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# Is *Hobby Lobby* Really A Brave New World? Litigation Truths About Religious Exercise by For-Profit Organizations

by ERIC RASSBACH\*

## Introduction

In Act V of *The Tempest*, Miranda sees for the first time in her life people other than her father, the magician Prospero, and her fiancé, Ferdinand. She famously exclaims:

O, wonder!  
How many goodly creatures are there here!  
How beauteous mankind is! O brave new world,  
That has such people in't!<sup>1</sup>

Prospero—who knows the men Miranda is seeing for the first time, and that they are far from “goodly”—responds with a certain amount of world-weariness:

‘Tis new to thee.<sup>2</sup>

During the *Hobby Lobby* litigation and after the case was decided, I felt a lot like Prospero.<sup>3</sup> In the months prior to and since the June 2014 decision, the exclamations of consternation, delight, and above all, hyperbole, came at a furious rate from public commentators and legal scholars. Yet from my perspective as a

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\* Deputy General Counsel, The Becket Fund for Religious Liberty. The views expressed in this essay are mine alone and do not necessarily the views of the Becket Fund or its clients. Many thanks to Mark Rienzi and the editors of the *Hastings Constitutional Law Quarterly* for their comments on an earlier draft.

1. WILLIAM SHAKESPEARE, *THE TEMPEST*, act V, sc. 1, *THE RIVERSIDE SHAKESPEARE* 1634 (Houghton Mifflin 1974).

2. *Id.*

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

religious liberty advocate who has frequently litigated Religious Freedom Restoration Act (“RFRA”)<sup>4</sup> and similar “substantial burden” claims for over ten years, the response seemed overwrought, bordering on the unhinged. As far as the law went, *Hobby Lobby* was a simple case, very much like the numerous other substantial burden cases that courts have been deciding for years. Professor Posner was not far off when he declared it “a bore” in *Slate*.<sup>5</sup> Nor does *Hobby Lobby* herald a new world of rampant religious freedom claims by for-profit corporations.<sup>6</sup> But that is not how (most of) the press nor (most of) the academy treated the case. And that poses the interesting questions of how and why the press and the academy have gotten *Hobby Lobby* so wrong and how we might objectively evaluate their assessments of the case’s effects.

In this brief essay, I will first describe past RFRA/substantial burden cases and the social narrative that typically frames them. Second, I will examine how the press and the academy treated *Hobby Lobby* differently than other RFRA cases. Third, I will describe some public predictions opponents have made about *Hobby Lobby*’s effects in the specific area of religious exercise by for-profit corporations. Finally, I will explain why those predictions are likely to be wrong and offer a counter-prediction of my own: religious exercise claims by for-profit corporations will remain relatively rare.

## I. Press and Scholarly Attention to Religious Liberty Cases Generally

I have litigated cases in the religious liberty space for more than a decade. During that time, I have represented many unpopular religious groups in cases litigated under the “substantial burden” standard first articulated in *Sherbert v. Verner*<sup>7</sup> and later codified in civil rights statutes such as the Religious Freedom Restoration Act.<sup>8</sup>

One example of an unpopular religious liberty client of ours was a Santería priest named José Merced, who was involved in a goat

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4. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (2013).

5. Eric Posner, *Religious people have rights, too—and that’s why Hobby Lobby threatens liberals*, SLATE (June 27, 2014, 5:12 PM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2014/scotus\\_roundup/supreme\\_court\\_2014\\_hobby\\_lobby\\_is\\_a\\_bore.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_2014_hobby_lobby_is_a_bore.html).

6. As it happened, only two Justices agreed with the government’s argument that for-profit corporations cannot engage in religious exercise. *See Hobby Lobby*, 134 S. Ct. at 2787, 2793 (Ginsburg, J., dissenting).

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

8. 42 U.S.C. § 2000bb *et seq.* (2013).

sacrifice case.<sup>9</sup> From 2008 to 2009, we litigated the *Merced v. Kasson* appeal at the Fifth Circuit under the substantial burden standard set forth in the Texas Religious Freedom Restoration Act.<sup>10</sup> Mr. Merced lived in Euless, a suburb of Dallas. For many years he conducted Santería religious ceremonies in his home.<sup>11</sup> These ceremonies included the ritual sacrifice and consumption of various animals.<sup>12</sup> After an anonymous tip to the police, the City of Euless threatened to prosecute Mr. Merced if he continued with his religious exercise.<sup>13</sup>

A fundamental premise of our litigation strategy in the *Merced* case was that goat sacrifice would never be popular in Texas. We assumed that some significant percentage of observers, perhaps a supermajority, would at least initially find the practice upsetting or abhorrent. We also thought that many judges might find animal sacrifice, at the very least, unfamiliar. We tried to preempt the likely distaste for our client's religious practice upfront, both in court, and when we received inquiries from the press.

