HOBBY LOBBY'S CONFLATED CORPORATE TAX EXEMPTION AND ITS IMPACT ON I.R.C. § 501(C)(3)

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I. INTRODUCTION

Can you imagine Koch Industries and Cargill enjoying Internal Revenue Code ("IRC") section 501(c)(3)[1] tax-exempt status similar to the Southern Baptist Convention and the Catholic Church? That could very well be a future consequence of the *Hobby Lobby* decision, particularly in light of current tax policy trends. The passage of the "Tax Cuts and Jobs Act"[2] ("TCJA") has fostered a renewed debate over the goals of current tax reform efforts and the priorities American tax policy generally advance.[3] In many ways, the TCJA also represents an extension of the policies underpinning *Burwell v. Hobby Lobby Stores, Inc.*[4]

A. The Conflated Corporate Tax Exemption

The *Hobby Lobby* decision became famous for recognizing business corporations as persons whose religious beliefs, and the exercise thereof, are entitled to protection under the Religious Freedom and Restoration Act ("RFRA"); exempting them from the contraceptive mandate embedded in the Patient Protection and Affordable Care Act ("ACA" or "Obamacare").[5] However, legal scholars have provided far less commentary on *Hobby Lobby*'s potential tax policy impact and future extensions of its rationale to justify providing business entities with broader tax exemptions historically reserved for the religious and other

1. *See* I.R.C. § 501(c)(3) (2018).
2. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054.
3. Sally P. Schreiber, *President Signs Tax Overhaul into Law*, J. ACCT. (Dec. 22, 2017), https://www.journalofaccountancy.com/news/2017/dec/president-signs-tax-cuts-jobs-act-201718112.html (discussing tax issues facing the U.S., i.e., Corporate and Individual Tax rates, Alternative Minimum Tax). Much of the reporting on the Tax Cuts and Jobs Act has summarized the results by categorizing those primarily affected as "winners and losers." Jesse Drucker & Alan Rappeport, *The Tax Bill's Winners and Losers*, N.Y. TIMES (Dec. 16, 2017), https://www.nytimes.com/2017/12/16/business/the-winners-and-losers-in-the-tax-bill.html. Prominently listed among the winners are corporations, businesses organized as pass-through entities, and the wealthy Americans most heavily invested and involved in managing these enterprises. Perhaps the biggest losers under tax reform are members of the nonprofit sector. This can readily be seen in the feared deterrent effects on charitable giving manifested in key parts of TCJA.
4. 573 U.S. 682 (2014).
5. *Id.* at 688–91.

nonprofit organizations. This Article examines *Hobby Lobby*'s departure from established tax and religious free exercise precedent, as well as the far-reaching impact this departure could have on American nonprofit tax policy for years to come.

B. Overview of the Article

Part II explores the history, purposes, and federal tax policies undergirding and precipitating the tax-exempt status of religious organizations under section 501(c)(3); including an analysis of the requirements necessary for maintaining that tax-exempt status. Part III examines the *Hobby Lobby* decision and its policy implications on the religious tax exemption provided in section 501(c)(3); accounting for the Court's *National Federation of Independent Business v. Sebelius*[6] holding that Congress's enactment of the ACA individual mandate was a valid exercise of its Constitutional taxing authority, discussing the connection between the ACA's individual and contraceptive mandates, and exploring the impact of RFRA protections articulated in *Hobby Lobby* on tax policy through the relief provided to corporate taxpayers. Part IV discusses the potential impact of extending *Hobby Lobby* free exercise tax policies to section 501(c)(3) in reducing the incentives for charitable giving, compromising available government funding for the social services nonprofit tax law aims to subsidize, and threatening the viability of many nonprofits who depend on the current nonprofit tax structure for survival/subsistence. Part V addresses arguments that the concerns expressed in this Article are exaggerated because (1) the *Hobby Lobby* Court intentionally limited the scope of its decision to the contraceptive mandate; (2) the Court limited applicability of its decision to closely held corporations; and (3) section 501(c)(3) and accompanying regulations provide sufficient protections against manifestation of potential problems described in this Article, *Hobby Lobby* based section 501(c)(3) claims are unlikely, and this Article presents unsolvable problems. In addressing these criticisms, the Article aims to reinforce the importance of heeding the warnings expressed and dangers described herein, should *Hobby Lobby* be applied to section 501(c)(3). Part VI concludes that Congress should amend RFRA to clarify the legal persons RFRA covers and its relationship to tax policy. These clarifications should, at a minimum, prevent section 501(c)(3) related problems.

6. 567 U.S. 519 (2012).

II. HISTORY, POLICY RATIONALE, AND TECHNICAL REQUIREMENTS OF I.R.C. § 501(C)(3)

This part explores the history, purposes, and federal tax policies undergirding and precipitating the tax-exempt status of religious organizations under Internal Revenue Code section 501(c)(3). This part will also analyze the pre-*Hobby Lobby* requirements necessary for maintaining that tax-exempt status as a reflection of the unique place American tax policy reserves for religion and other charitable purposes.

A. History and Policy Rationale of Religious Tax Exemption

Religious nonprofits have served a valuable role in American society throughout the nation's history.[7] America's religious and philanthropic roots extend beyond the original colonies to the nation's English heritage.[8] Charity, a cornerstone of the colonial social contract became key to communal advancement and manifested itself in the establishment of churches and other institutions.[9] Colonists' religious beliefs led them to establish institutions and charitable trusts to care for the poor, sick, and elderly.[10] Today's nonprofit organizations still largely serve those purposes that helped shape early American society.[11] These

7. *See* Peter Dobkin Hall, *Historical Perspectives on Nonprofit Organizations in the United States*, *in* THE JOSSEY-BASS HANDBOOK OF NONPROFIT LEADERSHIP AND MANAGEMENT 3, 3–5 (David O. Renz et al. eds., 3d ed. 2010). This Article focuses primarily on the development and treatment of nonprofits in the United States of America. The treatment of nonprofits in foreign jurisdictions, some of which are progenitors of American law and its corresponding nonprofits, while important, is beyond the scope of this Article. S*ee generally id.* at 3.

8. *See* James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 620–23 (1985) [hereinafter Fishman, *Development of Nonprofit Corporation Law*] (reciting the history of charitable giving in England before the seventeenth century, after the enactment of the English Statute of Charitable Uses of 1601, and its evolution in the United States); *see also* James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 245 (2003) [hereinafter Fishman, *Improving Charitable Accountability*] (citing thirteenth century papal decrees encouraging individuals to donate to charitable or religious purposes. Failure to do so risked "eternal damnation"). England largely led the effort to colonize what is now the United States, with establishment of Jamestown, Virginia in 1607. Many of England's cultural values and common law were embedded in America's society as a result of England's colonization. *See* Fishman, *Development of Nonprofit Corporation Law*, *supra*, at 621–23.

9. *See* Jeffrey A. Brauch, *John Winthrop: Lawyer as Model of Christian Charity*, 11 REGENT U. L. REV. 343, 346–47, 350–51 (1998); *see also* Fishman, *Development of Nonprofit Corporation Law*, *supra* note 8, at 620–23.

10. *See* Fishman, *Development of Nonprofit Corporation Law*, *supra* note 8, at 621–22; *see also* Fishman, *Improving Charitable Accountability*, *supra* note 8, at 245 n.197.

11. *See* Hall, *supra* note 7, at 4–5.

institutions educate[12] and shape America's social and cultural values through religious[13] and counseling services.[14] They also feed the hungry, shelter the homeless, clothe the destitute, and provide countless other important human and social services to the needy across Americans.[15]

Nonprofit services provide consideration for tax benefits these organizations receive by relieving traditional agencies "of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government."[16] According to a 1938 congressional report commenting on nonprofits' tax-exempt status, "[t]he Government is compensated for its loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from public funds."[17] Additionally, nonprofits can more efficiently provide social service assistance to citizens in need without the bureaucratic red tape, political feasibility, or loyalty calculations incumbent in governmental processes.[18] Nonprofits fill the void between the public and private sector—supplementing services the government can no longer afford to provide and businesses will not provide at a discount.

Nonprofit organizations are also a significant contributor to the American economy. In recent years, the nonprofit sector has grown with

12. I.R.C. § 501(c)(3) (2018); *see also Directory of Charities and Nonprofit Organizations*, *Education and Research*, GUIDESTAR, https://www.guidestar.org/NonprofitDirectory.aspx (last visited Mar. 16, 2018).

13. *See* Treas. Reg. § 1.6033-2(g)(1)(i) (2008) (categorizing churches, and their integrated auxiliaries, conventions, and other controlled affiliates, as exempt organizations not required to file Form 990).

14. *See* I.R.C. § 501(c)(3); *see also* Gita Gulati-Partee, *A Primer on Nonprofit Organizations*, POPULAR GOV'T, Summer 2001, at 31, 31–32; *Directory of Charities and Nonprofit Organizations*, *Health*, GUIDESTAR, *supra* note 12; *Directory of Charities and Nonprofit Organizations*, *Human Services*, GUIDESTAR, *supra* note 12; *Directory of Charities and Nonprofit Organizations*, *Public, Societal Benefit*, GUIDESTAR, *supra* note 12. Nonprofits help to shape America's culture and values by providing counseling services including those related to drug and alcohol addiction and abuse programs, and young adult services. *See Directory of Charities and Nonprofit Organizations*, *Health*, GUIDESTAR, *supra* note 12.

15. *See* Gulati-Partee, *supra* note 14, at 31–32 (noting that many of the organizations with which we come into regular contact fit our notions and casual definitions of "nonprofit," often without our realizing the connection); *Directory of Charities and Nonprofit Organizations*, *Human Services*, GUIDESTAR, *supra* note 12.

16. McGlotten v. Connally, 338 F. Supp. 448, 456 (D.D.C. 1972).

17. *Id.* (quoting H.R. REP. NO. 75-1860, at 19 (1938)).

18. *See* Garry W. Jenkins, *The Powerful Possibilities of Nonprofit Mergers: Supporting Strategic Consolidation Through Law and Public Policy*, 74 S. CAL. L. REV. 1089, 1100–01 (2001).

increasing speed, earning the label of a "growth industry."[19] From 2010 to 2013, the number of nonprofits operating in America grew by almost twenty percent.[20] This growth has impacted the United States' economy in important ways. In 2010, nonprofits held over $2.9 trillion in assets, reported over $1.6 trillion in revenue,[21] and received approximately $344.9 billion from donors and grant makers.[22] In 2012, the nonprofit sector contributed approximately $887.3 billion to the United States' economy and accounted for 5.4% to the nation's gross domestic product.[23] Nonprofits produced more revenue than the Federal Government, construction industry, and mining industry combined.[24]

The nonprofit sector's economic importance also manifests itself in the human resource contributions of employees and volunteers. In 2010, nonprofits employed 10.7 million workers, representing ten percent of the nation's workforce and making the nonprofit workforce the third largest of all U.S. industries behind retail trade and manufacturing.[25] Nonprofit

19. *See* David S. Walker, *A Consideration of an LLC for a 501(c)(3) Nonprofit Organization*, 38 WM. MITCHELL L. REV. 627, 629–30 (2012) (quoting JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS 12 (4th ed. 2010)).

20. *See* Paul Arnsberger, *Nonprofit Charitable Organizations, 2010*, STAT. INCOME BULL. 74, at 74 (2014), https://www.irs.gov/pub/irs-soi/14eowinbulcharitorg10.pdf (stating there were 1,280,739 active organizations recognized by the IRS in 2010); *cf.* JOHN A. KOSKINEN ET AL., INTERNAL REVENUE SERVICE DATA BOOK 12 (2014) (stating that approximately 1.367 million tax-exempt organizations filed tax returns in the year 2012). In 2010, there were approximately 1.28 million active nonprofits, and by 2013, the number of active nonprofits grew to approximately 1.463 million nonprofits. *See* Arnsberger, *supra*, at 74 n.4; KOSKINEN, *supra*, at 12. Although IRS tax-exempt recognition is a reliable source of nonprofit data, it is admittedly an incomplete measure of all nonprofit activities. Many organizations are not required to file Form 990 annual information returns, including churches, their affiliated organizations, and those nonprofits with gross receipts of $50,000 or less annually. *See* Treas. Reg. § 1.6033-2, 6 (2018); *Annual Exempt Organization Return: Who Must File*, IRS, https://www.irs.gov/charities-non-profits/annual-exempt-organization-return-who-must-file (last updated May 11, 2018).

21. *See* Arnsberger, *supra* note 20, at 74.

22. *Id.* at 75.

23. BRICE S. MCKEEVER & SARAH L. PETTIJOHN, URBAN INST., THE NONPROFIT SECTOR IN BRIEF 2014: PUBLIC CHARITIES, GIVING, AND VOLUNTEERING, 1 (2014), https://www.urban.org/sites/default/files/publication/33711/413277-The-Nonprofit-Sector-in-Brief--.PDF.

24. *See* U.S. DEP'T OF COMMERCE, BUREAU OF ECON. ANALYSIS, GROSS OUTPUT BY INDUSTRY (2015), https://apps.bea.gov/histdata/fileStructDisplay.cfm?HMI=8&DY=2015&DQ=Q2&DV=Annual&dNRD=November-5-2015.

