

## WHOSE RELIGION MATTERS IN CORPORATE RFRA CLAIMS AFTER *BURWELL V. HOBBY LOBBY STORES, INC.*, 134 S. CT. 2751 (2014)?

Some hailed the decision as a victory for religious liberty, establishing that the government cannot ignore religious convictions and force business owners to facilitate what they view as murder. Others decried it as a massive setback for the rule of law, establishing a loophole by means of which business owners can ignore the legal rights of others with impunity. In reality, the decision may have less to do with business owners than either narrative suggests, and may have broader implications for other corporate constituencies. Last Term, in *Burwell v. Hobby Lobby Stores, Inc.*,<sup>1</sup> the Supreme Court held that the Religious Freedom Restoration Act (RFRA)<sup>2</sup> requires regulators to exempt closely held corporations whose owners have religious objections from a requirement to provide insurance coverage for four medications with the potential to prevent embryonic implantation. Although corporate standing served to vindicate the religious liberty of business owners in this case, the Court's reasoning justifies a right that is distinct from the rights of individual owners and that could potentially be grounded in the religious beliefs of a corporation's other constituencies.<sup>3</sup>

The background to the Court's decision is well known. The Department of Health and Human Services (HHS), pursuant to the Patient Protection and Affordable Care Act,<sup>4</sup> issued a regulation requiring employers to provide medical insurance covering

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1. 134 S. Ct. 2751 (2014).

2. 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

3. The Court implicitly suggested two constituencies besides owners whose beliefs could be attributable to a corporation when it observed that corporations are capable of holding beliefs and performing actions when viewed together with “the human beings who own, run, and are employed by them.” *Hobby Lobby*, 134 S. Ct. at 2768. Scholars have suggested that a corporation's officers, executives, employees, and customers may all contribute to the religious identity of a for-profit corporation. See Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 21–24 (2013).

4. Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified as amended in scattered sections of 42 U.S.C.).

various types of preventive care.<sup>5</sup> One of these types of preventive care was contraception.<sup>6</sup> Four of the forms of contraception had the potential to destroy embryos by preventing them from implanting.<sup>7</sup> The families that owned and controlled Hobby Lobby and Conestoga Wood, two closely held for-profit corporations, believed that life begins at conception and held a religious conviction that they should not facilitate the death of human embryos.<sup>8</sup> These families and their companies sought injunctions based on RFRA and the Free Exercise Clause<sup>9</sup> that would prevent this portion of the mandate from being enforced against them.<sup>10</sup> The Third Circuit denied Conestoga Wood's request for an injunction, the Tenth Circuit granted Hobby Lobby's request, and the cases were combined on appeal to the Supreme Court.<sup>11</sup>

Justice Alito, writing for the majority and joined by Chief Justice Roberts, Justice Scalia, Justice Kennedy, and Justice Thomas, held that the regulation's application to the corporations in question violated RFRA because it burdened a person's exercise of religion and was not the least restrictive means of furthering the governmental interest asserted to justify the burden on religious exercise.<sup>12</sup> As a threshold matter, Justice Alito rejected intent- and policy-based arguments that the companies lacked standing, using a textual approach to hold that RFRA applies to regulations of for-profit corporations like the plaintiffs and thereby "protects the religious liberty of the humans who own and control those companies."<sup>13</sup>

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5. 45 C.F.R. § 147.130(a)(1)(iv) (2013).

6. *Id.*

7. *Hobby Lobby*, 134 S. Ct. at 2762–63.

8. *Id.* at 2764–66. Characterizations of the case as a challenge to a "contraceptive mandate" obscure the fact that the regulation applied to more than contraception and that the challenge was not to the provision of contraceptives as such.

9. RFRA provides, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it demonstrates that the burden on that person's exercise of religion is both "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a), (b) (2012). The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I. The Court did not reach the First Amendment claim.

10. *Hobby Lobby*, 134 S. Ct. at 2765–66.

11. *Id.*

12. *Id.* at 2759.