However, the case did not receive much press attention. Very few newspapers or scholars paid much attention when the Fifth Circuit ruled in favor of our client, applying Texas' RFRA to protect Mr. Merced's ability to engage in sacrifice.<sup>14</sup>

Another unpopular client was the Islamic Center of Murfreesboro, Tennessee. *Islamic Center of Murfreesboro v. Rutherford County, Tennessee* concerned our client's ability to build a new mosque next to a Baptist church in a small Tennessee city.<sup>15</sup> During the course of the dispute, the mosque construction site was vandalized and some of the construction equipment was set on fire.<sup>16</sup> Neighbors who opposed the mosque sued in state probate court seeking to overturn the approval for the mosque on the grounds that the permit hearing should have been advertised more widely in light

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9. See *Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. See *Islamic Ctr. of Murfreesboro & Ossama Bahloul v. Rutherford Cnty., Tenn.*, No. 3:12-cv-0738, 2012 U.S. Dist. LEXIS 99709 (M.D. Tenn., filed July 18, 2012).

16. See Robbie Brown & Christine Hauser, *After Attacks and Threats, Tennessee Mosque Opens*, N.Y. TIMES NEWS BLOG (Aug. 10, 2012, 4:47 PM), <http://thelede.blogs.nytimes.com/2012/08/10/after-attacks-and-threats-tennessee-mosque-opens/>.

of the mosque's supposedly controversial nature.<sup>17</sup> The state probate court ruled in their favor.<sup>18</sup> We then filed a separate federal lawsuit on behalf of the mosque, seeking the immediate issuance of an occupancy permit under the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"),<sup>19</sup> which, like RFRA, includes the "substantial burden" standard.<sup>20</sup> The Department of Justice filed a parallel federal action on behalf of the United States seeking the same relief.<sup>21</sup> The federal district court judge in Nashville ruled in favor of our client and the congregation was able to move into its new building in time for Ramadan.<sup>22</sup>

Other unpopular clients who have relied on the "substantial burden" standard include synagogues with neighbors who sought to prevent them from expanding their sanctuary,<sup>23</sup> Sikhs who want to carry kirpans into federal buildings,<sup>24</sup> Jewish prisoners who want kosher diets,<sup>25</sup> and minority congregations who were unwanted in particular neighborhoods.<sup>26</sup>

Although these cases frequently receive press coverage and the attention of scholars, in general, the public, the press, or the academy have not treated them as landmark cases. Federal courts simply applied the straightforward "substantial burden" standard and provided relief to the plaintiffs; few took note.

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17. See *Fisher v. Rutherford County Regional Planning Commission*, No.10CV1443 (Tenn. Chancery Ct. (June 1, 2012) (unpub.).

18. See *United States v. Rutherford Cnty.*, Tenn., No. 3:12-0737, 2012 WL 3775980 at \*2-3 (M.D. Tenn., filed Aug. 29, 2012).

19. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* (2013).

20. 42 U.S.C. § 2000cc.

21. See *United States v. Rutherford Cnty.*, Tenn., No. 3:12-0737, 2012 WL 3775980 at \*2-3 (M.D. Tenn., filed Aug. 29, 2012).

22. See *Rutherford Cnty.*, Tenn., 2012 WL 2930076. The angry neighbors continued their lawsuit until it was denied by the United States Supreme Court. See *Fisher v. Rutherford Cnty. Reg'l Planning Comm'n*, No. M2012-01397-COA-R3-CV, 2013 WL 2382300 (Tenn. Ct. App. May 29, 2013), *cert. denied*, 134 S. Ct. 2707 (2014).

23. See, e.g., *Congregation Kol Ami v. Abington Twp.*, No. Civ. A. 01-1919, 2004 WL 1837037 (E.D. Pa. Aug. 17, 2004).

24. See *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013).

25. See, e.g., *Moussazadeh v. Tex. Dep't of Criminal Justice*, 709 F.3d 487 (5th Cir. 2013); *Rich v. Sec'y, Fla. Dep't of Corrs.*, 716 F.3d 525 (11th Cir. 2013); *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004).

