

EXAMINING CORPORATE RELIGIOUS BELIEFS IN THE WAKE OF *BURWELL V. HOBBY LOBBY*

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I. INTRODUCTION

What constitutes a sincerely-held religious belief under the Religious Freedom Restoration Act (RFRA)¹ after *Burwell v. Hobby Lobby Stores, Inc.*?² Who or what is capable of asserting such a religious belief? Do the direct impacts of that belief on others matter in determining whether a religious exemption can and should be granted? The recent Hobby Lobby case has drawn so much fascination from both the legal community and the public at large because it strives to answer each of these questions—questions that have been widely contested in the courts for the better part of the past century. This Note addresses three facets of the decision with regard to the questions asked above: first, whether corporations are capable of asserting religious beliefs; second, where the burden of direct or indirect consequences of a granted exemption should be borne; and finally, what constitutes a sincerely-held religious belief with regards to corporate entities.

In *Hobby Lobby*, the majority decision downplayed the issue raised by the United States Department of Health and Human Services (HHS) that “it is difficult as a practical matter to ascertain the sincere ‘beliefs’ of a corporation.”³ Justice Alito argued that there is little probability of a large, publicly traded company like IBM or GE bringing RFRA claims.⁴ This is likely to be true, as it seems improbable that a large, publicly traded

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1 42 U.S.C. §§ 2000bb et seq.

2 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

3 *Id.* at 2774.

4 *Id.*

company with millions of individual owners could assert a singular religious belief, protectable by the RFRA.

However, more than 90 percent of all businesses in the U.S. are not large, publicly traded corporations, but rather, like Hobby Lobby, are closely-held corporations.⁵ *Black's Law Dictionary* defines a "close corporation" as a corporation whose stock is not freely traded and held by only a few shareholders (often within the same family).⁶ While they may seem small and relatively unimportant on paper, closely-held corporations include behemoths like food conglomerate Cargill, Inc. and candy giant Mars, Inc. Cargill has yearly revenues in excess of \$136 billion and employs approximately 140,000 individuals.⁷ Mars takes in \$33 billion in revenue and has about 72,000 employees.⁸ Closely-held corporations, in total, employ approximately half of all American workers.⁹ Should these closely-held corporations be able to assert religious beliefs? Should they be able to assert religious beliefs that allow them to pass the cost of various portions of healthcare to the U.S. government, and by proxy the American taxpayer?

Would a closely-held corporation owned by Christian Scientists be able to refuse employee coverage for vaccines; a closely-held corporation owned by Jehovah's Witnesses be able to refuse coverage for blood transfusions; or a closely-held corporation owned by Scientologists be able to refuse coverage for antidepressants?¹⁰ There is little guidance from the "compelling interest-least restrictive alternative test" the lower courts must apply when making these determinations.¹¹ Without clear instructions from the Court on this issue, lower courts will likely reach a number of inconsistent conclusions on where to draw the line. This Note explores the likely ramifications of *Hobby Lobby* and offers a remedy.

This Note proceeds by first explaining the history of RFRA and the Supreme Court's application of RFRA claims in the past. Second, the Note explores the reasoning behind both the majority's opinion and Justice Ginsburg's dissent in *Hobby Lobby*. The next Section argues that under *Hobby Lobby*, lower courts will reach differing conclusions as to what

5 Stephanie Armour & Rachel Feintzeig, *Hobby Lobby Ruling Raises Questions: What Does 'Closely Held' Mean?*, WALL ST. J., (June 30, 2014, 2:56 PM), <http://www.wsj.com/articles/hobby-lobby-ruling-begs-question-what-does-closely-held-mean-1404154577>.

6 *Corporation*, BLACK'S LAW DICTIONARY (9th ed. 2009).

7 *Id.*

8 *Id.*

9 Ezra Klein, *Hobby Lobby doesn't destroy Obamacare's reproductive health gains*, VOX, (July 3, 2014, 11:50 AM), <http://www.vox.com/2014/7/3/5865697/hobby-lobby-doesnt-destroy-obamacares-reproductive-health-gains>.

10 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2805 (2014).

11 *Id.*

qualifies as a substantial burden of religious exercise under RFRA. Fourth, the Note puts forward a recommendation—that the Supreme Court should revisit the issue presented in *Hobby Lobby* and create a clear, uniformly applied, two-part test for determining whether a closely-held corporation can in fact hold a religious belief. This proposed test focuses on determining the beliefs of the corporation, not the beliefs of its owners.

II. THE EVOLUTION OF RFRA, RLUIPA, AND APPLICATION OF THE CLAIMS PRE-*HOBBY LOBBY*

Consider the following hypotheticals: you are a Christian landlord with a strong religious conviction that you are violating God’s will by renting your property to an unmarried or same-sex couple,¹² however, state law bars housing discrimination on the basis of marital status or sexual orientation; or, you feel a religious obligation to assist a loved one in committing suicide, even though doing so would be a clear violation of a state law that criminalizes assisted suicide.¹³ In both of these cases, should you be exempted from the laws as they violate your religious beliefs? Or should the law apply the same to you as it does to others? These questions lie at the heart of the RFRA debate—whether the government can pass and enforce laws that burden an individual’s exercise of religion.

As can be imagined, the government is rarely enthusiastic when religious claims are brought against state or federal laws.¹⁴ At their best, they present an annoyance to the government—forcing it to create exemptions and loopholes through which those with religious beliefs can escape, and emerge unaffected. At their worst, these religious claims can jeopardize federal laws or governmental reform past the point of no return. In the case of *Hobby Lobby*, there was little chance that the decision would have an unraveling effect on the Affordable Care Act, but rather it would force the government to create a potentially large number of exemptions to female reproductive health-care coverage. In order to understand the legal foundation on which *Hobby Lobby* was decided, it is imperative to understand the judicial and legislative history behind the RFRA. Accordingly, we first look to the origins of RFRA and how it came into existence.

¹² Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1467 (1999).

¹³ *Id.* at 1528.

¹⁴ Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 249 (1995).

RFRA was passed into law by Congress after a widely unpopular Supreme Court case, *Employment Division v. Smith*.¹⁵ *Smith* involved two Native Americans who were fired, and subsequently denied unemployment benefits, for their use of peyote, despite the fact that they took the drug as part of a religious ritual.¹⁶ The Court ruled that laws which were not targeted at a specific religion or individual religious practices could incidentally burden religious practices, and moreover, that the Government need not provide special justifications for such laws.¹⁷ As a repudiation of this decision, Congress passed the RFRA; its purpose was to set forth that “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person . . . is the least restrictive means of furthering [a] compelling government interest.”¹⁸

A. *SHERBERT V. VERNER*

To unpack and apply RFRA’s terms, such as “substantially burden,” “least restrictive means,” and “compelling government interest,” courts look back to the pre-*Smith* Supreme Court cases which provided the Act’s foundation, notably *Sherbert v. Verner* and *Wisconsin v. Yoder*.¹⁹

The RFRA test, as passed, was mostly taken from the Supreme Court’s decision in *Sherbert*.²⁰ Mrs. Sherbert was fired from her job as a textile-mill operator after her employer moved from a five-day workweek to a six-day workweek.²¹ As a Seventh-day Adventist, Mrs. Sherbert refused to work on Saturdays²² because it conflicted with her religious beliefs, and subsequently lost her unemployment benefits because the Government determined she had failed to accept work without good cause.²³ In its decision, the Court created the Sherbert Test:

15 Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *The New Law of Religion: Hobby Lobby rewrites religious-freedom law in ways that ignore everything that came before.*, SLATE.COM, (July 3, 2014, 11:54 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html.