13. *Id.* at 2768.

First, Justice Alito rejected the argument that for-profit corporations are not persons within the meaning of RFRA. The Dictionary Act defines “person” to include corporations.<sup>14</sup> Additionally, nonprofit corporations have established rights under RFRA, and no feasible definition of persons includes nonprofits while excluding for-profits.<sup>15</sup> For these reasons, Justice Alito held that for-profit corporations are persons within the meaning of RFRA.

Second, Justice Alito rejected the argument that for-profit corporations are incapable of exercising religion within the meaning of RFRA. The recognized right of nonprofit corporations to exercise religion forecloses any argument that corporations in general cannot exercise religion.<sup>16</sup> The argument that for-profit corporations in particular cannot exercise religion because the profit motive is exclusive of religious purposes fails also. The recognized right of sole proprietorships to exercise religion while seeking profit establishes a presumption that profit and religion may be jointly pursued.<sup>17</sup> Contrary to the position taken by some judges, for-profit corporations are not an exception to this general rule, existing only to make money: State law authorizes corporations to act for any lawful purpose, including religious purposes; many corporations have been observed to organize as for-profits and to engage in religious and charitable activities that do not maximize profit; and an increasing number of states recognize benefit corporations, which seek a public benefit and a profit at the same time.<sup>18</sup> Because corporations are persons and nothing about being a for-profit corporation prevents an organization from exercising religion, corporations are textually within RFRA’s scope.

Turning to intent and policy, Justice Alito saw no reason to deviate from RFRA’s text. He held that RFRA’s protection was not intended to be limited to categories of actors expressly protected in pre-*Smith* decisions or to reflect any national tradition precluding protection of for-profits.<sup>19</sup> He also wrote that the de-

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14. *Id.*

15. *Id.* at 2768–69.

16. *Id.* (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012)).

17. *Id.* at 2769–70 (citing *Braunfeld v. Brown*, 366 U.S. 599 (1961)).

18. *Id.* at 2770–72.

19. *Id.* at 2772–74.

cision would not lead to unacceptable consequences. Proxy battles over the religious identities of large, publicly traded corporations are not a concern because the Court's decision is limited to closely held corporations and because of the practical obstacles to a large corporation's assertion of a RFRA claim.<sup>20</sup> Difficulties in determining the sincerity of an asserted religious belief are familiar to courts and must be accepted as a result of Congress's decision to pass RFRA.<sup>21</sup> Finally, conflicts among owners about the conduct of a business are not a concern as such conflicts are also familiar to courts and are governed by the established framework of state law.<sup>22</sup> For these reasons, Justice Alito concluded that for-profit corporations have standing under RFRA.

After establishing that the corporations had standing, Justice Alito found that the portion of the HHS regulation in question substantially burdened the exercise of religion by directing "the Hahns and Greens and their companies" to violate their religious beliefs.<sup>23</sup> Exercising their religious liberty would have resulted in fines up to, in Hobby Lobby's case, \$475 million per year.<sup>24</sup> This constituted a substantial burden.

Justice Alito rejected two arguments against the finding of a substantial burden. First, he rejected the argument that the plaintiffs could follow their convictions and save money by dropping insurance altogether and paying a \$2,000 annual penalty per employee. This argument, Justice Alito wrote, had not been addressed by any of the parties, ignored the plaintiffs' religious conviction that they should provide health insurance, and did not adequately account for the costs of the proposed action.<sup>25</sup> Second, Justice Alito rejected the argument that the connection between providing insurance coverage for medications that can destroy embryos and the moral wrong of an embryo's destruction is too attenuated to constitute a substantial burden. He warned that this argument did not truly address substantiality but inappropriately invited the Court to evaluate the reasonableness of the belief that providing coverage for the medications in question is a moral

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20. *Id.* at 2774.

21. *Id.*

22. *Id.* at 2774–75.

23. *Id.*

24. *Id.* at 2775–76.

