fact, it is precisely when religious rights are a minority that they need the most protection.

The bulk of my argument will focus on the legal justifications for protecting the Free Exercise of religion under the above-mentioned circumstances. I will endeavor to show that the current law in America supports the notion that the definition of "person" as it is used in RFRA should include for-profit corporations. There are three main reasons why this is the best interpretation: (1) the Dictionary Act's definition of "person" accurately describes Congress's intent when it used the word "person" in RFRA; (2) any argument that the corporate form or for-profit activity necessarily precludes the exercise of religion suffers from a fatal flaw in logic; and (3) any judicial fear of future litigation is unfounded. In addition, I will argue that Hobby Lobby exercises religion and that it deserved to be exempted from the contraceptive mandate.

A. How Can We Be Sure that Congress's Use of the Word "Person" in RFRA Includes For-profit Corporations?

There are two main reasons why it is clear that the congressional intent in RFRA was to include for-profit corporations: (1) Congress has narrowly defined the word "person" in previous legislation, but it did not do so in RFRA; and (2) the context surrounding RFRA does not indicate that the Dictionary Act definition of "person" should not apply.

The first point is self-evident. Congress exempted "religious" corporations, associations, etc., from Title VII's prohibition on discrimination.[176] The term "religious corporation" shows that Congress knows exactly how to exclude for-profit corporations from the protections of its legislation. It defies common sense to posit that Congress meant to exclude for-profit corporations in RFRA when it used the broad term "person" that typically includes all types of business forms instead of a narrower term it has used in the past. The general rule is that if Congress intends to exclude a particular class from its legislation, it will do so explicitly.[177]

The second reason the definition of the word "person" in RFRA should include for-profit corporations is because the Dictionary Act should apply. The Dictionary Act is a statute containing the default definitions of words commonly used in other statutes passed by Congress.[178] It states: "In determining the meaning of any Act of Congress, *unless the context indicates otherwise* . . . the word 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[179] If the Dictionary Act definition of "person" applies, it is clear that corporations are to be considered persons. The battle here is whether the context surrounding RFRA indicates that Congress intended some definition to apply other than the default definition they supplied in the Dictionary Act.

The first place to look for context is the surrounding text of RFRA.[180] The text of RFRA does not indicate any specific meaning. The text reads: "Government shall not substantially burden a person's exercise of religion . . . ."[181] That sentence is as generic and broad as can be drafted, so it is necessary to look for other context outside of the Act itself.

The extra-textual RFRA context centers around a separation-of-powers struggle between Congress and the Court. Immediately after the case *Employment Division v. Smith*[182] was decided, Congress passed RFRA to legislatively overrule it. This was done so that strict scrutiny would remain the standard for resolving Free Exercise disputes. Therefore, the common law context around RFRA is treated as practically identical to the common law context surrounding the Free Exercise Clause. At this point, some would argue that because no court has ever explicitly held that a for-profit corporation was exercising religion, Congress could not have intended for RFRA to cover for-profit corporations. That, however, is a hasty conclusion not necessarily supported by the whole context of the Free Exercise Clause case law. To begin, because no court has ever declared that the

176. 42 U.S.C. §§ 2000e-1(a), 12113(d)(1)-(2).

177. Chickasaw Nation v. United States, 208 F.3d 871, 880 (10th Cir. 2000).

178. 1 U.S.C. § 1.

179. *Id.* (emphasis added).

180. *Id.*

181. 42 U.S.C. § 2000bb-1(a).

182. Emp't Div. v. Smith, 494 U.S. 872 (1990) (overruling previous precedent that allowed Free Exercise claims regarding the oppressive consequences of neutral laws of general application).

philosophical possibility of a for-profit corporation exercising religion exists does not suggest that Congress took notice of the lack of commentary on the subject, inferred from that shortage that for-profit corporations were therefore incapable of exercising religion, and incorporated that legal theory into its drafting of RFRA by not even mentioning it. In other words, it takes a great leap to jump from "there is a lack of perfectly on-point context" to "Congress intended to close the book before the first word was written in it." There is a first time for everything.

