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# The Sincerely Religious Corporation

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# THE SINCERELY RELIGIOUS CORPORATION

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## I. INTRODUCTION

Can a profit-seeking corporation be sincerely religious? A corporation certainly can be religious if it exists for a religious purpose such as worship or religious education.[1] In *Burwell v. Hobby Lobby*, the Supreme Court added that a corporation existing for profit might also be religious.[2] Like a religious human or religiously purposed institution, a religiously minded commercial enterprise might be entitled to certain exemptions from laws that conflict with the enterprise's religion.[3] In *Hobby Lobby*, for example, the Supreme Court held that profit-seeking commercial enterprises were entitled to a religious exemption from a law requiring employee health plan coverage of drugs the enterprises' owners regarded as abortifacients.[4]

*Hobby Lobby* reinvigorated a long running debate about the necessity or propriety of accommodating religious objections to civil duties. Conflict between civil versus religious duty is hardwired in American law and culture. Profession of faith, spiritualism, and conscience lies deep in American politics but the United States has no religion.[5] The First Amendment assures freedom of religion and non-discrimination, but the First Amendment also prohibits the establishment of religion and favoritism for religion.[6] Episodes of conflict between the state and religion have risen in number with the growth of the state as a regulator and provider and with the diversification of religion.[7] The solution, for better or worse, has been a system of

1. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014).

2. *Id.* at 2769-70.

3. *Id.* at 2769-71.

4. *Id.* at 2785.

5. By act of Congress the current national motto is "in God we trust." 36 U.S.C. § 186 (1964). But long before the 1956 act Congress endorsed the secular "E. Pluribus Unum" as a national motto to appear on the seal and coinage of the United States. *See* Thomas A. Foster, *"In God We Trust" or "E Pluribus Unum"? The American Founders Preferred the Latter Motto*, ORIGINS (Nov. 9, 2011), https://origins.osu.edu/history-news/god-we-trust-or-e-pluribus-unum-american-founders-preferred-latter-motto [https://perma.cc/2TQ7-C644]. The percentage of Americans who describe themselves as "religious" is in decline, but it is still true that most Americans describe themselves as "religious," either "religious *and* spiritual" or "religious but *not* spiritual." All but 18% describe themselves as either religious, spiritual, or both. Michael Lipka & Claire Gecewicz, *More Americans Now Say They're Spiritual But Not Religious*, PEW RES. CTR. (Sept. 6, 2017), http://www.pewresearch.org/fact-tank/2017/09/06/more-americans-now-say-theyre-spiritual-but-not-religious/ [https://perma.cc/D4ES-D63K] (emphasis added).

6. U.S. Const. amend. I.

7. Michael W. McConnell, *The Problem of Singling out Religion*, 50 DEPAUL L.

mainly statutory balances of public and religious interests.[8] Under the Religious Freedom Restoration Act (RFRA), for example, compelling public interests prevail over rights of religious practice, but religious rights prevail over lesser public interests.[9] Even if a public interest is compelling, the state must demonstrate that its law is the "least restrictive means" of achieving its interest.[10] If it is not the "least restrictive means," a court might effectively rewrite the law by granting a specific religious exemption or alternative path to compliance.[11]

Laws granting accommodations for religious practice present a complication from the start. How should we identify and validate a religious practice? A party demanding an exemption from a public duty must connect the demand with a religious belief, not a mere political belief, philosophy or personal sense of right and wrong.[12] But distinguishing religious from secular belief systems is not easy, and there is a second complication: Validating the sincerity of the person who claims a religion. While it might be safe to assume a person's sincerity when there is nothing to gain by a religious claim, it is important to be skeptical when a person asserts religion to avoid a civic burden, such a military duty, taxes, or business regulations. The complexity of examining sincerity leads back to still another set of problems: compliance with the establishment clause and another Constitutional provision, the equal protection clause.

Sincerity is a state of mind ordinarily attributed to human persons, not institutions. Religion is belief and faith, which are mental processes. An institution or bureaucracy might write tenets of belief and rules of practice, but believing is human. However, religious accommodation laws are not always limited to religious beliefs or practices of humans. The RFRA and other laws require religious accommodation for "persons," and a person might be an abstract legal entity such as a corporation.[13] And it is now clear that the First Amendment, which creates personal rights indirectly by limiting state action, can be

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REV. 1, 1-2 (2000).

8. *Id.* at 2.

9. *Id.* at 7-8; 42 U.S.C. § 2000bb(b) (2012).

10. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

11. McConnell, *supra* note 7, at 3.

12. *Religious Exemptions under the Free Exercise Clause: A Model of Competing Authorities,* 90 YALE L.J. 350, 362-64 (1980).

13. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2784-85.

asserted by non-human entities as well as by humans.[14]

In the case of non-human persons, religiousness has depended until now on purely objective criteria such as organic religious purpose and religious function.[15] For example, a church is religious because it is chartered and exists for religious functions: worship and propagation of religious faith.[16] After *Hobby Lobby*, we have a new premise; non-human persons created and operated for secular purposes—such as earning a profit for owners—can exercise religion and might be entitled to accommodation.[17] Public officials must now decide claims for religious exemption for commercial profit-seeking enterprises.[18] Evaluating the legitimacy of such claims might become especially important if some religious commercial enterprises can gain competitive advantage over secular rivals or widely undermine public goals by asserting religion as grounds for exemption. The purpose of this Article is to imagine how public officials might undertake the difficult work of sorting legitimate from opportunistic claims in the case of commercial, profit-seeking non-human "persons" without violating the establishment clause or the equal protection clause, and without becoming too entangled in religion.

Part One of this Article summarizes the law of religious accommodation. The right of accommodation exists mainly by statute, not by the First Amendment.[19] The Supreme Court sees the First Amendment primarily as a right of free speech and non-discrimination with respect to religion,[20] not as a right of accommodation or exemption with respect to religious practice. The Court has been circumspect about a constitutional right of religious accommodation at least in part because of the complication of evaluating the sincerity of religious claims, and in part because of establishment clause and equal protection issues.[21] However, a number of statutes, especially the RFRA, require accommodation of sincerely asserted religious practices under a balancing test that resembles the Supreme Court's

14. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
15. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2769.
16. *Id.* at 2794.
17. *Id.* at 2769.
18. *Id.*
19. 42 U.S.C. § 2000bb(b) (2012).
20. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2761.
21. *Id.* at 2759.

approach for fundamental Constitutional rights.[22] Many of the states have added their own similar legislation.[23] *Hobby Lobby* shows that these laws are not merely symbolic.[24] Under certain circumstances, religious practitioners are entitled to an exemption or alternative path for compliance.[25]

Part Two of this Article explores how public authorities have evaluated the sincerity of human claims or the legitimacy of institutional claims under laws creating rights of religious accommodation. Human sincerity and institutional legitimacy are two different things, and each requires a different method of evaluation. The first is largely subjective, and, therefore, especially difficult and potentially dangerous, and the second is objective and considerably easier.

Finally, Part Three explores the meaning of *Hobby Lobby* with respect to the question of whether a profit-seeking corporation or similar business entity can exercise religion if it cannot have a religious belief. Belief, according to *Hobby Lobby*, can be imputed from the owners to the corporation.[26] Will the belief in such a case be tested as a matter of objective legitimacy in the same fashion as for a church or other religious organization? Or will it depend on the sincerity of the owners? Justice Alito's opinion in *Hobby Lobby* points toward a sincerity test.[27] In other words, *Hobby Lobby* suggests that allegedly religious commercial enterprises should be treated in much the same way as allegedly religious humans: Are they "sincere?"[28]

## II. THE LAW OF RELIGIOUS ACCOMMODATION

The right to religious accommodation of civic duties is mainly a matter of statutory law.[29] The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of religion, and that command is extended to the states by the Fourteenth Amendment.[30] However, the Supreme

22. *Id.* at 2761.