25. *Id.* at 2776–77.

wrong.<sup>26</sup> The HHS regulation, Justice Alito concluded, placed a substantial burden on the exercise of religion by corporations with standing under RFRA.

Justice Alito next considered whether the burden on the exercise of religion was justified as the least restrictive means of furthering a compelling government interest. Although he questioned the compelling nature of the government's interest "in ensuring that all women have access to all FDA-approved contraceptives without cost sharing," he found it unnecessary to resolve the issue because the application of the HHS regulation to the plaintiffs was not the least restrictive means of furthering these interests.<sup>27</sup> This governmental interest could be furthered with less restriction on the free exercise of religion, Justice Alito noted, if the plaintiffs were exempted from the HHS regulation and the four medications in question were provided to their employees in either of two ways. First, the government could pay for the medications.<sup>28</sup> Second, the government could require health insurance companies to pay for the medications and offset the expense with savings from avoided pregnancy-related healthcare costs, as it already did in order to provide employees of exempt nonprofits with access to all contraceptives.<sup>29</sup> Because the application of the HHS regulation to the plaintiffs substantially burdened an exercise of religion protected by RFRA and was not the least restrictive means of furthering the government's interest, Justice Alito concluded that RFRA required an exemption for the plaintiffs.

Justice Kennedy filed a concurring opinion. In legal terms, Justice Kennedy stated that the Court's decision was premised on the compelling nature of the government's interest in protecting the health of female employees.<sup>30</sup> The case turned on the government's inability to justify "distinguishing between different religious believers" by accommodating nonprofits but refusing to accommodate for-profits.<sup>31</sup> In policy terms, Justice Kennedy stated that, "all persons have the right to believe or strive to believe in a divine creator and a divine

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26. *Id.* at 2777–79.

27. *Id.* at 2779–80.

28. *Id.* at 2780–81.

29. *Id.* at 2782.

30. *Id.* at 2786 (Kennedy, J., concurring).

31. *Id.*

law,"<sup>32</sup> that, for the religious, "free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts,"<sup>33</sup> and that RFRA is designed to protect religious liberty while ensuring that such liberty is not used to "unduly restrict other persons, such as employees."<sup>34</sup>

Justice Ginsburg authored a dissenting opinion joined by Justice Sotomayor. Justice Breyer and Justice Kagan joined in part but would have decided the case on the merits without addressing whether for-profit corporations have standing under RFRA.<sup>35</sup> Justice Ginsburg argued that RFRA merely codified pre-*Smith* jurisprudence and accused the Court of misinterpreting RFRA as a radical, blanket requirement of exemptions in all cases, "no matter the impact that accommodation may have on third parties."<sup>36</sup> Regarding standing, Justice Ginsburg would have held that RFRA does not apply to for-profit corporations for three reasons. First, no pre-*Smith* decision recognized a for-profit corporation's eligibility for a religious exemption.<sup>37</sup> Second, corporations are artificial legal entities.<sup>38</sup> Third, America's tradition of special solicitude for religious nonprofits does not extend to commercial organizations, which are substantively different in that their employees are not typically of one faith and in that they are legal entities distinct from their owners that exist for the purpose of making a profit.<sup>39</sup>

On the merits, Justice Ginsburg would have held that the connection between the religious objections and the HHS regulation, being mediated by the independent choice of a woman to use a particular contraceptive, "is too attenuated to rank as substantial."<sup>40</sup> She would also have held, rather than assumed, that the government's asserted interest was compelling.<sup>41</sup> She would have defined the government's interest as one in establishing "compre-

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32. *Id.* at 2785 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

33. *Id.*

34. *Id.* at 2786–87.

35. *Id.* at 2806 (Breyer, J., dissenting).

36. *Id.* at 2787, 2792–93 (Ginsburg, J., dissenting).

37. *Id.* at 2794.

38. *Id.* at 2794–96.

39. *Id.* at 2793–97.

40. *Id.* at 2797–99.

