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NOTE

DON'T TAKE RELIGIOUS FREEDOM PURELY PERSONALLY: THE CONSTITUTIONAL CASE FOR CORPORATE RELIGIOUS FREE EXERCISE RIGHTS

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I. INTRODUCTION

On June 30, 2014, the Supreme Court issued its decision in *Burwell v. Hobby Lobby*.[1] Since then a hotly debated topic in legal and political circles is whether for-profit corporations have the right to operate in accordance with the religious dictates of their owners.[2] Opponents of religious free-exercise rights for for-profit corporations make two main points. First, religion is something only natural persons are capable of practicing.[3] Since corporations are artificial persons rather than natural persons, they are incapable of practicing religion.[4] Second, granting for-profit corporations the ability to practice religion will inevitably lead to a parade of horribles, such as discrimination against women and the LGBT community, denial of coverage for life-saving medical care, and the gutting of worker protection laws such as the Family and Medical Leave Act (FMLA).[5]

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

2. Ross Douthat, *A Company Liberals Could Love*, N.Y. TIMES, July 5, 2014, http://www.nytimes.com/2014/07/06/opinion/sunday/rossdouthatacompanyliberalscouldlove.html.

3. Korte v. Sebelius, 735 F.3d 654, 694–702 (7th Cir. 2013) (Rovner, J., dissenting); *see also Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting).

4. *Id.*

5. *Korte*, 735 F.3d at 689–93; *see also Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting); Wheaton College v. Burwell, 134 S. Ct. 2807 (2014) (Sotomayor, J., dissenting).

In this paper I will refute both arguments. First, I will show how free exercise of religion extends to both natural persons and to artificial persons such as corporations. Then, I will reveal that a parade of horribles resulting from granting for-profit corporations the ability to practice religion is unlikely to occur, but even if one does occur, it should be embraced as a necessary consequence of protecting the natural right of every man, woman, and corporation to follow the commands of God.

II. The Constitutional Right To Free Exercise Of Religion Extends To Corporations Because It Is Not A "Purely Personal" Right

Some opponents of extending free exercise rights to for-profit corporations argue that free exercise of religion is a "purely personal"[6] right that extends only to natural persons.[7] An examination of both relevant Supreme Court precedent and the meaning of "free exercise" at the time of the drafting of the First Amendment, however, shows that freedom of religion is not a "purely personal" right inapplicable to corporations.[8] To demonstrate this, I first turn to Supreme Court precedent on the subject of corporate personhood.

A. The Bellotti "Purely Personal" Test

The Supreme Court has consistently affirmed that corporations are persons, most recently in *First National Bank v. Bellotti*,[9] and *Citizens United v. F.E.C.*[10] Both cases dealt with political speech restrictions applied to corporations.[11]

In *Bellotti,* the Court spelled out a test in footnote 14 to determine whether or not a corporation is afforded a right granted to a natural person under the Constitution.

> Corporate identity has been determinative in several decisions denying corporations certain constitutional rights, such as the privilege against compulsory self-incrimination, or equality with individuals in the enjoyment of a right to privacy, but this is not because the States are free to define the rights of their creatures without constitutional limit. Otherwise, corporations could be denied the protection of all constitutional guarantees, including due process and the equal protection of the laws. Certain "purely personal" guarantees, such as the privilege against compulsory self-

6. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978).

7. *Korte*, 735 F.3d at 701 (Rovner, J., dissenting).

8. *See generally* Brief of the Christian Booksellers Ass'n, et al. as Amici Curiae Support of Hobby Lobby and Conestoga, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13–354, 13–356), 2014 WL 343200.

9. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

10. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

11. *Bellotti*, 435 U.S. at 767; *Citizens United*, 558 U.S. at 886–87.

> incrimination, are unavailable to corporations and other organizations because the "historic function" of the particular guarantee has been limited to the protection of individuals. Whether or not a particular guarantee is "purely personal" or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.[12]

Hence, determining whether or not the Free Exercise Clause applies to corporations requires an examination of the understanding of "free exercise" at the time of the drafting of the First Amendment. This is the topic that we shall explore next.