Moreover, the common law context is not quite as sparse as some would make it out to be. Free Exercise rights have historically benefitted from fierce protection by the courts, and some corporations have already been granted Free Exercise rights.[183] Though these corporations have been non-profit corporations, the question has never been addressed as to whether the rights are to stop at for-profit corporations. The Supreme Court specifically left open, for future exploration, the question of whether for-profit activity might qualify as religious activity.[184] Regardless, Congress certainly made no effort to distinguish between for-profit and non-profit corporations in RFRA. It stands to reason that if "person" already refers to one type of corporation, there ought to be no problem for every corporation to fall under the term "person" without any congressional indication to the contrary.

The Supreme Court seemed to implicitly acknowledge that there is no distinction between for-profit and non-profit entities when it extended Free Exercise rights in *United States v. Lee*[185] to individuals who own for-profit businesses. In that case, the Amish individual was a farmer and a carpenter—both of which were purely money-making business enterprises.[186] He hired several other people from his Amish community to work in his carpentry shop and on his farm.[187] He believed paying into Social Security on behalf of his employees violated the religious principle of personally providing for neighbors.[188] The Supreme Court held that the Social Security tax was indeed a burden on his religion, but that the governmental interest in maintaining the Social Security program outweighed the individual's belief that it was wrong to pay the taxes associated with his for-profit businesses.[189] So even though the result was a suppression of religious exercise, for-profit entities are in fact capable of religious exercise through their owners.

183. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

184. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring) (stating that "[i]t is . . . conceivable that some for-profit activities could have a religious character"); *Id.* at 349 (O'Conner, J., concurring) (emphasizing that the question of whether for-profit activities can qualify as also being religious is a question that "remains open").

185. United States v. Lee, 455 U.S. 252 (1982).

186. *Id.* at 255.

187. *Id.*

188. *Id.* at 257.

189. *Id.* at 259.

This court-granted right to exercise religion is contingent on whether the corporation can show that it was actually exercising religion, and it would still be tempered by the government's opportunity to show that its interests outweigh the individual's belief. In the case at hand, Hobby Lobby stood to lose much more than the plaintiff in *Lee*,[190] and as will be discussed below, the governmental interests in this case fall short of the burden required to justify restricting Hobby Lobby's religious faith.

B. Why is it Illogical to Assume that the Corporate Form or Profit-making Activities are Bars to Exercising Religion?

The most obvious answer to this question is that some corporations are already considered entities capable of exercising religion. Churches, educational institutions with religious affiliations, and other non-profit organizations do already exercise religion even under their incorporated form. The question, then, is not whether a board of directors can cause an entity to exercise religion—the answer to that question is an unchallenged "yes." The question is: are for-profit corporations of such a different nature that they cannot exercise religion?

The best way to answer this question is to look at the differences between for-profit and non-profit corporations; there are generally three.[191] The first is the declared purpose for which the corporation is formed. The second is that for-profits may do anything, including paying dividends to shareholders, with the profits they make. Third, as a result of the first two differences, non-profit corporations get a break on taxes while for-profit corporations do not. As these three differences are discussed further, it will become evident that they have more to do with taxes and less to do with religion.

First, declaring the purpose for which a corporation is organized and operated is only a tax-related requirement tangentially related to religion. To qualify for non-profit status, one may incorporate for any number of reasons, only one of which is for religious purposes.[192] For example, a corporation qualifies for non-profit status if it incorporates for "literary purposes" or to "foster amateur sports competitions."[193] It stretches reason to say that a non-profit corporation organized for the purpose of fostering amateur sports competitions may exercise religion while a for-profit corporation that also exclusively fosters amateur sports competitions cannot exercise religion. This is just one example that exposes the fiction of a non-profit/for-profit distinction in the realm of Free Exercise.

Second, the decision to pay money back to investors is not necessarily related to the purpose of the organization. There is an assumption that the only way to accomplish religious or charitable activity is through an entity

190. The taxes assessed in *Lee* totaled only $27,000, whereas Hobby Lobby would be forced out of business by the ACA penalties.

191. I.R.C. § 501(c)(3).

192. *Id.*

193. *Id.*

that receives donations instead of investments, but that assumption may deserve some scrutiny. To be fair, the invention of non-profit organizations by Congress was a good one. It provides an incentive for capable, interested, and dedicated citizens to supply worthy services to society so that the government can focus its attentions and resources more freely. It should be recognized, however, that it is not the *only* incentive to do good. There were do-gooders before the non-profit tax-break, and there will be do-gooders if it is repealed. It just might be too exclusive to label all for-profit work uncharitable and unreligious.