25. *See* LESTER M. SALAMON, S. WOJCIECH SOKOLOWSKI & STEPHANIE L. GELLER, JOHNS HOPKINS UNIV., HOLDING THE FORT: NONPROFIT EMPLOYMENT DURING A DECADE OF TURMOIL 1, 2 (2012) (noting that the nonprofit sector employs "[n]early 18 times more workers than the nation's utilities industry," "[f]ifteen times more workers than the nation's mining industry," "[n]early 10 times more workers than the nation's agriculture industry," "[a]bout five and a half times more workers than the nation's real estate industry," "[n]early

human resources multiply in impact when volunteer efforts are included. This distinguishes volunteerism and its impact on the efforts of nonprofits from traditional business workforce dynamics, providing a supplemental workforce to further nonprofit goals.[26] In 2012, more than 64 million Americans volunteered for or through a nonprofit, representing at least a quarter of the nation's population,[27] contributing almost 8 billion hours of service, and creating $175 billion of value.[28]

B. Tax Exempt Status Technical Requirements: The Organizational and Operational Tests

To maximize resources available for advancing their charitable purposes, nonprofits often seek section 501(c)(3) recognition.[29] The first, and arguably most important reason nonprofits apply for section 501(c)(3) recognition is to become exempt from federal income tax.[30] Exempt entities can also take advantage of numerous federal, state, and local tax code subsidies including reduced postal rates,[31] the ability to issue tax-exempt bonds,[32] exemption from federal unemployment taxes,[33] and exemption from most states income, sales, and property taxes.[34] Nonprofits also seek exempt entity status to entice private charitable

three times more workers than the nation's transportation industry," and "[a]bout twice as many workers as the nation's wholesale trade, finance and insurance, and construction industries").

26. *See* SARAH JANE REHNBORG ET AL., RGK CTR. FOR PHILANTHROPY & CMTY. SERV., STRATEGIC VOLUNTEER ENGAGEMENT: A GUIDE FOR NONPROFIT AND PUBLIC SECTOR LEADERS 2 (2009).

27. *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, USDL-16-0363, NEWS RELEASE, VOLUNTEERING IN THE UNITED STATES—2015, 4 tbl.A (2016), https://www.bls.gov/news.release/volun.nr0.htm [http://perma.cc/K66R-6T5X].

28. *Independent Sector's Value of Volunteer Time*, INDEP. SECTOR, https://www.independentsector.org/volunteer_time [https://perma.cc/ZKT6-TDHG] (calculating volunteer value for 2013 using a $22.55/hour wage standard).

29. *See* MCKEEVER & PETTIJOHN, *supra* note 23, at 2, 6 tbl.2, 8 tbl.3. Section 501(c)(3) of the I.R.C. allows a nonprofit to obtain a special status from the IRS after completing certain administrative and operational requirements. *See* I.R.C. § 501(c)(3) (2018). Although there are more than thirty types of organizations entitled to tax-exempt status, this Article is limited to the examination of section 501(c)(3) tax-exempt nonprofits. *See* MCKEEVER & PETTIJOHN, *supra* note 23, at 2.

30. *See* I.R.C. § 501(a) (2018). For a similar discussion of Section II.B herein, see Kenya J. H. Smith, *Charitable Choices: The Need for a Uniform Nonprofit Limited Liability Company Act (UNLLCA)*, 49 U. MICH. J.L. REFORM 405, 426–30 (2015).

31. *See* 39 U.S.C. § 3626(a) (2018).

32. *See* I.R.C. § 145(a) (2018).

33. *See* I.R.C. § 3306(c)(8) (2018).

34. *See* DEP'T OF TREASURY, INTERNAL REVENUE SERV., REV. 7-2014, APPLYING FOR 501(C)(3) TAX-EXEMPT STATUS 2 [hereinafter, INTERNAL REVENUE SERV., REV. 7-2014].

gifts, which are currently deductible under the income, estate, and gift tax.[35] Section 501(c)(3) organizations are also eligible to receive substantial government grants to help subsidize the goods and services they provide to the community.[36]

To determine whether an entity qualifies for tax-exempt status under section 501(c)(3), the IRS employs organizational and operational tests. The IRS prohibits private inurement and requires dedication of the entity's assets to its articulated exempt purposes.[37] These tests ensure that nonprofits receiving a tax benefit maintain purposes that help to improve society through its charitable endeavors.[38]

The organizational test establishes certain mandatory requirements for a nonprofit's governing documents.[39] The governing documents must expressly declare that the organization is formed "exclusively for one or more of the [philanthropic or charitable][40] purposes specified" to qualify for section 501(c)(3) status.[41] Additionally, the nonprofit must advance public, not private, benefits and it must not bestow more than incidental economic benefit to any individual or group.[42] The nonprofit may not use

35. *See* I.R.C. §§ 170(c)(2), 2522(a)(2) (2018) (stating that contributions to public charities are deductible); *see also id.* § 501(c)(3) (2018); MCKEEVER & PETTIJOHN, *supra* note 23, at 2. Organizations are typically divided into two categories: public charities and private foundations. Public charities meet certain public support criteria, such as receiving more than one-third of their support from gifts, grants, gross receipts from admissions, and sales of merchandise. I.R.C. § 509(a)(2). They constitute approximately two-thirds of all registered nonprofits. *See* MCKEEVER & PETTIJOHN, *supra* note 23, at 2, 15. Private foundations represent the other one-third of nonprofit Section 501(c)(3) organizations. *See What is a 501(c)(3)?*, FOUND. GRP., https://www.501c3.org/what-is-a-501c3/ (last visited Jan. 2, 2019). Only contributions to public charities are deductible for federal tax purposes. *See* I.R.C. § 170 (2018).

36. MCKEEVER & PETTIJOHN, *supra* note 23, at 4–5.

37. I.R.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1 (2018).

38. Fishman, *Development of Nonprofit Corporation Law*, *supra* note 8, at 620–23; *see also* INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 7.25.3.1.1(1) (1999). A nonprofit organization may be created for religious reasons or any one of the § 501(c)(3) tax-exempt purposes including, "scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals." *Id.*

39. Treas. Reg. § 1.501(c)(3)-1(a).

40. *See infra* text accompanying note 265.

41. Treas. Reg. § 1.501(c)(3)-1(a); I.R.C. § 501(c)(3) (including "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals").

42. Treas. Reg. § 1.501(c)(3)-1(d)(1). Although private benefit and no private inurement do overlap, private inurement has a narrower application, only applying to insiders. *Id.* at

a substantial part of its activities to promote political propaganda or attempt to influence legislation,[43] and it may not directly or indirectly intervene in any political campaign on behalf of any candidate for public office.[44] Finally, a nonprofit's governing documents must expressly distribute its assets for a public purpose upon dissolution.[45]

The operational test requires that the nonprofit actually operate in the manner prescribed by the governing documents, "primarily" and substantially accomplishing the "exempt" purpose.[46] The private inurement prohibition protects charitable assets by preventing any portion of the entity's net earnings to benefit any private shareholder or individual.[47] The private inurement prohibition includes excessive compensation, below market rate loans, and disproportionate benefits of any kind.[48]

To complete the registration process, a nonprofit must file for and obtain an Employer Identification Number from the IRS.[49] It must notify the IRS that it wishes to operate as a section 501(c)(3) tax-exempt nonprofit by filing a Form 1023 or Form 1023-EZ Application for Recognition of Exemption.[50] Once the application has been received and approved, the nonprofit has very few ongoing IRS filing requirements, the most notable being the annual information return Form 990.[51]

State nonprofit corporation statutes usually contain provisions needed to comply with the IRS's organizational and operational tests.[52] Although these statutes allow a nonprofit corporation to be organized for "any lawful . . . purpose," it also includes numerous exhaustive provisions protecting against private inurement in the context of the organizational

§ 1.501(a)-1(c) ("persons having a personal and private interest in the activities of the organization."). No private benefit applies to even "disinterested" parties. *See* Am. Campaign Acad. v. Comm'r, 92 T.C. 1053, 1068–69 (1989).

43. I.R.C. § 501(c)(3) (2018); Treas. Reg. § 1.501(c)(3)-1(b)(3).

44. I.R.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1(b)(3)(ii).

45. Treas. Reg. § 1.501(c)(3)-1(b)(4).

46. To primarily engage "in activities which accomplish one or more of . . . [the] exempt purposes specified." § 1.501(c)(3)-1(c)(1).

47. § 1.501(c)(3)-1(c)(2).

48. *See generally, e.g.*, I.R.S. Priv. Ltr. Rul. 82-34-084 (May 27, 1982); Lowry Hosp. Ass'n v. Comm'r, 66 T.C. 850, 858–59 (1976); Golden Rule Church Ass'n v. Comm'r, 41 T.C. 719, 721–22 (1964) *nonacq.* I.R.S. Announcement 1964-2 C.B. 3.

49. INTERNAL REVENUE SERV., REV. 7-2014, *supra* note 34, at 8.

50. *Id.*

51. *Id.* at 6. The Form 990-EZ and Form 990-N are also available (if the nonprofit's gross receipts are below $50,000). *Id.*

52. *See generally* MODEL NONPROFIT CORP. ACT § 2.02 cmt.2 (AM. BAR ASS'N 2009) (comment referencing compliance with section 501(c)(3)).

and operational tests.[53] These acts explicitly prohibit the distribution "of any part of its assets, income, or profits to its members, directors, members of a designated body, or officers."[54] However, "[a] nonprofit corporation may confer benefits upon or make contributions to members or nonmembers in conformity with its [charitable] purposes."[55] The provisions also require that charitable assets be dedicated to the nonprofit corporation's charitable purposes and prohibit actions that would result in the diversion of property held in trust.[56] The statues also protect against violation of the operational test by requiring that a nonprofit corporation be operated exclusively for the purposes stated in its organizational documents.[57]

Unincorporated nonprofit acts contain similar, though less exhaustive, language guarding against the diversion of property held for a charitable purpose.[58] The definition of an "unincorporated nonprofit association" distinguishes unincorporated nonprofit associations from those that cannot qualify for nonprofit status.[59] These acts further allow

53. *Id.* § 3.01 cmt.; *see, e.g.*, *id.* § 10.09(b), (d).

54. *Id.* § 6.40(a).

55. *Id.* § 6.41(b).

56. *See id.* §§ 12.03(a), 10.09(b)–(d), 10.23(a)–(c) (addressing amendments to articles of incorporation and bylaws); *id.* § 11.01 (addressing mergers). The Model Nonprofit Corporation Act ("MNCA") also provides examples of activities not considered "lawful." MODEL NONPROFIT CORP. ACT § 4 (AM. BAR ASS'N 1957). "[L]abor unions, cooperative organizations, and organizations subject to any of the provisions of the insurance laws of this State may *not* be organized under this Act." *Id.* (emphasis added). The official comments further clarify that any absence of express prohibitions should not be interpreted as permitting activities that would violate the spirit of the law. *Id.* § 3.01 cmt.

> The failure to set forth an explicit limitation on a nonprofit's activities does not mean that an enterprising entrepreneur can improperly and with impunity operate in the nonprofit form. In general, public benefit and religious corporations cannot make distributions to members or controlling persons . . . unreasonable compensation cannot be paid to members or controlling persons . . . in addition, the attorney general has broad powers to ensure that a public benefit corporation is not operating for the private benefit of any individual.

See id. § 3.02.

The MNCA also allows incorporators and other fiduciaries to impose other limitations they find necessary on the use of corporate assets and allows them to grant the corporation specific express powers. These powers include the power to establish pension and benefit plans for its officers, directors, and employees; the power to carry on a business; the power to make donations; the power to issue guarantees; the power to lend money and invest *and* reinvest funds; the power to establish conditions for membership and to impose dues and assessments; and the power to enter into a partnership or a joint venture.

57. MODEL NONPROFIT CORP. ACT § 1.40(6)(i); Treas. Reg. § 1.501(c)(3)-1(b)(4) (2018).

58. UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 28(4)(A) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2008) (amended 2011).

59. *Id.* § 2 cmt. 11.

unincorporated associations to engage in "profit-making activities," but restricts the use of those proceeds to nonprofit purposes.[60] The comment to this section further distinguishes between permitted and prohibited member relationships to the nonprofit association's profit-making activities.[61] These laws also distinguish permitted and prohibited distributions,[62] an important distinction between the essential nature of an unincorporated nonprofit and that of its business entity counterpart, the partnership.[63] This distinction, like that of the business/nonprofit corporate dichotomy, is important because most nonprofits are formed, at least in part, with section 501(c)(3) status in mind.[64]

IRS exemption from income tax seems to be a reliable, if incomplete, means of determining the number of nonprofits operating in America. Approximately 1.6 million nonprofits are listed with the IRS as exempt entities.[65] After accounting for churches and organizations "that normally ha[ve] annual gross receipts of $50,000 or less," neither of which are required to file with the IRS,[66] that number likely grows closer to 2.3 million organizations, or one nonprofit for every 175 Americans.[67] This might provide at least a partial explanation as to why nonprofit related scholarly analysis seems to focus on IRS recognition.