26. See, e.g., *Albanian Associated Fund v. Twp. of Wayne*, No. 06-CV-3217 (PGS), 2007 WL 2904194 at \*1 (D.N.J. Oct. 1, 2007) (Albanian mosque not allowed to build new building in Wayne, New Jersey).

But *Hobby Lobby* was different. The level of attention that the *Hobby Lobby* litigation received differed by many orders of magnitude from other religious liberty cases. For example, one rough measure of societal attention is number of hits on Google related to a particular topic. A Google search for the words “Hobby Lobby case” reveals 139,000 hits.<sup>27</sup> Yet a Google search for the words “Hosanna-Tabor case”<sup>28</sup>—another Supreme Court case that involved fundamental First Amendment issues—reveals only 2,520 hits.<sup>29</sup> Even accounting for the 2.5-year time gap between the two cases, this comparison tends to suggest that the level of attention paid to *Hobby Lobby* has been more than fifty times the level of attention paid to *Hosanna-Tabor*.

Scholars have also paid far more attention to *Hobby Lobby* than other religious liberty cases heard by the Supreme Court. A search of SSRN using Google reveals 4,520 scholarly articles that mention “Hobby Lobby.”<sup>30</sup> Yet there are only 845 that mention “Hosanna-Tabor.”<sup>31</sup> Given that scholarly articles usually need a significant amount of lead-time before publication, it seems clear that a rash of scholarly articles mentioning *Hobby Lobby* were rushed out both before and after the decision in late June 2014.

So why the difference in the level of attention? It was not because there was a doctrinal difference—*Hobby Lobby* was litigated under the same “substantial burden” standard as all of the cases I listed above. Nor was it because the case stood for some novel legal proposition; in fact, the doctrinal issues were far simpler than those at stake in other Supreme Court cases the Becket Fund has handled in recent years.<sup>32</sup> *Hosanna-Tabor*, for example, represented a much more fundamental shift in the law than did *Hobby Lobby*, and dealt with constitutional issues rather than statutory ones.

I have a theory about why *Hobby Lobby* received more attention: people have something to gain from hyping *Hobby Lobby*.

Take the defendants themselves. One explanation for the Department of Justice’s oddly aggressive litigation strategy in the contraceptive mandate cases is political. I have no doubt that

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27. Author’s own search (conducted Apr. 20, 2015).

28. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp’t Opportunity Comm’n*, 132 S. Ct. 694 (2012).

29. Author’s own search (conducted Apr. 20, 2015).

30. Author’s own search (conducted Apr. 20, 2015).

31. Author’s own search (conducted Apr. 20, 2015).

32. *See, e.g., Hosanna-Tabor*, 132 S. Ct. 694.

decision makers at the Department of Health and Human Services and the Department of Justice took into account the political overtones of the litigation. I also do not doubt that there were political operatives who might normally side with the Departments, but were happy that the government lost *Hobby Lobby*, especially since the decision came only four months before the Congressional midterm elections and thus could be deployed as part of particular political narrative.

The press also had a strong interest in hyping *Hobby Lobby* and the contraceptive mandate litigation generally. Anything related to the Affordable Care Act receives a lot of media attention, and the litigation has additional thematic overlays of religion, sex, and corporations. That means more page views, more papers sold, and ultimately more revenue.

Scholars also have self-interested reasons to hype *Hobby Lobby*. Since it involves a prominent Supreme Court case and issues that are receiving a lot of media attention, articles about *Hobby Lobby* are much more likely to be accepted at student-run law reviews. Additionally, accepted articles can translate into tenure, higher academic status, or a position on a higher ranked law school faculty. Thus, unlike any of the many preceding “substantial burden” religious liberty cases that garnered far less scholarly attention, *Hobby Lobby* has the prospect of launching many an academic career.

If different groups have a strong self-interest in hyping *Hobby Lobby* generally, they also have a particular interest in making hyperbolic predictions about the results of *Hobby Lobby*. A case that is a legal “bore” and thus results in little change in the law as applied by the courts across the country does not serve those (often financial) interests as well as a case that represents a major change in the underlying law. Thus the groups all have strong incentives to claim that *Hobby Lobby* represents a major change, even if it does not.

