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Telescoping and Collectivizing Religious Free Exercise Rights

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TELESCOPING AND COLLECTIVIZING RELIGIOUS FREE EXERCISE RIGHTS

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INTRODUCTION

The First Amendment to the United States Constitution protects an individual's right to freely exercise religion against government intrusion.[1] The amendment's Free Exercise Clause guarantees that persons can express their religious devotion as they see fit. Though protective of free exercise rights, the clause is not absolute. It does not exempt individuals from generally applicable laws that incidentally limit their exercise of religion.[2] Consequently, in the last few decades, laws such as the Religious Freedom Restoration Act ("RFRA") and the Religious Land Use and Institutionalized Persons Act ("RLUIPA") have been enacted to broaden the protection of the exercise of religion from governmental interference.

Under those statutes, a person may stop the federal government and, in some instances, state and local governments from engaging in conduct, including enforcing laws, that substantially affects the person's ability to freely practice religion, unless the government's action is triggered by a compelling interest and is the least restrictive means of furthering the compelling interest.[3] That expansion of the breadth of protection for free exercise rights is important. If the free exercise of religion is to be encouraged, it arguably should not yield every time a statute limits it.[4] When an individual's exercise of religion is effectively limited by a statute, striking a balance between the free exercise of religion and the regulation of religious conduct is reasonable. Though RFRA and RLUIPA may appear to simply allow an individual to avoid the effect of some laws that conflict with the individual's religious beliefs, arguably those statutes merely provide broad-

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1. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

2. *See* Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

3. *See* 42 U.S.C. §§ 2000bb-1(a),(b) (2012); 42 U.S.C. §§ 2000cc-1(a) (2012).

4. *Cf.* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144–45 (1987) (suggesting that government's accommodation of religious practices is sometimes necessary and sensible under the First Amendment); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987) (noting that, in some situations, government may be required to accommodate an entity's religious practices).

er coverage for the principle of religious autonomy that underlies the First Amendment.

However, First Amendment rights are not strictly limited to individuals. Churches and similar organizations may assert free exercise rights.[5] They can do so in either of two ways. An organization may serve as a vehicle to assert the free exercise rights of its members. In such situations, the organization's members telescope their free exercise rights through the organization. Alternatively, an organization may amalgamate and collectivize the individual free exercise rights of its members and be treated as though the organization were asserting its own free exercise rights. Whether a religious organization's exercise of free exercise rights is thought to be based on the collectivization or the telescoping of its members' free exercise rights, protection for such rights appears sensible when the organization has been created to facilitate the exercise of religious rights and is a primary outlet for an individual's exercise of those religious rights. Like individuals, churches may telescope their free exercise rights through affiliated organizations.[6] The protections of RFRA and the RLUIPA may extend to those affiliated religious organizations.[7] Consequently, some religious organizations and their affiliates may have the same latitude to avoid the effect of some laws as individuals.

However, courts may be ready to go significantly farther. In *Burwell v. Hobby Lobby Stores, Inc*.,[8] the Supreme Court applied RFRA to allow closely held, for-profit corporations owned by devout Christians to exercise religious rights.[9] Courts may be ready to allow any organization, if sufficiently imbued with religious faith by the people associated with it, to freely exercise religion and block the regulation of its interests by laws that would restrict the organization's free exercise rights. Whether that result—which arguably allows individuals to protect their financial and economic interests, not merely their spiritual interests—is sensible is not clear.

If courts are willing to expand religious liberty so that people may be allowed to choose—on the basis of their own religious beliefs—whether certain laws will apply to non-religious entities they create, those courts should take that step very carefully. This Paper explores the issue and proceeds as follows. Part I discusses three recent Supreme Court cases that illuminate the telescoping and the collectivization of free exercise rights. Part II considers problems that accompany telescoping and collectivizing

5. *See* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (noting the First Amendment's application to religious organizations).

6. *See, e.g.*, *Amos*, 483 U.S at 330.

7. *See* 42 U.S.C. § 2000cc-1(a); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768–69 (2014) (discussing the applicability of the RFRA).

8. 134 S. Ct. 2751.

9. *Id.* at 2759.

free exercise rights. Part III suggests how courts should critically evaluate the telescoping and collectivizing of free exercise rights. This Paper concludes with a warning about the danger that can accompany insufficient consideration of the telescoping and collectivizing of free exercise rights through entities.

I. RECENT SUPREME COURT RELIGIOUS EXERCISE CASES

The Supreme Court has recently decided three religious exercise cases that illustrate the drift toward allowing individuals and entities to decide what laws will apply to them based on religious belief. In *Holt v. Hobbs*,[10] plaintiff Holt sued, arguing that the prison's rule that prisoners remain clean-shaven violated his right to practice his religion.[11] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*[12] involved a church school that wished to avoid the strictures of federal employment discrimination laws when firing a teacher.[13] *Burwell v. Hobby Lobby Stores Inc.*[14] involved for-profit corporations owned by devout Christians that sought to avoid Patient Protection and Affordable Care Act ("ACA") regulations that required certain employers to provide certain forms of contraception through their insurance plans.[15] In each case, the government lost and the Court limited the ways the government could enforce its rules or laws.

A. Holt v. Hobbs

In *Holt*, plaintiff Holt, an Arkansas prisoner, sued to protect his right to keep his beard uncut, consistent with his religious beliefs.[16] The prison where Holt was housed required that prisoners be clean-shaven, unless the prisoner had a dermatological condition.[17] Inmates with such a condition could wear quarter-inch beards.[18] Holt offered to keep a half-inch beard as a compromise.[19] The warden declined the offer and pledged to enforce the rule.[20] Holt sued.[21]

10. 135 S. Ct. 853 (2015).
11. *Id.* at 860–61.
12. 132 S. Ct. 694 (2012).
13. *See id.* at 699.
14. 134 S. Ct. 2751.
15. *See id.* at 2764–66.
16. Holt v. Hobbs, 135 S. Ct. 853, 861 (2015).
17. *Id.* at 859.
18. *Id.* at 861.
19. *Id.*
20. *Id.*
21. *Id.*

Applying the RLUIPA, the Supreme Court found for Holt.[22] The RLUIPA requires that any action by a state or local government that substantially burdens the religious practice of an institutionalized person must be "the least restrictive means of furthering a compelling governmental interest."[23] Holt argued that he sincerely believed, based on his religion, that he was required to leave his beard unshaven.[24] The state did not dispute the sincerity of Holt's belief regarding his religious obligation to remain unshaven, but did note that not all Muslims believe that their faith requires that men be unshaven.[25] The Court addressed the state's argument by noting that a religious practice need not be "compelled by or central to a system of religious belief" to be an exercise of religion covered by RLUIPA.[26] Holt's exercise of religion—not shaving his beard—was substantially burdened because he would have been disciplined had he refused to shave his beard.[27] Though the Court found that the state's interest in prison safety and controlling contraband was a compelling state interest, the Court also found that the state's solution—the requirement that prisoners be clean shaven—was not the least restrictive means of furthering that interest.[28] Consequently, Holt prevailed.