23. NAT'L CONF. OF STATE LEGISLATORS, *State Religious Freedom Restoration Acts*, (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice /state-rfra-statutes.aspx [https://perma.cc/KH6S-52D4].

24. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2785.

25. *Id.* at 2781.

26. *Id.* at 2774.

27. *Id.* at 2775.

28. *Id.*

29. 42 U.S.C. § 2000bb(b) (2012).

30. U.S. Const. amend. I, XIV.

Court has held that the "free exercise" clause standing alone requires only that lawmakers must not discriminate against or target religion for adverse treatment.[31] A law with a legitimate secular purpose that does not discrimination between religions or against religion in general does not violate the First Amendment.[32] In *Employment Division v. Smith*,[33] Justice Scalia wrote that "if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[34] The *incidentally* burdensome effect of a law on a religious practice violates the Constitution only when *other* liberties—such as freedom of expression or the right of parents to manage the education of their children—are also affected.[35] By rejecting a broad right of religious accommodation under the First Amendment, the Court limited one potential source of claims for religious exemption from public duty, and it also limited one reason why public officials might need to evaluate the sincerity of persons claiming religion as a reason for exemption from burdens borne by the general public.[36]

If the First Amendment was all that protected a religious practice from any burden of civic duty, there would presently be little right of religious accommodation, only a right of religious speech and a right against intentional discrimination. Rights of accommodation of religious practice, such as abstaining from work on a Saturday, exist mainly because of legislative or executive action,[37] not the First Amendment. The federal and state governments have a long history of granting religious exemptions by statute or administrative order.[38]

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31. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2790.

32. *Id.*

33. Emp't Div. v. Smith, 494 U.S. 872 (1990). The petitioners in *Smith* were practitioners of a religion that included the use of peyote in religious ceremonies. *Id.* at 874. They were terminated from their jobs with a drug rehabilitation organization because they had test positive for drugs. *Id.* A state unemployment compensation agency denied their claims for benefits on the grounds that they were terminated for "misconduct" as defined by state law. *Id.* They appealed, arguing that the state violated the First Amendment by applying state law in a way that prevented their religious practice—the ceremonial use of peyote. *Id.* at 875.

34. *Id.* at 878.

35. *Id.* at 878-79.

36. *Id.* at 877-79.

37. 42 U.S.C. § 2000e-2 (2012).

38. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,792-93 (Oct. 13, 2017) (to be codified at 45 C.F.R. pt. 147).

Do exemptions and other accommodations based on religion establish religion in violation of the First Amendment's establishment clause or discriminate in violation of the equal protection clause? How can the government grant privileges to a class of persons defined by their religion without discriminating against and possibly shifting burdens to persons who do not share the same religion? If a right of accommodation is not obviously prohibited by the Constitution, might such a right nevertheless unreasonably and dangerously require the government to evaluate the sincerity of religion-based claims for special treatment in a way that inevitably establishes qualified religions, or that discriminates in violation of equal protection?

The Court began its struggle with these questions before *Smith* in a conscientious military service objection case, *Gillette v. United States*.[39] In *Gillette*, two draftees brought an establishment clause challenge to a federal statute exempting from the draft a person "who, by reason of *religious* training and belief, is conscientiously opposed to participation in war in *any* form."[40] In other words, the statute as interpreted exempted persons who proved their pacifism was religious and absolute, but not persons who proved their pacifism was religious but qualified.[41] The petitioners argued that the law discriminated in favor of religious sects opposing all war, and against religious sects opposing only "unjust" wars.[42]

The Court in *Gillette* assumed the petitioners' sincerity in objecting on alleged religious grounds to participation in the Vietnam War or other wars they believed to be unjust.[43] However, their religious pacifism allowed exceptions, and the Court agreed with the government that the statute required religious-based objection to all wars without exception.[44] The Court then addressed whether this statutory distinction between

39. Gillette v. U.S., 401 U.S. 437 (1971).

40. *Id.* at 441 (emphasis added). The right of conscientious objection exists by statute, not because of the First Amendment or any other provision of the Constitution. "The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him." U.S. v. Macintosh, 283 U.S. 605, 623-24 (1931).

41. However, lower courts had allowed that a conscientious objector was not disqualified by reason of his acceptance of self-defense, defense of family, or defense of others in the face of immediate and extreme violence. *Gillette*, 401 U.S. at 439-41.

42. *Id.* at 439.

43. *Id.* at 439-40.

44. *Id.* at 443, 451-52.

absolute and qualified religious pacifism discriminated unconstitutionally.[45] It is clear that the Court struggled with this issue, but the Court ultimately rejected the discrimination claim for three reasons.[46]

First, the exemption was not intended "to foster or favor any sect, religion, or cluster of religions."[47] Congress had not endorsed absolute pacifism.[48] To the contrary, Congress supported the war, and believers in qualified pacifism were simply left to comply with the same duty of military service imposed on all other citizens.[49] To put the matter somewhat differently, there is generally little or no Constitutional right to government accommodation of religious practice, and if lawmakers deign to allow a statutory exemption for a religious practice like pacifism, under-inclusiveness in defining the practice is not necessarily unconstitutional, at least if the omission of similar practices is not invidious or designed to elevate one religion over others.

Second, the Court found that the exemption did have a secular or religiously "neutral" purpose, which was to avoid "the hopelessness of converting a sincere conscientious objector into an effective fighting man."[50] The existence of a secular purpose helps to rebut alleged religious bias, and it also provides a rational public interest to the extent necessary to overcome a variety of constitutional challenges, such as an equal protection challenge.[51] In this case, the exemption was not to endorse or benefit any religion but to avoid the potential chaos of a fighting force including individuals who absolutely, for reasons of immovable conscience, refused to fight.[52]

Neither of the Court's first two explanations is completely satisfying standing alone. Each requires speculation about the intent of lawmakers in drawing distinctions between grantees and non-grantees of privilege, each entails some risk of religious bias and religious gerrymandering, and each fails persuasively to address the possibility that under-inclusiveness is a violation

45. *Id.* at 452-53.
46. *Id.* at 447-48.
47. *Id.* at 452.
48. *Id.* at 443.
49. *Id.* at 461.
50. *Id.* at 453.
51. *Id.* at 453-56.
52. *Id.* at 455-56.

of equal protection.[53] Indeed, the Court conceded that the practical effect of the statute was to grant different treatment to two different forms of religious pacifism.[54]

However, the Court offered a third reason to uphold Congress's distinction between absolute and qualified religious pacifism, which was that the unbearable complexity of evaluating the sincerity of religion within the bounds of the broader exemption sought by the petitioners.[55] An individual's means of distinguishing religiously just wars from religious unjust wars might actually involve some political or other non-religious factors, and the individual's views about a particular war might change as the facts or the individual's perception of the facts change over time.[56] Sorting religious from other factors with reasonable certainty would often be impossible.[57] Thus, the Court agreed with the government that extending the exemption to qualified pacifism would result in a right "of uncertain dimensions" involving "a real danger of erratic or even discriminatory decision-making in administrative practice."[58] Moreover, "[t]here is a danger that as between two would-be objectors, . . . that objector would succeed who is more articulate, better educated, or better counseled;"[59] and "[t]here is even a danger of unintended religious discrimination—a danger that a claim's chances of success would be greater the more familiar or salient the claim's connection with conventional religiosity could be made to appear."[60]

The Court also worried that expanding the exemption to include religious opposition to "unjust" wars would lead to government arbitration of religious values, threatening the separation between church and state.[61]

"[T]he more discriminating and complicated the basis of

53. Joseph E. Capizzi, *Selective Conscientious Objection in the United States,* 38 J. OF CHURCH & ST. 339, 350-51 (1996). The majority tersely rejected an equal protection argument on the ground that the distinction between absolute and qualified pacifism was based on "neutral, secular reasons" and that "the line that Congress has drawn . . . is neither arbitrary nor invidious." *Gillette*, 401 U.S. at 449 n.14.