41. *Id.* at 2799–01.

hensive preventive care for women furnished through employer-based health plans” and concluded that the Court’s proposed less restrictive means, which provide care outside of employer-based plans, fail to promote that interest.<sup>42</sup> Justice Ginsburg warned that the Court’s interpretation of RFRA would lead to future litigation raising more difficult questions, including how the religious scruples of a publicly traded corporation could be determined and how disputes among a corporation’s owners should be resolved.<sup>43</sup> For these reasons, Justice Ginsburg would have rejected the corporations’ RFRA claims.<sup>44</sup> The Court limited its holding to closely held corporations, but Justice Ginsburg argued, among other things, that “its logic extends to corporations of any size, public or private,” raising many questions not reached in *Hobby Lobby*.<sup>45</sup>

One question that has received little attention in the aftermath of *Hobby Lobby* is whether a corporation’s RFRA claim must always depend on the religious beliefs of its owners or may, in certain cases, invoke the religious beliefs of other corporate constituencies, such as officers, directors, employees, and customers.<sup>46</sup> This question may be important for companies whose owners are not religious but that have boards or officers with strong religious convictions,<sup>47</sup> for companies that provide employment to religious individuals whose beliefs are not readily accommodated in other parts of a given industry,<sup>48</sup>

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42. *Id.* at 2801–03.

43. *Id.* at 2797 n.19.

44. Justice Ginsburg also rejected the First Amendment claim as foreclosed by *Employment Division v. Smith*, 494 U.S. 872 (1990). *Hobby Lobby*, 134 S. Ct. at 2790–91 (Ginsburg, J., dissenting).

45. *Id.* at 2797.

46. Prior to *Hobby Lobby*, Colombo, *supra* note 3, at 21–24, suggested that other constituencies may contribute to the religious identity of a for-profit corporation. Since the decision, little attention has been given to how the Court’s reasoning relates to this suggestion.

47. For example, one wonders what the outcome would have been if Hobby Lobby had been purchased by shareholders who did not share the Greens’ religious views but wanted the Greens to continue operating the company (including managing its insurance plans) because of their experience and success, even if that meant their religious convictions would continue to guide the company’s conduct.

48. For example, it might be possible for an Islamic banking practice (even if it were purchased by non-Muslim owners) to seek an exemption on behalf of its Muslim bankers if these employees observed the Muslim prohibition on charging interest and Congress passed a consumer protection law requiring banks to publish the effective rate of interest for all loans. *Cf. Murray v. Geithner*, 624 F. Supp. 2d 667, 676 (E.D. Mich. 2009) (denying motion to dismiss as-applied Establishment Clause challenge to federal bailout because AIG’s Shariah-compliant financ-

and for companies that exist in part to provide customers with products or services that meet religious requirements.<sup>49</sup> The Court implicitly suggested two constituencies besides owners whose beliefs could be attributable to a corporation when it observed that corporations are only capable of holding beliefs and performing actions when viewed together with “the human beings who own, run, and are employed by them.”<sup>50</sup> Moreover, every step of the Court’s standing analysis permits—and in some cases suggests—the position that corporations should have a right to bring RFRA claims grounded in the religious beliefs of constituencies other than owners.

The first holding necessary to the Court’s standing analysis was that for-profit corporations are persons within the meaning of RFRA. This holding turned on the Dictionary Act’s definition of person and the fact that no feasible interpretation of “persons” includes nonprofits and excludes for-profits.<sup>51</sup> These factors support a finding that for-profit corporations have standing under RFRA regardless of whose beliefs lie behind their claims.

The second holding necessary to the Court’s standing analysis, that for-profit corporations are capable of exercising religion within the meaning of RFRA, sheds more light on what religious beliefs may guide a corporation’s actions. This holding was supported by two subsidiary holdings—that the corporate form does not prevent the exercise of religion and that the profit motive does not prevent the exercise of religion. The reasons given for the first subsidiary holding apply to corporations regardless of whose religious beliefs underlie their claims, and the reasons given for the second suggest that corporations may invoke the beliefs of non-owners.