The *Holt* Court's analysis provided a standard application of RLUIPA to an individual's exercise of religion claim. The government refused to allow Holt to engage in a religious practice. RLUIPA required that the government justify its action. The government could not do so, and it lost. Simply stated, RLUIPA expands the protection for an individual's free exercise rights more broadly than the Free Exercise Clause does.[29]

B. Hosanna-Tabor Evangelical Church and School v. EEOC

Hosanna-Tabor involved the exercise of religious rights through a church and church-affiliated school.[30] In that case, plaintiff Cheryl Perich, a commissioned minister and teacher at the school, argued that she had been

22. *Id.* at 867.

23. *Id.* at 859.

24. *Id.* at 861.

25. *Id.* at 862.

26. *Id.* (quoting 42 U.S.C. § 2000cc–5(7)(A) (2012)); *see also* Davis v. Fort Bend Cnty., 765 F.3d 480, 485 (5th Cir. 2014) (noting that courts cannot inquire into whether a religious belief is "central to the religion" or "a true religious tenet").

27. *Holt*, 135 S. Ct. at 862 (noting that the key issue is whether this practice was substantially burdened, not whether his exercise of religion, broadly construed, was substantially burdened by not being allowed to keep a one-half inch beard).

28. *Id.* at 863–64.

29. For a discussion of RLUIPA's relationship to the free exercise clause, see *id.* at 859–60.

30. The church operated the school. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct. 694, 699 (2012). However, the school had its own board of directors. *Id.* at 699–700.

fired by her Lutheran church school in violation of the Americans with Disabilities Act ("ADA") because she demanded to be allowed to return to work after a medical leave.[31] Perich had been on leave during the school year after being diagnosed with narcolepsy.[32] After being cleared to return to work and requesting to return, Perich was told that she had to remain on leave for the remainder of the school year.[33] After receiving that information, renewing her desire to return, and being told the she would likely be fired if she did not relent, Perich threatened to sue.[34] The church congregation then severed ties with Perich by rescinding her call to minister at the church.[35] The next day, she was fired from the school as a teacher.[36]

The school argued that the ADA did not apply to the situation because the plaintiff was a minister subject to the ministerial exception.[37] Though not codified, the ministerial exception bars employment discrimination suits filed by a minister challenging a termination by the minister's religious employer.[38] The exception is an outgrowth of the First Amendment's limitation on the government's regulation of the affairs of religious entities.[39] The Free Exercise and Establishment Clauses limit governmental interference in a church's choice of its ministers, including the application of laws that would force churches to keep ministers or encourage the churches to do so by allowing compensation for discrimination.[40] Such employment discrimination statutes deprive the employer of its freedom to freely control "those who will personify its beliefs," and must yield.[41] Consequently, a religious employer may fire one of its ministers for any reason without regard to employment discrimination statutes that would otherwise limit such termination.[42]

A key issue in *Hosanna-Tabor* was whether the ministerial exception applied to Perich or her teaching position. Perich argued that even though

31. Who fired Perich is unclear. The Court deems the church to have fired Perich, but the chairman of the school's board was involved in the firing. *See id*. at 700, 710.

32. *Id.* at 700.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 701. For a broader discussion of the ministerial exception, see Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011).

38. *Id.* at 710.

39. *Id.* at 705–06.

40. *Id*. at 702 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."). Whether ministers can sue their churches in contract or tort based on their employment relationship is unsettled. *See* Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J. L. PUB. POL. 839, 861-62 (2012).

41. *Id*. at 706.

42. *Id*. at 710.

she was a minister, her teaching job was not necessarily a position to which the ministerial exception should apply.[43] When Perich began teaching at Hosanna-Tabor, she was a lay teacher.[44] After meeting certain academic requirements and receiving her call to minister at Hosanna Tabor, she was commissioned as a minister.[45] She then became a "called" teacher at the school.[46] Thereafter, in essence, she was a minister who taught in the school. The teaching position required that she provide some religious instruction to students, but the position did not require that its holder be a commissioned minister.[47] Indeed, Perich was replaced by a lay teacher.[48] However, the nature of the teaching job did not appear to matter much in this context. Though the Court discussed Perich's job duties and her teaching position, it focused on the fact that Perich was a minister. Accordingly, the Court decided that Perich was a minister who necessarily was covered by the ministerial exception.[49]

The Court suggested that *Hosanna-Tabor* merely involved a church firing a minister, an easy case under the ministerial exception.[50] Certainly, the Hosanna-Tabor congregation had a free exercise right to rescind Perich's call to minister at the parish and effectively fire her as one of its ministers. However, the case can be as easily understood as involving a church school firing a teacher.[51] Perich arguably served both as a minister and as a lay teacher. Before Perich was called to the parish, she served in her position as a lay teacher. When Perich took medical leave, her job was filled by a lay teacher. Consequently, it is not clear that Perich should have had to retain her call to the parish to retain the teaching position. Perich clearly was a minister, and her skills and training as a minister presumably allowed her to function better in her role as a teacher at the school. However, whether Perich should have been considered a minister who was fired or a schoolteacher who was fired is a contested question.[52] The Court did not

43. The Court struggled over that issue. *See id*. at 707–09.

44. *Id.* at 700.

45. *Id.* at 699–700; *see also* Laycock, supra note 40, at 840-41 (discussing the role commissioned ministers play in the Lutheran Church).

46. *Id.* at 700.

47. *Id.* at 708.