54. Capizzi, *supra* note 53, at 351.

55. *Gillette*, 401 U.S. at 454-55.

56. *Id.* at 455-56.

57. *Id.*

58. *Id.* at 455.

59. *Id.* at 457.

60. *Id.*

61. *Id.* at 457-58.

classification for an exemption—even a neutral one—the greater the potential for state involvement" in determining the character of persons' beliefs and affiliations, thus "entangle[ing] government in difficult classifications of what is or is not religious," or what is or is not conscientious.[62]

This problem would likely be greatest when the religions claim involves a belief and practice not clearly associated with a well-established and widely practiced religion. The more unusual and individualistic the religion, the more likely it is that the arbiter will be suspicious of a false and merely convenient assertion of belief or an inflated seriousness of the practice. Members of well-established religions clearly have the advantage if government officials are left to determine the sincerity of religions claims. Moreover, persons whose beliefs are grounded in religion clearly have the advantage over those with sincerely and strongly held beliefs that are not clearly connected with religion as an arbiter sees religion, and that might be grounded in part on social, political or "secular" philosophical values.

The Court's worries that religious privileges violate the establishment clause and entangle the government in objectionable and potentially discriminatory inquiries into religious sincerity were on full display in *Gillette*.[63] They also were likely behind the scenes in the Court's otherwise odd treatment of a pair of cases addressing the statutory privilege granted to religious employees by Title VII of the Civil Rights Act of 1964.[64] Title VII as originally enacted prohibited employment discrimination—even by private sector employers—on the basis of religion.[65] The Equal Employment Opportunity Commission (EEOC) interpreted this prohibition against discrimination to require employers to accommodate the religious practices of employees, such as not working on Saturdays, unless accommodation would cause an "undue hardship."[66] Congress eventually amended Title VII to endorse

62. *Id.* (internal citations omitted).

63. *Id.* at 445-47.

64. *See* Trans World Airlines, Inc. v. Hardison et al., 432 U.S. 135 (1977); Cummins v. Parker Seal Co., 516 F.2d 544 (1975).

65. *The Law*, EEOC, www.eeoc.gov/eeoc/history/35th/thelaw/index.html [https://perma.cc/9ETJ-G4ZS] (last visited Mar. 3, 2018).

66. *Shaping Employment Discrimination Law*, EEOC, https://www.eeoc.gov/eeoc/history/35th/1965-71/shaping.html [https://perma.cc/PRM4-FKAE] (last visited Mar. 4, 2018).

the EEOC's interpretation.[67] Congress's declaration of an employer duty to accommodate employee religious practices—usually by exempting religious employees from work or rules required of other employees—raised obvious establishment clause and equal protection issues.[68] Why should public or private sector employers be compelled to bear potentially significant burdens of supporting myriad alleged religious practices of individual employees?

In *Cummins v. Parker Seal Co.*, an employer discharged an employee whose religion prohibited work on Saturday, and the employee sued claiming the discharge violated his right to accommodation of his religious practice.[69] A majority of a divided Sixth Circuit Court of Appeals panel held that the requirement of "reasonable accommodation" did not unlawfully establish religion.[70] Echoing *Gillette,* the court majority found a neutral, secular purpose.[71] "[A]s a practical matter, certain persons will not compromise their religious convictions and that they should not be punished for the supremacy of conscience."[72] The privilege of accommodation was not intended to establish or endorse any particular religion or group of religions.[73] Of course a clear effect of this statutory privilege was a benefit (relief from weekend work) allocated on the basis of religion, and a potential burden to persons not sharing the religion in question.[74] The employer would suffer the burden of struggling to accomplish weekend work if the employee was excused, or other employees might bear an additional load if required to substitute for the religiously privileged employee.[75] This was precisely the argument of dissenting Judge Celebrezze.[76] Judge Celebrezze also warned of entanglement over the nature and sincerity of religious beliefs: "Disposition [of claims for accommodation] will require inquiry into the sincerity with which beliefs are held and force consideration of the validity of the religious nature of

67. *See id.*

68. EEOC, *Questions and Answers: Religious Discrimination in the Workplace*, https://www.eeoc.gov/policy/docs/qanda_religion.html [https://perma.cc/5W94-BVH4] (last visited on Apr. 7, 2018).

69. *Cummins*, 516 F.2d at 545.

70. *Id.* at 551.

71. *Id.* at 555 (Celebrezze, J. dissenting).

72. *Id.* at 552-53.

73. *Id.* at 553.

74. *Id.* at 555 (Celebrezze, J. dissenting).

75. *Id.*

76. *Id.*

claims, procedures which are not favored and may themselves be improper because they put courts in review of religious matters."[77]

The Supreme Court, split four and four, affirmed per curium for lack of a majority and without a written opinion by any member of the Court. [78] The reasons or degree of any individual justice's agreement or disagreement with the Sixth Circuit majority or dissent cannot be known, but in retrospect it is clear that a compromise was evolving. Within a few months the Court decided another case, *Trans World Airlines, Inc. v. Hardison,* in which a seven justice majority of the Court held that an employer establishes the statutory "undue hardship" defense by showing that accommodation would constitute more than a *de minimis* burden.[79] Of course, undue burden clearly suggests something more than a *de minimis* burden, because a substantial burden might be due and reasonable depending on circumstances. The dissenting minority correctly observed, "[t]he Court's interpretation of the statute, by effectively nullifying it, has the singular advantage of making consideration of petitioners' constitutional challenge unnecessary."[80]

The Court's drastic reduction of an employer's duty to accommodate religion under Title VII certainly alleviated the Constitutional issue.[81] If neither the employer nor any of the applicant's fellow employees owes more than a *de minimis* burden, practically no burden at all, it is much harder to argue that a right to accommodation establishes or favors a religion at the expense of the employer or fellow employees. Moreover, the fact that so little is required of the employer or fellow employees makes it rare that a court must undertake a careful analysis of a religious employee's sincerity because so little is at stake in a Title VII religious accommodation case. Religious employees typically prevail when the accommodation costs the employer and other employees nothing, and the employer has denied the accommodation arbitrarily or reflexively.[82] Under these circumstances there is so little to gain for the employee and so

77. *Id.* at 559 (Celebrezze, J. dissenting).

78. Parker Seal Co. v. Cummins, 429 U.S. 65 (1976). The Court subsequently issued another order vacating the Sixth Circuit's decision and remanded the case for further proceedings in light of *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977).

79. *Trans World Airlines, Inc.*, 432 U.S. at 84.

80. *Id.* at 89.

81. *Id.* at 92 n.6.