In the remainder of this essay I describe some of these predictions in one area concerning *Hobby Lobby*—religious exercise by for-profit corporations—and then explain why I think these predictions are wrong.

## II. Predictions Regarding the Effects of Hobby Lobby on For-Profit Religious Exercise Claims

It is not hard to find parades of horrors about *Hobby Lobby*. Indeed, prominent *Washington Post* columnist Ruth Marcus entitled one of several columns about the case “Supreme Court Hobby Lobby ruling could start a ‘parade of horrors.’”<sup>33</sup> In the article, Marcus reviews different claims about possible corporate free exercise claims, reciting the potential for Exxon to bring a religious exercise claim, or for a company to object to paying for blood transfusions (presumably in a reference to Jehovah’s Witnesses’ beliefs).<sup>34</sup> She then concludes—without offering support for her conclusion—“the minute the court opens this door, there are going to be a lot of corporate fists waving.”<sup>35</sup>

Similarly, prominent Supreme Court commentator and journalist Jeffrey Toobin published a post-*Hobby Lobby* column entitled “*On Hobby Lobby, Justice Ginsburg Was Right.*”<sup>36</sup> In it he cites the ill effects predicted by Justice Ginsburg in her *Hobby Lobby* dissent, and then claims to prove them true. However, the argument rests almost entirely on evidentiary rulings in a single court case from Utah (which I discuss in more detail below), other contraceptive mandate cases, and various RFRA claims (regarding issues like union organizing at religious colleges) that have been brought but have not been successful. He concludes with the same open-door metaphor as Marcus: “the Supreme Court, having opened the door to these cases, appears unlikely to shut it any time soon.”<sup>37</sup>

Scholars are not much different. At the Supreme Court, a group of forty-four corporate law scholars submitted an amicus brief describing what they said would be the bad effects of recognition of a for-profit corporation’s ability to engage in religious exercise.<sup>38</sup> Among other things, the scholars claimed that allowing for-profit

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33. Ruth Marcus, *Supreme Court Hobby Lobby ruling could start a ‘parade of horrors’*, WASH. POST (Mar. 25, 2014), [http://www.washingtonpost.com/opinions/ruth-marcus-supreme-court-hobby-lobby-ruling-could-start-a-parade-of-horrors/2014/03/25/e803675a-b45e-11e3-8cb6-284052554d74\\_story.html](http://www.washingtonpost.com/opinions/ruth-marcus-supreme-court-hobby-lobby-ruling-could-start-a-parade-of-horrors/2014/03/25/e803675a-b45e-11e3-8cb6-284052554d74_story.html).

34. *Id.*

35. *Id.*

36. Jeffrey Toobin, *On Hobby Lobby, Ginsburg Was Right*, THE NEW YORKER (Sept. 30, 2014), <http://www.newyorker.com/news/daily-comment/hobby-lobbys-troubling-aftermath>.

37. *Id.*

38. See Amicus Curie Brief of Corporate and Criminal Law Professors for Petitioners, No. 13-354, 13-356, *Sebelius v. Hobby Lobby*, 134 S. Ct. 678 (2013).

corporations to engage in religious exercise would incentivize “subterfuge”:

Are federal courts prepared to adjudicate complex (and potentially intrusive) questions of whether a given corporation is invoking religion merely as a subterfuge to gain an economic advantage over competitors, rather than in “good faith” (however a court might define that term)?<sup>39</sup>

They claimed it would be easy for corporations to have a “‘Road to Damascus’ conversion” in order to make additional profits.<sup>40</sup> According to the forty-four professors, this all results in a “slippery slope” that they urged the Supreme Court to avoid.<sup>41</sup> But in the assessment of other corporate law scholars writing in the *Harvard Law Review Forum*, the forty-four professors’ brief “parades horrors” without any real factual basis.<sup>42</sup> Nevertheless, other scholarly claims of terrible effects from *Hobby Lobby* abound.<sup>43</sup>

With respect to the more scholarly predictions, one positive aspect of these public predictions is that they are testable.<sup>44</sup> That is, after time passes, we can look at the predictions and determine whether the scholars making them were right or wrong. Those making the predictions can then be held to account—asked to explain why their predictions deviated from the actually observed results and

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39. *Id.* at 27; *see also id.* at 25–28.