Larger nonprofits with greater notoriety dominate the American collective ability to describe the sector.[68] However, modern nonprofits

60. *Id.* § 5(d).

61. *See id.* § 5 cmt.d ("The fact that some or all of the members receive some direct or indirect benefit from a nonprofit association's profit-making activities will not disqualify an unincorporated nonprofit organization from being a nonprofit association under this act so long as the benefit is in furtherance of the nonprofit association's nonprofit purposes. The distribution of any profits to the members for the members' own use, *e.g.*, a dividend distribution to members, would, however, disqualify the organization from being a nonprofit association because the distribution is not made in furtherance of the nonprofit association's nonprofit purposes.").

62. *See* Walker, *supra* note 19, at 629–31.

63. *See* UNIF. UNINCORPORATED NONPROFIT ASS'N ACT § 5 cmt.d.

64. *See* DEP'T OF TREASURY, INTERNAL REVENUE SERV., OMB NO. 1545-0056, FORM 1023: APPLICATION FOR RECOGNITION OF EXEMPTION UNDER SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE (2017); DEP'T OF TREASURY, INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 1023 (2017).

65. *See* DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., REV. 3–2014, INTERNAL REVENUE SERVICE DATA BOOK 56 tbl.25 (2013).

66. *See Annual Exempt Organization Return: Who Must File*, *supra* note 20.

67. *See* KATIE L. ROEGER, AMY S. BLACKWOOD & SARAH L. PETTIJOHN, THE NONPROFIT ALMANAC 2012, at 2 (2012).

68. *See Top 100 Nonprofits on the Web*, TOP NONPROFITS, https://topnonprofits.com/lists/best-nonprofits-on-the-web/[http://perma.cc/T4B2-BZC5] (last visited June 3, 2015) (measuring popularity using more current measures including Twitter followers, Facebook likes, and Google Opinion).

exist in many sizes and for various purposes—they range from bootstrap community-centric startups fueled by a small, committed core of stakeholders and Spartan financing; to multibillion-dollar relief organizations like the American Red Cross, which employs over 30,000 people.[69] Of 1.56 million nonprofits registered with the IRS in 2010, approximately 600,000, or just over a third of those organizations, filed a Form 990.[70] Further, according to a recent Urban Institute report on the nonprofit sector, 75% of nonprofits reporting to the IRS in 2010 received less than $100,000 in revenues.[71] The section 501(c)(3) tax exemption regulatory process generally provides needed stability and accountability to ensure that America's nonprofits serve their stated purposes and receive needed supplemental benefits for doing so.

III. *HOBBY LOBBY* (THE TAX CASE)

This part examines the *Hobby Lobby* decision and its policy implications for section 501(c)(3) of the IRC. This examination will account for the Court's *National Federation of Independent Business v. Sebelius* holding regarding the ACA as an exercise of Congress's taxing authority, discuss *Hobby Lobby*'s RFRA protected religious exercise as affected by the ACA's contraceptive mandate, and examine the links between the individual and contraceptive mandates. This part will also discuss the *Hobby Lobby* Court's basis for finding Hobby Lobby Stores, Inc., Mardel, and Conestoga Wood Specialties (collectively, the "*Hobby Lobby* Corporations") were entitled to an exemption from contraceptive mandate, and the corresponding tax, based on their religious practices.

69. *See* AM. RED CROSS, AMERICAN RED CROSS GUIDE TO SERVICES (2011), http://www.redcross.org/images/MEDIA_CustomProductCatalog/m3140117_GuideTo Services.pdf; *see also Phi Beta Kappa Society, Full Text of "Form 990-EZ" for Fiscal Year Ending June 2016*, PROPUBLICA, https://projects.propublica.org/nonprofits/organizations/956201337/201700399349200715/IRS990EZ (last visited Feb. 16, 2019); William P. Barrett, *The Largest U.S. Charities for 2016*, FORBES (Dec. 14, 2016, 9:44 AM), https://www.forbes.com/sites/williampbarrett/2016/12/14/the-largest-u-s-charities-for-2016/#5e5d76564abb. Exempt organizations having "annual gross receipts $50,000 or less ($25,000 or less for tax years ending before December 31, 2010)" are among those not required to file a Form 990 informational return. *See Annual Exempt Organization Return: Who Must File*, *supra* note 20.

70. *See* ROEGER ET AL., *supra* note 67, at 5 tbl.1.1.

71. AMY S. BLACKWOOD, KATIE L. ROEGER & SARAH L. PETTIJOHN, URBAN INST., THE NONPROFIT SECTOR IN BRIEF: PUBLIC CHARITIES, GIVING, AND VOLUNTEERING 3 (2012), https://www.urban.org/sites/default/files/publication/25901/412674-The-Nonprofit-Sector-in-Brief-Public-Charities-Giving-and-Volunteering-.PDF.

Finally, this part will discuss the tax policy impact *Hobby Lobby* could have on section 501(c)(3) exemption claims.

A. The Hobby Lobby Background

Hobby Lobby is widely noted as a watershed moment in the Court's recognition of corporate personhood and the religious freedoms enjoyed by those artificial persons. The case is less known for its impact on federal tax policy, particularly as it relates to religious organizations. The *Hobby Lobby* Court addressed whether the contraceptive mandate, as promulgated by the United States' Departments of Health and Human Services ("HHS"), Treasury, and Labor (collectively, the "Mandating Agencies")[72] under authority granted in the ACA, violated the constitutional rights to free religious exercise under the Religious Freedom Restoration Act of 1993 of the "*Hobby Lobby* Corporations," rights historically viewed as limited to individuals[73] and organized congregations of faith.[74]

1. Conestoga

Conestoga Wood Specialties entered the case as a closely held Pennsylvania for-profit corporation organized, owned, and controlled by Norman and Elizabeth Hahn and their three sons (the "Hahns").[75] The Hahns maintained that their religious beliefs mandate that they conduct their business affairs "in accordance with their religious beliefs and moral principles."[76] Reflecting those beliefs, Conestoga's mission statement committed it to "operat[ing] in a professional environment founded upon the highest ethical, moral, and Christian principles."[77] Further, its "Vision and Values Statements" confirms Conestoga's corporate goals "ensur[e] a reasonable profit in [a] manner that reflects

72. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 698 n.6, 743 (2014); Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 400 n.1 (E.D. Pa. 2013); Brief for Respondents, *Hobby Lobby*, 573 U.S. 682 (No. 13-356).

73. *Hobby Lobby*, 573 U.S. at 751–52.

74. *Id.* at 705.

75. *Id.* at 700–01 ("Fifty years ago, Norman Hahn started a wood-working business in his garage, and since then, this company, Conestoga Wood Specialties, has grown and now has 950 employees. . . . [The Hahns] control its board of directors and hold all of its voting shares. One of the Hahn sons serves as the president and CEO.").

76. *Conestoga*, 917 F. Supp. 2d at 402.

77. *Hobby Lobby*, 573 U.S. at 701.

[the Hahns'] Christian heritage."[78] The legal controversy centered on the Hahns's beliefs, as devout Mennonites, that "[t]he fetus in its earliest stages . . . shares humanity with those who conceived it," and their corresponding opposition to abortion.[79]

Conestoga et al., sued the Mandating Agencies, seeking an injunction against enforcement of the contraceptive mandate.[80] The United States District Court, Eastern District of Pennsylvania, Judge Goldberg, denied Conestoga's request for a preliminary injunction.[81] The U.S. Third Circuit Court of Appeals, Circuit Judge Cowen, affirmed the district court's denial of Conestoga's petition, finding that "for-profit, secular corporations cannot engage in religious exercise" within the meaning of RFRA or the First Amendment.[82]

2. Hobby Lobby and Mardel

In similar fashion, David and Barbara Green, along with their three children, entered as Christians who own and exclusively control two closely held Oklahoma business corporations, Hobby Lobby Stores, Inc. and Mardel Christian Book Stores.[83] The Greens operate both corporations through a management trust that, like Hobby Lobby and Mardel, has fully adopted the Green's religious beliefs.[84] In support of its

78. *Id.* (alteration in original) (quoting Complaint at 94, *Hobby Lobby*, 573 U.S. 682 (No. 13-356)).

79. *Id.* at 700 (alteration in original).

80. Complaint at 2, 24, *Conestoga*, 917 F. Supp. 2d 394 (No. 5:12-CV-06744-MSG) (The Hahns argued that "it would be sinful and immoral for them to intentionally participate in, pay for, facilitate, or otherwise support any contraception").

81. *Conestoga*, 917 F. Supp. 2d at 419.

82. Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381, 389 (3d Cir. 2013), *rev'd and remanded sub nom.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (the Third Circuit also rejected the claims brought by the Hahns as individuals because the court concluded that the "[m]andate does not impose any requirements on the Hahns" in their personal capacity).

83. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (en banc). In 1970, David Green started an arts-and-crafts store that has grown into a nationwide chain. There are now five hundred Hobby Lobby stores, and the company has more than thirteen thousand employees. Mart Green, one of David's sons, runs Mardel, which operates thirty-five Christian bookstores. David serves as the CEO of Hobby Lobby, and his three children serve as the president, vice president, and vice CEO. *Id.* at 1122; Brief for Respondents at 8, *Hobby Lobby*, 723 F.3d 1114 (No. 13-354).

84. The Greens operate Hobby Lobby and Mardel through a management trust (of which each Green is a trustee), and that trust is likewise governed by religious principles. The trust exists "to honor God with all that has been entrusted" to the Greens and to "use the Green family assets to create, support, and leverage the efforts of Christian

petition for relief from the contraceptive mandate, Hobby Lobby et al., offered evidence to prove the inextricable integration of their Christian beliefs and business operations.[85] The trust agreement committed "'to honor[ing] God with all that has been entrusted' to the Green family and to 'use the Green family assets to create, support, and leverage the efforts of Christian ministries.'"[86] Each trustee of the management trust also signed a commitment to ensure that the trust and operating companies conduct business in accordance with the family's professed religious beliefs.[87] Hobby Lobby's statement of purpose committed it to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles."[88] "Mardel, which sells exclusively Christian books and materials," similarly fashions itself as "a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support."[89] Hobby Lobby and Mardel stores close on Sundays, at a calculated sacrifice of millions in annual sales.[90] The businesses refrain from selling, facilitating the sale, or promoting the use of alcohol. In accordance with the commitment to honor God in all they do, the Greens attested to using their profits to support Christian charities and ministries worldwide.[91] In commemorating several holidays throughout the year, the companies

> ministries." The trustees must sign "a Trust Commitment," which among other things requires them to affirm the Green family statement of faith and to "regularly seek to maintain a close intimate walk with the Lord Jesus Christ by regularly investing time in His Word and prayer."

Hobby Lobby, 723 F.3d at 1122 (citation omitted) (quoting Complaint at 5, *Hobby Lobby*, 723 F.3d 1114 (No. CIV-12-1000-HE)).

85. *See* Brief of Appellants at 1–4, *Hobby Lobby*, 723 F.3d 1114 (No. 12-6294).
86. *See* Complaint at 9, *Hobby Lobby*, 723 F.3d 1114 (No. CIV-12-1000-HE).
87. *Hobby Lobby*, 723 F.3d at 1122 (citing Complaint, *supra* note 86, at 5).
88. Complaint, *supra* note 86, at 5.
89. *Hobby Lobby*, 723 F.3d at 1122 (quoting Complaint, *supra* note 86, at 6).
90. Complaint, *supra* note 86, at 2; *Hobby Lobby*, 723 F.3d 1114 (No. 13-354).
91. *See* Complaint, *supra* note 86, at 9–11.

> [The Greens] believe that God has blessed them so that they might bless others. For example, David and Barbara Green signed the Giving Pledge, agreeing to donate the majority of their wealth to philanthropy. In this pledge, the Greens stated, "We honor the Lord in all we do by operating the company in a manner consistent with Biblical principles. From helping orphanages in faraway lands to helping ministries in America, Hobby Lobby has always been a tool for the Lord's work. For me and my family, charity equals ministry, which equals the Gospel of Jesus Christ."

Id. at 9–10.

maintained a regular practice of purchasing full-page newspaper ads and post messages regarding its Christian beliefs on its website.[92]

Hobby Lobby and Mardel et al., sued the Mandating Agencies in the United States District Court for the Western District of Oklahoma, also seeking a permanent injunction against enforcement of the contraceptive mandate.[93] The district court denied Hobby Lobby's preliminary injunction request,[94] and the plaintiffs appealed that decision to the Tenth Circuit Court of Appeals. In a divided opinion, the Tenth Circuit reversed the trial court and granted Hobby Lobby's injunction motion. Contrary to the Third Circuit's conclusion, the Tenth Circuit found Hobby Lobby and Conestoga to be "persons" under RFRA possessing religious free exercise rights entitled to protection.[95] The court further held that the contraceptive mandate substantially burdened Hobby Lobby's exercise of religion by requiring it (and Mardel) to choose between "compromis[ing] their religious beliefs" and paying a heavy fee—either "close to $475 million more in taxes every year" if they simply refused to provide coverage for the contraceptives at issue, or "roughly $26 million" annually if they "drop[ped] health-insurance benefits for all employees."[96] The court concluded that the Mandating Agencies failed to demonstrate a compelling interest in enforcing the mandate against Hobby Lobby, and alternatively, that Mandating Agencies failed to prove that enforcement of the contraceptive mandate was the "least restrictive means" of furthering the Government's asserted interests.[97]

B. The Hobby Lobby Holding

The United States Supreme Court granted certiorari and consolidated the *Hobby Lobby* and *Conestoga* cases to resolve the split in

92. *Id.* at 12 ("Every Christmas and Easter, Hobby Lobby takes out full-page ads in all newspapers in which it advertises. These ads celebrate the religious nature of the holidays and direct readers who would like to learn more, or are in need of spiritual guidance, to a site where they can download a free Bible and to the phone number of an outside ministry which provides spiritual counseling. In recent years, they have also taken out ads on the Fourth of July, celebrating the Christian beliefs of many of our nation's founders."); *see also* HOBBY LOBBY, *Holiday Messages*, https://www.hobbylobby.com/about-us/holiday-messages (last visited Nov. 25, 2018).