82. *See, e.g.,* Opuku-Boateng v. State of Cal., 95 F.3d 1461 (9th Cir. 1996).

little to lose for the employer that the employee's sincerity can usually be taken for granted. The Court followed *Hardison* with *Employment Division v. Smith*, ending much possibility of a general, free-ranging right of religious accommodation under the First Amendment, and avoiding the need to evaluate the sincerity of religious practice claims based on the Constitution.[83]

In the absence of a general First Amendment right of accommodation or a broad right of accommodation in employment, rights of accommodation were limited to the rule against discrimination, specific statutory exemptions, and limited common law doctrine.[84]

The First Amendment rule against discrimination, exemplified by *Sherbert v. Verner*,[85] prohibits the government from discriminating against religious practice, such as when an unemployment compensation agency automatically excludes religion from the myriad and otherwise individually assessed reasons an employee might be excused from a work absence.[86] Statutes address particularized civil-religious duty conflicts weighed in advance by legislatures and easily subject to subsequent repeal or amendment. One example is the federal statute for conscientious objector exemption from the draft.[87] State laws that allow religion-based exemptions from vaccination requirements[88] or a religion-based affirmative defense against criminal prosecution for medical neglect of a child provide another batch of examples.[89] A few states require an employer by statute to grant an employee time off to attend one religious service per week, even if doing so would not be required by the minimal accommodation duty of Title VII.[90] The ecclesiastical abstention doctrine, a court-made rule resting on

83. Emp't Div. v. Smith, 494 U.S. 872, 888-90 (1990).

84. *Id.* at 912 n.5.

85. Sherbert v. Verner, 374 U.S. 398 (1963).

86. *Id.* at 410.

87. 50 U.S.C. § 3806(j) (2012). For another federal statute for accommodation, see 42 U.S.C. §§ 2000cc(a)(1), 2000cc-5(5) (2012), which demands religious accommodation in the case of land use regulation.

88. NAT'L CONF. OF ST. LEGISLATURES, *States with Religious and Philosophical Exemptions from School Immunization Requirements* (Dec. 20, 2017), http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx [https://perma.cc/F3RP-H3RQ].

89. For a summary of these laws, *see* CHILD HEALTHCARE IS A LEGAL DUTY, INC., *Religious Exemptions to Medical Treatment of Children in State Criminal Codes* (Apr. 29, 2015), http://childrenshealthcare.org/wp-content/uploads/ 2015/04/State-exemptions-criminal6.pdf [https://perma.cc/W2VB-64GF].

90. E.g., TEX. LAB. CODE ANN. § 52.001 (West 2014).

the common law and the Constitution, has some of the effects of a religious exemption by preventing courts from intervening in or deciding disputes within a religious organization.[91] The ministerial exemption, most recently invoked by the U.S. Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[92] prevents the courts from intervening in a religious organization's selection of its spiritual and ministerial personnel, such as a minister, even to address an allegation of otherwise prohibited discrimination.[93] While all of these laws are potentially important and contentious in specific contexts, none of these laws risk a general and wide-ranging resistance to civil law in the name of religion, sincere, or otherwise.

The Religious Freedom Restoration Act is different.[94] By its name it purports to "restore" an era of a general, free-ranging right of accommodation for conduct or inaction associated with a religious belief.[95] The Act expressly repudiates Justice Scalia's opinion in *Smith*.[96] In essence, it treats any "religious practice" as the equivalent of a fundamental liberty protected from government limitation by a balancing test borrowed from substantive due process.[97] Thus, the Act states that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government does so "in furtherance of a compelling governmental interest;" and by "the least restrictive means."[98] The "exercise of religion" is defined to include "any exercise of religion, whether or not compelled by, or central to, a

91. David Young & Steven Tigges, *Into the Religious Thicket—Constitutional Limits on Civil Court Jurisdiction over Ecclesiastical Disputes*, 47 OHIO ST. L. J. 475, 482 (1986).

92. 565 U.S. 171 (2012).

93. *Id.* at 196.

94. 42 U.S.C. § 2000bb-1 (2012).

95. 42 U.S.C. § 2000bb(b) (2012). The act refers to *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) as examplars of a general right against burdens on religious practice, but as Justice Scalia noted in *Smith*, each of these cases depends on something else—either the rule against discrimination (*Sherbert*) or the association of other fundamental liberty interests, such as the right to manage the education of one's own children (*Yoder*). Emp't Div., Dep't. of Human Res. of Or. v. Smith, 494 U.S. 872, 881, 883-85 (1990).

96. 42 U.S.C. § 2000bb(a)(4) (2012).

97. 42 U.S.C. § 2000bb(b) (2012) (declaring Congressional intent to restore the approach of *Sherbert* and *Yoder*.).

98. 42 U.S.C. § 2000bb (2012). The Court subsequently held that the Act does not apply to state governments. *City of Boerne v. Flores*, 521 U.S. 507, 534-36 (1997).

system of religious belief."[99] For example, a person might belong to a religion that permits but does not compel polygamy. As long as a practitioner can associate his or her polygamy with a religious purpose (perhaps the fruitful reproduction of the religious membership) or a religious belief (perhaps that four people are a single marital union before God), the practice is an exercise of religion. Moreover, a person might be a member of an organized religion or system of religious belief but hold a personal and eccentric view or interpretation of the sect's doctrine. A Lutheran might firmly believe that Saturday work is sinful. It makes no difference whether Lutheran doctrine corroborates this view.

The RFRA might be asserted against a nearly boundless range of civic duties. Among all the complications this unbounded approach creates is the greater danger of opportunistic assertions of sincere and insincere religious beliefs. A religious belief is insincere and opportunistic if it is manufactured to avoid a public duty. But even a sincere belief can be opportunistic if an action based on the belief is in no way required by the religion but is convenient to the practitioner and potentially burdensome to others. This complication is created by RFRA. It may or may not be severely complicated by the *Hobby Lobby* extension of RFRA rights to non-human "persons," such as corporations, depending on what tests of sincerity or legitimacy the courts eventually adopt in the case of non-human persons.

## III. HOW ARE SINCERITY OR LEGITIMACY TESTED?

Before *Hobby Lobby*, the courts had adopted two separate tracks for evaluating the credibility of religions persons. Human persons claiming religion were subject to questions about sincerity.[100] Non-human persons, such as churches, religious schools, and other religious organizations were subject to a test of legitimacy.[101] The sincerity test is ultimately subjective while the legitimacy test is essentially objective.

99. 42 U.S.C. § 2000bb-2(4) (2012) (adopting the definition in 42 U.S.C. § 2000cc-5(7) (2012)).

100. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774-75 (2014).

101. *Id.* at 2770-72.

### *A. The Sincerity Test*

Sincerity is the appropriate test of a human person's claim of religious belief. It depends largely on many of the same criteria ordinarily used to evaluate a party's "good faith" or the credibility of a witness's testimony about nearly any kind of fact in doubt, especially when there is suspicion of fabrication.

In most cases there is very little reason to question an individual's assertion of religious belief. We tend to accept each other's assertion of religious belief even if we are amazed by the strangeness of the belief. In fact, the more strange the belief, the less likely it is that the believer has any reason to lie about his or her belief. There is nothing to gain and much to lose by casting one's self as different or exceptional in a religious way. Religious minorities often attract a great deal of bias and hostility by being open about their unusual religion. The rewards and inducements for faith, expressions of faith, or religious practice depend on the reality of the belief system. Therefore, a person asserting a religious belief is usually doing so because he or she also sincerely believes in a religious reward or punishment.