16 *Emp’t Div. v. Smith*, 494 U.S. 872, 874 (1990).

17 Schwartzman et al., *supra* note 15.

18 Eugene Volokh, *1A. What Is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013, 7:43 AM), <http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act/>.

19 Volokh, *supra* note 18. *See also* *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

20 Micah J. Schwartzman, *What Did RFRA Restore? Responding to Hobby Lobby: The Ruling and Its Implications for Religious Freedom*, GEORGETOWN UNIVERSITY, (Sept. 11, 2014), <http://berkleycenter.georgetown.edu/cornerstone/hobby-lobby-the-ruling-and-its-implications-for-religious-freedom/responses/what-did-rfra-restore>.

21 *Sherbert*, 374 U.S. at 399.

22 Seventh Day Adventists practice sabbatarianism, which requires, among other things, that adherents refrain from working on Saturday as it is a holy day. *See Sabbatarianism*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/Sabbatarianism> (last visited Oct. 10, 2015).

23 *Sherbert*, 374 U.S. at 401.

[W]hich asked first whether the state policy at issue imposed a substantial burden on the claimant's right to free exercise of religion and, second, if there is a burden, whether the infringement is justified by a compelling state interest and is narrowly tailored or the least restrictive means to achieve this interest.²⁴

In applying this test, the Court first determined that there was a substantial burden on Mrs. Sherbert's religion since she was in effect required to forego her religious beliefs in order to qualify for unemployment benefits.²⁵ With the first condition being met, the Court then looked to see whether there was a compelling state interest and if it was the least restrictive means to achieve the interest. The State put forward the argument²⁶ that it had a compelling interest in reducing the filing of fraudulent claims asserting religious objections.²⁷ The Court decided that deterring spurious claims could be a compelling state interest, but there was insufficient evidence to support this claim.²⁸ Moreover, and more importantly, the Court determined the burden would be on the State to prove complete denial of benefits was the least restrictive form of regulation.²⁹ Since the State could show neither that there was a compelling interest, nor that the denial of benefits to Mrs. Sherbert was the least restrictive form of regulation they could impose, the Court determined that the state law did not survive the least restrictive test.³⁰

B. *WISCONSIN V. YODER*

Wisconsin v. Yoder provides another look at how the Supreme Court addressed Free Exercise questions prior to RFRA. *Yoder* relied on and arguably expanded the scope of the Free Exercise Clause.³¹ Together with *Sherbert*, it provided what is referred to as the Sherbert/Yoder Test.³²

In *Yoder*, Amish parents objected to a Wisconsin law that mandated compulsory education for children residing in the state, either at a public or

²⁴ *Sherbert v. Verner*, BERKLEY CENTER, <http://berkleycenter.georgetown.edu/cases/sherbert-v-verner> (last visited Oct. 10, 2015).

²⁵ *Sherbert*, 374 U.S. at 404.

²⁶ Although this argument was made at the Supreme Court level, it was never actually made in the South Carolina Supreme Court. Accordingly the court did not give significant weight to this argument.

²⁷ *Sherbert*, 374 U.S. at 407.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *See generally id.*

³¹ Kenneth Marin, *Employment Division v. Smith: The Supreme Court Alters the State of the Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1443 (1991).

³² Eugene Volokh, *First Amendment*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/First-Amendment#ref1089375>, (last visited Oct. 10, 2015).

private institution until the age of sixteen.³³ The parents declined to continue to send their children (ages fourteen and fifteen) to school after they completed the eighth grade.³⁴ The parents argued that high school attendance went against their Amish religion and culture, and that forced attendance would endanger both their salvation and the salvation of their children.³⁵

In applying the first prong of the Sherbert Test, the Court held that the parents had adequately proven that the imposition of mandatory high school level education on the Amish children would interfere directly with their religious beliefs.³⁶ The Court then determined that the parents had provided an adequate alternative to mandatory education as proposed by the State, as the Amish children would instead be involved in informal vocational training within the Amish community.³⁷ While they would not receive the same formal education as their peers, the Amish children would learn trades that had been practiced in the community for generations and would result in them becoming productive members of society.³⁸ The Court concluded that there would be no harm to the children, to the public, or to the welfare of either, and therefore, since no harm would be done, the Amish community could be exempted.³⁹

Yoder arguably added a new element to the Sherbert Test—that the belief asserted by the individuals must be sincerely held. While it appears in the dicta of the decision, the Court stresses numerous times that the Amish belief is sincere, and that it had been proven that their religious lifestyle had a longstanding tradition of vocational training within the community itself.⁴⁰ In their analysis of Free Exercise claims post-RFRA, courts have seemed to acknowledge RFRA's Sherbert/*Yoder* Test foundation and maintain that “the beliefs need not be longstanding, central to the claimant’s religious beliefs, internally consistent, consistent with any written scripture, or reasonable from the judge’s perspective. They need only be sincere.”⁴¹ As can be seen in the case of the Amish in *Yoder*, if a religious belief is longstanding and reasonable, it helps the person’s RFRA

33 *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

34 *Id.*

35 *Id.* at 209.

36 *Id.* at 213.

37 *Id.* at 235.

38 *Id.* (the Court stressed several times throughout the course of the opinion that lack of a formal education would not be excessively detrimental to the children because the Amish community had proven itself to be self-sufficient and made up of productive members of society).

39 *Id.* at 230.

40 *See Id.*

41 Volokh, *supra* note 18.

claim; however, it is in no way a requirement for bringing a successful RFRA claim.