93. Complaint, *supra* note 86, at 39.

94. *See* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1296–97 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *aff'd sub nom*. Hobby Lobby Stores, Inc. v. Burwell, 573 U.S. 682 (2014).

95. *Hobby Lobby*, 723 F.3d, at 1129, 1129 n.5.

96. *Id.* at 1140–41.

97. *Id.* at 1143–44.

circuit authority.[98] For the Majority, Justice Alito affirmed the Tenth Circuit and overturned the Third Circuit's decision, holding that all of the business corporations involved met the definition of being "persons" with free religious rights protected by RFRA.[99] The Court further held that compliance with the contraceptive mandate, substantially burdened the *Hobby Lobby* Corporations' exercise of religion under RFRA.[100] The Court concluded that, even assuming that the Mandating Agencies could satisfy the compelling governmental interest requirement, the Mandating Agencies did not satisfy the "least restrictive means" test.[101]

In articulating the rationale supporting its holding, the Court first addressed the religious free exercise standard by which the claims of the *Hobby Lobby* Corporations should be measured.[102] The Court explained RFRA as a congressional response to *Employment Division, Department of Human Resources of Oregon v. Smith*.[103] Prior to *Smith*, cases like *Sherbert v. Verner*[104] and *Wisconsin v. Yoder*[105] determined whether challenged government actions violated the Free Exercise Clause of the First Amendment by applying a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion.[106] If it did, the next concern was whether it was needed to serve a compelling government interest.[107] The *Smith* Court repudiated *Sherbert* and *Yoder*, holding that "neutral, generally

98. Sebelius v. Hobby Lobby Stores, Inc., 571 U.S. 1067 (2013); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 705 (2014).

99. *Hobby Lobby*, 573 U.S. 682, 708, 762 n.23 (2014) (finding "nonprofit corporation can be a 'person' within the meaning of the RFRA").

100. *Id.* at 718–19.

101. *Id.* at 727–28.

102. *Id.* at 708–19.

103. 494 U.S. 872, 874–77, 884–90 (1990). *Smith* concerned two members of the Native American Church who were fired for ingesting peyote for sacramental purposes. The Oregon Supreme Court applied the *Sherbert* test and held that the State of Oregon's denial of their unemployment benefits claims on the ground that consumption of peyote was a crime violated the Free Exercise Clause. *Id.* at 875. The *Smith* Court reversed, warning that applying the *Sherbert* test to all claims involving a generally applicable law "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Id.* at 888, 890; *see also* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 125 (CQ Press, 9th ed. 2016) ("Congress enacted RFRA in direct response to the Court's decision in Employment Div., Dept. of Human Resources of Ore v. Smith . . . .").

104. 374 U.S. 398, 399–403, 410 (1963) (holding that an employee could not be denied unemployment benefits after being fired for refusing to work on her Sabbath).

105. 406 U.S. 205, 218–19, 234–36 (1972) (holding that Amish children could not be required to attend school until the age of 16 in contravention of their Amish beliefs).

106. *Hobby Lobby*, 573 U.S. at 694–95.

107. *Id.*

applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."[108] The *Hobby Lobby* Court observed that Congress enacted RFRA in order to ensure broad protection for religious liberty, providing that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[109] Furthermore, the *Hobby Lobby* Court cited RFRA's directive that if a government action substantially burdens a person's exercise of religion under RFRA, a person is entitled to an exemption from the rule unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[110]

RFRA embodied Congress's desire to reject *Smith*'s limited reading of the impact laws of general applicability would have on religious rights, expressly stating that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[111] However, as the *City of Boerne* Court noted, RFRA's "least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify."[112] The *City of Boerne* Court also held that Congress overstepped its Constitutional authority in seeking to make RFRA requirements binding on individual states.[113] Congress originally designed RFRA to apply to both the Federal Government, based on the enumerated power that supports the particular agency's work, and the States based on its power under Section 5 of the Fourteenth Amendment to enforce the First Amendment.[114] The *City of Boerne* Court held that "[t]he stringent test RFRA demands. . . . far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."[115] Based on the forgoing, The *Hobby Lobby* Court concluded that "RFRA did more than merely restore the balancing test used in the *Sherbert* line of

108. City of Boerne v. Flores, 521 U.S. 507, 514 (1997).

109. *Hobby Lobby*, 573 U.S. at 694–95 (quoting Religious Restoration Freedom Act, 42 U.S.C. § 2000bb–1(a) (1993)); *see also* 42 U.S.C. § 2000bb–2(1) (defining "government" to include any "department" or "agency" of the United States).

110. *Hobby Lobby*, 573 U.S. at 694–95 (citing 42 U.S.C. § 2000bb–1(b) (1993)).

111. 42 U.S.C. § 2000bb(a)(2); *see also id.* § 2000bb(a)(4).

112. *City of Boerne*, 521 U.S. at 509.

113. *Id.* at 532–36.

114. *Id.* at 515–18.

115. *Id.* at 533–34.

cases; it provided even broader protection for religious liberty than was available under those decisions."[116]

The *Hobby Lobby* Court also incorporated another indispensable statute in crafting its RFRA doctrine. As the Court noted, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") under its Commerce and Spending Clause powers to address RFRA problems the *City of Boerne* Court raised.[117] Although RLUIPA applied to a more discreet category of governmental actions, focusing of institutionalized persons and religious institutional land use, the *Hobby Lobby* Court read RLUIPA as dramatically expanding RFRA's definition of the "exercise of religion."[118] The Court supported this expanded reading of the exercise of religion by explaining:

> [N]othing in the text of RFRA as originally enacted suggested that the statutory phrase 'exercise of religion under the First Amendment' was meant to be tied to this Court's pre-*Smith* interpretation of that Amendment. . . . When Congress wants to link the meaning of a statutory provision to a body of this Court's case law, it knows how to do so.[119]

The Court also responded to critics of its approach by querying as to:

> [W]hy Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases. . . . It is simply not possible to read these provisions as

116. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 772 n.3 (2014) (quoting *City of Boerne*, 521 U.S. at 509 for the proposition that RFRA's "least restrictive means requirement 'was not used in the pre-*Smith* jurisprudence RFRA purported to codify'").

117. *Id.* at 694–95; Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc (2000)).

118. *Hobby Lobby*, 573 U.S. at 696 ("In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the 'exercise of religion' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.' And Congress mandated that this concept 'be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.'" (quoting 42 U.S.C. §§ 2000cc-3(g), -5(7)(A) (2000)); *see* 42 U.S.C. § 2000bb-2(4) (1994) (defining "exercise of religion" as the "exercise of religion, as defined in section 2000cc-5 of this title").

119. *Hobby Lobby*, 573 U.S. at 714 (citing the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1)) ("authorizing habeas relief from a state-court decision that 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'").

> restricting the concept of the "exercise of religion" to those practices specifically addressed in our pre-*Smith* decisions.[120]

The Court concluded:

> [T]he results would be absurd if RFRA merely restored this Court's pre-*Smith* decisions in ossified form and did not allow a plaintiff to raise a RFRA claim unless that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that this Court entertained in the years before *Smith*. [121]

1. RFRA Corporate Personhood Analysis

After establishing the newly articulated breadth of its religious exercise doctrine, the *Hobby Lobby* Court moved on to address whether business corporations enjoyed the same free exercise of religion protection generally afforded individuals and religious nonprofit corporations.[122] The Court began its methodical rationalization with the text of RFRA, using congressional silence regarding persons covered under RFRA to incorporate the Dictionary Act's definition of persons.[123]

120. *Id.* at 709–15 ("HHS and the principal dissent make one additional argument in an effort to show that a for-profit corporation cannot engage in the 'exercise of religion' within the meaning of RFRA: HHS argues that RFRA did no more than codify this Court's pre-*Smith* Free Exercise Clause precedents, and because none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection. This argument has many flaws. . . . [T]he one pre-*Smith* case involving the free-exercise rights of a for-profit corporation suggests, if anything, that for-profit corporations possess such rights. In *Gallagher v. Crown Kosher Super Market of Mass., Inc.*,. . . . [t]he three dissenters, Justices Douglas, Brennan, and Stewart, found the law unconstitutional as applied to the corporation and the other challengers and thus implicitly recognized their right to assert a free-exercise claim. Finally, Justice Frankfurter's opinion, which was joined by Justice Harlan, upheld the Massachusetts law on the merits but did not question or reserve decision on the issue of the right of the corporation or any of the other challengers to be heard. It is quite a stretch to argue that RFRA, a law enacted to provide very broad protection for religious liberty, left for-profit corporations unprotected simply because in *Gallagher*—the only pre-*Smith* case in which the issue was raised—a majority of the Justices did not find it necessary to decide whether the kosher market's corporate status barred it from raising a free-exercise claim." (citations omitted)).

121. *Id.* at 715–16.

122. *Id.* at 711–12 ("While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. . . . If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.").

123. *Id.* at 707–717 ("As we noted above, RFRA applies to 'a person's' exercise of religion and *RFRA itself does not define the term 'person*.' We therefore look to the Dictionary Act,

The Court then reasoned that drawing on the personhood distinction between individuals and artificial persons could not sustain different RFRA treatment because the Mandating Agencies stipulated to exemptions for nonprofit corporations. The Court cited its history of recognizing nonprofit corporations as persons under RFRA, as well as the Mandating Agencies' history of exempting religious nonprofits under their rule making authority.[124]

While the *Hobby Lobby* Court minimized distinctions between the exercise of religion by business entities and individuals or entities formed specifically for religious purposes, Justice Ginsburg recalled the policies underlying the stark historical distinction between the two types of entities.[125] Likewise, individuals are acknowledged as having religious

which we must consult '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.' Under the Dictionary Act, 'the wor[d] "person" . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.' Thus, unless there is something about the RFRA context that 'indicates otherwise,' the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard. . . . [B]oth HHS and the principal dissent [contend] that the Nation lacks a tradition of exempting for-profit corporations from generally applicable laws. By contrast, HHS contends, statutes like Title VII, expressly exempt churches and other nonprofit religious institutions but not for-profit corporations. In making this argument, however, HHS did not call to our attention the fact that some federal statutes *do* exempt categories of entities that include for-profit corporations from laws that would otherwise require these entities to engage in activities to which they object on grounds of conscience. If Title VII and similar laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations." (emphasis added) (footnote omitted) (citations omitted)).

124. *Id.* at 708–09 ("We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition, and HHS makes little effort to argue otherwise. *We have entertained RFRA and free-exercise claims brought by nonprofit corporations*, and HHS concedes that a nonprofit corporation can be a 'person' within the meaning of RFRA. This concession effectively dispatches any argument that the term 'person' as used in RFRA does not reach the closely held corporations involved in these cases. No known understanding of the term 'person' includes *some* but not all corporations. The term 'person' sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations." (emphasis added) (citations omitted)).

125. *Id.* at 752–54 (Ginsburg, J., dissenting opinion) ("The First Amendment's free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations. . . . No such solicitude is traditional for commercial organizations. Indeed, until today, religious exemptions had never been extended to any entity operating in 'the commercial, profit-making world.'" (quoting Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987))).

rights historically denied to business corporations, with a seemingly consistent focus on the individual exercising religion.[126]

The Court also attacked arguments by the Mandating Agencies and the dissent that business corporations could not exercise religion, and as the Mandating Agencies contended, should maintain generating profits as their primary objective.[127] The Court argued that, under modern law, corporate secular and religious objectives can harmoniously coexist and enabling statutes allow this symbiotic cohabitation.[128]

126. *See id.*; Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 466 (2010) (Stevens, J. concurring in part and dissenting in part).

127. *Hobby Lobby*, 573 U.S. at 710–12.

128. *Id.* at 709–13 ("According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. . . . The dissent suggests that nonprofit corporations are special because furthering their religious 'autonomy . . . often furthers individual religious freedom as well.' But this principle applies equally to for-profit corporations: Furthering their religious freedom also 'furthers individual religious freedom.' In these cases, for example, allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns. If the corporate form is not enough, what about the profit-making objective? In *Braunfeld*, we entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and the Court never even hinted that this objective precluded their claims. . . . *If, as Braunfeld recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can't Hobby Lobby, Conestoga, and Mardel do the same?* Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money. This argument flies in the face of modern corporate law. 'Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act for *any lawful purpose* or business.' While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well. . . . Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals. In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the 'benefit corporation,' a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners. In any event, the objectives that may properly be pursued by the companies in these cases are

The Court justified its holding by employing the agency principles of the aggregate theory.[129] The Court collapsed the notion that the *Hobby Lobby* Corporations possessed their own legal personhood.[130] In doing so, the Court seemingly contradicted its own finding that the *Hobby Lobby* Corporations had standing to bring the instant action against the Mandating Agencies.