When there is little to gain and no motivation for insincerity, we should generally take people at their word when they say they have a practice that is because of a sincerely held religious belief. Thus, if students refuse to pledge allegiance on religious grounds, parents deny medical care to their own children on religious grounds, or missionaries seek to interrupt our privacy and work by proselytizing, interrogating the believer about sincerity will usually be pointless. The state or the employer may or may not owe a duty to exempt or otherwise accommodate the believer, but the reasonableness or burden of accommodation is an entirely separate question. It will be apparent to anyone who regularly reads accommodation cases that courts nearly always assume sincerity and make a decision based on the weight of the public or employer interest and the practicality of accommodation.

Sometimes, however, there is something to be gained by an insincere claim of belief. Draftees clearly have something to gain by claiming religious "conscientious objector" status: Avoidance of a burdensome service and possibly death or severe injury.[102] Employees can gain an additional holiday or avoid

102. 50 U.S.C. § 3806(j) (2012).

inconvenient or undesirable work schedules by claiming a religious practice of ceasing labor on certain days or attending worship on certain days.[103] Prisoners might gain access to better food by falsely claiming religious dietary practices.[104] Members of a collective bargaining unit can avoid paying fees to a union by claiming a religious objection.[105] Employers might avoid certain benefits costs by claiming a religious objection to covering maternity care for unwed mothers.[106]

When there is a reason to believe there is an ulterior motive for an assertion of religious belief, there is reason to be skeptical. The greater the earthly reward of a religious practice, the greater the possibility that some claimants are insincere. In such cases, the courts or other government officials have frequently undertaken the extremely difficult examination of individual sincerity.[107] Challenging an alleged believer is very different from the usual interrogation of a witness.

To begin with, nothing aside from the bare assertion of faith is necessary for the believer to establish a prima facie case of sincerity. The alleged believer can make his or her case by stating the belief, under oath if the believer's alleged religion permits an oath.

Second, the usual technique of attacking credibility because of the unreasonableness of a factual account is nearly useless in interrogating a religious believer. Is a person who believes they spotted and identified the defendant from a distance of half a mile to be believed? Clearly not. Is a person who believes the world was created in seven days, or that Jonah was swallowed by a whale and survived to tell the tale, to be believed? Yes, in most instances, with respect to the witness's belief in these unreasonable facts. Thus, one of the classic methods of interrogation is removed from the toolkit.[108]

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103. TEX. LAB. CODE ANN. § 52.001 (West 2014).

104. Abate v. Walton, 1996 U.S. App. LEXIS 624 *7, *11.

105. *See* 29 U.S.C. § 169 (2012).

106. COLUM. L. SCH. CTR. FOR GENDER & SEXUALITY L., *Unmarried & Unprotected: How Religious Liberty Bills Harm Pregnant People, Families, and Communities of Color*, https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/PRPCP/unmarried_unprotected_-_prpcp.pdf [https://perma.cc/J9MC-44FG] (last visited May 22, 2018) (internal citation omitted).

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

108. *See, e.g.*, EEOC v. Consol Energy, Inc., 860 F.3d 131 (4th Cir. 2017) (holding that unreasonableness was no reason to reject, as a matter of law, the employee's claim that he could not use the office scanning machine because using the machine

Still, courts, lawyers and government officials have used other methods to challenge an alleged religious belief, but with limited success and always with great risk to First Amendment values, equality under the law, and government efficiency.

The most common but also the most dangerous tool is simple observation of the witness under examination or cross-examination. The fact finder's sense of the credibility of the witness is rarely expressly addressed in reported court decisions. One of the rare exceptions is *Gobitis v. Minersville School District*,[109] involving a religion-based objection to the pledge of allegiance, where the court addressed the issue of sincerity in this way:

> No one who heard the testimony of plaintiffs and observed their demeanor upon the witness stand could have failed to be impressed with the earnestness and sincerity of their convictions. While the salute to our National flag has no religious significance to me and while I find it difficult to understand plaintiffs' point of view, I am nevertheless entirely satisfied that they sincerely believe that the act does have a deep religious meaning and is an act of worship which they can conscientiously render to God alone.[110]

Judges probably consider demeanor far more often than would be revealed simply by reading reported decisions. However, reliance on demeanor, especially in rejecting an alleged religious belief, is dangerous on a number of counts. It opens the door to bias against different or unusual religions. A judge or jury might see honesty in the eyes of a Catholic and deception in the eyes of a Moslem simply because of a bias in favor of mainstream Christian faith and a suspicion of non-Christian faiths. For similar reasons, evaluating credibility based on demeanor is one way in which the courts, especially when they rely on jury trials, become entangled with religion in a way that risks free exercise, establishment clause, and nondiscrimination values of the Constitution. Seeking to accommodate some religions can effectuate bias against others.

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would leave the mark of the devil on his hand; sincerity was for the jury to decide).

109. 32 Pa. D. & C. 489 (Pa. Dist. Ct. 1938).

110. *Id.* at 494.

Another technique is to evaluate the "depth" of a witness's testimony by considering the witness's ability to "explain" the belief or its source.[111] The limits of this approach are obvious. Not all religious beliefs can be explained especially because religions are often based on faith rather than factual observation. However, the source of most religious beliefs can probably be explained. A witness might not be able to support an argument that the world was created in seven days by reference to any facts or logic, but the belief has a source: the Bible. On the other hand, completely spontaneous belief sourced in personal and individual revelation is especially suspect if it is perfectly timed to avoid a public duty or gain some benefit.

An attack against a witness's consistency is yet another technique for challenging sincerity. Again, however, pointing to inconsistency has great limitations in the interrogation of an alleged believer. Religion exists in part to restrain us from temptations. Still, believers may sin even though they sincerely believe. For many believers, faith involves ongoing self-negotiation. It is possible that a Mafia Don really does believe in salvation and damnation but is hoping for a last moment deal.[112] Inconsistency, standing alone, is usually insufficient to prove insincerity.[113] Inconsistency is most telling if the occasions for the alleged believer's assertion of religious belief seem too well coordinated with occasions to avoid duty or gain a benefit.[114]

If a challenger cannot undermine the credibility of a witness's belief that is the basis for the witness's practice, the challenger might attempt to challenge the necessity or urgency of the practice. It is one thing for a religion to permit polygamy. It is another for a religion to demand polygamy. Attendance at church services might be advisable but not mandatory. Some sins will cause other members to think less of you, others will land you in Hell. This line of attack is most useful when qualification for a statutory exemption requires absolute belief and practice, as in the case of the statutory exemption for

111. Schlemm v. Litscher, 2017 WL 4296810 (W.D. Wis. 2017) (witness failing to explain the source or origin of his belief that "Ghost Feast foods" must be fresh and without preservatives or salt).

112. *See, e.g.*, Claire Giangravè, *Catholic Priest Among those Arrested in Mafia-Run Scam to Steal from Migrants*, CRUX (May 15, 2017), https://cruxnow.com/global-church/2017/05/15/catholic-priest-among-arrested-mafia-run-scam-steal-migrants/ [https://perma.cc/7LDX-MMGW].

113. *See* Fisher v. Devore, 2017 WL 363409 (W.D. Ark. 2017); Equal Emp't Opportunity Comm'n v. Triangle Catering, LLC, 2017 WL 81826 (E.D.N.C. 2017).

114. U.S. v. Pitt, 144 F.2d 169, 170-71 (3d Cir. 1944).

conscientious objectors.[115] However, the RFRA provides that a religious practice includes any religious exercise "whether or not compelled by, or central to, a system of religious belief."[116] The term likely includes, therefore, acts merely celebrating a religion even if not mandatory.