B. The Founding Fathers' Understanding of Religious Free Exercise

In the late eighteenth century, "free exercise" was understood to include "various forms of free public religious action—religious speech, religious worship, religious assembly, religious publication, religious education, among others."[13] When glancing at this list, one notices that some of these activities are capable of being exercised by groups, and some, such as religious assembly, religious publication, and religious education, are even activities that are generally or exclusively conducted by groups of persons.[14] Free exercise, therefore, was probably not understood by the drafters of the First Amendment as something that extended only to individuals.[15] It is thus likely that the drafters of the First Amendment intended the Free Exercise Clause's protections to extend to groups of natural persons.[16] Since corporations are groups of natural persons, they would have likely been considered capable of exercising religion.[17]

Judge Timothy Tymkovich explained why this is the case in his majority opinion for the Tenth Circuit in *Hobby Lobby v. Sebelius*:[18]

> It is beyond question that associations—not just individuals—have Free Exercise rights: "An individual's freedom to speak, *to worship,* and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." Therefore, courts have "recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and *the exercise of*

12. *Bellotti*, 435 U.S. at 778 n.14.

13. John Witte, Jr., *Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 395 (1996).

14. *See generally* Brief of the Christian Booksellers Ass'n, *supra* note 8.

15. *Id.* at 8–20.

16. *Id.*

17. *Id.*

18. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

> *religion.* The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." Accordingly, the Free Exercise Clause is *not* a "'purely personal' guarantee . . . unavailable to corporations and other organizations because the 'historic function' of the particular [constitutional] guarantee has been limited to the protection of individuals." As should be obvious, the Free Exercise Clause at least extends to associations like churches—including those that incorporate.[19]

C. *The Supreme Court's Rulings in Lukumi and Hobby Lobby Demonstrate That Some Corporations Can Exercise Religion*

In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,[20] a Santeria church organized as a nonprofit corporation was found to have standing to challenge a city ordinance seeking to outlaw the animal sacrifices that form an essential part of the Santeria religion's worship services.[21] As Judge Diane Sykes of the U.S. Court of Appeals for the Seventh Circuit notes in her majority opinion in *Korte v. Sebelius*, the church in *Lukumi* "[was] not in court solely asserting the rights of [its] members based on associational standing" but was "asserting [its] own rights too."[22] Since the church was organized as a corporation, the fact that it was found to have standing to assert violations of its own religious freedom, and not just the religious freedom of its members, indicates corporations are not categorically precluded from the religious free exercise protections of the First Amendment.[23]

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that closely-held corporations are persons under the Religious Freedom Restoration Act of 1993, reasoning that:

> A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-

19. *Id.* at 1133–34 (internal citations omitted).
20. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
21. *Id.* at 525–27.
22. Korte v. Sebelius, 735 F.3d 654, 675 (7th Cir. 2013).
23. *Id.*

> exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.[24]

The Court's reasoning, then, is that corporations have rights because the people who own and operate them have rights.[25] Granting rights, such as religious liberty, to corporations is done in order to safeguard the religious beliefs of their owners and operators.[26]

Hence, relevant Supreme Court precedent and an examination of the First Amendment drafters' understanding of the phrase "free exercise" demonstrate that at least some corporations are capable of exercising religion under the Free Exercise Clause.

III. It Is Unlikely That A Parade of Horribles Will Follow If Free Exercise Rights Are Granted To For-Profit Corporations

The final main argument that opponents of granting free exercise rights to for-profit corporations make is the "parade of horribles" argument. This argument is articulated by the Lambda Legal Defense and Education Fund, Inc. (Lambda Legal), an LGBT rights advocacy group, in their amicus curiae brief filed in *Burwell v. Hobby Lobby.*[27] Lambda Legal's argument is presented as follows:

> Many employees, like many business owners, hold religious and other beliefs that guide their lives. Those beliefs remain with them when entering their shared place of business. As recognized in the decisions discussed above, permitting owners of for-profit companies to interject themselves into employees' home lives and decisions concerning fertility, birth control, and childbearing—which the Companies' arguments do—not only would encourage others to do the same, but would subvert compelling interests in autonomy, public health, and gender equity served by the rule the Companies resist. The Companies offer no limiting principle and, indeed, there is none. Religious critiques of contraception can as easily be leveled at sterilization, infertility care, and decisions between vaginal delivery and caesarian section. How does autonomy survive an employer's line-item veto of insurance coverage that pokes and prods personal decisions by shifting costs from health plan to worker? Stepping back from the reproductive health context of these cases, imagine how our nation's workplace standards would be transformed were this Court to embrace

24. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

25. *Id.*

26. *Id.*

27. *See generally* Brief of Lambda Legal Def. and Educ. Fund, Inc., et al. as Amici Curiae Supporting Petitioners, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13–354, 13–356), 2014 WL 334441 [hereinafter Lambda Legal Amicus Brief].