40. *Id.* at 27.

41. *Id.* at 25.

42. Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm*, 127 HARV. L. REV. F. 273, 291 (May 20, 2014) (“For over half a century, then, there has been no *per se* bar to free exercise claims by for-profit corporations, and the parade of horrors envisioned by the scholars has simply not materialized.”); *see also id.* at 291 n.119 (citing David Skeel, *Corporations and Religious Freedom*, WALL ST. J., Dec. 2, 2012 (expressing doubt that a Supreme Court ruling in favor of *Hobby Lobby* will lead to “a massive wave of corporate religious freedom claims”)).

43. *See, e.g.*, Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35 (2015); Jennifer Jorczak, “Not Like You and Me”: *Hobby Lobby, the Fourteenth Amendment, and What the Further Expansion of Corporate Personhood Means for Individual Rights*, 80 BROOK. L. REV. 285 (2014); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014).

44. Newspaper columnists typically write their articles at a sufficiently high level of generality that their claims cannot easily be tested.

how their predictions might be improved in the future. With respect to scholarly predictions, this can then be turned into a scoring system for the accuracy of scholarly predictions, allowing non-academics some insight into whether the predictions a particular scholar is offering should be credited or not.

### III. So Far, the Predictions Have Not Been Coming True

Although the verdict of history is not yet in, the evidence so far does not support the horribles. In the nine and a half months since the Supreme Court rendered its decision in *Hobby Lobby*, the predictions set out above have not fared too well. As of mid-April 2015, the Supreme Court and the federal courts of appeals have applied *Hobby Lobby* just four times in any significant way, excluding the immediate context of the contraceptive mandate litigation.<sup>45</sup> The horribles have not yet paraded, and there seems to be little prospect that they will.

The Supreme Court first applied *Hobby Lobby* just seven months after deciding it. In *Holt v. Hobbs*, the Court considered a substantial burden claim from an Arkansas prisoner named Abdul Muhammad.<sup>46</sup> Muhammad sought to wear a half-inch beard in accordance with his Muslim faith.<sup>47</sup> But Arkansas is one of the few states that banned beards for prisoners, so prison officials denied his request.<sup>48</sup> Muhammad, proceeding pro se, brought a claim under RLUIPA, a federal civil rights law that protects religious exercise for inmates.<sup>49</sup> After a hearing before a magistrate judge, Muhammad lost in both district court and at the Eighth Circuit.<sup>50</sup> But when Muhammad applied pro se to Justice Alito for an injunction pending a grant of certiorari, Justice Alito referred the application to the

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45. Even within the context of the contraceptive mandate litigation, the applications of *Hobby Lobby* by the courts of appeals have been very brief, or have gone against the plaintiff. See, e.g., *Eternal Word Television Network, Inc. v. Secretary, U.S. Dept. of Health & Human Servs.*, 756 F.3d 1339 (11th Cir. 2014) (briefly applying *Hobby Lobby* to rule in favor of religious plaintiff); *Priests For Life v. U.S. Dept. of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014) (distinguishing *Hobby Lobby* to rule against religious plaintiff).

46. See *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

47. *Id.*

48. *Id.*

49. See 42 U.S.C. § 2000cc-1 *et seq.* (2013).

50. See *Holt*, 135 S. Ct. at 861.

entire Court, and the Court granted the injunction.<sup>51</sup> The Court then considered and granted the petition for certiorari.<sup>52</sup>

The Supreme Court applied *Hobby Lobby* to rule unanimously in favor of Muhammad.<sup>53</sup> Although *Hobby Lobby* had been decided under a different statute, RFRA, it shared the substantial burden standard with RLUIPA. The Court first held that Arkansas had imposed a substantial burden on Muhammad's religious exercise of wearing a beard: "If petitioner contravenes [the no-beard] policy and grows his beard, he will face serious disciplinary action. Because the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise."<sup>54</sup> The Court then held that Arkansas had not demonstrated that it had used the least restrictive means available of meeting its stated interest in preserving prison security.<sup>55</sup> This case had little to do with corporate overreaching in the area of religious exercise, but everything to do with the simple "substantial burden" standard the Court also applied in *Hobby Lobby*.<sup>56</sup> But that narrative does not fit the doom-and-gloom predictions of *Hobby Lobby* opponents.