Even if challenging the sincerity of an alleged believer is excruciatingly difficult, the RFRA and other religious exemption or accommodation laws make it necessary especially if freely granted exemptions might open the floodgate for too many insincere claimants and significantly impair public goals.[117] But assigning floodgate management to the courts or government officials is fraught with risks of discrimination and entanglement with religion.

If the task becomes too difficult or dangerous the RFRA might supply its own solution. In any RFRA challenge by a believer against a government law or action, the government may prove that the law or action furthers a compelling public interest and "is the least restrictive means of furthering that compelling governmental interest."[118] It is possible that the courts will ultimately hold that the risks inherent in adjudicating sincerity in claims for exemption from compelling but burdensome duties make the broad denial of exemptions the only and least restrictive solution.[119] Beyond this affirmative defense under the RFRA are the limits of the establishment clause and equal protection clause.

### *B. The Legitimacy Test*

Before the RFRA and *Hobby Lobby*, other laws such as Section 702 of Title VII had already made it necessary for courts to decide claims of religion by corporations and other organizations.[120] Section 702 permits employment discrimination on the basis of religion by "a religious corporation, association, educational institution, or society."[121] A

115. 50 U.S.C. § 3806(j) (2012).

116. 42 U.S.C. § 2000bb-2(4) (2012) (adopting 42 U.S.C. § 2000cc-5(7)(A) (2012)).

117. Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1222 (2017).

118. 42 U.S.C. § 2000bb-1(b)(2) (2012).

119. *Id.*

120. 42 U.S.C. § 2000e-1(a) (2012).

121. *Id.*

"corporation, association, educational association, or society"[122] cannot have a sincere belief or faith like a human. Validation of an organization's qualification as "religious" depends on an entirely objective test based on the organization's creation, purpose, function, activity, and self-expression to the community.[123] For organizations, the test is legitimacy.[124]

Section 702 clearly applies to organizations and only organizations—not individuals.[125] To qualify as exempt an employer organization must be religious.[126] An organization composed of individuals who happen to share a religion is not necessarily a religious organization.[127] In other words, the abstract or legal entity that constitutes the employer must have an objective religious nature apart from the beliefs or practices of the individuals of which it is composed.[128] Otherwise, any individual or group merely having a shared religion would be exempt from the requirement of nondiscrimination. It is unlikely Congress intended such a broad exemption from discrimination law. The courts appear uniformly to have adopted this restrictive view of Section 702, and Congress has tacitly approved the courts' interpretation of Section 702 for at least three decades.

The chief challenge for the courts has been to evaluate the religious nature of organizations founded by, affiliated with, related to, or supported by a religious organization or person but engaged in activities that are secular.[129] These secular activities may include regular commercial profit-seeking activity or non-profit activity of the sort that is typical of both secular and religious activities, such as charity or education.[130]

When an organization is substantially engaged in commercial, profit-seeking activity, the courts have easily rejected qualification under Section 702.[131] In *E.E.O.C. v. Townley Engineering & Mfg. Co.*, for example, a for-profit mining company was unsuccessful in its claim that it was a

122. *See id.*
123. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2763 (2014).
124. *Id.*
125. 42 U.S.C. § 2000e-1(a) (2012).
126. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2763.
127. EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619 (9th Cir. 1988).
128. *Id.*
129. *Id.* at 619.
130. Spencer v. World Vision, Inc., 633 F.3d 723, 735-36 (9th Cir. 2011).
131. *Townley Eng'g & Mfg. Co.*, 859 F.2d at 618-19.

religious entity.[132] The evidence of the individual owners' religious sincerity was compelling and appears not to have been doubted.[133] For Section 702 religious organization claims, the court adopted the "primarily religious" test: Is the organization primarily religious, or secular?[134] On the religious side, the individual owners used the proceeds from the business to support various religious activities, and they presented their business to the public as religious, such as by including Bible verses in invoices and purchase orders.[135] On the secular side the company was a commercial mining operation organized for a profit.[136] The court appears to have found that profit-seeking was nearly if not entirely decisive.[137] It was dismissive of the company's claim for a Section 702 exemption.[138]

Non-profit organizations that perform services that both secular and religious organizations routinely offer have presented a greater challenge.[139] In *Spencer v. World Vision*, the employer organization provided charitable services of the sort that might be offered by a religious or purely secular or even public institution.[140] However, the employer required all employees, including general office and technology employees, to state their "relationship with Jesus Christ" and acknowledge an agreement with World Vision's faith, which included belief in the Doctrine of the Trinity and in the deity of Christ.[141] A divided court held that the employer did qualify as a religious organization under Section 702—but not based on the sincerity of the religious beliefs of its individuals founders and managers.[142]

The majority itself was split over what set of factors were relevant and material, or possibly decisive in determining an organization's primarily religious or secular nature.[143] However, both Judge O'Scannlain and Judge Kleinfeld adopted objective

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132. *Id.* at 619.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *See id.*
138. *Id.*
139. Spencer v. World Vision, Inc., 633 F.3d 723, 731 (9th Cir. 2011) (O'Scannlain, J. concurring).
140. *Id.* at 737.
141. *Id.* at 739-40.
142. *Id.* at 741.
143. *Id.* (Kleinfeld, J. concurring).

views.[144]

In Judge O'Scannlain's view, only a non-profit organization could be primarily religious.[145] Thus, in his view no commercial enterprise could gain the exemption based on its incidental religious activities or its moral or financial support of religion.[146] In the case of an ambiguous non-profit organization, the key factors according to Judge O'Scannlain are whether the organization "1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), 2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and 3) holds itself out to the public as religious."[147]

The employer in *Spencer* was a qualified non-profit, and its articles of incorporation included many references to Christian faith and purpose.[148] The employer was also engaged primarily if not exclusively in activities that were consistent with religious purpose even if they might also be performed by a secular organization.[149] These activities included caring for children in need and providing emergency aid in times of crisis.[150] Some of activities, such as evangelism, were undeniably religious.[151] The organization sought outside support mainly by outreach to churches.[152] Finally, the organization held itself out to the public as religious.[153] Its logo was a Christian cross, religious symbols were present throughout its facilities, and it had adopted certain guidelines for communications with the outside community to assure a clear Christian message.[154]

Judge Kleinfeld agreed that the organization was religious, but he relied on a somewhat different set of objective criteria.[155] Judge Kleinfeld worried that reliance on proof of formal incorporation and approval of non-profit status for tax purposes would unfairly deny the exemption to some very small and informal organizations, or serve as a subterfuge for some

144. *Id.* at 741-42.
145. *Id.* at 734.
146. *Id.* at 735.
147. *Id.* at 734.
148. *Id.* at 736, 741.
149. *Id.* at 737.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 738.
154. *Id.*
155. *See id.* at 741-48 (Kleinfeld, J. concurring).

entirely secular and even commercial activities.[156] Doctors, for example, might organize into a non-profit association to provide routine medical services, and draw large salaries rather than dividends from the association's revenues.[157] A more important distinction, according to Judge Kleinfeld, is whether the organization provides goods or services in exchange for above cost or market rate payments versus no payment or below cost payments by the recipients.[158] An organization charging more than cost or charging market value is much more likely a commercial organization than a charitable religious one.[159]

The O'Scannlain and Kleinfeld approaches share one difficult complication; each allows religious qualification based on activities that might just as easily be secular.[160] Charity is a religious activity only if it is motivated and guided by religion.[161] What sets a religious charity apart from a secular charity is organizational design, charter, bylaws, mission statement, and perhaps the beliefs of the individuals who manage it.[162] To this extent there is still some room for consideration of sincerity in evaluating an organization's claim of religiousness.[163] In *Spencer* it was clear that the organization was founded expressly on religious principles and that the individual founders and managers were sincerely religious.[164] In other cases it might not be so clear, and there is some risk that a secular non-profit will include a statement of religion in its charter merely to qualify as religious. However, it is important to remember that the Section 702 exemption has a very limited effect as it merely allows the organization to prefer employees of the same religion.[165] If an organization *consistently* restricts itself to hiring persons of a particular religion, as was the case in *Spencer*,[166] that fact is some evidence that the organization is religious in practice and not just on paper.