The *Hobby Lobby* Court the dismissed as unfounded concerns over the sincerity of business corporations asserting religious beliefs.[131] The Court cited RLUIPA to analogize protections afforded to the claims of "'institutionalized persons,' a category that consists primarily of prisoners," to corporate claims.[132] The Court, referencing a "well documented" history of prisoners asserting dubious religious exercise claims, opined that "[i]f Congress thought that the federal courts were up to the job of dealing with insincere prisoner claims, there is no reason to believe that Congress limited RFRA's reach out of concern for the seemingly less difficult task of doing the same in corporate cases."[133]

governed by the laws of the States in which they were incorporated—Pennsylvania and Oklahoma—and the laws of those States permit for-profit corporations to pursue 'any lawful purpose or "act," including the pursuit of profit in conformity with the owners' religious principles." (emphasis added) (citations omitted)).

129. *Id.* at 706–07 ("[I]t is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. 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.").

130. *Id.* at 708 ("[N]o conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.").

131. *Id.* at 718–19 ("HHS and the principal dissent express concern about the possibility of disputes among the owners of corporations, but that is not a problem that arises because of RFRA or that is unique to this context. The owners of closely held corporations may—and sometimes do—disagree about the conduct of business. And even if RFRA did not exist, the owners of a company might well have a dispute relating to religion. For example, some might want a company's stores to remain open on the Sabbath in order to make more money, and others might want the stores to close for religious reasons. State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. Courts will turn to that structure and the underlying state law in resolving disputes." (citations omitted)).

132. *Id.* at 718.

133. *Id.* ("If, as HHS seems to concede, Congress wanted RFRA to apply to nonprofit corporations . . . what reason is there to think that Congress believed that spotting insincere claims would be tougher in cases involving for-profits?").

2. RFRA Burden Analysis

The *Hobby Lobby* Court also discussed RFRA's prohibition:

> [T]he "Government . . . substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to *the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[134]

Furthermore, the Court identified the contraceptive mandate as the mechanism burdening the *Hobby Lobby* Corporations' religious beliefs.[135] However, rather than focusing on these religious aspects, the Court supported its conclusion by describing the tax consequences that each corporation faced for noncompliance.[136] The Court used some form of the word "tax" thirty-three times in its opinion.[137] Emphasizing taxation was critical because the Court recognized the payments required of the *Hobby Lobby* Corporations under the ACA as taxes.[138] Then, to support its conclusion that taxes can constitute a burden on religious exercise, the Court cited *United States v. Lee*, inter alia.[139] The Court also acknowledged the Mandating Agencies' argument that the tax liability

134. *Id.* at 705 (second alteration in original).

135. *See id.* at 690–91 (holding that the Contraceptive Mandate "violate[s] RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest").

136. *See id.* at 691–92 ("[I]f [the Corporations] do not comply [with the contraceptive mandate], they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies. *If these consequences do not amount to a substantial burden, it is hard to see what would*." (emphasis added)).

137. *See id.* at 688–772. The word "tax" was used thirty-three times between the majority (twenty-one) and the dissent (twelve); compare this with the thirty-two times that "contraceptive mandate" was used in the majority (thirty-one) and dissent (one).

138. *See id.* at 718–20 (noting that if the Corporations do not comply with the contraceptive mandate, "they will be taxed $100 per day for each affected individual. For Hobby Lobby, the bill could amount to $1.3 million per day or about $475 million per year; for Conestoga, the assessment could be $90,000 per day or $33 million per year; and for Mardel, it could be $40,000 per day or about $15 million per year. These sums are surely substantial." (citation omitted)).

139. *Id.* at 710 ("[A] law that 'operates so as to make the practice of . . . religious beliefs more expensive' in the context of business activities imposes a burden on the exercise of religion." (second alteration in original)). *See generally* United States v. Lee, 455 U.S. 252, 254–55 (1982) (involving an Amish employer who challenged the IRS's assessment of more than $27,000, claiming that IRS enforcement of the social security taxes violated his First Amendment free exercise rights).

incurred under the ACA regulations could have been less than the actual cost of providing the contraceptive coverage at issue.[140] However, the Court found that argument unpersuasive, responding with a different tax calculation it found more persuasive.[141] The Court seemed intent on relieving the *Hobby Lobby* Corporations of the incumbent liability, notwithstanding the compromised nature of the financial burden rationale. Therefore, the Court concluded that the economic burden imposed by the potential tax consequences was sufficient to warrant deeper scrutiny under RFRA.[142] As the forgoing demonstrates, the Court outlined an unprecedented description of taxes as a burden on the exercise of religion, triggering strict scrutiny analysis.

3. RFRA Compelling Governmental Interest and Least Restrictive Means Analyses

The *Hobby Lobby* Court continued its analysis by deciding whether the Mandating Agencies demonstrated a compelling governmental interest that would satisfy RFRA.[143] The Court intimated that that some

140. *See Hobby Lobby*, 573 U.S. at 720 ("It is true that the plaintiffs could avoid these assessments by dropping insurance coverage altogether and thus forcing their employees to obtain health insurance on one of the exchanges established under ACA.").

141. *See id.* at 720–22. ("But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges, this course would also entail substantial economic consequences. The companies could face penalties of $2,000 per employee each year. These penalties would amount to roughly $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel. . . . The companies could attempt to make up for the elimination of a group health plan by increasing wages, but this would be costly. Group health insurance is generally less expensive than comparable individual coverage, so the amount of the salary increase needed to fully compensate for the termination of insurance coverage may well exceed the cost to the companies of providing the insurance. In addition, any salary increase would have to take into account the fact that employees must pay income taxes on wages but not on the value of employer-provided health insurance. Likewise, employers can deduct the cost of providing health insurance, but apparently cannot deduct the amount of the penalty that they must pay if insurance is not provided; that difference also must be taken into account. Given these economic incentives, it is far from clear that it would be financially advantageous for an employer to drop coverage and pay the penalty." (citations omitted)).

142. *See id.* at 719, 726 ("Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate 'substantially burden[s]' the exercise of religion. We have little trouble concluding that it does. . . . Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" (alteration in original) (quoting 42 U.S.C. 2000bb-1(a)–(b) (1993)).

143. *Id.* at 726–27 ("RFRA . . . 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the

of the stated governmental interests might be too broad to satisfy RFRA requirements.[144] Then, the Court turned to a more specific governmental interest asserted by the Mandating Agencies in providing the contraceptives at issue to female employees without requiring them to share in the costs.[145] Although the *Hobby Lobby* Corporations contested whether those interests were sufficiently compelling under RFRA, the Court presumed this RFRA prong to be satisfied.[146]

The *Hobby Lobby* Court then turned to the final RFRA element: the "least-restrictive-means test."[147] The Court described that test as containing a very exacting requirement.[148] The Court held that the Mandating Agencies had failed to show that the contraceptive mandate was the "least restrictive means" of satisfying the asserted governmental interests.[149] In so finding, the Court pointed to the contraceptive mandate exemption that the Mandating Agencies had already granted to religious nonprofits as an accommodation the Mandating Agencies should have also provided to the *Hobby Lobby* Corporations.[150] The *Hobby Lobby*

person"—the particular claimant whose sincere exercise of religion is being substantially burdened.' This requires us to 'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants' . . . ." (alterations in original) (citations omitted))).

144. *Id.* at 726 ("[The Mandating Agencies] assert[] that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting 'public health' and 'gender equality.' RFRA, however, contemplates a 'more focused' inquiry . . . ." (citation omitted)).

145. *Id.* at 727 ("In addition to asserting these very broadly framed interests, [the Mandating Agencies] maintain[] that the mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing." (citations omitted)).

146. *Id.* at 728 ("We find it unnecessary to adjudicate this issue. We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA, and we will proceed to consider the final prong of the RFRA test, *i.e.*, whether HHS has shown that the contraceptive mandate is 'the least restrictive means of furthering that compelling governmental interest.'" (quoting 42 U.S.C. § 2000bb-1(b)(2) (1993))).

147. *Id.* at 730; *see also* 42 U.S.C. § 2000bb-1(a), (b) (requiring the government to "demonstrate[] that application of [a substantial] burden to *the person* . . . is the least restrictive means of furthering [a] compelling governmental interest." (emphasis added)).

148. *See Hobby Lobby*, 573 U.S. at 728 ("The least-restrictive-means standard is exceptionally demanding . . . ." (citing City of Boerne v. Flores, 521 U.S. 507, 532 (1997))).

149. *See id.* ("[The least-restrictive-means test] is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.").

150. *See id.* at 730–31 ("HHS itself has demonstrated that it has at its disposal an approach that is less restrictive . . . . HHS has already established an accommodation for nonprofit organizations . . . . Under that accommodation, the organization can self-certify . . . ." (citation omitted)).

Court did not address the fact that the *Lee* Court declined the opportunity to analyze Mr. Lee's claimed tax exemption under the First Amendment because an accommodation existed in a manner very similar to the one used to support the *Hobby Lobby* "least restrictive means" analysis.[151] The *Hobby Lobby* Court did not deny that the cost of providing the disputed contraceptives would still require funding from some source. Interestingly, the *Hobby Lobby* Court and the *Hobby Lobby* Corporations intimated their agreement with the government filling this gap, presumably with tax revenue generated from the *Hobby Lobby* Corporations and other taxpayers.[152] One could query as to why the *Hobby Lobby* Corporations would not object to the government using tax revenue to which they have contributed in providing the objectionable contraceptives. Perhaps the *Hobby Lobby* Corporations considered it too difficult to overcome the *Lee* validation of a categorical requirement to pay taxes.[153] The *Hobby Lobby* Corporations might have concluded that they could better protect their contraceptive mandate objections as "sincerely held . . . beliefs."[154] This rationale can also explain why the *Hobby Lobby* majority seemed intent on labelling the contraceptive mandate, not the incumbent taxes, as the burden the *Hobby Lobby* Corporations faced and characterized the controversy as a mandated healthcare issue, sidestepping a more robust constitutional analysis of the taxes at issue.[155]

151. *See* United States v. Lee, 455 U.S. 252, 260 n.11 (1982) ("We need not decide whether the Free Exercise Clause compelled an exemption as provided by § 1402(g); Congress' grant of the exemption was an effort toward accommodation.").

152. *See Hobby Lobby*, 573 U.S. at 728 ("The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections."); *id.* at 767 (Ginsburg, J., dissenting) ("Conestoga suggests that, if its employees had to acquire and pay for the contraceptives (to which the corporation objects) on their own, a tax credit would qualify as a less restrictive alternative. A tax credit, of course, is one variety of 'let the government pay.'" (citation omitted)); *see also id.* at 723 n.33 (majority opinion) ("[The Mandating Agencies] authorized the exemption from the contraceptive mandate of group health plans of certain religious employers, and later expanded the exemption to include certain nonprofit organizations with religious objections to contraceptive coverage." (citation omitted)).

153. *See id.* at 734 ("*Lee* was a free-exercise, not a RFRA, case, but if the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes.").

154. *See id.* at 723, 729 ("[I]t is not for us to say that [the Corporations'] religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' . . . ." (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981))).

155. *See id.* at 734.

C. Hobby Lobby Applicability to Section 501(c)(3)

The *Hobby Lobby* Court seemed intent on positioning the contraceptive mandate as a governmentally-imposed burden from which it provided the *Hobby Lobby* Corporations relief.[156] The Court also referred to "HHS" throughout its opinion as shorthand for the U.S. Department of Health and Human Services, Treasury Department, and Labor Department (together, the "Mandating Agencies"), the collective agencies responsible for enforcing the contraceptive mandate and other provisions of the ACA. However, the Court's analysis, as well as its references to the contraceptive mandate and HHS, require additional context for proper consideration. Just two years before the *Hobby Lobby* decision, the Court validated a similar ACA mandate in *NFIB v. Sebelius*. *NFIB* involved challenges to the IRS's ability to collect payments from individuals who do not maintain personal health insurance coverage (the "individual mandate").[157] The *NFIB* Court held that Congress was exercising its taxing authority in establishing the individual mandate and granting the Mandating Agencies enforcement authority.[158] The *NFIB* Court validated that mandate as advancing legitimate policy objectives in seeking to shape behavior by encouraging individuals to purchase health insurance and thereby spreading coverage costs over a larger pool of contributing members.[159] The contraceptive mandate and corresponding tax liability served similar behavior shaping objectives, encouraging employers to provide the contested contraceptive services or contribute to the system designed to provide those services.[160]

156. *See id.* at 733 ("[O]ur decision in these cases is concerned solely with the contraceptive mandate.").

157. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 539 (2012) ("This case concerns constitutional challenges to . . . the individual mandate . . . . The individual mandate requires most Americans to maintain 'minimum essential' health insurance coverage. . . . Beginning in 2014, those who do not comply with the mandate must make a '[s]hared responsibility payment' to the Federal Government." (alteration in original) (quoting I.R.C. § 5000A (2012))).

158. *See id.* at 570 ("Our precedent demonstrates that Congress had the power to impose the [individual mandate] under the taxing power . . . . That is sufficient to sustain it.").

159. *See id.* at 695 (Scalia, J., dissenting) (stating that "the Act attempts to achieve near-universal health insurance coverage by spreading its costs to individuals, insurers, governments, hospitals, and employers—while, at the same time, offsetting significant portions of those costs with new benefits to each group.").

160. *See Hobby Lobby*, 573 U.S. at 742 (Ginsburg, J., dissenting) ("[I]ncreased access to contraceptive services, the sponsors comprehended, would yield important public health gains. *See, e.g.*, [155 CONG. REC. 29768 (2009)] (statement of Sen. Durbin) ('This bill will expand health insurance coverage to the vast majority of [the 17 million women of

The mandate enforcement authority Congress delegated to the IRS for both the individual mandate and the contraceptive mandate are quite analogous. Congress delegated arguably the most important enforcement authority for the individual mandate at issue in *NFIB* to the IRS: the power to collect the penalty imposed for noncompliance with the mandate.[161] Congress delegated similar enforcement authority to the IRS for the contraceptive mandate and the *Hobby Lobby* Court acknowledged as much by referring to the potential taxes in support of its RFRA burden finding.[162] This coincides with the positioning of the litigants in both cases. As noted above, the *Hobby Lobby* Corporations sued the U.S. Treasury Department and the Secretary of the Treasury, along with HHS and the Department of Labor, in seeking relief from the contraceptive mandate. NFIB, a nonprofit corporation acting on behalf of many members who were also corporations, sued the same Mandating Agencies.[163] The *Hobby Lobby* Court most heavily referenced the financial consequences facing the *Hobby Lobby* Corporations in finding that the Treasury Department and the other Mandating Agencies had burdened the *Hobby Lobby* Corporations' religious exercise.[164] The *NFIB* Court referenced similar tax consequences imposed on individuals and employers who do not comply with ACA mandates.[165]

However, the *Hobby Lobby* Court did not mention its own *NFIB* decision. Instead, the *Hobby Lobby* Court recognized a categorical requirement to pay taxes, a requirement historically deemed sacrosanct.[166] This recognition might seem perfectly aligned with the

reproductive age in the United States who are uninsured] . . . . This expanded access will reduce unintended pregnancies.')." (third alteration in original)).

161. *See Sebelius*, 567 U.S. at 539 ("The Act provides that the penalty will be paid to the Internal Revenue Service with an individual's taxes, and 'shall be assessed and collected in the same manner' as tax penalties, such as the penalty for claiming too large an income tax refund." (citing I.R.C. § 5000A(g)(1) (2012))).

162. *See Hobby Lobby*, 573 U.S. at 720 ("If the . . . companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed $100 per day for each affected individual." (citing I.R.C. § 4980D (2012))).

163. *See Sebelius*, 567 U.S. 519; *Hobby Lobby*, 573 U.S. 682.

164. *See Hobby Lobby*, 573 U.S. at 691 (stating specific consequences the companies would face).

165. *See Sebelius*, 567 U.S. at 695 (Scalia, J., dissenting) ("Employers with at least 50 employees must either provide employees with adequate health benefits or pay a financial exaction if an employee who qualifies for federal subsidies purchases insurance through an exchange.").

166. *See Hobby Lobby*, 573 U.S. at 692–93 ("[O]ur holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can 'opt out of any law (saving only tax laws) they judge incompatible with their

NFIB Court's rationale in upholding the individual mandate as a valid exercise of Congress's taxing authority. It could also lead to the inference that the Court would reach the same conclusion regarding the contraceptive mandate. Instead, the *Hobby Lobby* Court referenced *Lee*, inter alia, in holding that the "taxes" associated with the contraceptive mandate burdened the *Hobby Lobby* Corporations' religious exercise.[167] These tax consequences served as the linchpin in the *Hobby Lobby* Court's articulation of the burden on the *Hobby Lobby* Corporations' religious exercise that violated RFRA.[168]

The *Hobby Lobby* Court concluded its RFRA analysis by pointing to the exemption that the Mandating Agencies had already granted to religious nonprofits as one the Mandating Agencies should have also provided to the *Hobby Lobby* Corporations in order to comply with RFRA.[169] The importance of this accommodation centered on the tax relief the *Hobby Lobby* Corporations were seeking, and drove the economics behind the sought-after accommodation.[170] Accordingly, the *Hobby Lobby* Court essentially determined the denial of an exemption from the taxes violated RFRA's "least restrictive means" test. In holding that the Mandating Agencies could have satisfied the RFRA "least-restrictive-means" test by providing the same exemption to the

sincerely held religious beliefs.'" (quoting *id.* at 739–40 (Ginsburg, J., dissenting))); White v. United States, 305 U.S. 281, 292 (1938) (stating that deductions are "allowed as a matter of legislative grace").

167. *See Hobby Lobby*, 573 U.S. at 710 ("Thus, a law that 'operates so as to make the practice of . . . religious beliefs more expensive' in the context of business activities imposes a burden on the exercise of religion." (alteration in original) (quoting Braunfeld v. Brown, 366 U.S. 599, 605 (1961))).

168. *See id.* at 691 ("Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do.").

169. *See id.* at 730–31 ("HHS itself has demonstrated that it has at its disposal an approach that is less restrictive . . . . [and] has already established an accommodation for nonprofit organizations with religious objections. Under that accommodation, the organization can self-certify . . . .").

170. *See id.* at 731 (stating that the accommodation established for religious nonprofits allows the organization to "self-certify that it opposes providing coverage for particular contraceptive services"). The ACA then requires:

> [The] organization's insurance issuer or third-party administrator [to] "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries."

Id. (second, third, and fourth alteration in original) (first quoting 45 C.F.R. § 147.131(c)(2) (2013), then quoting Treas. Reg. § 54.9815-2713A(c)(2) (2013))).

Hobby Lobby Corporations, the *Hobby Lobby* Court essentially guaranteed the *Hobby Lobby* Corporations a tax exemption based on their religious exercise. A future Court could utilize this rationale to apply RFRA to the IRS denying the *Hobby Lobby* Corporations, or similarly situated applicants, tax exempt status under section 501(c)(3).

Section 501(c)(3) confers a special economic benefit on entities qualifying thereunder as nonprofit organizations advancing their respective charitable purposes, including exemption from federal income tax as well as other federal, state, and local subsidies.[171] Nonprofit entities qualifying as exempt under section 501(c)(3) are limited to, *inter alia*, corporations formed exclusively for a charitable purpose listed therein.[172] One of the most recognized and longstanding exempt purposes is advancing religion.[173] Religious entities and the special place they hold in American society is at least as old as the Republic itself.[174] This status is manifested in the fact that churches are among the few select exempt entities not required to file for exempt status or submit annual 990 information form.[175] Religion is also the only tax-exempt category whose members also enjoy categorical protections under the United States Constitution.[176] This is important because the controversy at the heart of *Hobby Lobby* turned on the very exercise of religion, the types of corporations deemed capable of exercising religion, and whether contraceptive mandate-related taxes burdened such religious exercise. Without this constitutional protection, it is established precedent that natural and juridical persons are required to pay taxes enacted by Congress and collected by the U.S. Treasury Department, absent a statutory exemption, as tax exemptions are a function of legislative grace.[177]

Under *Hobby Lobby*, the denial of an exemption and resulting tax liability represents a burden on a corporation's religious exercise by making that exercise more expensive through the corresponding tax liability.[178] This rationale could be extended to religious exemptions

171. *See supra* Part II.

172. I.R.C. § 501(c)(3) (West 2018).

173. *Id.* (recognizing other purposes, such as, educational and scientific).

174. *See supra* Part II.A.

175. *See supra* Part II.B.

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

177. *See* White v. United States, 305 U.S. 281, 292 (1938) (stating that deductions are "allowed as a matter of legislative grace"); *see also supra* note 166 and accompanying text.

178. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 710 (2014) ("Thus, a law that 'operates so as to make the practice of . . . religious beliefs more expensive' in the context of

under section 501(c)(3) because the denial of tax-exempt status to those claiming such status on religious grounds subjects those claimants to otherwise avoidable federal income tax, an undeniably economic consequence. A future Supreme Court examining this claim could hold that denial of the exemption, and the resulting income tax liability, burdens the denied applicant's religious exercise, triggering the *Hobby Lobby* RFRA analysis.[179] The Court could then employ *Hobby Lobby's* "least restrictive" rationale to find that the IRS should grant the exemptions already granted to religious nonprofits under section 501(c)(3).[180]

IV. IMPACT OF *HOBBY LOBBY* APPLICATION ON SECTION 501(C)(3)

A RFRA-protected right to a religious tax exemption would undoubtedly cause a myriad of problems not contemplated by our current nonprofit tax structure. Those consequences could include a dramatic increase in taxpayers claiming a religious tax exemption. This seismic expansion in claimed exemptions could cause much deeper damage to already-strained federal and state budgets, thus increasing the federal deficit and triggering even greater austerity measures. These consequences would likely collectively harm the nonprofit community and America's neediest citizens by severely reducing the resources available and driving greater competition for those scarce resources, resulting in an environment that favors the wealthy and more sophisticated at the expense of our society's most vulnerable members.

A. Incentivizing Exemption Claims Over Charitable Giving

This type of *Hobby Lobby* RFRA exemption extension creates an incentive for business owners to claim this exemption in lieu of traditional charitable giving. We will assume, in good faith, that taxpayers claiming tax-exempt status are sincere in their religious

business activities imposes a burden on the exercise of religion." (quoting Braunfeld v. Brown, 366 U.S. 599, 605 (1961))).

179. *See id.* at 710 (holding that the ACA's contraceptive mandate burdened the Corporations' exercise of religion). *But see* United States v. Lee, 455 U.S. 252, 257 (1982), *superseded by statute*, Exemption Act of 1988, Pub. L. No. 100-647, 102 Stat. 3781 ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.").

180. *Hobby Lobby*, 573 U.S. at 690–91 ("[T]he Federal Government [is prohibited] from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.").

beliefs triggering RFRA coverage.[181] Courts would likely be extremely reluctant to pose a forensic inquiry into those beliefs. However, as the *NFIB* Court stated, tax policy tends to strongly influence human behavior.[182] The Tax Cuts and Jobs Act ("TCJA"), signed into law in December 2017, provides contemporary evidence of this type of embedded policy yielding immediate results.[183]

According to a Tax Policy Center Study, the TCJA will reduce the number of American Households making charitable contributions by more than 50% in 2018.[184] Similarly, the cost of charitable giving is expected to increase by 8% because of the new law.[185] The new law also roughly doubles the estate tax exemption to $22 million for couples, which reduces previous incentives for charitable bequests by wealthy taxpayers.[186] It follows that the nonprofit financial landscape has changed significantly for the foreseeable future and taxpayers will search for opportunities to maximize charitable tax benefits. Those taxpayers would likely welcome a *Hobby Lobby* religious tax exemption as an alternative benefit to exercising their faith.

This policy shift comes at an inopportune time as charities are seeking to recover from recent down-cycles in philanthropic giving. Charitable contributions experienced a decline of 9.5% between 2007 and 2008, with only modest increases in giving from 2008 to 2011.[187] The

181. *Id.* at 759 (Ginsburg J., dissenting) ("RFRA . . . distinguishes between 'factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature,' which a court must accept as true, and the 'legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened' . . . ." (quoting Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008))).

182. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 567 (2012) (discussing Congress's ability to influence behavior through taxation: "taxes that seek to influence conduct are nothing new").

183. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

184. *Impact on the Tax Benefit of Charitable Deduction of H.R.1, The Tax Cuts and Jobs Act, by Expanded Cash Income Level, 2018*, TAX POLICY CENTER tbl.T18-0009 (Jan. 11, 2018), https://www.taxpolicycenter.org/model-estimates/impact-itemized-deductions-tax-cuts-and-jobs-act-jan-2018/t18-0009-impact-tax.

185. Joseph Rosenberg & Philip Stallworth, *The House Tax Bill is Not Very Charitable to Nonprofits*, TAX POLICY CENTER: TAXVOX (Nov. 15, 2017), https://www.taxpolicycenter.org/taxvox/house-tax-bill-not-very-charitable-nonprofits.

186. Howard Gleckman, *21 Million Taxpayers Will Stop Taking Charitable Deductions Under the New Tax Law*, FORBES (Jan. 11, 2018, 3:52 PM), https://www.forbes.com/sites/beltway/2018/01/11/21-million-taxpayers-will-stop-taking-charitable-deductions-under-the-new-tax-law/#7fdacef6238f.