> the approach the Companies request. Business owners with religious objections to blood transfusion could exempt that life-saving service from their employees' health coverage. They could selectively exclude coverage for "sinful" medications that control pain, alleviate depression, or manage HIV. Those who believe that all modern medical treatments interfere with Divine will could refuse coverage for all but faith healing.[28]

Lambda Legal's main concern, therefore, is that granting free exercise rights to for-profit corporations would render meaningless the strong legal protections afforded to the rights of workers via laws like the Employee Retirement Income Security Act (ERISA), Title VII of the Civil Rights Act of 1965, and the FMLA, if corporations were granted protection under the Free Exercise Clause of the First Amendment. I find the scenario Lambda Legal lays out unlikely to happen under a First Amendment analysis due to the test that the Supreme Court outlined in *Employment Division Department of Human Resources of Oregon v. Smith*.[29]

A. Employment Division Department of Human Resources of Oregon v. Smith

In *Smith*, Alfred Smith and Galen Black, the plaintiffs, had been fired by the employer, a private drug rehabilitation organization, for smoking peyote, a hallucinogenic drug.[30] Smith and Black's reason for smoking peyote was religious, as smoking peyote is a sacrament in the Native American Church, a religious body of which both are members.[31] Smith and Black then applied for unemployment benefits, but were denied because their reason for being fired was breaking a law (peyote smoking was illegal in Oregon at the time, even for religious purposes).[32] Smith and Black then challenged their denial of unemployment benefits, claiming that the denial violated their Free Exercise rights under the First Amendment.[33]

The Court held that Oregon's criminal ban on peyote was constitutional because it was a "valid and neutral law of general applicability,"[34] meaning that the law applied to everyone and did not target any particular group of religious believers.[35] Laws that are neutral and generally applicable, the Court explained, do not violate the First Amendment even if they forbid conduct that a religion mandates or vice versa.[36] In *Lukumi*, the

28. *Id.* at 28–29.
29. Emp't Div. Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 883 (1990).
30. *Id.* at 874.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 879.
35. *Smith*, 494 U.S. at 872.
36. *Id.*

Court provides further clarification on what makes a law "neutral" and "generally applicable."[37]

B. Neutrality

Justice Anthony Kennedy states in the majority opinion in *Lukumi* that "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."[38] Moreover, the law must be both facially neutral and operationally neutral to pass the *Smith* test.[39] The city ordinance forbidding animal slaughter struck down in *Lukumi*, although facially neutral, was found not to be operationally neutral because it did not overtly ban Santeria animal sacrifices.[40] An examination of the motives for passing the ordinance and the many exceptions to the animal slaughter ban revealed that it was designed to forbid the practice of the Santeria religion within the city's border.[41]

C. General Applicability

Having clarified the neutrality prong of the *Smith* test, Justice Kennedy then proceeded to discuss the test's second prong, the requirement of "general applicability."[42] Although he did not precisely define what "general applicability" is, he does say that the challenged animal slaughter ban fell well short of it because it effectively exempted every form of animal slaughter other than for religious rituals.[43] Hence, the ordinance was not generally applicable.[44]

Because the Court does not clearly define "general applicability" under the *Smith* test, several interpretations have been proposed.[45] One such interpretation is offered by then-Judge Samuel Alito in his majority opinion in *Fraternal Order of Police Newark Lodge 12 v. City of Newark*.[46] In *Fraternal Order of Police*, Muslim police officers whose faith requires them to wear beards challenged a no-beards policy that the Newark Police Department had followed since 1971.[47] The Newark Police Department's rationale behind the policy was a uniform appearance of their police officers.[48] Alito found that the policy's existing exception for officers with a medical condition had already undermined the police department's interest in a uniform

37. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531 (1993).
38. *Id.* at 533.
39. *Id.* at 534.
40. *Id.* at 537–39.
41. *Id.*
42. *Id.* at 542.
43. *Lukumi*, 508 U.S. at 543–46.
44. *Id.*
45. THOMAS C. BERG, THE STATE AND RELIGION IN A NUTSHELL 118 (2d ed. 2004).
46. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (1999).
47. *Id.* at 360.
48. *Id.* at 366.

appearance for their police officers.[49] Consequently, the requirement was not generally applicable and the second prong of the *Smith* test was not satisfied.[50]

Another possible interpretation of the test, advanced by Professor Douglas Laycock, is what he describes as the "most favored nation"[51] interpretation, in which religious practices must be treated at least equal to the most favorably treated secular practices under the particular law.[52]

Regardless of which interpretation is correct, however, in order for a law to pass the *Smith* test, it must not facially or operationally target any particular religious group or groups and not contain so many exemptions that it is apparent that the law was enacted to disfavor the practice of one or more religions.[53] So long as those two criteria are met, the government's law will pass constitutional muster even if it substantially burdens the ability of individual religious believers or groups of religious believers to practice their faith.[54]

Moreover, even if a law fails the *Smith* test, the government can still prevail under the strict scrutiny evaluation that applies in those cases if it demonstrates a compelling state interest.[55] For example, the Supreme Court has decided in previous cases that the functionality of the Social Security System[56] and combating racial discrimination[57] are sufficiently compelling interests to permit the government to substantially burden the religious free exercise rights of citizens.

Granting free exercise rights to corporations, hence, doesn't mean that the corporation's religious interests will always prevail over the government's interests. The *Smith* test is highly deferential to the government and very easy to satisfy.[58] Thus, Lambda Legal's concerns about major civil rights legislation being undermined by granting corporations free exercise rights are unwarranted under present Free Exercise Clause jurisprudence.

IV. The Parade Of Horribles, If It Occurs, Should Be Embraced As Necessary To Protect Religious Liberty

As stated above, I find it unlikely, given the Supreme Court's decision in *Smith*, that the scenario Lambda Legal outlines in their amicus brief will come to pass. The Supreme Court's interpretation of the Free Exercise

49. *Id.*
50. Berg, *supra* note 45, at 121.
51. *Id.*
52. *Id.*
53. *Id.* at 118–21.
54. *Id.*
55. Emp't Div. Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 883 (1990).
56. United States v. Lee, 455 U.S. 252, 258–61 (1982).
57. Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).
58. Berg, *supra* note 45.

Clause in *Smith*, however, is not the only possible interpretation.[59] Michael Stokes Paulsen offers an alternative understanding of the Free Exercise Clause in *The Priority of God: A Theory of Religious Liberty*.[60]

Paulsen labels his interpretation the "pro-exemption reading"[61] of the Free Exercise Clause and outlines it as follows:

> The Free Exercise Clause is properly understood as conferring broad substantive immunity from government laws or regulations that would operate to prohibit sincere religious belief and exercise. As long as a claimed religious practice is truly *religious*, not pretextual, and has any plausible claim to religious truth—that is, as long as the claimed religious right is not contrary to the clear, universal moral command of God, resulting in serious harms outside the truly consenting, sincerely confessing community of faith—the state's rule must yield in the specific instance.[62]

Paulsen then proceeds to discuss the "non-discrimination rule"[63] reading of the Free Exercise Clause adopted by the Supreme Court in *Smith*, in which the Free Exercise Clause only prohibits federal laws (and, via the Fourteenth Amendment, state laws) that specifically target and discriminate against religious practices.[64] Since either interpretation is plausible based on the text of the Free Exercise Clause itself, Paulsen argues, we need to examine the broader logic and structure of the Clause.[65] Reading the Clause from a "non-religious perspective" leads to the non-discrimination interpretation, whereas reading the Clause from the perspective that religious exercise is an "inalienable right" conferred by God upon mankind leads to the pro-exemptions interpretation.[66] Paulsen contends that the non-discrimination interpretation of the Free Exercise Clause is incorrect.[67] I agree with him for two main reasons.