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156. *Id.* at 745.

157. *Id.* at 746.

158. *Id.* at 747.

159. *Id.* at 747-48.

160. *Id.* at 741; *see also World Vision, Inc.*, 633 F.3d at 748 (Kleinfeld, J. concurring).

161. *World Vision, Inc.*, 633 F.3d at 747 (Kleinfeld, J. concurring).

162. *See, e.g., id.* at 736; *World Vision, Inc.*, 633 F.3d at 746 (Kleinfeld, J. concurring).

163. *See World Vision, Inc.*, 633 F.3d at 746 (Kleinfeld, J. concurring).

164. *Id.* at 735-36.

165. 42 U.S.C. § 2000e-1(a) (2012).

166. *World Vision, Inc.*, 633 F.3d at 725.

Judge Berzon, the dissent in *Spencer*, would have avoided the difficulty described above by adopting a particularly narrow and objective approach.[167] In her view, an organization qualifies as religious under Section 702 only if it is "a church or similar entity organized for the purpose of *worship*."[168] Activities that could be either religious or secular are insufficient to make an organization religious.[169] Most of the activity of the organization in *Spencer* was for the management of charitable activity, which is not inherently religious.[170] The organization was not a "church" or other place of worship.[171] No matter how religious the organization's personnel, and no matter how Christian their motivation, the organization was not religious under Judge Berzon's approach.[172]

The three opinions in *Spencer* show the variety of approaches that might be taken with respect to whether a corporation or other organization is religious, but all three agree that the test is mainly objective.[173] Whether an organization is religious depends on whether it is religious by its organization and function.[174] The sincerity of the individuals who form the organization does not need much evaluation for this purpose. None of these approaches require that the membership or employees must be homogenous in their religious beliefs. An organization might serve, accept work, and open its facilities to persons of other religions or no religion at all. What matters most are the non-profit form, religious function and organization, and religious expression to the outside world. Individual sincerity is not a likely issue unless the organization might be a complete sham.[175] In this way, the objective legitimacy of a non-profit organization's claim of religiousness is completely different from the subjective sincerity of an individual's claim of a religious reason for a practice. Evaluating a religious organization's legitimacy does involve some of the same dangers of entanglement found in the adjudication of

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167. *Id.* at 749, 763 (Berzon, J. dissenting).

168. *Id.* at 755 (emphasis added).

169. *Id.* (citing State v. Hutterische Bruder Gemeinde, 191 N.W. 635, 643 (1922)).

170. *Id.* at 744-45 (Kleinfeld, J. concurring); *World Vision, Inc.*, 633 F.3d at 749 (Berzon, J. dissenting).

171. *World Vision, Inc.*, 633 F.3d at 749 (Berzon, J. dissenting).

172. *Id.*

173. *See generally id.* (illustrating the three types of opinions throughout the case).

174. *See id.* at 736; *World Vision, Inc.*, 633 F.3d at 746 (Kleinfeld, J. concurring).

175. *See* EEOC v. Townley Eng'g Mfg. Co., 859 F.2d 610, 619 (9th Cir. 1988).

individual sincerity, but the dangers are much less severe. Because the tests of legitimacy are so objective, any bias in favor of some religions over others should be much easier to spot and remedy.

In light of the controversy stirred by *Hobby Lobby*, it is important to emphasize that a profit seeking commercial enterprise can never be religious under these objective tests, in *Spencer*, developed for Section 702.[176] If the place of worship test described by Judge Berzon is the right one,[177] then a profit seeking business cannot qualify. Commercial enterprise is not worship and is obviously not inherently religious. If the ultimate choice is for Judge O'Scannlain's or the Judge Kleinfeld's test allowing a broader range of activity, a profit seeking business will still fail to qualify because these approaches reject profit-seeking as a religious activity.[178] It is true that some money-making commercial enterprises have attempted to present themselves as churches or non-profit religious organizations, but these efforts consistently fail[179] or require circumstance that prevent them from ever being a common enough occurrence to cause any loss of sleep.[180] The success of these tests in foreclosing a flood of sham religious organizations is due at least in part to the courts' strict requirement that only non-profits can qualify for a Section 702 exemption. *Hobby Lobby* removes the non-profit qualification for purposes of the RFRA.[181]

## IV. SINCERITY, LEGITIMACY, AND THE PROFIT-SEEKING ORGANIZATION

*Hobby Lobby* introduces new problems of verification. If a corporation formed for commercial, profit-seeking purposes claims a religion, how can we know if the corporation's religion is sincere or legitimate? For that matter, which test should we use? Should we look for sincerity? Or organizational legitimacy?

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176. *See World Vision, Inc.*, 633 F.3d at 723 (illustrating the three types of opinions throughout the case).

177. *Id.* at 753 (Berzon, J. dissenting).

178. *Id.* at 734; *World Vision, Inc.*, 633 F.3d at 748 (Kleinfeld, J. concurring).

179. *E.g.* Reich v. Shiloh True Light Church of Christ, 85 F.3d 616 (4th Cir. 1996); Brock v. Wendell's Woodwork, Inc., 867 F.2d 196 (4th Cir. 1989) (describing church's commercial residential construction enterprise).

180. People v. Strong, 63 N.E.2d 119 (N.Y. 1945) (describing fortune-telling business arranged to be a church).

181. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759-60, 2774 (2014).

Justice Alito's opinion for the majority veered between both approaches in *Hobby Lobby*, with a decided tilt toward sincerity.[182]

The Court's summary of the facts emphasized that the incorporated "persons" seeking RFRA relief in the consolidated proceedings in *Hobby Lobby* were closely held corporations.[183] The first, Conestoga Wood Specialties, was no small business.[184] It employed nearly one thousand employees, but it was owned entirely by the Hahan family.[185] It was not challenged that the Hahans were "devout members of the Mennonite Church."[186] The company had adopted "'Vision and Values Statements'" affirming a goal to "'ensur[e] a reasonable profit in [a] manner that reflects [the Hahns'] Christian heritage.'"[187]

Another corporation seeking relief, Hobby Lobby, was owned and managed by the Green family and employed more than thirteen thousand employees.[188] Hobby Lobby's statement of purpose dedicated the company to "'[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.'"[189] Each participating family member pledged to run the businesses in accordance with these religious beliefs and to use the assets to support Christian ministries.[190] Consistent with their religious beliefs, the Greens closed Hobby Lobby stores on Sundays, refused to facilitate or promote alcohol use, and used business assets to contribute to Christian causes and promotion of the Christian principles.[191]

Organizations do not have religious beliefs, but the RFRA does not protect beliefs or faith per se.[192] Instead, it protects the "exercise" of religion, which appears to mean action.[193] The particular exercise Hobby Lobby and Conestoga sought to unburden was opposition to abortion, including opposition to the provision of employee benefits that included contraception