187. BLACKWOOD, ROEGER & PETTIJOHN, *supra* note 71, at 4–5 (reporting that giving declined by just under 4% from 2008 to 2009 and increased by 1% between 2010 and 2011). *See generally* Kenya J.H. Smith, *Papa's Brand New Bag: The Need For IRS Recognition of*

Chronicle of Philanthropy reported that 2009 contributions to the nation's largest charities dropped 11%.[188] According to GuideStar's 2012 national survey of nonprofit organizations, more than a third of reporting nonprofits experienced a decrease in funding in that year.[189]

B. Deeper Governmental Budget Deficits

The potential explosion in new *Hobby Lobby* claims, and proliferation of new exemptions, could damage already fragile federal and state budgets, exacerbating the national debt and triggering greater austerity measures. Experts estimate the current federal deficit will exceed $1 trillion by 2020.[190] Despite Trump Administration assurances to the contrary, many experts still worry that TCJA will push those deficits past previous projections.[191] Many of the austerity measures instituted during the budget battles early in the Obama Administration are still in place.[192] Washington observers expect further proposed spending cuts to appear in the FY2019 budget process.[193] The new *Hobby Lobby* RFRA

an Independent Nonprofit Limited Liability Company (NLLC), 98 MARQ. L. REV. 1695 (2015).

188. Noelle Barton & Holly Hall, *Donations Dropped 11% at Nation's Biggest Charities Last Year*, CHRONICLE OF PHILANTHROPY (Oct. 17, 2010), https://philanthropy.com/article/A-Sharp-Donation-Drop-at-Big/125004 (stating the United Way experienced a 4.5% decrease, Salvation Army received an 8.4% decrease, and Food for the Poor, a 27% decrease in contributions).

189. CHUCK MCLEAN & CAROL BROUWER, THE EFFECT OF THE ECONOMY ON THE NONPROFIT SECTOR: AN OCTOBER 2012 SURVEY, GUIDESTAR 3–4 (Oct. 2012), https://www.guidestar.org/ViewCmsFile.aspx?ContentID=4781 [https://perma.cc/C9M3-SG2S?type=live].

190. Chuck Jones, *Trump's Federal Budget Deficit: $1 Trillion And Beyond*, FORBES (Feb. 9, 2018, 8:30 PM), https://www.forbes.com/sites/chuckjones/2018/02/09/trumps-federal-budget-deficit-1-trillion-and-beyond/#4d3e68c6544f.

191. *See, e.g.*, Binyamin Appelbaum, *Debt Concerns, Once a Core Republican Tenet, Take a Back Seat to Tax Cuts*, N.Y. TIMES (Dec. 1, 2017), https://www.nytimes.com/2017/12/01/us/politics/tax-cuts-deficit-debt.html ("This week, the congressional scorekeeper, the Joint Committee on Taxation, reported that the Senate's tax plan is, in fact, a stimulus plan that costs $1 trillion—the amount it would add to the debt over the next decade after accounting for its significant economic benefits."); Neil Irwin, *The Era of Fiscal Austerity Is Over. Here's What Big Deficits Mean for the Economy*, N.Y. TIMES: UPSHOT (Feb. 9, 2018), https://www.nytimes.com/2018/02/09/upshot/the-era-of-fiscal-austerity-is-over-heres-what-big-deficits-mean-for-the-economy.html.

192. *See* Budget Control Act of 2011, Pub. L. No. 112–25, 125 Stat. 240; CONG. RESEARCH SERV., THE BUDGET CONTROL ACT OF 2011: LEGISLATIVE CHANGES TO THE LAW AND THEIR BUDGETARY EFFECTS 2 (Feb. 23, 2018), https://www.everycrsreport.com/files/20180223_R44874_4d2eca3d70319ae641a3cfe0966af4dd3f408ada.pdf.

193. *See, e.g.*, Damian Paletta & Erica Werner, *White House Budget Proposes Increase to Defense Spending and Cuts to Safety Net, but Federal Deficit Would Remain*, WASH. POST (Feb. 12, 2018), https://www.washingtonpost.com/business/economy/white-house-

exemptions could further drastically impact the federal budget and force even deeper cuts to government spending, acutely affecting charities and other social service providers.

Government grants and contracting with nonprofits—prime nonprofit sector growth catalysts—originated largely during World War II and expanded further during President Lyndon Johnson's Great Society programming.[194] However, Reagan-Bush fiscal restraint policies during the 1980s mandated a sharp decline in social service funding.[195] President Clinton facilitated a modest restoration to social services funding through expansion of entitlement programs, re-characterization of certain aid programs and welfare reform.[196] The great recession of 2008 precipitated another round of austerity measures and government spending retrenchment.[197] The current presidential tax cuts and budget priorities do not provide a reason to believe that government spending on social services will increase anytime soon.[198]

C. Increased Business Competition for Reduced Resources Otherwise Reserved to Aid Nonprofits in Serving Needy Americans

The *Hobby Lobby* RFRA Income Tax Exemption and corresponding budget crises would inevitably reduce resources available for direct social services and nonprofit funding, increasing competition for scarce resources, and favoring the wealthy and more sophisticated at the expense of America's most vulnerable citizens. This effect could be compounded by business competition for otherwise philanthropic resources that the *Hobby Lobby* RFRA exemption could incentivize. The nonprofit sector as a whole derives half of its revenue through fees for services provided.[199] The 2012 Nonprofit Finance Fund national survey of nonprofit organizations found that 55% of nonprofits surveyed did not

budget-proposes-increase-to-defense-spending-and-cuts-to-safety-net-but-federal-deficit-would-remain/2018/02/12/f2eb00e6-100e-11e8-8ea1-c1d91fcec3fe_story.html?utm_term=.cc1a9e139c6a.

194. *See* LESTER M. SALAMON, *The Resilient Sector: The Future of Nonprofit America*, *in* THE STATE OF NONPROFIT AMERICA 3, 21–22 (Lester M. Salamon ed., 2d. ed. 2012).

195. *See id.* at 22.

196. *See id.* at 23–24.

197. *See id.* at 24.

198. *See* Paletta & Werner, *supra* note 193.

199. SALAMON, *supra* note 194, at 10–11 (stating that fees account for 52% of revenue, while approximately 40% of nonprofit funding comes from government sources and 10% from philanthropy. Government grants constituted only 9.2% of the total revenue for public charities in 2012); *see also* MCKEEVER & PETTIJOHN, *supra* note 23, at 4; Pablo Eisenberg, *Citizen Engagement: The Nonprofit Challenge*, NONPROFIT Q. (Dec. 21, 2004), https://nonprofitquarterly.org/2004/12/21/citizen-engagement-the-nonprofit-challenge/.

have or did not receive federal government contracts or funding.[200] Of those that reported receiving funding, less than 25% found those contract amounts sufficient to fully fund organizational programming.[201] This coincides with a shift in government funding from direct payments made to nonprofit service providers in favor of voucher payments directly to the recipients of the service (consumers) that has forced nonprofits to compete for these funds and allowed for-profit businesses to compete in markets once dominated by nonprofits.[202] The flexibility that business entities naturally possess in raising needed capital by issuing stock placed nonprofit competitors at an immediate disadvantage.[203] One should also note that under current law, nonprofits do not enjoy the full array of entity options available to businesses, particularly the increasingly popular LLC, except in very limited contexts.[204] IRS approval remains the primary impediment to greater nonprofit LLC use.[205] These limitations in nonprofit financial and structural capabilities can compromise nonprofit organizational effectiveness.[206] Some might argue that businesses entering these nonprofit markets actually provide a benefit by providing more choice to service recipients. However, studies show that, despite working with a resource shortage, nonprofits continue

200. *See* NONPROFIT FIN. FUND, 2012 STATE OF THE SECTOR SURVEY (2012), http://www.nonprofitfinancefund.org/sites/default/files/paragraphs/file/download/2012survey_brochure.pdf.

201. *Id.*

202. *See* SALAMON, *supra* note 194, at 24–25 (describing consumer subsidies primarily in the form of loan guarantees, tax benefits, and vouchers, all of which provided creative legislative tools in providing government assistance that did not as overtly and visibly impact the federal budget in the appropriations process, a chief criticism of the direct subsidies to nonprofits).

203. *See id.* at 31.

204. *Compare* Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 GA. L. REV. 1113, 1124 (2007) (discussing the nonprofit corporation as the preeminent nonprofit entity), *with* HARRIET SMITH WINDSOR, DEL. DEP'T OF STATE, DIV. OF CORPS., 2005 ANNUAL REPORT 2, (Jan. 31, 2006), http://www.corp.delaware.gov/2005%20doc%20ar.pdf, *and* JEFFREY W. BULLOCK, DEL. DEP'T OF STATE, DIV. OF CORPS., 2013 ANNUAL REPORT 2, http://corp.delaware.gov/Corporations_2013%20Annual%20Report.pdf (together showing Delaware corporations grew from 32,664 in 2003 to 34,234 in 2013 compared to LLC growth from 55,381 in 2003 to 109,169 in 2013).

205. *See* Smith, *supra* note 30, at 423–24; Kennard Wing & Mark A. Hager, *Getting What We Pay For: Low Overhead Limits Nonprofit Effectiveness*, NONPROFIT OVERHEAD COST PROJECT, No. 3, 2004, at 1–2, http://www.urban.org/uploadedpdf/311044_NOCP_3.pdf (stating the need to master complex billing systems, develop marketing plans, and secure financing to manage lagging reimbursements and economic down cycles—all of which arguably drain resources that should have been committed to the nonprofit's articulated charitable purposes).

206. Wing & Hager, *supra* note 205, at 1–2.

to experience an increase in demand for services.[207] According to a report by the Nonprofit Finance Fund, 79% of nonprofits across the country reported an increase in the demand for services in 2017, and 86% of nonprofits anticipate an increase of 86% in 2018.[208] The increased competition from businesses for increasingly scarce resources, coupled with the natural advantages businesses enjoy, could irreparably injure the nonprofit sector and its collective ability to serve the neediest members of American society. This dangerous potential likely motivated the *Hobby Lobby* Court in its attempts to limit its holding.

V. CRITIQUES OF *HOBBY LOBBY* TAX EXEMPTION CONCERNS

Part V addresses critics who might argue that section 501(c)(3) concerns expressed in this Article are exaggerated and unjustified. These critics might argue that *Hobby Lobby* is not a tax case and would therefore have no applicability to section 501(c)(3). These critics might also argue that *Hobby Lobby* section 501(c)(3) concerns are overblown because the *Hobby Lobby* Court limited its holding to closely held corporations. Critics might finally argue that section 501(c)(3) organizational and operational tests provide sufficient protections from the dangers articulated in this Article. These critiques are discussed in turn below, demonstrating the need to address the potential dangers presented by *Hobby Lobby's* impact on section 501(c)(3).

A. Hobby Lobby Is Not A Tax Case

Critics might argue that *Hobby Lobby* is not a tax case and accordingly does not apply to section 501(c)(3). These critics will point to the fact that the *Hobby Lobby* Court specifically limited its decision to the contraceptive mandate at issue. These critics might further assert that the *Hobby Lobby* Court distinguished *Lee*, a case that more directly involved a claimed tax exemption.

In supporting arguments that *Hobby Lobby* is not a tax case, critics might emphasize the *Hobby Lobby* Court's express adjudicatory limitation to the contraceptive mandate issue.[209] These critics might

207. *See* NONPROFIT FIN. FUND, STATE OF THE NONPROFIT SECTOR SURVEY 2018 (2018), https://nff.org/sites/default/files/paragraphs/file/download/341454_NFF_Survey_R1_Proof.pdf; *cf. Poverty in the U.S.*, POVERTY SOLUTIONS: UNIV. OF MICH., https://poverty.umich.edu/about/poverty-facts/us-poverty/ (last visited Dec. 30, 2018).

208. *See* NONPROFIT FIN. FUND, *supra* note 207.

209. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 733 (2014) ("In any event, our decision in these cases is concerned solely with the contraceptive mandate.").

reference the *Hobby Lobby* Court's incorporation of the term "contraceptive mandate" into its RFRA analysis thirty-two times.[210] Critics might also reference the *Hobby Lobby* Court's interpretation of the Patient Protection and Affordable Care Act, § 1001(a)(5), codified in Title 42, in resolving the contraceptive mandate controversy.[211] Critics might view RFRA's placement in Title 42 as inferring a stronger connection between RFRA and the contraceptive mandate, which was also codified under Title 42.[212] The critics might yet note that the Court primarily based its *NFIB* and *Lee* decisions, but not its *Hobby Lobby* decision, on Title 26-related analysis. This view might lead critics to conclude that the relationship between RFRA and the individual mandate at issue in *NFIB* is more strained.

The logic underlying that conclusion cannot prevail for several reasons. On its own terms and as interpreted by the *Hobby Lobby* Court, RFRA impacts a much broader array of otherwise authorized governmental action.[213] To restrict RFRA solely to governmental actions authorized under Title 42 would also deny its applicability to Department of Labor actions, from which the department derives much of its authority to enforce the ACA, as well as other federal labor laws, under Title 29.[214]

The forgoing proximity rationale for restricting RFRA coverage to the contraceptive mandate is also unworkable in a more specific tax context. Congress generally establishes federal tax law through amendments to Title 26 of the U.S.C. Congress granted the Treasury Department enforcement authority for both the contraceptive mandate and the individual mandate in Title 26.[215] The plaintiffs in both *NFIB* and *Hobby Lobby* sued the Treasury Department, inter alia, in seeking relief from both mandates. Title 26 is not Congress's exclusive tax policy

210. These references occur almost exclusively in the majority's discussion of the burden placed on the religious exercise of the *Hobby Lobby* Corporations. *See id.* at 771 (Ginsburg, J., dissenting) (using the phrase "contraceptive mandate" in the dissent only once).