Similarly, in *Haight v. Thompson*, the Sixth Circuit reversed summary judgment, holding that five Native American prisoners on death row in Kentucky could make out a claim under the "substantial burden" standard in order to seek access to a religious sweat lodge.<sup>57</sup> There, the Sixth Circuit relied on *Hobby Lobby* in interpreting RLUIPA.<sup>58</sup> And in *Davila v. Gladden*, the Eleventh Circuit applied *Hobby Lobby* to RFRA claims brought by a Santería prisoner incarcerated in a federal prison.<sup>59</sup> The Eleventh Circuit cited *Hobby Lobby* seven times in ruling that the Bureau of Prisons had imposed a substantial burden on the prisoner's religious exercise.<sup>60</sup>

In *McAllen Grace Brethren Church v. Salazar*, the Fifth Circuit ruled in favor of several Native Americans who had been prosecuted

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51. *Id.* at 861–62.

52. *Id.*

53. *Id.* at 859.

54. *Id.* at 862.

55. *Id.* at 863–67.

56. *Id.* (citing *Hobby Lobby* nine times).

57. *See Haight v. Thompson*, 763 F.3d 554 (6th Cir. 2014).

58. *Id.* at 569.

59. *See Davila v. Gladden*, 777 F.3d 1198 (11th Cir. 2015).

60. *Id.*

for possessing eagle feathers they used in religious ceremonies.<sup>61</sup> The Fifth Circuit reversed the district court's grant of summary judgment in favor of the federal government defendants, relying primarily on *Hobby Lobby*.<sup>62</sup>

In contrast to these many applications of *Hobby Lobby* by Courts of Appeals that many observers are hard-put to criticize, *Hobby Lobby* opponents have focused on a single, discovery-phase Utah federal district court case that they say demonstrates the ill effects of *Hobby Lobby*.<sup>63</sup> In *Perez v. Paragon Contractors*, the Department of Labor has been investigating a religious group, the Fundamentalist Church of Jesus Christ of Latter-Day Saints, for alleged violations of child labor laws.<sup>64</sup> The trial judge, relying on RFRA and *Hobby Lobby*, has issued evidentiary rulings that have limited the federal government's ability to enforce administrative subpoenas against a witness alleged to be familiar with the inner workings of the religious group.<sup>65</sup> But *contra Hobby Lobby's* opponents, *Hobby Lobby* does not have much to do with the *Perez* case. The substantial burden standard the *Perez* court has been applying is exactly the same standard that has existed in the Tenth Circuit for years; the existence of *Hobby Lobby* made no difference to the outcome.<sup>66</sup> Moreover, according to the district court, the government apparently made little effort to explain why it could not obtain the information it wanted by other, less restrictive means.<sup>67</sup>

Indeed, if *Perez* is the best critics of *Hobby Lobby* can come up with, they will not get too far. That is especially so in light of the many different religious minorities—Muslim, Native American, and

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61. See *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014).

62. *Id.* (citing *Hobby Lobby* eighteen times).

63. See *Perez v. Paragon Contractors, Corp.*, No. 2:13CV00281-DS, 2014 WL 4628572 at \*1 (D. Utah Sept. 11, 2014). For an example of a critique based on the *Perez* case, see Toobin, *supra* note 36. In the article, Toobin refers to a “sampling of court actions since *Hobby Lobby*” but then cites only court actions in the *Perez* case and a ruling in another contraceptive mandate case. *Id.* Most of the situations he invokes are unsuccessful RFRA claims, or hypotheticals.

64. See *Perez*, 2014 WL 4628572 at \*1.

65. *Id.* at \*3.

66. See *Kikumura v. Hurley*, 242 F.3d 950, 958–62 (10th Cir. 2001) (applying same substantial burden standard). Indeed, in her concurring opinion in *Holt*, Justice Sotomayor recognized this continuity, citing that same pre-*Hobby Lobby* Tenth Circuit substantial burden standard. See *Holt*, 135 S. Ct. at 867-868 (Sotomayor, J., concurring) (citing *Yellowbear v. Lampert*, 741 F.3d 48, 59 (10th Cir. 2014); *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011)).

67. See *Perez*, 2014 WL 4628572 at \*4.

Santero—who are already benefiting from *Hobby Lobby*. And notably, none of the cases turn on religious exercise by for-profit corporations. Cases involving religious exercise by for-profit corporations remain just as rare as they were before *Hobby Lobby*.