48. *Id.* at 700.

49. *Id.* at 710.

50. *Id.* ("The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her.").

51. Lay teachers and called teachers generally had the same duties. *See id.* at 700.

52. The Court suggested that determining the positions that are subject to the ministerial exception is not a mechanical process based merely on a job description or job functions. *See id.* at 708.

decide whether the position was ministerial, focusing instead on whether Perich was a minister.[53]

The ministerial exception is about more than whether the employee is an ordained or commissioned minister. One need not be ordained to serve in a role covered by the ministerial exception.[54] The exception may also relate directly to the position the terminated employee held. How the Court decides what positions are covered by the ministerial exception and whether it should cede the coverage decision to the religious organization is important.[55] If a church-related employer can describe nearly all of its employees as ministers and if the inquiry into the employer's justification for doing so is limited, the employer's decision regarding who is a minister will govern in most situations. If so, *Hosanna-Tabor* functionally allows a church school to decide when the ADA applies to it.

Unfortunately, the Court appeared to give little thought to whether there was a difference between the congregation's right to rescind Perich's call as a minister and the school's right to fire her as a teacher.[56] That distinction may not appear to matter much. However, given that Perich's claims related to matters of disability discrimination, rather than to matters of religious discrimination or doctrine, the distinction may be as much a matter of allowing the church school to choose whether the employment discrimination law will apply to it than it is a matter of allowing a church or its affiliated entity to engage in the free exercise of religion.[57]

C. Burwell v. Hobby Lobby Stores, Inc.

At issue in *Hobby Lobby* was whether the free exercise rights of closely held, for-profit corporations requires that such corporations be exempted from certain parts of the ACA. After the ACA's passage, the Department

53. *See id.* at 708 ("We express no view on whether someone with Perich's duties would be covered by the ministerial exception in the absence of the other considerations we have discussed.").

54. *See, e.g.*, Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 180 (5th Cir. 2012) (finding music director to be a minister); *see also Hosanna-Tabor*, 132 S. Ct. at 711 (Alito, J., concurring) (suggesting that ordination cannot be the key to finding that someone is a minister for purposes of the ministerial exception and that job function is more important).

55. *See Hosanna-Tabor*, 132 S. Ct. at 710 (Thomas, J., concurring) (suggesting that the First Amendment "require[s] civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister").

56. *Id.* at 710 (deeming the case to be about a church firing a minister).

57. Title VII specifically allows certain religious employers to discriminate in employment on the basis of religion. *See* 42 U.S.C. § 2000e-1(a) (2014); *see also* 42 U.S.C. § 2000e-2(e) (2014) (allowing religious discrimination in certain circumstances). Not only can a religious organization fire or refuse to hire an employee whose religious beliefs are inconsistent with the organization's, an employee may be barred from suing for harassment or retaliation based on religion. *See* Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189 (4th Cir. 2011).

of Health and Human Services ("HHS") developed regulations specifying the benefits, including contraceptive benefits, covered employers must provide under the ACA through the employer's insurance plans.[58] HHS exempted some religious, non-profit employers—but no for-profit corporations—from the regulations.[59] The plaintiffs, all closely held, for-profit companies, argued that providing or being involved in providing some of the required forms of contraception would substantially burden their exercise of religion.[60] Each plaintiff-employer company had been founded by individuals or families with strong religious beliefs and had been operated consistent with those beliefs.[61] The Court held that the corporations were exempt from the HHS regulations.[62]

The case was decided under RFRA rather than directly under the First Amendment.[63] RFRA protects a person's (including a corporation's) exercise of religion; it does not distinguish between non-profit and for-profit corporations.[64] Substantively, RFRA and RLUIPA are analyzed in the same way.[65] The government violates RFRA when it substantially burdens a corporation's exercise of religion, but fails to demonstrate that its actions are both supported by a compelling governmental interest and represent the least restrictive means of effectuating the interest.[66] After acknowledging that protecting the free exercise rights of the corporations is shorthand for protecting the rights of the owners of the corporations,[67] the Court determined that the corporations' exercise of religion had been substantially limited by being forced to provide the forms of contraception at issue.[68] Though the Court assumed that the HHS regulations were justified by a compelling governmental interest, it found that the regulations were not the

58. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762–63 (2014).

59. *Id.* at 2762–64.

60. *Id.* at 2765–66.

61. *Id.* at 2764–66.

62. *Id*. at 2759 ("We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.").

63. *Id*. at 2759.

64. *Id.* at 2768–71.

65. *See* Holt v. Hobbs, 135 S. Ct. 853, 860 (2015) (noting that RFRA and RLUIPA are to be interpreted in the same manner).

66. *See Hobby Lobby*, 134 S. Ct. at 2767 ("RFRA prohibits the '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.'" (quoting 42 U.S.C. §§ 2000bb-1(a), (b))).

67. *Id.* at 2768.

68. *Id.* at 2775–79.

least restrictive means of furthering the government's interests and invalidated them as they applied to the plaintiff corporations.[69]

Telescoping illuminates *Hobby Lobby*. The owners' free exercise rights were telescoped such that the corporate rights were acknowledged to be the owners' individual free exercise rights that were being exercised by the corporation on the owners' behalf.[70] At its starkest, *Hobby Lobby* allowed the owners of closely held corporations to choose which law would apply to their for-profit corporations based on the owners' religious devotion. However, *Hobby Lobby* may not be the end of the issue regarding an owner's latitude to exercise free exercise rights through its corporation.[71] The dissent suggested *Hobby Lobby* provides no clear end to an owner's power to decide what governmental actions its corporation need not follow when such government actions conflict with the owner's religious beliefs.[72]

D. Summary

Taken together, *Holt*, *Hosanna-Tabor*, and *Hobby Lobby* suggest that a different set of laws may apply to the faithful and their corporations than to the general population. That is not necessarily surprising in a society that protects religious devotion. If religious devotion is to be fully protected by the government, the law may be required to yield when such devotion conflicts with the law. However, the cases do not appear to provide a clear stopping point for *when* the law must yield. In all three cases, the party that wanted to avoid the application of laws or rules based on its desire to exercise religious rights won. However, the nature of the claim of religious devotion and exemption from government action or law differed depending on the collectivization and telescoping at issue.