C. THEORIES REGARDING CONGRESS'S INTENDED EFFECTS FOR RFRA

At the time of its enactment, RFRA was largely understood to codify the pre-*Smith* Sherbert/Yoder Test.⁴² Likely Congressional intent is apparent in the title of the act itself—the Religious Freedom “*Restoration*” Act. However, as time has passed, there have been an increasing number of RFRA decisions and an increasing number of questions as to how exactly Congress intended the courts to interpret RFRA. Since the enactment of RFRA, there have been a number of disparate theories posited as to the intended effect of RFRA. The first interpretation presented by legal scholars posits that RFRA restored the Court’s jurisprudence prior to *Smith*, which held that neutral and generally applicable laws are not subjected to strict scrutiny when they impose substantial burdens on religions.⁴³ The second interpretation holds that “RFRA restores only those pre-*Smith* cases in which the Court had applied the standard set forth in *Sherbert* and *Yoder*.”⁴⁴ Under this view, courts can ignore Supreme Court cases where the Court never applied strict scrutiny, but they must consider constitutional decisions where the Court applied the same standard as relevant.⁴⁵ The third interpretation simply holds that under RFRA, *Sherbert* and *Yoder* are persuasive authorities that a court should rely on its application of strict scrutiny under RFRA.⁴⁶

There is one final theory as to the intended effect of RFRA that contrasts sharply from the three theories presented above. It has been coined the “radical theory,” as it indicates a radical break from prior Free Exercise decisions under the First Amendment.⁴⁷ Under this theory, “the application of strict scrutiny under RFRA is entirely unencumbered by any prior free exercise decisions under the First Amendment,”⁴⁸ except for *Sherbert* and *Yoder*. Put another way, “[t]he late pre-*Smith* ‘compelling interest’ cases—cases that frequently contradicted one or more of these principles—are simply no longer good law. So far as RFRA is concerned, it

42 Schwartzman, *supra* note 20.

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

is as if *Lee*,⁴⁹ *Goldman*,⁵⁰ *Roy*,⁵¹ and *Hernandez*⁵² were never decided. The slate has been wiped clean (except, of course, for *Sherbert* and *Yoder*).⁵³

There is good reason to believe that the radical theory is in fact, the best way to understand Congressional intent in passing RFRA. Perhaps one of the best arguments that Congress meant to break from prior Free Exercise decisions under the First Amendment is the fact that the RFRA added the “least restrictive means” test.⁵⁴ Prior to the passing of the RFRA, the *Sherbert/Yoder* Test required that the Government, in applying a neutral, generally applicable law, prove a compelling interest and that the law itself was narrowly tailored.⁵⁵ However, under the RFRA, the test is whether the Government can prove a compelling interest and whether the law is the *least restrictive means* of achieving that interest.⁵⁶ While “narrowly tailored” arguably just means that the law is, on a spectrum of burdens, on the minimal side, the “least restrictive means” wording requires that the Government show that there is no plausible way that the law could be passed with any less of a burden on the person.

Herein lies a concern largely at the heart of the reasoning in both Justice Alito’s majority decision in *Hobby Lobby* and Justice Ruth Bader Ginsburg’s dissent—the meaning of Congress when it passed RFRA into law. Justice Alito interestingly used the Religious Land Use and Institutionalized Persons Act (RLUIPA)⁵⁷ in interpreting the scope of the RFRA and Congressional intent.⁵⁸ As the title suggests, RLUIPA was passed in the context of land use cases and the religious rights of prisoners in federal penitentiaries. At first look, it seems unusual that RLUIPA plays a role in determining the meaning of RFRA and its application, as it seems to involve very different matters than the ones at stake in *Hobby Lobby*. The following Section addresses the role of both RFRA and RLUIPA in *Hobby Lobby* and the impact both statutes had on the ruling.

49 United States v. Lee, 455 U.S. 282 (1982).

50 Goldman v. Weinberger, 475 U.S. 503 (1986).

51 Bowen v. Roy, 476 U.S. 693 (1986).

52 Hernandez v. Comm’r, 490 U.S. 680 (1989).

53 Paulsen, *supra* note 14, at 284.

54 Marci A. Hamilton, *How a RFRA Differs from the First Amendment*, RFRAPERILS, <http://rfraperils.com/how-a-rfra-differs-from-the-first-amendment/>.

55 *Id.*

56 *Id.*

57 42 U.S.C. §§ 2000cc et seq.

58 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2761-62 (2014).

III. THE APPLICATION OF RFRA AND RLUIPA IN THE MAJORITY OPINION AND THE DISSENT

As noted above, *Hobby Lobby* was not decided on First Amendment grounds, but on RFRA. Interpretation of RFRA by both the majority and the dissent largely determines the outcome of the case. If Hobby Lobby Stores, Inc., a closely-held corporation, cannot assert a RFRA claim to begin with, their religious exemption claim fails outright. Subsection A summarizes and analyzes Justice Alito’s majority position on RFRA’s applicability, while Subsection B examines Justice Ginsburg’s view on the applicability of RFRA to corporations.

A. RFRA AS A BREAK FROM FIRST AMENDMENT JURISPRUDENCE: THE MAJORITY VIEW

The first analysis that must be undertaken is to determine whether Hobby Lobby can assert a RFRA claim. The RFRA prohibits:

“Government [from] substantially burden[ing] *a person’s* exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application of the burden to *the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”⁵⁹

1. *Person*

The Court first addressed whether under the RFRA, a corporation like Hobby Lobby was considered to be a person.⁶⁰ To determine the definition of person, the Court followed the Dictionary Act, which provides a set of definitions for potentially ambiguous terms.⁶¹ Unless the statute in question indicates a contrary intention for the meaning of a word, the Dictionary Act controls.⁶²

Under the Dictionary Act, the word “person” includes, among other things, corporations, companies, associations, and partnerships.⁶³ Since there was nothing in the text of the RFRA that suggested Congress meant to adopt a different meaning, the Court construed Hobby Lobby as a person under the RFRA.⁶⁴

59 *Id.* at 2767 (quoting 42 U.S.C. §§ 2000bb-1(a), (b)).

60 *Id.* at 2768-69.

61 1 U.S.C. §1.

62 *Id.*

63 *Id.*

64 *Burwell*, 134 S.Ct. at 2768.

2. *Exercise of Religion*

The Court next examined whether a corporation could exercise religion.⁶⁵ Justice Alito stressed the similarities between corporations and other non-corporeal entities like religious non-profits and sole-proprietorships. Since non-profits and sole-proprietorships had been granted exceptions under RFRA, it logically followed that closely-held corporations should also be granted the same protections.⁶⁶

The point of contention between the majority and the dissent was that while corporations may be people,⁶⁷ the formation and operation of corporations is driven by profit. The majority opinion harmonized non-profit corporations and for-profit corporations by showing that disparate corporate forms can be adopted to achieve the same general purpose, and by pointing to the adoption of hybrid corporate forms that are being formally recognized by the states.⁶⁸ For example, a group of environmentalists may choose to form a for-profit corporation rather than a non-profit because of lower incorporation costs, or their desire to lobby for specific legislation.⁶⁹

The Court then discussed Congressional intention in passing the RFRA and RLUIPA. The Department of Health and Human Services (HHS) argued that Congress enacted RFRA in order to “codify pre-*Smith* law” (the theory described above in Section II(C)).⁷⁰ Accordingly, HHS argued that since RFRA was a Congressional reaction to the Supreme Court’s decision in *Smith*, Congress merely intended to revert the law back to how it existed the day before *Smith*.⁷¹ And since there had been no pre-*Smith* cases that involved religious exemptions being granted to corporations, there should now be no exemptions provided under RFRA.⁷²

Interestingly, the majority opinion brought RLUIPA, a statute that deals primarily with land use for religious exercise, into the fold.⁷³ Justice Alito used RLUIPA as a statutory interpretation tool in order to support the “radical theory” of RFRA (discussed above in Section II(C)). Justice Alito cited to the amendment of RFRA through RLUIPA, in which the statute

65 *Id.* at 2769.