Third, the main reason for a corporation to declare any specific and limiting purpose is to qualify for the non-profit tax benefit. But it may be easier to accomplish laudable goals without relying on the tax benefit. One may reasonably conclude that it is preferable not to depend on donations or worry over compliance with other non-profit regulations in the running of a business. It is perfectly reasonable to assume that some, possibly many, for-profit corporations have come into existence to do more than simply make profits. One may start a business for many reasons. For instance, one might want to offer a particular service to society, or to fulfill personal dreams and passions. Why not also to further one's religion?

The decision to make profits under the traditional corporate scheme or to be exempt from taxes may be wholly independent from the decision to operate a corporation on certain religious principles, use profits to do good deeds, or cause the corporation to exercise religion. Drawing a constitutional line between for-profit and non-profit corporations, the definitions of which are based on a tax code that has seen nearly annual changes in the last decade, is at best imprudent and hasty.

C. Why is Fear of Future Litigation Unfounded?

Some detractors have voiced concern that if for-profit corporations are explicitly given the constitutional right of Free Exercise, many corporations will take advantage of that ruling. The fear is that there will be a flood of filings attempting to exempt corporations from any number of onerous financial burdens placed on them by the federal government. The problem with this position is that it is closer to dicta designed to end the conversation rather than an actual concern. The reality is that if corporations are recognized as exercising religion, it has limited applicability and is just as easily monitored as individuals exercising religion.

First, there is a reason that no court has ever had to address whether or not a for-profit corporation can exercise religion until very recently. The reason is because the federal government has never passed legislation so morally divided and so broadly sweeping as the ACA. It is not that lawyers have become more clever in their representation of corporations trying to save a buck here and there. Birth control that can cause abortion is a real issue in the hearts of many who own businesses. Neither the federal government nor the courts are suggesting that this is a ploy to avoid a financial burden. The truth of the claim is evident. No business could seriously

complain that its religion demanded 20-hour workdays. The non-religious nature of that claim is equally evident. There will not be a flood of filings because there are not yet any other similar issues of debatable moral import in regulatory corporate law. This is a novel circumstance with a remedy that has very limited applicability.

The next concern is that even if the applicability is limited, it will be difficult to discern which corporations sincerely hold the belief in question. "Ah, yes," a devious corporation may say, "we believe this too. With all of our corporate heart." But I am skeptical that the task of discerning a corporation's sincerity of belief would be any more difficult than discerning the sincerity of an individual's belief. After all, courts are already required to inquire into the sincerity of an individual's belief. No one has cited the difficulty in discerning individual sincerity as a reason for doing away with individual religious liberty. That argument similarly fails with respect to corporations.

After reviewing the law, it seems evident that the Free Exercise Clause extends its protection to for-profit corporations by way of RFRA. One's worldview, however, will certainly color each argument that has been made thus far. So by way of reinforcing the position that the freedom of religion ought to be protected with earnest vigor, I will briefly delve into a few historical comments. The Supreme Court, in its mission to honor the vision our Founders set forth for us in the Constitution, expressed its robust commitment to fortify religious freedom in America: "The values protected by the religious freedom clauses of the First Amendment 'have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance.'"[194] The question may be fairly asked, why do we value the protection of religious freedom so strongly? The Supreme Court put it this way: "[T]he people of this nation have ordained in the light of history, that . . . these liberties [religious faith and political belief] are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[195] That Court would go on to say that these fundamental liberties are a great roof under which a myriad of beliefs and lifestyles could thrive.[196]

VI. CONCLUSION

This Note has argued for the extension of the right to exercise religion to for-profit corporations under RFRA and Free Exercise Clause. Both the settled law and the underlying principles for protecting the right to exercising religion support extending these rights. Granting for-profit corporations the right to exercise religion does not, as some tend to argue, necessarily infringe on any other rights. Extending these rights is the logical product flowing from the historically fierce protection of the right to the

194. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 402 (3d Cir.) (Jordan, J., dissenting) (quoting Wisconsin v. Yoder, 406 U.S. 205, 214 (1972)).

195. *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)).

196. *Id.*

freedom of religion, including the right to incorporate and continue one's practice of religion. Gender equality does not suffer a defeat at the hands of this Supreme Court opinion. Rather than paint Hobby Lobby as a "Prince John" greedily hoarding its wealth, those who fight for the rights of minorities oppressed by their society should triumph in the reality that one corporation, in the face of a greed-driven and avaricious economy, shines like a city on a hill.

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