The Court’s reasons for holding that corporate status did not prevent the plaintiffs from exercising religion apply with equal force to claims based on the religious beliefs of any corporate constituency. The Court argued that the standing of nonprofit corporations was dispositive of the issue, implicitly holding

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ing activities could be “religious activity” despite the fact that the company is not controlled by Muslim owners).

49. For example, halal foods, kosher products, Islamic banking services, or medical services for women who believe they should not receive treatment from doctors who treat male patients.

50. *Hobby Lobby*, 134 S. Ct. at 2768.

51. *Id.* at 2768–69.



that for-profit corporations and nonprofit corporations are indistinguishable for purposes of religious exercise.<sup>52</sup> Responding to the dissent's argument that the two corporate forms may be distinguished based on the role that nonprofit standing could play in promoting individual religious freedom, the Court noted that for-profit standing would likewise promote individual religious freedom.<sup>53</sup> Allowing corporations to bring claims that protect the religious freedom of constituents other than owners also has the effect of promoting individual religious liberty.

The Court's reasons for holding that a profit motive did not prevent the plaintiffs from exercising religion suggest that the beliefs of constituencies other than owners may govern a corporation's religious conduct. The Court began by establishing a presumption, based on the recognized ability of sole proprietorships to exercise religion while seeking profit, that monetary and religious motives are not mutually exclusive.<sup>54</sup> The Court then provided three reasons why this presumption is not overcome by the argument that for-profit corporations exist solely to make money. Each of these three reasons suggests that a corporation's exercise of religion may be governed by the beliefs of non-owners.

First, the Court rejected the characterization of for-profit corporations as entities that exist solely to make money on the ground that state law authorizes corporations to act for any lawful purpose.<sup>55</sup> For-profit corporations, the Court noted, have as much of a legal right to further religious objectives as to undertake other costly initiatives, ranging from pollution control and energy conservation to improvements in working conditions and benefits, when their owners agree to pursue those ends.<sup>56</sup> Although the Court explicitly noted only that corporations enjoy the right to pursue religious goals when their owners agree, as they did in the case before it, the agreement of other constituents in other cases may activate the same legal right on which the Court relied. Corporate law recognizes that ownership and management may be separated, and it is possible for a corporation's management to pursue a religious objec-

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52. *Id.* at 2769.

53. *Id.*

54. *Id.* at 2769–70.

55. *Id.* at 2770–72.

56. *Id.* at 2771.

tive without obtaining approval from its owners.<sup>57</sup> Because this argument turns on a right of corporations that may be exercised pursuant to the religious beliefs of constituents other than owners, it suggests that owners are not the only individuals whose beliefs may be attributed to a corporation making a RFRA claim.

Second, the Court rejected the characterization of for-profit corporations as entities that exist solely to make money on the ground that for-profit corporations have been observed to engage in religious and charitable activities that do not maximize profit.<sup>58</sup> The Court noted that for-profit corporations can pursue religious and charitable aims in ways that nonprofits cannot and quoted Hobby Lobby's statement of purpose and Conestoga Wood's statement of vision and values to demonstrate that for-profit corporations sometimes do "seek to perpetuate the religious values shared, in these cases, by their owners."<sup>59</sup> The Court's observation that the religious values were, "in these cases," shared by the corporations' owners implies that, in other cases, corporations might seek to perpetuate the religious values shared by other constituencies. This inference not only tracks the Court's language but also reflects its underlying logic. The Court's argument hinges on the unspoken premise that religious aims in corporate statements of purpose and values may be attributed to corporations. The individuals who own a corporation at the time it makes a claim are not always the authors of these statements and do not necessarily share the religious views of those who framed the statements. Thus, this argument, like the first, suggests that the religious beliefs underlying a corporation's RFRA claim do not need to be the beliefs of owners and may, in fact, be those of other participants in a corporate enterprise.

Third, the Court rejected the characterization of for-profit corporations as entities that exist solely to make money on the ground that states have formally recognized the religious and charitable aims of for-profit corporations by creating the benefit corporation, which seeks a public benefit and a profit at the

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57. See Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 792 (2005).