66 *Id.* at 2769-72.

67 Corporations may be people and have many of the same First Amendment rights of individual citizens. *See* *Citizens United v. FEC*, 558 U.S. 310, 343 (2010).

68 *Id.* at 357.

69 *See Id.*

70 Brief for Petitioner at 13, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct 2751 (2014) (No. 13-354).

71 *Id.*

72 *Id.*

73 *See generally* 42 U.S.C. §§ 2000cc et seq.

deleted the prior reference to the First Amendment.⁷⁴ Justice Alito took this to mean that Congress did not intend to restrict the court to its pre-*Smith* era jurisprudence, and instead wiped the slate clean with regards to earlier First Amendment case law.⁷⁵

As RLUIPA received a brief reception in *Hobby Lobby* in comparison to its statutory counterpart, RFRA, there has been little discussion about the possible consequences of the majority's treatment of RLUIPA. While Justice Alito seemed solely to intend to clarify the legislative intent of Congress with regards to RFRA, it has been noted that new types of land use cases could arise under *Hobby Lobby*.⁷⁶ Since RFRA and RLUIPA are "sister statutes" that have been, for the most part (with *Hobby Lobby* being no exception) interpreted together, there are questions as to what the *Hobby Lobby* ruling could mean for religious persons, including corporations, that claim RLUIPA protections in land use cases.⁷⁷

With corporations now able to claim RFRA exemptions, there is an argument to be made that they could claim RLUIPA exemptions as well. What would this look like? . . . "If for-profit corporations may characterize their 'pursuit of profit' as related to their "exercise of religion, then there would be no end to the types of 'religious exercise' for which corporations could seek protection under RLUIPA . . . The result would also be a dramatically increased burden on local planning commissions, boards of appeal, and similar entities tasked with enforcing land use regulations and addressing requests for variance. Allowing for-profit corporations to invoke RLUIPA would likely lead to a sharp increase in cases in which the government must make land use decisions with the possibility of RLUIPA litigation looming in the background."⁷⁸

Whether or not any of this will come to fruition is uncertain and likely improbable; but the stage has been set. All that is required to bring a RFRA or RLUIPA claim for an exemption is an asserted religious belief. Although there may be a small chance of a corporation prevailing on the claim, especially if the corporation's claimed religious belief is widely believed to be insincere, the claims will nonetheless force the Government into lengthy and expensive lawsuits. At its worst, RLUIPA could be used as a

⁷⁴ *Burwell*, 134 S.Ct. at 2751.

⁷⁵ *See id.* at 2751.

⁷⁶ Amicus Brief, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356).

⁷⁷ *Id.* at 8.

⁷⁸ Stephen R. Miller, *Hobby Lobby's "passing strange" interpretation of RLUIPA: an unlikely, but potentially dramatic, impact on land use law?*, LAND USE PROF BLOG 28-29, (July 1, 2014), http://lawprofessors.typepad.com/land_use/2014/07/hobby-lobbys-passing-strange-interpretation-of-rluipa-and-the-cases-unlikely-but-potentially-chillin.html.

negotiation tactic against local municipalities; for example, a developer might demand a conditional use permit or zone change in exchange for not pursuing a RLUIPA suit.

Next, the majority opinion cited to sections of code that provide for-profit corporations with exemptions from certain activities that are highly subject to religious and moral disapproval.⁷⁹ From this point, Justice Alito made the convincing argument that “Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations.”⁸⁰ The majority opinion allowed an escape valve here by implying that if Congress did not intend for-profit corporations to be exempted, Congress could go back and rewrite the law in order to leave no doubt.

Finally, and perhaps most importantly, Justice Alito addressed HHS’s concern regarding the difficulty of ascertaining the beliefs of a corporation.⁸¹ Justice Alito first seemed to underplay that this would ever be an issue for large, publicly traded companies, as it would be difficult to make a claim regarding the religious beliefs of tens of thousands of shareholders.⁸² And rightly so. It seems extremely unlikely that a large, multinational corporation with tens of thousands of owners would be able to assert a sincere, coherent religious belief shared by all owners of the corporation. While the Court never explicitly said that large, publicly-held corporations cannot hold religious beliefs, it seemed to imply that if one of these large corporations were to attempt to assert a religious belief, the claim would not be viewed as legitimate and the corporation would subsequently not be granted exemptions.⁸³

Justice Alito again utilized RLUIPA to strengthen his argument, this time looking to the legislative history and the context in which RLUIPA was passed.⁸⁴ Along with land use protection as discussed above, RLUIPA also pertains specifically to institutionalized persons, referenced by the ‘IP’ in RLUIPA.⁸⁵ Institutionalized persons often assert a variety of religious

79 See 42 U.S.C.A. § 300a-7 (determining that for-profit entities may be exempted from sterilization or abortion procedures that run contrary to either religious beliefs or moral convictions).

80 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2774 (2014).

81 *Id.*

82 *See Id.*

83 *See Id.*

84 *Id.*

85 42 U.S.C. §§ 2000cc et seq.

claims. Often times they are deemed to be sincere;⁸⁶ other times they are not.⁸⁷

In determining whether courts would be able to weed out sincere claims from insincere claims, Justice Alito looked to the history of RLUIPA, which passed despite widespread acknowledgement that many times a prisoner's purported religious beliefs were in fact nothing but a sham to gain preferential treatment.⁸⁸ Since Congress, in passing RLUIPA, believed that the courts would be able to weed out the sincere claims from the insincere claims, the majority opinion reasoned that courts would similarly be able to weed out insincere RFRA claims made by for-profit corporations.⁸⁹

Based on each of the arguments presented above, the Court determined that a for-profit corporation, considered to be a person under RFRA and the Dictionary Act, would be able to exercise religion. After determining that for-profit corporations are considered persons, and that said persons are capable of exercising religion, the Court moved on to the test imposed on the Government: whether the law substantially burdens the person.

3. *Substantial Burden*

The majority quickly dispatched of the substantial burden issue by showing that Hobby Lobby Stores would be subjected to up to \$475 million in fines per year if the corporation failed to comply with the healthcare mandate.⁹⁰ The Court determined that by forcing Hobby Lobby to either pay a \$475 million fine annually, or provide for a service which goes against the religious beliefs of its owners, the Government had put a substantial burden on the religious beliefs of Hobby Lobby.⁹¹ After finding that the ACA mandate substantially burdened Hobby Lobby's owners, the inquiry then shifted to the Government to prove that the burden (1) was in furtherance of a compelling governmental interest, and (2) was the least restrictive means of furthering that compelling governmental interest.⁹²

⁸⁶ *Holt v. Hobbs*, 135 S. Ct. 853, 857 (2015) (upholding a prisoner's right to maintain a beard in a fashion that goes against prison laws, since his religious beliefs as a Muslim require him to maintain a beard that is at least 1/2 inches).