#### IV. Why Religious Exercise Claims By For-Profit Organizations Will Remain Rare

For-profit organizations are quite unlikely to raise a large number of religious liberty claims post-*Hobby Lobby*. In fact, the greatest number of religious liberty claims will remain prisoner claims under RLUIPA and religious land use claims by non-profit houses of worship, also brought under RLUIPA. State RFRA claims in general will also remain rare.<sup>68</sup> There are several factors that will make religious liberty claims by for-profit entities relatively rare.

##### A. Sincerity

One reason religious exercise claims by for-profit organizations will be rare is that all religious exercise claims, whether under the Constitution or federal civil rights laws, are subject to a sincerity inquiry.<sup>69</sup> This is because unlike speech, when it comes to religious exercise, the law uniformly demands that outward religious acts manifest an inner belief.<sup>70</sup> This principle holds true not just in the United States, but across all Western legal systems—it inheres in the nature of religious liberty.<sup>71</sup> The Free Exercise Clause, RFRA,

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68. See Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021 (2012); Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010).

69. See, e.g., *Hobby Lobby*, 134 S. Ct. at 2774 (discussing sincerity requirements).

70. See *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005) (under RLUIPA, “prison officials may appropriately question whether a prisoner’s religiosity, asserted as the basis for a requested accommodation, is authentic”); *Gillette v. United States*, 401 U.S. 437, 457 (1971) (“[T]he ‘truth’ of a belief is not open to question”; rather, the question is whether the objector’s beliefs are ‘truly held’”) (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)); see also *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (distinguishing “freedom to believe” from “freedom to act”).

71. Like *Cantwell*, international human rights instruments typically divide the right to freedom of religion or belief into two parts—an absolute right to hold certain religious beliefs, and a more limited right to manifest those beliefs in public. See, e.g., International Covenant on Civil and Political Rights, art. 18(1), Dec. 16, 1966, 999 U.N.T.S. 171 (“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”); European Convention on Human Rights, art. 9, Nov. 4, 1950, E.T.S. no. 005 (“Everyone has the right to freedom

RLUIPA, and other religious accommodation laws therefore all require that the religious exercise in question be sincere.<sup>72</sup>

There are several reasons that the universal sincerity requirement will significantly limit the kind and number of religious exercise claims that can be brought by for-profit organizations. In the first instance, it stretches credulity to believe that any Fortune 500 for-profit corporation like Apple, Exxon, IBM, or Starbucks would ever claim to be engaged in religious exercise. Since the law demands a genuine connection to a religious conscience or “forum internum”<sup>73</sup> in order to make out a religious exercise claim, these companies will not be able to make out a religious liberty claim, because they would never assert that they possess such a religious conscience.

Moreover, in the context of large publicly held companies, there is generally a significant divergence between ownership (i.e., the shareholders), and control (i.e., the board of directors and management). In *Hobby Lobby*, by contrast, five family members owned and controlled the entire company, and had by means of a trust arrangement subjected family members’ continued ownership of the company to adherence to specific religious beliefs.<sup>74</sup>

Perhaps most importantly, for most for-profit corporations there would be significant downside costs to insincerity. A corporation that represented that it had a religious belief to gain a legal or financial advantage of some sort when it did not in fact possess that belief would be liable for criminal or civil fraud.<sup>75</sup> Individuals who falsely

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of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”). Note that international human rights instruments connect the manifestation part of the right to the belief part of the protection.

72. See, e.g., *Hobby Lobby*, 134 S. Ct. at 2774 n.28 (“To qualify for RFRA’s protection, an asserted belief must be ‘sincere’; a corporation’s pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.”); Holt, 135 S. Ct. at 862 (“of course, a prisoner’s request for an accommodation must be sincerely based on a religious belief and not some other motivation”); *Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972) (“the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs” in supporting their claim under the Free Exercise Clause).

73. For a summary of how the terms “forum internum” and “forum externum” are used in the international law of religious liberty, see T. Jeremy Gunn, *Freedom of Religion: UN and European Human Rights Law and Practice*, 23 J.L. & RELIGION 763, 763–64 (2008) (book review).