In *Holt*, the individual plaintiff objected to the application of the prison rules. Losing would have restricted his exercise of core faith values in a direct and personal manner. No collectivization or telescoping was necessary. *Hosanna-Tabor* allowed a church school to object to having its decision to fire one of its teachers reviewed. A loss for Hosanna-Tabor would have required that the church school justify its firing of the teacher, just as a non-

69. *Id.* at 2781–82.

70. *Id.* at 2768 ("[P]rotecting 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.").

71. For a broader discussion of Hobby Lobby's possible implications, see Terri R. Day, Leticia M. Diaz & Danielle Weatherby, *A Primer on* Hobby Lobby*: For-Profit Corporate Entities' Challenge to the HHS Mandate, Free Exercise Rights, RFRA's Scope, and the Nondelegation Doctrine*, 42 PEPP. L. REV. 55 (2014).

72. Justice Ginsburg noted that it was unclear whether the owners could decline to provide other medical care on religious grounds, such as blood transfusions. *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).

religious school would have been required to do. The decision relied on the collectivization of parishioners' free exercise rights in a church and the telescoping of those rights through the church-affiliated school. In *Hobby Lobby*, the corporations' owners objected to the application of a law that offended their religious sensibilities. The owners suggested that a loss would have required them to violate their deeply held religious beliefs. The owners' free exercise rights were telescoped through the corporation.[73] The owners may be correct that applying the law to their corporations is the same as burdening their free exercise rights directly, but their claim ought to require significant justification. These three Supreme Court cases raise the questions of whether and when the collectivization and telescoping of free exercise rights is sensible. Part II takes a closer look at the collectivization and telescoping of such rights.

II. COLLECTIVIZING AND TELESCOPING FREE EXERCISE RIGHTS

Free exercise is most easily understood as the exercise of an individual's right to practice religion. The idiosyncratic nature of religious belief and practice should make protecting free exercise rights a personal affair. Consequently, telescoping and collectivizing free exercise rights so that entities appear to exercise religious rights directly is problematic. Allowing a group of individuals to telescope their free exercise rights through an entity may be troublesome unless the entity was created to facilitate the exercise of such rights and individuals use the entity explicitly to exercise such rights. However, that the entity is merely exercising the free exercise rights of individuals should remain clear. That harm to the religious rights of the individuals—rather than harm to the prerogatives of the entity—should be the measure of harm to free exercise rights must remain clear. The same is true when free exercise rights are collectivized and an entity appears to be allowed to exercise such rights on its own. Harm to the entity's prerogatives may be treated as harm to free exercise rights. However, the key is that harm to the entity's free exercise rights must necessarily harm the free exercise rights of the entity's adherents. Both telescoping and collectivization are best understood in the context of entities created primarily or solely to facilitate the exercise of those free exercise rights, i.e., churches or their equivalent.

73. However, the Court was unclear at times regarding whether the free exercise rights of the individual owners of the companies or the free exercise of the companies' free exercise rights were at issue. *See id*. at 2768.

A. Idiosyncracy and Belief

The idiosyncratic nature of religious belief can make telescoping and collectivizing free exercise rights difficult to justify. A belief need not be common to other practitioners of the same religion or to anyone else in order to be protected.[74] Indeed, the belief not need be strictly religious.[75] It merely needs to be sincere and as deeply held as a religious belief.[76]

Even when the individuals share common beliefs, individuals can operationalize free exercise in idiosyncratic manners. Consequently, determining whether an exercise of governmental power harms an individual's free exercise of religion should be an individualized process.[77] For example, how precisely the plaintiff in *Holt* operationalized his free exercise rights is unclear, and precisely how the prison's policy violated his religious rights is likewise somewhat unclear. Holt argued that his religious beliefs required that his beard remain uncut.[78] However, he was willing to cut his beard to one-half inch. If his sincerely held belief was that he had to leave his hair uncut, a half-inch beard would not appear to be consistent with his sincerely held belief. Conversely, if his sincerely held belief was that he was merely required to resist cutting his hair as much as practicable, offering to keep a one-half inch beard or a beard of whatever length he believed the warden would allow would appear to be a compromise that might be consistent with his sincerely held belief.[79] How Holt operationalized his free exercise obligations is important. If forcing Holt to cut his beard to one-half inch substantially restricts his exercise of religion—keeping his hair uncut—it is unclear that it is a proper solution. Conversely, if his willingness to keep a beard cut to one-half inch suggests that he may not have a sincerely held religious belief that he is not allowed to cut his beard, it is not clear that letting him keep a half-inch beard in violation of prison policy

74. *See* Holt v. Hobbs, 135 S. Ct. 853, 862–63 (2015) (noting that even idiosyncratic religious beliefs that are not held by all members of the faith are protected by RLUIPA and the Free Exercise Clause).

75. *See, e.g.*, Chenzira v. Cin. Child. Hosp. Med. Cent., 2012 WL 6721098, *4 (S.D. Ohio 2012) (noting the possibility that veganism can be protected as a moral or ethical belief akin to a religious belief).

76. *See* Davis v. Fort Bend Cnty., 765 F.3d 480, 485 (5th Cir. 2014) (focusing on whether covered beliefs are "moral or ethical beliefs as to what is right and wrong" and are "sincerely held with the strength of traditional religious views"); *see also Hobby Lobby*, 134 S. Ct. at 2778 (noting that religious beliefs need not be objectively reasonable to be protected).

77. Indeed, disputes about church doctrine and its application continue, even among clergy who presumably share the same religious beliefs and doctrine. *See, e.g.*, Henry L. Chambers, Jr. & Isaac A. McBeth, *Much Ado About Nothing Much*: *Protestant Episcopal Church in the Diocese of* Virginia v. Truro Church, 45 U. RICH. L. REV. 141, 142–46 (2010) (discussing the Episcopal Church's internal disputes regarding homosexual clergy).

78. *Holt*, 135 S. Ct. at 861.