⁸⁷ *Green v. White*, 525 F. Supp. 81, 83-84 (E.D. Mo. 1981) ("[I]t does not necessarily follow that . . . defendant denied the plaintiff the ability to exercise his religion in violation of the Constitution by denying him conjugal visits, banquets, or the ability to distribute his newspaper. In light of plaintiff's reputation and his actions a responsible person would very well conclude his religion was no more than a sham."), *aff'd*, 693 F.2d 45 (8th Cir. 1982); *See also* Ben Adams & Cynthia Barmone, *Questioning Sincerity: The Role of Courts After Hobby Lobby*, 67 *STAN. L. REV. ONLINE* 59, 61-62 n.25 (2014).

⁸⁸ *Burwell*, 134 S.Ct. at 2774.

⁸⁹ *Id.*

⁹⁰ *Id.* at 2779.

⁹¹ *Id.* at 2775-76.

⁹² *Id.* at 2767.

4. *Compelling Government Interest*

After brief explanation, the Court decided that providing women with cost-free access to the four FDA approved contraceptives at issue was a compelling government interest.⁹³ While the opinion chooses not to explore the answer directly, it assumes that it is a compelling government interest,⁹⁴ in turn moving the analysis to whether the law is the least restrictive means of furthering the compelling government interest.

5. *Least Restrictive Means*

The final inquiry depended on whether the law, as applied, was the least restrictive means to achieve the compelling government interest.⁹⁵ If the ACA mandate was held to be the least restrictive means to provide women with cost-free access to the four FDA approved contraceptives, then the law would stand; Hobby Lobby would either be required to pay for the contraceptives, pay the fine for failing to comply with the mandate, or stop providing their employees with health insurance, thereby forcing the employees to find their own insurance. If the ACA mandate was not found to be the least restrictive means, then the law would not stand, and Hobby Lobby would be eligible for an exemption.

It is not surprising, given the Court's treatment of for-profit corporations as persons and the conflation between for-profit and non-profit enterprises in the preceding Sections, that Justice Alito determined that the ACA mandate was not the least restrictive means of achieving the compelling government interest. Instead, the Court found that the least restrictive means to provide the contraceptives would be for the Government to assume the cost instead of the employer.⁹⁶

Ultimately, HHS had undermined its own position by providing a workable alternative to non-profits and religious organizations.⁹⁷ Here, we started to see why the Court had spent so much time equating for-profit corporations with various non-profit organizations. Justice Alito cited to the fact that HHS had already provided this workable alternative to other organizations, which he then determined is the least restrictive means to achieve the mandate.⁹⁸

93 *Id.* at 2780.

94 *Id.*

95 42 U.S.C. §§ 2000bb et seq.

96 *Burwell*, 134 S.Ct. at 2780.

97 *Id.*

98 *Id.* at 2780.

One of the dissent's principal concerns was that a contraceptive exemption would adversely affect Hobby Lobby's female employees in seeking these contraceptives.⁹⁹ If the majority had determined that women's reproductive rights would be adversely affected by Hobby Lobby's owners' religious beliefs, it would be almost impossible to prove that the ACA was not the least restrictive means. However, the majority instead assumed that if the ACA was held to apply to Hobby Lobby, the company would cease to provide health insurance for its employees altogether, forcing them to find their own insurance on the government-run exchange.¹⁰⁰ Forcing the employees to find and pay for an entirely new insurance plan through a new insurance provider would be much more burdensome on the women than simply using cost-shifting to place the burden on the Government.¹⁰¹ By providing for-profit corporations with a religious exemption under RFRA, the majority opinion allowed the employees to continue to use the insurance they already had through their employer.¹⁰² Nothing would change, except for the fact that the government would end up paying for the contraceptives in question.¹⁰³

The final portion of Justice Alito's opinion addressed various concerns of the dissent, including whether the Court's decision would lead to a flood of religious objections to other medical procedures as well as more pernicious outcomes, such as whether employers might be able to discriminate against certain races or sexual orientations in hiring.¹⁰⁴ It is important to note that the Court carefully separated this case from First Amendment jurisprudence by clearly stressing that this decision was made solely on statutory grounds through RFRA, and that it was therefore unnecessary to rule on the First Amendment claims otherwise raised.¹⁰⁵ By deciding *Hobby Lobby* free from First Amendment jurisprudence, the Court granted itself freedom from past First Amendment cases and the ability to structure its decision outside the confines of much Free Exercise case law. To separate the decision from First Amendment Free Exercise law, Justice Alito took a counterargument from the dissent that discusses the *Lee* case;¹⁰⁶ Justice Alito stressed that this case did not apply since it was decided on First Amendment grounds, rather than RFRA grounds.

99 *Id.* at 2782-83.

100 *Id.* at 2782.

101 *Id.* at 2782-83.

102 *Id.* at 2782.

103 *Id.* at 2783.

104 *Id.*

105 *Id.*

106 *United States v. Lee*, 455 U.S. 282 (1982).

Justice Alito further limited the holding of *Hobby Lobby* by clarifying what the ruling stands for and that with which it does not concern itself.¹⁰⁷ Justice Alito made it clear that not all religious objections to health insurance mandates would be successful by pointing out that vaccine coverage may be required and that the least restrictive means test may in fact be met depending on the facts of the situation.¹⁰⁸ He also made it clear that attempts at racial discrimination in the workplace would not be protected by the *Hobby Lobby* decision, stating “The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”¹⁰⁹ It is the opinion of the Court that in enacting RFRA, Congress understood the types of religious exemption claims that would be raised by individuals, and implicitly trusted the courts to be able to weed out insincere and unworkable exemptions.¹¹⁰

B. RFRA AS A RETURN TO FIRST AMENDMENT JURISPRUDENCE: THE MINORITY VIEW

The fundamental difference between the majority and minority opinions hinged unsurprisingly on the intended effect of RFRA.¹¹¹ The case was not decided on First Amendment grounds due to numerous challenges. For example, it would be difficult to justify given that the Free Exercise Clause requires the exempted activity “must not significantly impinge on the interests of third parties.”¹¹²

As described above, there are a number of competing views regarding Congressional intent in passing RFRA.¹¹³ In her dissenting opinion, Justice Ginsburg looked to the legislative history to support her position that RFRA was simply meant to return to the Sherbert/Yoder test as had been applied pre-*Smith*.¹¹⁴ Justice Ginsburg questioned the majority’s application of RLUIPA in determining that Congress meant to expand the applicability of RFRA.¹¹⁵ RLUIPA amended RFRA’s definition of the term “exercise of

107 *Burwell*, 134 S.Ct. at 2783.

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.* at 2751.

112 *Id.* at 2790-91; *See also* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions From the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 362 (2014) (arguing that the RFRA challenge to the contraceptive mandate of the ACA likely violates the Establishment Clause).

113 *See* Paulsen, *supra* note 14.

114 *Burwell*, 134 S.Ct. at 2751.