58. *Hobby Lobby*, 134 S. Ct. at 2770 n.23, 2771.

59. *Id.* at 2770 n.23 (internal quotation marks omitted).

same time.<sup>60</sup> One of the key reasons for recognizing these dual purposes is to enable the directors of benefit corporations to make decisions that are not in the best financial interest of shareholders without incurring liability for breach of fiduciary duty.<sup>61</sup> In a sense, then, the benefit corporation exists to prevent business owners from asserting that their rights should govern corporate decisionmaking. This makes benefit corporations a peculiar example for the Court to use if it intended for owners to be the only constituency whose religious beliefs could control a corporation's acts. The Court implies that the religious purpose stated in a benefit corporation's charter could form the basis of a corporate RFRA claim, despite the possibility that its owners at the time of the lawsuit might not share the religious beliefs the corporation would assert. Thus, each of the Court's reasons for holding that for-profit corporations do not exist solely to seek a profit attributes religious beliefs to corporations on grounds that are not intrinsically tied to ownership.

The third holding in the Court's standing analysis was that RFRA does not codify a pre-*Smith* system of precedents that denies for-profit corporations the ability to claim religious rights or reflect a national tradition in which for-profit corporations are considered secular.<sup>62</sup> Each of the Court's reasons for this holding could apply to claims made by a for-profit corporation based on the rights of non-owners, and one may suggest that the beliefs of other constituencies are relevant. In rejecting the argument that pre-*Smith* precedent does not recognize free exercise rights in for-profit corporations, the Court relied in part on *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*<sup>63</sup> The *Gallagher* Court addressed the merits, without questioning standing, of a challenge to a Sunday closing law based on the rights of a kosher market, its customers, and a rabbi who represented a class of rabbis with duties including inspection of kosher markets.<sup>64</sup> The Court in *Hobby Lobby* argued that the decision to address the

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60. *Id.* at 2771.

61. See Christopher Lacovara, Note, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 COLUM. BUS. L. REV. 815, 843 (2011) (noting that legislators pass benefit-corporation statutes with the intent of shielding directors from liability to shareholders asserting a right to have their profit maximized).

62. *Hobby Lobby*, 134 S. Ct. at 2772–74.

63. 366 U.S. 617 (1961).

64. *Id.* at 618–19.

merits implied the standing of for-profit corporations.<sup>65</sup> Similar reasoning would suggest that the customers and rabbi had standing and that their religious liberty was implicated by the law's application to the market. Given the Court's statement that corporate religious liberty exists to protect individual religious liberty, it seems feasible under *Gallagher* for a corporation to challenge a regulation based on the religious beliefs of customers and other non-owners.

The fourth position taken by the Court in its standing analysis was that allowing for-profit corporations to bring RFRA claims would not lead to unacceptable consequences in any of three areas. First, the Court rejected the argument that its decision opened the door to polarizing proxy battles for control of large, publicly traded corporations both because claims by such companies were unlikely to occur often and because the case before it involved "closely held corporations, each owned and controlled by members of a single family."<sup>66</sup> This statement, without necessarily limiting the implications of the Court's reasoning, attempts to limit the scope of its ruling. Yet even this statement suggests that the beliefs of those who control a corporation—who are not necessarily those who own it—are significant in assessing a corporation's RFRA claim. Second, the Court rejected the argument that questions of sincerity would be too complex for the judiciary, on grounds unrelated to the individual whose beliefs a corporation claims as its own.<sup>67</sup> Third, the Court rejected the argument that its decision would spark unmanageable controversy among the owners of closely held corporations, indicating that disputes among owners would be resolved by state law regarding corporate governance.<sup>68</sup> State law regarding corporate governance does not always make the decisions of owners controlling, however.<sup>69</sup> If state law regarding corporate governance determines whose beliefs may be attributed to a corporation, corporate claims will not always be rooted in the beliefs of owners. In summary, the Court's standing analysis suggests at several points, and never undermines, the idea that corporations may bring claims based on

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65. *Hobby Lobby*, 134 S. Ct. at 2772–73.