74. See *Hobby Lobby*, 134 S. Ct. at 2775–76.

75. See, e.g., 18 U.S.C. § 1001 (2013) (general federal criminal fraud statute); 18 U.S.C. § 1341 (criminalizing mail fraud); 18 U.S.C. § 1343 (2013) (criminalizing wire fraud); 18 U.S.C. § 1348 (2013) (criminalizing securities fraud).

testified that a corporation held a particular religious belief would be liable for perjury.<sup>76</sup> Publicly traded corporations would be liable for securities laws violations.<sup>77</sup>

In short, the sincerity requirement presents a significant restriction on religious liberty claims by for-profit corporations.<sup>78</sup>

### **B. Rarity of Government Interference With For-Profit Religious Exercise**

Another reason that religious exercise claims by for-profit organizations will be rare is that government interference with for-profit religious exercise is likely to remain rare. Most Americans and most legislators support religious accommodations for dissenters, shown by the wide array of religious accommodations that governments of all sorts have put in place.<sup>79</sup>

This is not to say that government interference will not increase in coming years, resulting in more conflicts. That much seems to be a certainty, at least as long as government continues to expand its regulations into new areas of human activity that will inevitably involve religious people. But scale and scope matter, and this category of litigation will never rise to the level of ubiquity that, for example, employment discrimination lawsuits have.

### **C. Large Religious Non-Profit Organizations Have Brought Very Few RFRA Claims in the Past**

Another indicator tending to show that RFRA claims by for-profit organizations will be small is the experience of large religious non-profit organizations. By large religious non-profit organizations I mean entities such as large private universities or private hospital systems, which are typically organized as non-profit corporations. Almost no one disputes that these large, somewhat commercial, and heavily regulated religious non-profits are capable of engaging in

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76. See 18 U.S.C. § 1621 (2013) (criminalizing perjury).

77. See, e.g., 15 U.S.C. § 78j (Section 10b of the Securities Exchange Act).

78. For an in-depth treatment of the application of sincerity in the context of for-profit religious exercise, see Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59 (2014), available at <http://www.stanfordlawreview.org/online/questioning-sincerity>.

79. See generally Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103 (2015); Mark Rienzi, *The Constitutional Right Not to Kill*, 62 EMORY L.J. 121, 125–30 (2012) (describing conscience protections as to military operations, capital punishment, assisted suicide, and abortion).

religious exercise.<sup>80</sup> Although these large non-profit religious organizations frequently interact with the federal government—as contractors, as grantees, and as regulated entities—and can raise RFRA claims, they have brought few such claims.<sup>81</sup> The reality is that large religious non-profits take advantage of certain custom-built religious accommodations, but only infrequently raise the kinds of claims that federal RFRA plaintiffs do.<sup>82</sup> Given the similarities between religious for-profits and large religious non-profits, religious for-profits are likely to raise RFRA claims just as infrequently.

### Conclusion

So did *Hobby Lobby* create a brave new world of religious claims by for-profit corporations? Only much more time will tell, but my guess is that over time, *Hobby Lobby* will not be seen as a case that significantly changed the trajectory of the law of religious liberty. Instead, it will be seen as part of a broader continuum of substantial burden cases that started long before *Hobby Lobby* and will continue long after it. The difference will be that pundits and scholars will no longer view what was decided in *Hobby Lobby* as something “new.”

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80. See, e.g., Internal Revenue Service, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 2 (describing difference between “churches” and “religious organizations” and defining religious organizations as entities that advance religion).

81. A search of all federal cases in the Westlaw database using the search terms “RFRA” and “non-profit corporation” reveals just 68 cases. Author’s own search (conducted Apr. 20, 2015). Of those, the only cases where they can be said to involve large non-profit corporations are challenges to the Affordable Care Act’s contraceptive mandate. See, e.g., *Eternal Word Television Network, Inc. v. Sec’y, U.S. Dept. of Health & Human Servs.*, 756 F.3d 1339 (11th Cir. 2014). This tallies with Professor Lupu’s survey indicating that 60% of pre-1997 RFRA claims were brought by prisoners. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L. REV. 575, 591 (1998). His survey shows conclusively that most claims were brought by individuals rather than non-profit corporations; large non-profit corporations are barely represented. *Id.* at 603–17.

82. One example of religious accommodations for religious non-profits is Title VII’s religious exemption, which among other things, allows religious employers to show a preference for co-religionist employees. 42 U.S.C. § 2000e–1 (2013). The Supreme Court upheld this religious accommodation in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987).

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