115 *Id.* at 2791-92.

religion” by broadening it to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”¹¹⁶ In the majority view, Congress changed the definition of “exercise of religion” in RLUIPA to separate RFRA from First Amendment case law and subsequently alter the landscape of religious accommodation claims.¹¹⁷ In Justice Ginsburg’s interpretation, RLUIPA was neither supposed to make any changes to RFRA’s connection with prior First Amendment jurisprudence, nor broaden the categories of who can assert RFRA claims.¹¹⁸ Rather, the goal of Congress in passing RLUIPA was simply to allow courts to continue to protect individuals whose religious beliefs were not widely shared and to prevent the courts from questioning the centrality of the at question practice to the asserted religion.¹¹⁹

The belief that RFRA intended to codify the Court’s pre-*Smith* jurisprudence drives Justice Ginsburg’s analysis throughout the application of RFRA to Hobby Lobby’s challenge of the ACA mandate.¹²⁰ As discussed ante, while Justice Alito believes in the “radical theory” of RFRA, Justice Ginsburg believes in the first theory—simply that Congress’ intent was to turn back the clock to the Court’s jurisprudence prior to *Smith* and to codify the Sherbert/Yoder test as previously applied.

1. Person

Under the assumptions that Congress did not intend to alter the Court’s pre-*Smith* jurisprudence, and that RLUIPA was enacted to address a completely different set of issues with no bearing on who is entitled to bring RFRA claims, Justice Ginsburg argued that there was no prior case law to support the contention that corporations are considered to be people under RFRA.¹²¹ In determining what constitutes a person within the meaning of the statute, Justice Ginsburg argued that the Dictionary Act did not apply, as its definition is only to be used when context does not indicate otherwise, and here context does indicate otherwise.¹²²

Justice Ginsburg conceded that, traditionally, non-profits and other religious organizations have been considered to be persons under the meaning of RFRA in order to receive exemptions from laws of general applicability when those laws conflict with the tenets and beliefs of the

116 *Id.*

117 *Id.* at 2761-62, 2791-92.

118 *Id.* at 2792.

119 *Id.*

120 *See Id.* at 2751.

121 *Id.* at 2793-94.

122 *Id.*

entity.¹²³ However, she distinguished the two entities types by noting that for-profit corporations and religious organizations have vastly different interests, and are often treated differently.¹²⁴ A for-profit corporation's goal is simply to make money and return a profit for its owners or investors. However, a religious organization is usually created around the beliefs that drive the religion, and works to advance a particular goal within the teachings or principles of that religion.

Moreover, it can be assumed that the members who make up a religious organization joined that organization because they share the same beliefs.¹²⁵ Yet, in a for-profit corporation, depending on its size, there will be a number of employees who do not subscribe to the religious beliefs of the owners.¹²⁶ It is illegal for a for-profit corporation to attempt to restrict others who hold different beliefs from working for them.¹²⁷ In light of these fundamental differences in the scope of the entity and the disparate treatment they receive in other areas of the law, the minority opinion concluded that corporations should not be considered persons under the meaning of RFRA.¹²⁸

2. *Substantial Burden*

While the majority opinion summarily concluded that the ACA mandate substantially burdened the owners of Hobby Lobby, the minority opinion gave the issue more discussion.¹²⁹ Justice Ginsburg did not question the sincerity of the Hobby Lobby owners' belief that abortion is wrong or their belief that the forms of contraception in question constituted abortion.¹³⁰ Rather, the minority's argument was that the relationship between paying for health insurance for employees, which merely provides coverage for the forms of contraception in question, may not legally be enough to establish that the owners' beliefs are substantially burdened.¹³¹ For example, even if Hobby Lobby paid for the insurance, it was not the

123 *Id.* at 2794.

124 *Id.* at 2795.

125 *Id.*

126 For example, Hobby Lobby stores currently employs over 22,000 individuals. *See America's Largest Private Companies*, FORBES.COM, <http://www.forbes.com/companies/hobby-lobby-stores/>. While it is likely that a large number of these employees chose to work at Hobby Lobby because they shared in the religious beliefs of the owners of the company, there are certainly a large number who do not share in those beliefs. Further, even if the employees are Christians, as the Hobby Lobby owners are, they may have vastly different views on what constitutes an abortion and whether abortion is a sin in their God's eyes.

127 *See* Equal Emp't Opportunity Comm'n, *Religious Discrimination*, <http://www.eeoc.gov/laws/types/religion.cfm>.

128 *Burwell*, 134 S.Ct. at 2797.

129 *See Id.*

130 *Id.* at 2798.

131 *Id.*

one prescribing the contraceptives or providing them to its employees. Further, it would have no knowledge of which of its employees, if any, were using the contraceptives in question.

Justice Ginsburg continued to rely on the legislative history surrounding RFRA in arguing that the ACA mandate did not substantially burden the owners' exercise of religion.¹³² She pointed to the record, where the original draft of RFRA simply provided that a "burden" on the exercise of religion was sufficient to trigger a RFRA claim. After debate, "burden" was changed to "substantial burden," signifying that Congress intended there to be a clear connection between the challenged law and the burden on the free exercise of the individual's religion.¹³³

3. *Compelling Government Interest*

The minority opinion was clearly in agreement with the majority opinion on this point—that the provision of certain contraceptives for women constitutes a compelling government interest.¹³⁴ Justice Ginsburg, however, made sure to emphasize how compelling the government interest is by showing the effect that the lack of provision of these contraceptives would have on women.¹³⁵ Pregnancy can be hazardous to many women's health, and even life threatening.¹³⁶ For these women, access to the in-question contraceptives could be a matter of life and death.¹³⁷ And if these women were required to pay for the contraceptives themselves, many may not be able to.¹³⁸ An intrauterine device ("IUD"), for example is more effective than other forms of birth control, but correspondingly costs much more.¹³⁹ To afford an IUD, a woman making the minimum wage would have to work for one full month.¹⁴⁰

4. *Least Restrictive Means*

Having argued her position for each of the prior components of a RFRA claim, Justice Ginsburg turned to the question of whether the ACA mandate was the "least restrictive means" of meeting the compelling government interest.¹⁴¹ As this was arguably the strongest point in the

132 *Id.* at 2799.

133 *Id.* at 2797–98.

134 *See Id.* at 2801.

135 *Id.* at 2800.

136 *Id.* at 2799.

137 *Id.*

138 *See Id.* at 2800.

139 *Id.*

140 *Id.*

141 *Id.* at 2801.

majority opinion, the minority opinion faced an uphill battle in arguing that the ACA mandate was the least restrictive means.

Justice Ginsburg argued that having the Government pay the bill instead of the corporation was not a feasible alternative for three main reasons. First, she argued that the ACA is not equipped to handle these kinds of administrative obstacles.¹⁴² She pointed to the fact that the ACA provides for the individual corporations to maintain their current system of health insurance to minimize logistical issues.¹⁴³ Second, she argued that the fund that would pay for the contraceptives that Hobby Lobby would not provide is not sufficiently funded and is “not designed to absorb the unmet needs of . . . insured individuals.”¹⁴⁴ Finally, Justice Ginsburg asked, “where is the stopping point to the ‘let the government pay’ alternative?”¹⁴⁵ What would happen if an employer’s religious beliefs require them to pay the minimum wage¹⁴⁶ or pay equal wages for equal work?^{147,148}

Justice Ginsburg’s third argument is a variation of the most important objection that the minority opinion raised about the *Hobby Lobby* decision: what is the scope of the decision? The majority opinion took great care in attempting to limit the scope of the decision. They explicitly outlined things to which the opinion does not apply.¹⁴⁹ However, when looking at the substance of the decision, it is hard to imagine this case not being interpreted as one which “align(s) for-profit enterprises with nonprofit religion-based organizations.”¹⁵⁰ It remains to be seen where the line will be drawn, even within the ACA mandate, let alone cases where corporations bring RFRA claims against other laws with which they do not agree. Within the framework of the ACA mandate, consider:

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah’s Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations

142 *Id.* at 2802.