66. *Id.* at 2774.

67. *Id.* at 2774.

68. *Id.* at 2774–75.

69. See *Avi-Yonah*, *supra* note 57, at 792 (noting that corporate law allows arrangements by which ownership and control are separated).

the religious beliefs of constituencies other than their owners. It provides no guidance on how the beliefs of different constituencies should be weighed against each other or on whether there are any actors whose religious beliefs might not be relevant.

At the merits stage of its analysis in *Hobby Lobby*, the Supreme Court attributed the religious beliefs of the corporations' owners to the corporations. These were the only individual beliefs at issue in the particular case before the Court. But the Court's standing analysis opens the door for corporations to make RFRA claims that are based, not on the religious liberty of their owners, but on the religious beliefs of other constituencies.

The existence of a corporate right to make RFRA claims that is distinct from the rights and beliefs of its owners raises important questions for today's scholars and tomorrow's courts. Normatively, does the religious liberty of individuals adequately justify corporate RFRA claims?<sup>70</sup> Descriptively, when are individual beliefs relevant to corporate claims if ownership is not the criterion for relevance?<sup>71</sup> Doctrinally, what rules—particularly concerning sincerity of religious beliefs—will minimize the problems of over and under-inclusiveness?<sup>72</sup> In short,

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70. If corporate RFRA claims are made only to defend the rights of individuals, a more straightforward means of vindicating the rights at stake would be to accord standing to the individuals themselves, as the D.C. Circuit did—and was rebuffed for failing to recognize corporate standing—in *Gilardi v. Dep't. of Health & Human Servs.*, 733 F.3d 1208, 1214–16 (D.C. Cir. 2013), *vacated and remanded by Gilardi v. Dep't of Health & Human Servs.*, No. 13-567, 2014 WL 2931834 (U.S. July 1, 2014). If corporate RFRA claims are made on behalf of the corporation as an entity distinct from its individual constituents, they may not all be justified by the idea of vindicating individual rights.

71. The relationship of a corporation's rights with the rights of its constituents can be complex. Some courts have recognized a distinction between corporations and their constituents such that a corporation may claim a right against directors for failing to pursue its interests—which balance the interests of constituents—although no constituent or constituency has a right that it may claim against the directors. See *Credit Lyonnais Bank Nederland v. Pathe Commc'ns Corp.*, No. 12150, 1991 WL 277613, at \*34 (Del. Ch. Dec. 30, 1991) (holding that, at least in zone of insolvency, directors owe duty to corporation and not to any constituency); see also *Roselink Investors v. Shenkman*, 386 F. Supp. 2d 209, 215 (S.D.N.Y. 2004) (quoting *Credit Lyonnais*). It is possible that corporations could have a right against the government that is similarly distinct from but related to any rights its constituents might claim.

72. If, as the Court suggests, state law regarding corporate governance determines whose religious beliefs may be attributed to a corporation, the rule may be under-inclusive. Corporations will not be able to seek exemptions in order to ac-

why, when, and how is any given constituency's belief relevant to a corporate claim? But all that is the subject of another story, just beginning.<sup>73</sup> The point of this story is that *Hobby Lobby* was not a victory for business owners alone as some popular narratives suggest. After *Hobby Lobby*, the religious beliefs of others matter as well.

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commodate religious employees or provide goods and services that comply with the religious duties of their customers unless the companies happen to be controlled by individuals who share the religious views of their employees and customers. If corporations can claim beliefs not held by those who exercise legal control over them, the rule may be criticized as overinclusive, allowing corporations to strategically select the employees or customers whose beliefs the corporation will claim in order to justify policies chosen for economic rather than religious reasons.

73. The author investigates potential answers to these questions in *Reasoning from Principles of Religious Liberty to a Test of Corporate Sincerity* (available at <http://ssrn.com/abstract=2500850>).

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