First, Paulsen is right that the "non-religious perspective" interpretation "[fails] to serve the purposes for which the right presumably exists."[68] This is because such an interpretation allows the government to bypass the Clause's protections by enacting facially-neutral, generally applicable laws that force religious believers to act contrary to their religious beliefs, effectively forbidding them from living the dictates of their religion.[69] Given the broad array of religious expression considered "free exercise of religion" at

59. Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1191 (2013).
60. *Id.* at 1191–1206.
61. *Id.* at 1191.
62. *Id.* at 1162.
63. *Id.* at 1191.
64. *Id.* at 1190.
65. Paulsen, *supra* note 59, at 1192
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

the time of the adoption of the amendment[70] it makes no sense for the Founding Fathers to, on the one hand extend constitutional protection to a broad swath of religious activity, and on the other hand "permit the government to circumvent religious freedom"[71] so easily.

Second, the Declaration of Independence and other documents authored by the Founding Fathers clearly demonstrate that they understood all rights as having their origin in God.[72] If this is the case, then, as Paulsen argues, the "non-religious" reading of the Free Exercise Clause is nonsensical because:

> [f]rom the perspective that credits the possibility that there is such a thing as a God whose commands have priority, and that takes as its starting point the proposition that religious freedom is the state's recognition of the strong presumptive validity of that ordering of priorities, it makes little sense to read the Free Exercise Clause as anything other than *ousting state authority over the believer's conduct*, wherever and whenever such state authority is in genuine conflict with genuine religious obligation.[73]

Thus, since the Founding Fathers understood the origin of rights as God rather than positive law, and the Free Exercise Clause granted protection to a wide array of religious activity, it is unlikely that the non-discrimination reading of the Free Exercise Clause is the reading that was intended by the Founding Fathers.

A. The Parade of Horribles Objection to the Pro-Exemption Reading

Lambda Legal and others, however, would likely object to such an interpretation on the grounds that it will lead to the parade of horribles they outlined in their amicus brief.[74] Lambda Legal's concerns are valid, and there will undoubtedly be situations where citizens will need to assume extra burdens as a result of accommodating the religious practices of other citizens. However, if such a parade of horribles occurs, it is the necessary side effect of ensuring "the priority of God's true claims on human conduct over any competing obligation imposed by Man."[75]

The right to religious freedom does not, however, give a person the right to religious exemptions to things that clearly violate the universal moral command of God, as Paulsen points out, because in those situations we know clearly what God commands.[76] Absent such a situation, the law

70. Witte, *supra* note 13, at 395.
71. Paulsen, *supra* note 59, at 1192.
72. *See* THE DECLARATION OF INDEPENDENCE para. 1–2 (U.S. 1776); Paulsen, *supra* note 59, at 1204.
73. Paulsen, *supra* note 59, at 1192.
74. Lambda Legal Amicus Brief, *supra* note 27, at 28–29.
75. Paulsen, *supra* note 59, at 1222.
76. *Id.* at 1213.

must give way to the person's religious belief so long as that belief is sincere.[77] Where the law of man contradicts what a man or woman sincerely believes to be a command of God, the law of man must give way to the law of God so long as that dictate does not contravene what society knows to be the universal moral law.[78] As the Youth Catechism of the Catholic Church (YOUCAT) aptly states, "God wishes us to acknowledge his love and even now to live our whole life in relation with him."[79] Giving government the power to "circumvent religious freedom seemingly at will"[80] effectively robs every human being of the freedom to live their lives in accordance with God's commands.[81]

V. Conclusion

Having examined both main arguments against granting free exercise rights to for-profit corporations, I conclude that they both fail. Contrary to the claims of corporate free-exercise opponents, religious free exercise is not a "purely personal" right inapplicable to corporations.[82] And, if granting religious free exercise rights to corporations results in a parade of horribles, then the parade of horribles should be embraced as the necessary consequence of protecting the freedom of every natural and artificial person to follow the commands of God, which no one, not even human rulers, has any authority to impede or override.[83]

77. *Id.* at 1180.
78. *Id.* at 1211.
79. YOUCAT: Youth Catechism of the Catholic Church 45 (Christoph Schönborn ed., Michael J. Miller trans., 2011).
80. Paulsen, *supra* note 59, at 1192.
81. *Id.* at 1177–78.
82. Hobby Lobby Inc. Stores v. Sebelius, 723 F.3d 1114, 1133–34 (10th Cir. 2013).
83. *Id.* at 1211.