143 *Id.*

144 *Id.* (quoting Brief for National Health Law Program et al. as *Amici Curiae* at 23, 24).

145 *Id.*

146 *See* *Tonv & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290 (1985).

147 *See* *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990).

148 *Burwell*, 134 S.Ct. at 2802.

149 *Id.* at 2783 (“[O]ur decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer’s religious beliefs. . . . The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. . . . Our decision today provides no such shield.”).

150 *Id.* at 2803.

(Christian Scientists, among others)? According to counsel for Hobby Lobby, “each one of these cases . . . would have to be evaluated on its own . . . apply[ing] the compelling interest-least restrictive alternative test.” Tr. of Oral Arg. 6. Not much help there for the lower courts bound by today’s decision.¹⁵¹

Regardless of whether the majority or minority decision was the correct one, the majority opinion has set the stage for corporations to bring lawsuits under RFRA. As corporations begin to assert RFRA claims against the Government, considerable new law will be made, for better or worse. The Court appeared confident that the lower courts will not have trouble interpreting the legal reasoning behind the *Hobby Lobby* decision. The Court also had great faith that the courts will be able to apply RFRA claims as asserted by corporations much as the courts have applied RFRA and RLUIPA claims by individuals in past decisions.

Whether or not this will be the case is yet to be seen. But, as Justice Ginsburg closed her dissent, by allowing a new class of persons (corporations) to assert RFRA claims, the courts have opened themselves up to interpreting an entirely new class of RFRA claims. Lower courts will likely be forced to evaluate the merits of competing religious claims, choosing to grant accommodations to some, while denying accommodations for others. By extending RFRA protections to corporations, courts now have to go through the RFRA process on a larger scale, while also deciding whether the owners’ beliefs as attributed to the corporation are subject to exemptions.

IV. THE LIKELY EFFECTS OF *HOBBY LOBBY*: THE IMMINENT STRUGGLE IN LOWER COURTS TO DETERMINE THE COMPELLING INTEREST/LEAST RESTRICTIVE ALTERNATIVE TEST

As the dust settles from the *Hobby Lobby* decision, we are left with little indication about the future of corporations asserting RFRA claims. While this Note argues that there will be relatively few claims arising from corporations asserting religious exemptions based on RFRA, there are likely to be a handful. Although there may only be a small number of cases arising, each one will have widespread effects. Consider the closely-held corporations mentioned at the beginning of this Note—each of those companies employs tens of thousands of workers. If a corporation of this size asserted a similar RFRA claim against the contraceptive mandate of

151 *Id.* at 2805.

the ACA, the ramifications would be notable. Perhaps the Government will be able to pay the bill for Hobby Lobby, with its roughly 18,000 employees, but what if another 100,000 or 1,000,000 are added to that number?

Perhaps the most complicated aspect in the post-*Hobby Lobby* world is determining the meaning of RFRA. The majority opinion signals a clear split from prior First Amendment jurisprudence.¹⁵² It was often assumed by many in academia and in the courts that Congressional intent in drafting RFRA was to turn back the clock to before *Employment Division v. Smith*, to restore the Sherbert/Yoder test and the successive line of case law that relied upon it.¹⁵³

By choosing to view RFRA outside of the context of past Free Exercise cases, and interpret RFRA solely through the wording of the legislation itself, the Court created a large amount of uncertainty for lower courts in interpreting RFRA. After *Hobby Lobby*, lower courts now know that closely-held corporations can assert RFRA claims.¹⁵⁴ The Court was quite explicit in providing that closely-held corporations can assert RFRA claims.¹⁵⁵ But in the wake of *Hobby Lobby*, many sources claimed that the Court decided that RFRA can *only* apply to closely-held corporations. Unfortunately, this is untrue. While the Court limited the scope of the decision to closely-held corporations, it did not foreclose the possibility that a large, publicly-traded corporation could assert a RFRA claim. It simply stated:

These cases, however, do not involve publicly traded corporations, and *it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims.* HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable. In any event, *we have no occasion in these cases to consider RFRA's applicability to such companies.*¹⁵⁶

As can be seen, the possibility of a GE or IBM asserting a RFRA claim is not closed off by the Court. Further, is there a limit to what kinds of closely-held corporations can assert RFRA claims? Does the corporation have to be completely owned by one individual or family that holds sincere

152 *Id.* at 2791–92.

153 Paulsen, *supra* note 14, at 284–86.

154 *Burwell*, 134 S.Ct. at 2768.

155 *Id.*

156 *Id.* at 2774 (emphasis added).

religious beliefs? What if the corporation is owned by thirty shareholders who are each equal shareholders in the business and sixteen of those thirty want to assert a RFRA claim while the other fourteen do not? Can the business assert such a claim?

Moreover, how strict is the “least restrictive means” test? The majority opinion holds that it is exceptionally demanding,¹⁵⁷ but just how demanding? In the arena of healthcare issues provided by the ACA alone, there are endless variations to this question. As Justice Ginsburg addressed, will other medical procedures that are disallowed by certain religions be granted the same protections? With such little guidance from the Court on these matters, it seems each challenge will be decided on a case by case basis. Unfortunately, the test, as it currently exists, leaves the courts much leeway in its interpretation. Lower courts and Circuits are likely to split on the issues.

Under the current *Hobby Lobby* framework, there are two main questions that need to be addressed when determining the validity of a RFRA claim. First, when can a corporation assert a RFRA claim? Second, how do you both balance and interpret the compelling interest/least restrictive means test?

V. A PROPOSED TEST: A NEW STANDARD FOR CORPORATIONS BRINGING RFRA CLAIMS

Under the current *Hobby Lobby* framework, the beliefs of the individuals who own the corporation are the deciding factor in determining whether the corporation can bring a RFRA claim.¹⁵⁸ In the case of *Hobby Lobby*, the inquiry was relatively simple, as the owners were united in their beliefs and there was little to no question of their sincerity.¹⁵⁹ However, it stands to reason that the determination will not always be so clear cut. Consider the case when a corporation’s ownership is divided on issues of religion and religious beliefs. Can a RFRA claim be brought regardless? As the majority decision noted, when there is division between the owners of the corporation, the courts could look to underlying state corporate law and structure of the bylaws in order to determine a resolution.¹⁶⁰ Yet, this seems to undermine the very purpose of the RFRA statute in the first place.

157 *Id.* at 2780.

158 *Id.* at 2759.

159 *Id.*

160 *Id.* at 2774–75.