79. *See id*. at 862 (noting that it is possible that duty to religion may have been discharged by attempting to adhere to a belief, whether successful or not).

is a sensible solution, even if the prison's rule on beards is unjustifiable. How a group of people holding the same belief regarding the need to keep their beards uncut would collectively operationalize that religious belief is even less clear.[80]

Clarity is important if an entity is to exercise the religious rights of a group of individuals. When religious belief conflicts with a generally applicable law, the precise nature of the belief should be explored, given that the law may have to yield. The refusal to be precise about the nature of a religious belief and to ask direct questions about that belief is not a sign of respect for the religious belief, but a show of disrespect for the generally applicable law—a law that others must follow.

B. Telescoping

Telescoping involves projecting free exercise rights of individuals through another entity when it is generally understood that the entity is exercising the rights of the individuals. *Hobby Lobby* is an example of telescoping rights through an entity.[81] Telescoping is odd in that if it is clear that the rights asserted are those of individuals associated with the entity, arguably the individuals should assert their rights on their own. However, telescoping may be efficient. If those associated with an organization share common beliefs and common practices that are operationalized through the organization, allowing the organization to be treated as the vessel through which religious rights are exercised might be sensible.

However, given the idiosyncrasy of religious belief, an entity may not be protecting the free exercise rights of some of its members when it asserts the free exercise rights of other members. If only half of an entity's members operationalize free exercise rights in a particular way, a law that restricts the manner in which the applicable rights have been operationalized only burdens the free exercise rights of half of the entity's members. Nonetheless, if the free exercise rights of some of the entity's members are violated, allowing the organization to assert free exercise rights on its members' behalf may be sensible and efficient. Telescoping may be harmless if the focus of assessing the entity's assertion of rights remains on the free exercise rights of its individual members.

C. Collectivization

Collectivization occurs when an entity exercises the rights of its members or parishioners as the entity's own rights. It is more extreme than tele-

80. The *Holt* Court suggested that not all Muslims believe their beards must remain uncut, but that the belief that one's beard must be uncut is not idiosyncratic. *See id.* at 862–63.

81. *See Hobby Lobby*, 134 S. Ct. at 2768.

scoping in that collectivization suggests that the free exercise rights at issue are the rights of the entity.[82] When the government intentionally restricts the practices of a collective religious entity, e.g., a church, the direct assertion of free exercise rights by the entity is easy to understand. However, collectivization is more problematic when the entity seeks to avoid the strictures of a generally applicable law.

Allowing the entity to assert its own rights would appear sensible only if its members operationalize free exercise in the same way. If only some portion of the entity's membership's free exercise rights are affected by the law, the church is actually telescoping the rights of some parishioners rather than collectivizing the rights of all parishioners. Nonetheless, collectivization might cause little harm if the entity is a church or similar organization.

Collectivizing the free exercise rights of parishioners in a church may be sensible if there is a shared doctrine or shared free exercise practice that can be discerned. The key is that parishioners adhere to the church and its doctrine. When a church has been created or maintained to facilitate its parishioners' free exercise rights, a church's members presumably adhere to the church's doctrine.[83] Individual members of the church may operationalize church doctrine in various ways, but it is the church's doctrine that they are trying to apply. To the extent that free exercise is about protecting the religious beliefs an individual holds and the religious practices an individual engages in, collectivizing the free exercise rights of followers of the same church or religion seems reasonable. A parishioner may disagree with church doctrine, but any disagreement between an adherent's interpretation of church doctrine and actual church doctrine reflects the adherent's personal belief, which will be protected separately by free exercise doctrine. Even if one believes that a church should technically have no real free exercise rights of its own, collectivizing parishioners' free exercise rights and allowing a church to exercise those rights collectively may be sensible. A court could treat the existence of a church's free exercise rights as a recognition that individual parishioners adhere to church doctrine and wish to exercise their free exercise rights through the church.

D. Corporate Entities and Free Exercise Rights

The *Hobby Lobby* Court suggests that free exercise rights that are provided to some entities can be provided to any entity on similar terms and in

82. *See, e.g.*, *id.* at 2794–95 (focusing directly on the church's religious rights rather than the religious rights of parishioners); Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (suggesting that a church can hold and exercise religious rights).

83. *See* Henry L. Chambers, Jr., *Slavery, Free Blacks, and Citizenship*, 43 RUTGERS L.J. 487, 493–94 (2013) (discussing adherence and church membership).

similar situations.[84] Consequently, providing free exercise rights to a church school, like Hosanna-Tabor, may be similar to providing free exercise rights to a for-profit corporation owned by devout Christians, like Hobby Lobby. The argument that corporate form does not matter, so that incorporated churches and unincorporated churches will be treated the same, is sensible. The argument that all corporate entities have the same capacity to exercise religion because some corporate entities do is weaker.[85] Justifying the telescoping or collectivization of the free exercise rights of church members in a church is easier than justifying the telescoping or collectivization of the free exercise rights of owners of a for-profit business in that business.[86]

Theoretically, a corporation could be treated just like a church, as a receptacle for free exercise rights. However, for-profit corporations are not created primarily to facilitate the owners' free exercise rights; they reflect the owners' free exercise rights.[87] The owners do not adhere to the corporation in the manner that congregants adhere to their church. Rather, the corporation adheres to its owners and changes whenever, and however, the owners require.[88] The corporation's actions may reflect the owners' devotion to religious principles, but the corporation does not exist to facilitate the owners' free exercise of religion. Given that, there is little need or justification to telescope or collectivize free exercise rights. Rarely, if ever, should a for-profit business be considered to be exercising its *own* free exercise rights, rather than merely asserting the disparate and possibly inconsistent free exercise rights of its owners and members as individuals.

Corporate telescoping or collectivization of religious rights would seem to rest on the notion that the religious beliefs of multiple owners can be identified and transmitted to a corporate body as a single-belief structure. That is unlikely. Surely, the general religious views of all owners may be sufficiently consistent for all to agree to a particular corporate policy.[89] However, that does not mean that the owners share specific beliefs so com-

84. *See Hobby Lobby*, 134 S. Ct. at 2769–73 (explaining that for-profit and non-profit corporations alike are covered by RFRA and its protection of the exercise of religion).

85. *See id.* at 2769–70 (suggesting that both for-profit and non-profit corporations can exercise religion).

86. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) ("For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.").

87. *See Hobby Lobby*, 134 S. Ct. at 2768.

88. *See id*. ("Corporations, 'separate and apart from' the human beings who own, run and are employed by them, cannot do anything at all." (quoting Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Hum. Servs., 724 F.3d 377, 385 (3d Cir. 2013))).