182. *Id.* at 2775-77.
183. *Id.* at 2765.
184. *Id.* at 2764.
185. *Id.*
186. *Id.*
187. *Id.* (citation omitted).
188. *Id.* at 2765; One family member owned an additional business also incorporated and employing nearly four hundred employees, *id.*
189. *Id.* at 2766 (citation omitted).
190. *Id.*
191. *Id.*
192. 42 U.S.C. § 2000bb-1(a) (2012).
193. *Id.*

medicines.[194] One of the main issues regarding these enterprises' qualification for RFRA relief was whether a *profit*-seeking business can exercise religion within the meaning of the RFRA.[195] The government evidently conceded that a *non*profit organization could "exercise" religion.[196] After all, a nonprofit religious institution qualifies for Title VII's Section 702 exemption by engaging primarily in religious activity or serving a religious function.[197] Section 702 avoids much inquiry into the existence of sincere beliefs.[198] It simply requires religion-based creation, organization and function—excluding a profit-seeking function.[199]

A commercial profit-seeking organization, on the other hand, is not a religious organization. In what respect, therefore, can any of its actions or refusals to act be deemed to be an exercise of religion? First, Justice Alito noted, some organizational acts can be the very same actions an individual might take in order to exercise that individual's religion.[200] For example, Justice Alito noted, a profit-seeking organization can support charitable causes, require ethical or moral business practices, or refuse to engage in acts violating the values or religion of its owners.[201] Of course, charity and ethical business practices are not inherently religious. Socially worthy causes and ethical codes are just as likely to be found among non-religious individuals or secular organizations. Charity can be a "religious" exercise if it is motivated or guided by a religious belief, but organizations do not believe. When a non-profit charity seeks a religious organization exemption under Section 702, it proves it has other objective attributes of a religious entity, including a religious origin, design and expression to the community.

Justice Alito also observed that the distinction between profit and non-profit organizations is blurred by state laws that authorize hybrid corporate forms organized to earn a profit for owners *and* a public benefit beyond the strict interest of the

194. *Hobby Lobby Stores*, 134 S. Ct. at 2765.
195. *Id.* at 2769.
196. *Id*
197. 42 U.S.C. § 2000e-1(a) (2012).
198. *See id.*
199. *Id.*
200. *Hobby Lobby Stores*, 134 S. Ct. at 2769.
201. *Id.* at 2771.

owners.[202] In other words, some corporations can organize with purposes or restrictions that might conflict with shareholders' *financial* interests. Such an organization might adopt the same kinds of purposes or restrictions often observed by religious individuals. Of course, it would take more than a commitment to ethical, socially, or environmentally conscious conduct to make the hybrid corporation's actions religious or exercises of religion because a secular organization can also have such commitments. An individual's good works can be an exercise of religion because of the individual's belief, but even a hybrid organization cannot believe. To be religious the hybrid organization might need some of the other characteristics of a Section 702 religious organization—including a non-profit function.[203]

How then can a for-profit organization ever exercise a religion or have religious actions? The answer appears to lie in what might be the most important passage in Justice Alito's opinion:

> . . . Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of "persons." But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends . . . . When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.[204]

202. *Id.*
203. 42 U.S.C. § 2000e-1 (2012).
204. *Hobby Lobby Stores*, 134 S. Ct. at 2768.

Not surprisingly, it is the religious belief of individual owners that makes a corporation's actions religious. This will be easiest to see in the case of a business that might have been a sole proprietorship but which is incorporated. When a business is owned by a single human, the corporation and its owner are alter egos at least in the sense that the corporation can do nothing that is not really the action of the human owner. At least for purposes of religion and the exercise of religion, incorporation does not create a separate "person."[205] For the smallest of businesses this is good news. An individual owner does not forfeit free exercise rights by incorporating.[206] Moreover, there is nothing inconsistent in the individual's pursuit of a profit and his compliance with religious beliefs. Whether the individual's business is incorporated or not does not affect the individual's need for or entitlement to statutory or Constitutional protection as a human.

It is also clear that Justice Alito intended that profit-seeking corporations must be subject to the same tests of sincerity courts use in the case of individual religious claims.[207] In a particularly important footnote, Justice Alito commented that "[t]o qualify for RFRA's protection, an asserted belief must be 'sincere' . . . ."[208] The requirement of sincerity is not express in the RFRA, but it is necessarily implicit in the Act.[209] In making this point, Justice Alito was responding to worries of the dissenting justices that the Court's decision would open the doors for many typical commercial corporations to seek relief from all sorts of government regulations.[210] A for-profit corporation that is not a "religious" organization (and cannot be, because it is for profit) might be subject to heightened scrutiny with respect to the sincerity of an asserted religious belief of its owners.[211]

When a profit-seeking organization is larger and involves more than one owner, the problem will undoubtedly be more complex. More than one person can share a belief, and in fact some organizations, such as the Catholic Church, are made of

205. *Id.* at 2768.
206. *Id.*
207. *Id.* at 2774.
208. *Id.* at 2774 n. 28.
209. 42 U.S.C. § 2000bb-1 (2012).
210. *Hobby Lobby Stores*, 134 S. Ct at 2774-75.
211. *Id.* at 2774.

millions of faith sharing individuals. However, there is an important difference between a church having many members and an incorporated enterprise having many owners. Membership in the former is based on shared belief, but membership among the class of owners of a commercial enterprise is normally based on a contribution or exchange of money or assets. It is easy to ascribe a belief to a church or similar religious organization because of the common belief of its members. Assigning a belief to a commercial enterprise will be more difficult.

Justice Alito thought it unlikely that the courts would face many assertions of religion by commercial enterprises more complex than the corporations in *Hobby Lobby*.[212] He discouraged anticipation that publicly traded corporations might ever prove a religion common to the ownership, "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."[213]

Justice Alito seemed confident that the complexity posed by multiparty ownership will not be too difficult, but this might be because the facts in *Hobby Lobby* were so easy. Each of the for-profit corporations before the Court were cohesive family businesses and owned by a relatively small number of related parties.[214] None of them had yet faced the sort of schism or family diversification that might place the religious belief of the corporation into doubt. And there was no challenge regarding the religious sincerity of the ownership.

How then will courts accomplish the task of evaluating sincerity of a for-profit corporation? As discussed in Part II.A, evaluating the sincerity of a single individual is a daunting task. Evaluating the sincerity of a larger group could become much more complex. Justice Alito believed it would be easy enough to resolve a corporation's internal disagreement about belief or practice by resort to the usual laws for intra-corporate disputes.[215] However, such dispute resolution requires enforcement and ultimate decision by the courts. If the dispute is religious in character, it is hard to see how a court can avoid

212. *Id.* at 2783.
213. *Id.* at 2774.
214. *Id.* at 2764-65.
215. *Id.* at 2797 n. 19.

becoming entangled in religion. The prospect of internal disputes also increases the risk of bias, discrimination, and the court's establishment of the religion of one group over another within the same corporation.

## V. CONCLUSION

Justice Alito concluded in *Hobby Lobby* that "Congress was confident of the ability of the federal courts to weed out insincere claims" for religious accommodation for profit-seeking corporations.[216] Congress may have been confident, but its confidence will not make the courts' task any easier. Knowing the sincerity of an individual is hard when there is the possibility of an ulterior motive. Knowing the sincerity of an entire business association of individuals will likely be harder. If the difficulty of the task were all that mattered, this would be a question of work, but the problem is potentially much greater than either Congress or Justice Alito appreciated. The risk of establishment clause violations, unlawful discrimination and entanglement are always present when the courts are called upon to evaluate sincerity. These risks are likely to be much greater in determining the sincerity of for profit corporations.

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216. *Id.* at 2774.