By treating a corporation as a person under the statute, the Court is implicitly implying that its underlying components act in unison—that they speak with a collective voice. The purpose of RFRA was “to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”¹⁶¹ Since corporations are now defined as persons, and persons are still defined as persons, it follows that some persons (individuals) who choose to organize a for-profit business in the corporate form may have their rights substantially burdened by the government when the other persons (individuals) they chose to form a corporation (corporation, also person) with, have different religious beliefs. The minority persons (individuals) within the corporation are thus foreclosed from being able to assert that their religious exercise is burdened by the government; they are left without recourse, other than to sell their interest in the business or to go along with activity which they deem to be morally reprehensible.

This is the problem the Court was faced with in *Hobby Lobby*. Either the owners would have to pay large fines or cease providing health insurance for their employees. Further, the Court determined in the meaning of RFRA that individuals who owned a for-profit corporation did not give up their religious rights. Accordingly, it seems that individuals who own a for-profit corporation, but are in a minority position, should also be afforded religious-based protections as well.

Instead of using this approach, it would be better for the court to look at the corporation as an actual person. Currently, the Court’s view is that a corporation is a person in that it is a collection of its owners’ beliefs and actions. But this raises a multitude of problems, just one of which is discussed above. Rather than trying to parse out the similarities and differences between the individuals who own the corporation and the corporation itself, the analysis should be driven solely by the corporation.

For example, in the case of a corporation bringing a RFRA claim, the corporation should only be allowed to bring such a claim if it is clear that the “beliefs” of the corporation, not the beliefs of the owners, are substantially burdened. But how can beliefs be ascribed to corporations? Well first off, how does the Court determine the validity of beliefs? The Court routinely talks about sincerity in its analysis. Both *Wisconsin v. Yoder* and *Burwell v. Hobby Lobby* talked at length about the sincerity of the petitioners’ beliefs. And that sincerity was determined through the individuals’ outward manifestations. Beliefs are reflected through outward

161 42 U.S.C. §§ 2000bb et seq.

manifestations. For example, in determining that the owners of Hobby Lobby were sincere in their beliefs, the Court cited to the fact that they close their stores on Sunday, they take out ads in the newspapers inviting people to come to know Jesus Christ as their personal Lord and Savior, and they contribute a large amount of the corporation's profits to Christian missionaries.¹⁶²

If, for example, Hobby Lobby's owners gave large amounts of money to abortion clinics and supported the removal of all references to God in various forms of government, but similarly requested a religious accommodation from the ACA contraceptive mandate because it went against their beliefs as Christians, it seems reasonable to think there would be serious questions as to whether or not such a claim should be granted.

By looking at the actions of the corporation itself, rather than the people who own and run the corporation, we can more easily determine whether the corporation can in fact bring those claims. In the instant case, Hobby Lobby is closed on Sunday, takes out ads in the newspaper to promote its Christian beliefs, and contributes large amounts of its profits to Christian missionaries. How is this analysis different than that where the actions are ascribed to the people who own the business? In the case of *Hobby Lobby*, there may not be a clear difference. But consider a scenario under RLUIPA, similar to RFRA, in which a corporation asserts that it should not have to follow certain municipal zoning restrictions because they substantially burden its practice of religion. While the owners of the corporation may assert their religious beliefs, if those beliefs are not in concordance with the actions of the business, the exception for the corporation will not be granted.

By thinking about how one can tell whether a corporation can assert religious beliefs without looking to the beliefs of its owners, it quickly becomes apparent that this is a difficult determination. How exactly can a corporation undertake actions that prove it is religious? How can we tell a corporation's beliefs without looking to the beliefs of its owners? Corporate personhood is a legal fiction; they can be considered persons for some purposes and not persons for other purposes.¹⁶³ At the core of *Hobby Lobby* is the extension of corporate personhood to RFRA claims, meaning that the courts should now look to the corporation as a person rather than the people. While this is what should happen, it is plausible that the courts will continue to conflate the owners' beliefs with those of the corporation.

¹⁶² *Burwell*, 134 S.Ct. at 2766.

¹⁶³ See *What Is The Basis for Corporate Personhood?*, NPR.COM, (Oct. 24, 2011, 3:00 PM), <http://www.npr.org/2011/10/24/141663195/what-is-the-basis-for-corporate-personhood>.

Where exactly does one end and the other begin? Take, for instance, the corporate charter—the founding document drafted by the owners of the corporation, which puts forth the laws and guidelines which will govern the company.

[C]harters may presumably include provisions limiting what products the firm may sell (for example, only Halal or Kosher food, no tobacco, no alcohol . . . Moreover, the charter may contain aspirational provisions, such as a requirement that the firm conduct business in a manner respectful of the environment or consistent with God’s plan. Each would “impose the views” of the founding shareholders on the corporation. Some might even reduce profits. None of these provisions would contravene the laws of Delaware, which allow corporations to pursue any “lawful purpose.”¹⁶⁴

The corporate charter should be the first source consulted in determining whether a corporation holds a sincere religious belief. If there is language or intent in the corporate charter that supports a religious foundation for the corporation, the religious nature should be presumed. However, if there is no religious theme or undertones in the document, it should not serve to preclude a corporation from claiming it holds religious beliefs. If the corporate charter is not dispositive, the court should then look to the actions of the corporation in determining the plausibility of any claimed religious belief.

The goal of looking to the corporation’s beliefs instead of the beliefs of the owners would be two-fold. First, it would help to limit the role of the court in determining the sincerity and merit of the individuals’ beliefs, which arguably should not be the role of the court.¹⁶⁵ While it may not be any better for the court to attempt to determine a corporation’s belief, as has been argued in this Note, it seems to be preferable than attempting to determine the beliefs of the individuals who own the company, as any one company can have a large number of members, each of whom may not hold the same religious beliefs as any one of his or her partners.

Second, looking to the corporation’s beliefs instead of the beliefs of the owners will provide more certainty for the lower courts in their determinations of whether a corporation is able to bring such a claim in the first place. The actions of the corporation are much easier to ascertain because its beliefs can be inferred either from its corporate charter or its actions, both of which are more readily identifiable than the claimed beliefs

¹⁶⁴ Alan T. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of The Firm*, 127 HARV. L. REV. F. 273 (2014), http://harvardlawreview.org/2014/05/hobby-lobby-corporate-law-and-the-theory-of-the-firm/#_ftn61.

¹⁶⁵ *Id.* at 293-94.

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of an individual. While the owner of a corporation might bring an insincere RFRA or RLUIPA claim in order to gain a competitive business advantage, and it would be hard to question that individual's sincerity, it is much easier to look at the actions of the corporation itself as being manifestations of its beliefs and use those actions to make the determination.

VI. CONCLUSION

If we are going to continue with the assumption that corporations are persons, we should treat them like persons. Treating the for-profit corporation as a person under RFRA requires that we look not to the religious beliefs of the owners of the corporation, but to the corporation itself. While we cannot talk to the corporation to find out what its true beliefs might be, we can look to its founding documents or actions to determine its sincerity in asserting a RFRA claim.