89. *See Hobby Lobby*, 134 S. Ct. at 2771.

pletely that they can speak with one voice consistently on free exercise issues.

The problems of telescoping or collectivization are acute when the entity has multiple members or owners, but some of these conceptual problems would exist even if there were a single owner or member. The owner's rights must be managed by agents and employees of the corporation.[90] Whether the rights were asserted properly would depend on how well the agents and employees knew the owner's religious beliefs and how that knowledge translated into policy or day-to-day operations. If agents misperceive the substance of the owners' religious views, religious rights cannot be operationalized accurately. Any mismatch is problematic because the basis for allowing free exercise rights to trump a law is that the law impermissibly restricts the owner's specific operationalizing of religious exercise.[91] Looking to a restriction on the entity's exercise of religion, as in *Hobby Lobby*, to determine whether the owner's free exercise rights have been violated may not be sensible.

Nonetheless, telescoping free exercise rights could be harmless if the focus remains on the free exercise rights of the individual owner. If courts ask those members who want to enforce their free exercise rights through their corporation precisely how their free exercise rights are harmed by limiting the prerogatives of the corporation, and if the courts closely analyze the answers, allowing telescoping may not be harmful, though it may prove to be largely pointless.[92]

E. Summary

The collectivizing and telescoping of religious rights may seem sensible, as these actions merely reflect the notion that individuals have free exercise rights that may be affected if entities with which they are associated are harmed. Nonetheless, courts should be careful to consider collectivization and telescoping for what they are—shorthand for protecting individual free exercise rights. As noted above, collectivization and telescoping may be sensible when churches or similar organizations are the entities at issue, but may not make much sense if the entities are non-religious. However, if telescoping and collectivization are used to allow both religious and non-

90. Corporations can act only through their agents and employees. *See Hobby Lobby*, 134 S. Ct. at 2768; Braswell v. United States, 487 U.S. 99, 110 (1988).

91. *See* Henry L. Chambers, Jr., *The Problems Inherent in Litigating Employer Free Exercise Rights*, 86 U. COLO. L. REV. 1141, 1164–66 (2015) (discussing the problems of agents overclaiming free exercise rights on employer's behalf).

92. This is particularly important because corporations are not generally considered the alter ego of their owners. *See* Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 166 (2001); *see also Braswell*, 487 U.S. at 104–05 (noting that the owner of corporation and the corporation are separate entities for purposes of replying to a subpoena).

religious entities to assert free exercise rights, courts must focus specifically on how individual rights are affected by the harm visited on the entities.

III. MANAGING THE COLLECTIVIZATION AND TELESCOPING OF RIGHTS

The broad conceptualization of collectivizing and telescoping individual free exercise rights has created a climate in which many entities can claim to exercise free exercise rights. Cabining these claims before they effectively become requests by the faithful that any entity with which the faithful are associated be exempt from laws that arguably offend the faithful's religious sensibilities is difficult, but must be done. The key lies in addressing burgeoning claims without limiting the core protection of individual free exercise rights. Resolving the issue may require asking additional serious and possibly unsettling questions about the nature of the free exercise claims being asserted by individuals and related entities.

A. Direct Exercise of Individual Free Exercise Rights

When individuals exercise free exercise rights directly, as in *Holt v. Hobbs*, neither collectivization nor telescoping occurs. The proper breadth of the protection of the individual's free exercise rights remains an open question, but that is not related to collectivizing or telescoping such rights. The protection provided to religious beliefs in *Holt* and in other cases may be broad, but that is arguably consistent with treating religious beliefs as personal rights of conscience. Any argument that *Holt* allows a religious person to have his own set of rules apply to him stems from the nature of the protection of religious rights, rather than from collectivizing or telescoping such rights.

B. Exercising Individual Free Exercise Rights Through Church or Similar Organizations

Exercising rights through an organization designed to facilitate the exercise of religious belief, such as a church, can be sensible. Members of the church adhere to church doctrine for purposes of the church's exercise of the free exercise rights. However, the focus should generally remain on the free exercise of the rights of members, rather than on the free exercise rights of the church. Nonetheless, in practice, when the application of a law or its avoidance is at issue, the focus is often on the rights of the church.[93]

93. *See, e.g.*, Alcazar v. Corp. of the Catholic Archbishop of Seattle, 627 F.3d 1288, 1291 (9th Cir. 2010) (discussing additional cases focusing on the free exercise of churches); Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1243 (10th Cir. 2010) ("The ministerial exception preserves a church's "essential" right to choose the people who will 'preach its values,

As noted in Part I, the ministerial exception allows churches to fire ministers without providing a reason. Even if a termination is unrelated to religion and was triggered by the discriminatory conduct that the statute at issue was meant to address, churches do not have to answer for the firing.[94] In some cases, the discrimination claims involved cannot be heard even when they involve employees who are largely engaging in secular tasks or tasks that may not require religious training.[95] Though it is unclear that the firing would comport with any parishioner's operationalizing of free exercise rights, courts have allowed free exercise rights to justify the refusal to review terminations in those situations. The church's interests as an employer may be more relevant than the congregation's interest in free exercise.

Presumably, if every parishioner disagreed with the church's decision to fire a person the church deems to be a minister, parishioners would leave or attempt to have the church's decision reversed. However, rather than rely on parishioner action, courts should consider asking searching questions regarding whether the employee who was fired was a minister, whether the position in question was ministerial and whether the firing was really consistent with or required by church doctrine. Doing so might trench on the church's free exercise rights more than courts have in the past, but it may be necessary to provide some limitation on religious prerogative.[96]

C. Exercising Free Exercise Rights Through a Church-Affiliated Entity

teach its message, and interpret its doctrines, both to its own membership and to the world at large,' free from the interference of civil employment laws.").

94. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct. 694, 701 (2012); Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 605 (Ky. 2014) (asserting that ministerial exception makes a court incompetent to hear employment discrimination claims by ministers against their religious employers).

95. For example, in Cannata v. Catholic Diocese of Austin, 700 F.3d 169 (5th Cir. 2012), the music director at a Catholic church was deemed a minister who could be fired without explanation. *Id*. at 180; *see also* EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 805 (4th Cir. 2000) (deeming the director of music ministry to be a minister). Consequently, his Age Discrimination in Employment Act (ADEA) and ADA claims could not be heard. *Cannata*, 700 F.3d at 170. Cannata argued that his tasks were largely secular. *Id*. at 177 ("The crux of Cannata's argument is that he merely played the piano at Mass and that his only responsibilities were keeping the books, running the sound system, and doing custodial work, none of which was religious in nature. However, the performance of secular duties, the Supreme Court has said, may not be overemphasized in the context of the ministerial exception." (citing *Hosanna-Tabor*, 132 S. Ct. at 709)).

96. *See Hosanna-Tabor*, 132 S. Ct. at 704–05 (discussing the tradition of leaving church doctrine to churches). For an interesting discussion of how the ministerial exception ought to fit with religious doctrine, see Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965 (2007).

Exercising free exercise rights through a church-affiliated entity involves telescoping a church's free exercise rights. *Hosanna-Tabor* appears to be an example.[97] In that case, the church school fired a minister-teacher, but was not subject to the ADA for the dismissal because of the ministerial exception.[98] The church school arguably exercised the church congregation's right to decide who could minister in the church's name at the school.[99] If the school was a ministry of the church, that approach may be sensible.

However, the issue that arises when a church invokes the ministerial exception directly arises in this context as well. The use of the ministerial exception can be as consistent with the affiliated entity's administrative convenience as with religious devotion.[100] Certainly, in *Hosanna-Tabor*, the church congregation spoke when it rescinded Perich's call.[101] However, the congregation did not speak with religion-based clarity about whether Perich should remain a teacher at the school.[102] In cases like this one, courts should seek clarity by distinguishing between the church/congregation's free exercise rights and the church-affiliated entity's rights. Determining how applying a law to the church-related entity harms the church members' free exercise rights would clarify what rights were violated and guarantee that collectivizing and telescoping rights in this context would not deform the inquiry regarding the law's effect on the exercise of free exercise rights.

D. Exercise of Free Exercise Rights by Unaffiliated Religious Organizations

Religious organizations that are unaffiliated with churches may attempt to exercise religious rights. That exercise of rights may be problematic because it appears to suggest collectivization or telescoping in a context in which neither may be appropriate. The organization will likely have an organizing statement of principles with which members will presumably

97. For a discussion of whether *Hosanna-Tabor* involved the firing of a minister or the firing of a teacher, see *supra* Part I.B.

98. *Hosanna-Tabor*, 132 S. Ct. at 710.

99. *See id*. at 700 (discussing the order of events and role the school's board played in leading to the minister's dismissal).

100. Indeed, the school told plaintiff that it had hired a lay teacher for the remainder of the school year and that her position was no longer available. *See id.* Affiliated organizations may not need to be religious to be covered by the ministerial exception and similar doctrines. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

101. *See Hosanna-Tabor*, 132 S. Ct. at 700.

102. The congregation appeared to have only spoken on rescinding the minister's call to ministry at the church. *See id*.

agree.[103] However, few members are likely to adhere to the statement of principles in the way parishioners adhere to church doctrine. If a substantial proportion of members adheres to the statement of principles, the organization arguably should be considered a small, independent church rather than an unaffiliated religious organization. If few members adhere to the organization's doctrine, there may be no reason to collectivize the rights of members. Such members, like members of churches, may have very different ways of operationalizing their free exercise rights. More importantly, such members—unlike members of churches—are not likely to use the organization as a vehicle to exercise their free exercise rights. Under those circumstances, there may be little reason to allow the organization to exercise the free exercise rights of its members. Rather, the organization would need to assert its own free exercise rights.

Allowing an organization to assert religious beliefs expressed through its statement of principles that may be agreed to by many members, but not adhered to in a religious fashion, is troublesome. Certainly, an organization's charter may express religious beliefs with which its members agree. However, that does not mean that members view the organization as an entity through which to exercise religious rights. In that case, the application of the organization's principles as deeply held religious beliefs that allow it to avoid a law of general applicability would be less about exercising the free exercise rights of the organization's members and more about advancing the organization's religious prerogatives.

Conlon v. InterVarsity Christian Fellowship[104] may provide an example. In this case, plaintiff's sex discrimination claim was dismissed when the court determined that her claim was barred by the ministerial exception.[105] Plaintiff had been a spiritual director with defendant Intervarsity Christian Fellowship ("IVCF"). InterVarsity Christian Fellowship is "an evangelical campus mission serving students and faculty on college and university campuses nationwide."[106] Through its policies and Purpose Statement and Doctrinal Basis, IVCF had made clear that it highly valued marriage and expected its employees to "honor their marriage vows."[107] Plaintiff claimed that she was fired for failing to reconcile her marriage, even though at least two other "similarly situated male [IVCF] employees

103. An organization may have religion-based doctrine that members agree to observe. *See* Conlon v. Intervarsity Christian Fellowship, 777 F.3d 829, 831 (6th Cir. 2015) (noting IVCF's Purpose Statement and Doctrinal Basis which presumably forms the core of its beliefs).

104. 777 F.3d 829 (6th Cir. 2015).

105. *Id.* at 831.

106. *Id.*

107. *Id.*

divorced their spouses during their employment, but were not disciplined or terminated."[108]

InterVarsity Christian Fellowship claimed that it was a religious organization and that plaintiff was a minister.[109] The Sixth Circuit agreed, noting that, even though IVCF is not a church and is not affiliated with a church, it is a Christian organization with a Christian mission.[110] The court deemed IVCF a religious group that could claim the ministerial exception.[111] Consequently, the court held that IVCF, a self-identified Christian organization without any formal ties to any church or denomination, could choose, through its bylaws and its Purpose Statement and Doctrinal Basis, whether Title VII's sex discrimination provisions would apply to its termination decision.[112]

Courts that provide such organizations access to the ministerial exception ought to consider asking what makes an unaffiliated organization more like a church than like a standard non-profit organization that is influenced by religious faith but is not considered a religious organization. Specifically, the court should ask whose free exercise rights are being asserted. If the organization cannot find anyone who claims to exercise his or her free exercise rights through the organization, the organization should not be allowed to claim to be exercising free exercise rights. If an individual or group of individuals claims to exercise free exercise rights through the organization, the court should ask how thir free exercise rights would be harmed by enforcing employment discrimination statutes with respect to the entity or by not allowing the entity to use the ministerial exception. If no individual could persuasively argue that keeping the plaintiff as a minister violates his or her free exercise rights, the organization is presumptively using the ministerial exception for its own purposes, rather than for the purposes of its members. That may not be a legitimate use of free exercise protection.

E. Exercising Free Exercise Rights Through Non-Religious Organizations

When non-religious organizations enjoy free exercise rights, the organization exercises the rights of its owners. *Hobby Lobby* is the example; its deficiencies are clear. In *Hobby Lobby*, the Court did not appear to ask the

108. *Id.* at 832.

109. *Id.* at 833–34.

110. *Id.* at 834.

111. *Id.* at 833. A multidenominational or nondenominational group can be a religious group for the purpose of the ministerial exception. *Id.* at 834

112. *See* Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 310 (4th Cir. 2004) (deeming a Jewish nursing home unaffiliated with a temple to be a religious organization that could claim the ministerial exception based on its bylaws and its attention to Jewish religion).

difficult, but necessary, questions regarding how a limitation on the for-profit corporations harmed the free exercise rights of the its owners. Not asking the questions is of concern because courts need to make a serious inquiry into how the owners' free exercise rights are harmed by the application of a law to the owner's company. This is different than asking whether the owners disagree with the law or are offended by it. Undoubtedly, asking questions about the owners' beliefs might entangle courts with religious doctrine issues that courts do not want to consider. However, if a non-religious organization claims that a law should yield because the organization's free exercise rights—its owners' rights—are being harmed, a hard look at that claim is reasonable.

F. Financial Incentives

A practical problem accompanies broad notions of the collectivization and telescoping of free exercise rights. Loose notions of collectivization and telescoping can lead individuals to attempt to protect their financial interests, rather than merely their spiritual interests, through free exercise claims made through entities.[113] Asserting religious rights can be financially valuable for entities, their members, or their owners.[114] The ability to fire a minister or teacher without concern for violating an employment discrimination statute, as in *Hosanna-Tabor*, may be valuable. The value may be particularly significant when the religious organization is competing with entities that do not have that latitude.[115] The ability to refuse to provide insurance for certain forms of health care, as in *Hobby Lobby*, may also be valuable. Even if the employer does not plan to save money through the exercise of such rights, if the rights can be asserted without cost, there may be an incentive to assert such rights. If courts are not willing to take a hard look at the sincerity of an organization's or its owners' beliefs, additional claims for religious exemption may be made.

Specifically, additional corporations may begin to request religious exemptions. The *Hobby Lobby* Court found that a closely held, for-profit corporation can exercise religious rights. The *IVCF* court appeared to sug-

113. Some might argue that that already occurred in Braunfeld v. Brown, 366 U.S. 599 (1961). However, that case involved a sole proprietor claiming individual free exercise rights directly rather than through an entity. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2770 (2014) (discussing *Braunfeld*).

114. The *Braunfeld* Court did discuss the effect that laws that unintentionally affect religion might have on business competition. *Braunfeld*, 366 U.S. at 608–09.

115. In *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, a nursing home was allowed to avoid liability for FLSA claims. 363 F.3d 299, 310 (2004). Consequently, the plaintiff could not recover wages for hours already worked for which he claimed that he was not paid. The ability to designate certain employees who will not be allowed to bring wage-and-hour claims has economic value, particularly if one's competitors cannot do so.

gest that a religious organization can exercise religious rights based on its nondenominational bylaws and profession of faith. If IVCF and Hobby Lobby can exercise religious rights, there may be no reason why a for-profit corporation operated pursuant to religious principles should be unable to exercise religious rights merely because of its large number of owners. *Hobby Lobby* justified allowing closely-held, for-profit corporations to exercise free exercise rights in part because of the small number of owners such corporations have.[116] Presumably, too many owners would lead to too many disagreements regarding religion and the inability to agree on operationalizing free exercise rights. However, if religious free exercise rights can arise based on bylaws or a charter, there may be little reason why a regular for-profit corporation with a religious-based charter could not be deemed to exercise religious rights.[117]

CONCLUSION

Free exercise is about the freedom and prerogative to exercise religion without government intrusion. Given that the free exercise of religious rights is good, individuals arguably should push those rights as far as allowed. Pushing free exercise rights will, on occasion, become a request that a different set of laws apply to the faithful than apply to others.[118] *Holt*, *Hosanna-Tabor*, and *Hobby Lobby* can be read broadly as suggesting that deeply held religious beliefs should trump government regulation in many circumstances.[119] A fair reading of those cases might encourage individuals and entities to exercise their free exercise rights until told to "stop."

There must be a stopping point. This Paper does not suggest where the stopping point is. That is too large a topic for this piece. Rather, this Paper suggests that in order to ensure the expansion of free exercise rights does not become a vehicle to allow the faithful to shield their financial interests from generally applicable law, additional, uncomfortable questions about precisely how the free exercise rights of individuals associated with entities are affected by the application of particular laws to such entities must be asked. Courts should ask those questions.[120] The Constitution and statutes

116. *Hobby Lobby*, 134 S. Ct. at 2774.

117. Indeed, *Hobby Lobby* arguably suggests that. *See id.* at 2771–72 (noting that a corporation focused on religion and profit may already be acceptable under state laws).

118. *See* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct. 694 (2012) (trumping ADA); *Hobby Lobby*, 134 S. Ct. 2751 (trumping Health and Human Services regulations promulgated pursuant to the ADA).

119. The *Hobby Lobby* Court would probably argue otherwise. *Hobby Lobby*, 134 S. Ct. at 2783 (suggesting that *Hobby Lobby* is a narrow decision and criticizing the claim that the decision could be read broadly to cover additional medical procedures).

120. For a discussion of the difficulty in finding proper answers, see William P. Marshall, Burwell v. Hobby Lobby*: Bad Statutes Make Bad Law*, 2014 SUP. CT. REV. 71 (2014).

like RFRA and RLUIPA should protect religious free exercise rights fiercely, but should make sure that core religious or spiritual beliefs, rather than mere financial interests, are the only factors that can trump generally applicable laws.