211. *See* 42 U.S.C. § 300gg-13(a)(4) (2012).

212. *See id.* § 300gg-13 (2010).

213. *See id.* § 2000bb-2(1) (2012) (defining "government" to include any "department" or "agency" of the United States); *Hobby Lobby*, 573 U.S. at 693 ("Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty."). *But see* City of Boerne v. Flores, 521 U.S. 507, 534 (1997) ("This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."), *superseded by statute*, 42 U.S.C. § 20000cc-1 (2000).

214. *See* 29 U.S.C. § 218c (2012) (prohibiting employee discrimination on the basis of the receipt of an ACA tax credit).

215. I.R.C. § 4980H (2012); I.R.C. § 5000A (2012).

repository.[216] The *Hobby Lobby* Court used the word "tax" (or a derivative of the word) thirty-three times in its opinion.[217] Title 26 tax laws are also inextricably integrated with other code titles to provide a more complete picture of the legal requirements.[218] With this in mind, it is difficult to see post-*Hobby Lobby*, how RFRA can be limited is such a way as to deny its applicability to the tax code.

Even if RFRA is generally applicable to the tax code, critics might point to the manner in which the *Hobby Lobby* Court distinguished that decision from *Lee* in concluding that *Hobby Lobby* should not be applied to section 501(c)(3). Despite citing *Lee* in finding that the contraceptive mandate burdened the *Hobby Lobby* Corporations' religious exercise, the *Hobby Lobby* Court distinguished the *Lee* Court's denial of the petitioner's requested exemption from social security taxes.[219] The *Hobby Lobby* Court cited its *Lee* holding that "[t]he obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes."[220] The Court acknowledged that it decided *Lee* under the Free Exercise Clause of the First Amendment and prior to Congress enacting RFRA. The *Hobby Lobby* Court nevertheless opined that it would have reached the same result as in *Lee*.[221] In doing so, the Court focused on RFRA's "least restrictive" standard and distinguished the petition in *Lee* as requesting relief from Social Security taxes generally.[222] It is interesting that the *Hobby Lobby* Court did not discuss the fact that *Lee* involved an exemption from the social security taxes provided for self-employed persons, but not for employees or

216. *See e.g.*, 11 U.S.C. § 523 (2012) (referring to tax matters in a bankruptcy context); 19 U.S.C. § 3 (2012) (referring to Customs and Duties).

217. *Hobby Lobby*, 573 U.S. 682 (using word "tax" thirty-three times—twenty-one times in the majority and twelve times in the dissent—and the phrase "contraceptive mandate" thirty-one times).

218. *Id.* at 696–97 ("[The Affordable Care Act] generally requires employers with 50 or more full-time employees to offer 'a group health plan or group health insurance coverage' that provides 'minimum essential coverage.' . . . Unless an exception applies, ACA requires an employer's group health plan or group-health-insurance coverage to furnish 'preventive care and screenings' for women without 'any cost sharing requirements.'" (citing I.R.C. § 5000A(f)(2) (2010); § 4980H(a), (c)(2); and 42 U.S.C. § 300gg–13(a)(4) (2010))).

219. *Id.* at 734–35 ("HHS analogizes the contraceptive mandate to the requirement to pay Social Security taxes, which we upheld in *Lee* despite the religious objection of an employer, but these cases are quite different.").

220. *Id.* at 734 (citing United States v. Lee, 455 U.S. 252 (1982)).

221. *Id.* ("*Lee* was a free-exercise, not a RFRA, case, but if the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes.").

222. *Id.*

employers.[223] Perhaps that acknowledgement would make it more difficult to explain the Court's ability to distinguish between the religious exercise of different classes of individuals in *Lee*, but blur the distinction between business and religious nonprofit corporations.

Instead of holding that the imposition of taxes is not a burden, the *Hobby Lobby* Court distinguished *Lee* under the "least restrictive means" test. The *Hobby Lobby* Court observed that there was no less burdensome means of operating the Social Security system while accommodating the petitioner's religious exercise, and thus denied the claimant's petition for an exemption from social security taxes.[224] In contrast, the *Hobby Lobby* Court found that the ACA provided a framework under which the Mandating Agencies could employ a less-restrictive to categorical compliance with the mandate or paying the levied tax; that would accommodate the *Hobby Lobby* Corporations and their religious exercise.[225] The *Hobby Lobby* Court reasoned that exempting the *Hobby Lobby* Corporations from the contraceptive mandate, and corresponding tax burden, based on their corporate religious exercise was a less restrictive option than requiring categorical compliance with the mandate or payment of the levied tax. The Court further explained its conclusion by drawing on the exemptions provided as an accommodation to religious nonprofits as a key justification for mandating those same exemptions be granted to business corporations. In so doing, it granted

223. *Lee*, 455 U.S. at 255 ("Congress has accommodated self-employed Amish and self-employed members of other religious groups with similar beliefs by providing exemptions from social security taxes." (citing I.R.C. § 1402(g) (2018))).

224. *Hobby Lobby*, 573 U.S. at 734 (stating that the *Lee* Court explained "that it was untenable to allow individuals to seek exemptions from taxes based on religious objections to particular Government expenditures" and "observed that '[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief'" (alteration in original) (quoting *Lee*, 455 U.S. at 252, 260)).

225. *Id.* at 734–35 ("Recognizing exemptions from the contraceptive mandate is very different. ACA does not create a large national pool of tax revenue for use in purchasing healthcare coverage. Rather, individual employers like the plaintiffs purchase insurance for their own employees. And contrary to the principal dissent's characterization, the employers' contributions do not necessarily funnel into 'undifferentiated funds.' The accommodation established by HHS requires issuers to have a mechanism by which to 'segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services.' Recognizing a religious accommodation under RFRA for particular coverage requirements, therefore, does not threaten the viability of ACA's comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would." (citations omitted)).

these businesses equal standing with religious nonprofits under RFRA.[226]

A future Court could utilize this rationale to apply the *Hobby Lobby* RFRA rationale to a case of the IRS denying the *Hobby Lobby* Corporations, or similarly situated applicants, tax exempt status under section 501(c)(3) of the IRC. The Court could hold the denial and the resulting income tax liability to be a burden on the exercise of the denied applicant's religious exercise, triggering a *Hobby Lobby*-styled RFRA analysis.[227] Assuming the Court were to stipulate to the IRS being able to meet the "compelling interest" standard through its tax collection, the Court would likely then employ *Hobby Lobby*'s "least restrictive" standard rationale in finding that the IRS should have granted the exemptions already granted to religious nonprofits under section 501(c)(3). The religious exemption from federal income tax has a long and storied history.[228] The *Hobby Lobby* Court based its "least restrictive" analysis on accommodations the Mandating Agencies had already granted to religious corporations based on the nonprofit status of those religious corporations.[229] The rationale employed by the *Hobby Lobby* Court, which connected taxes as a burden on religious exercise to the "least restrictive means" standard through the use of a novel application of a preexisting exemption, set a dangerous precedent for business corporations to claim section 501(c)(3) exempt status in exercising their religion in the context of their business.[230]

Critics might next argue that even if *Hobby Lobby* proves applicable to section 501(c)(3), concerns regarding the breadth of the problem are exaggerated because the *Hobby Lobby* Court limited its holding to closely held corporations. In limiting its holding, the *Hobby Lobby* Court

226. *Id.* at 708 (stating that the same principle applies to business corporations).

227. *See Lee*, 455 U.S. at 257 ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."); Braunfield v. Brown, 366 U.S. 599, 603 (1961) ("Certain aspects of religious exercise cannot, in any way, be restricted by either federal or state legislation.").

228. *See supra* Part II (discussing the exemption tracing back to enactment of the tax code—even before other exempt categories were created).

229. 45 C.F.R. § 147.131 (2015) ("(a) *Religious employers*. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a 'religious employer' is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.").

230. *See supra* Part III.C.

acknowledged and dismissed concerns that large, publicly traded corporations could use its rationale.[231] The dissent criticized the decision as effectively endowing religious rights on all corporations, regardless of size and complexity.[232] The majority sidestepped this issue by deeming the problem unlikely and unripe.[233] The *Hobby Lobby* Court held that issue was not ripe as the *Hobby Lobby* controversy involved closely held corporations.[234] The *Hobby Lobby* Court also emphasized the closely held nature of the corporations involved as justification for viewing the *Hobby Lobby* Corporations' beliefs as a proxy for the beliefs of their owners.[235] Although the *Hobby Lobby* Court never uses the term, its rationale seems to validate the "passed through" theory advanced by *Conestoga* in its appeal before the Third Circuit.[236] Under the "passed through" theory,

231. *Hobby Lobby*, 573 U.S. at 717–20.

232. *Id.* at 756–57 (Ginsburg, J., dissenting) ("The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. Little doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.").

233. *Id.* at 717 (majority opinion) ("These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. . . . In any event, we have no occasion in these cases to consider RFRA's applicability to such companies.").

234. *Id.* ("Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere 'beliefs' of a corporation. HHS goes so far as to raise the specter of 'divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric.' These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. . . . In any event, we have no occasion in these cases to consider RFRA's applicability to such companies. *The companies in the cases before us are closely held corporations*, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs." (emphasis added)).

235. *Id.* at 707 ("[P]rotecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.").

236. *See* Conestoga Woods Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 386 (3d Cir. 2013) ("Appellants argue that Conestoga can exercise religion under a 'passed through' theory, which was first developed by the Court of Appeals for the Ninth Circuit in *EEOC v. Townley Engineering & Manufacturing Company,* 859 F.2d 610 (9th Cir. 1988), and affirmed in *Stormans, Inc. v. Selecky,* 586 F.3d 1109 (9th Cir. 2009)."), *rev'd and remanded sub nom*. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

a corporation is "an extension of the beliefs of members of [its owners], and . . . the beliefs of the [owners] are the beliefs of the [corporation]."[237]

The *Hobby Lobby* Court's rationale disregards the fundamental nature of corporate law. Corporations are not determined to be large or small simply based on whether they are closely held or publicly traded. All corporations, large and small, must satisfy and comply with the same corporate requirements. While it is true that many states allow corporations to be formed for "any lawful purpose," a point the *Hobby Lobby* Court emphasized in finding the *Hobby Lobby* Corporations capable of exercising religion,[238] one must also acknowledge the historical distinctions between the accepted purposes of business corporations and nonprofit corporations.

Early English common law generally restricted corporate purposes to those specifically provided in their charters.[239] This constrained perspective of corporate personhood was embraced through the ratification of the U.S. Constitution as well as by early American jurisprudence.[240] Justice Marshall articulated the artificial entity policy thrust in *Trustees of Dartmouth College v. Woodward*, famously declaring: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."[241] The artificial entity theory posited that the entity's very existence was a function of sovereign grace.[242] States chartered these entities for specific purposes, usually

237. *Conestoga*, 724 F.3d at 387 (quoting Stormans, Inc. v. Selecky, 586 F.3d 1109, 1120 (9th Cir. 2009)).

238. *See Hobby Lobby*, 573 U.S. at 710–13.

239. *See Bank of the U.S. v. Deveaux,* 9 U.S. (5 Cranch) 61, 88 (1809) ("As our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, we resort to them for aid, in ascertaining its character."), *overruled in part by* Louisville, Cincinnati, & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 388–89 (2010) (Scalia, J., concurring); *id.* at 426–27 (Stevens, J., concurring in part and dissenting in part) (describing how a corporation's charter "specified the corporation's powers and purposes and 'authoritatively fixed the scope and content of corporate organization'" (quoting J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970, at 15–16 (2004 ed. 1970))).

240. *See* 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2, at 7 (Carol A. Jones ed., Thomson/West 2006) (rev. vol. 2006) ("Historically, there was a distrust or disfavor of private corporations. Some of the states ratified the Constitution with misgivings respecting the power of Congress to form corporations, which in fact created but few . . . leaving this matter to the states . . . .").

241. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

242. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 129–32 (3d ed. 2005) (discussing the history of corporations as special charters from the state).

involving a demonstrable public good.[243] As American law evolved, "free incorporation" became the preferred approach in hopes of removing the corrupted potential of the previously more restricted incorporation processes.[244]

Today, state corporate law almost universally recognizes corporations as permitted to engage in "any lawful . . . purpose" in facilitating business.[245] However, the *Hobby Lobby* decision did not discuss important statutory provisions designed to address functions nonprofit entities serve. The *Hobby Lobby* Court cited the Oklahoma General Corporation Act in support of its position that both nonprofit and business corporations possessed such "any lawful purpose" capacity.[246] Missing from this analysis was a key provision in the Oklahoma law that restricts a nonprofit corporation from issuing capital stock or providing "pecuniary gain, incidentally or otherwise, to its members as such."[247] These provisions should not be overlooked as they distinguish nonprofits from businesses in the economic relationship that exists between the corporation and its stakeholders. They also facilitate the nonprofit's ability to satisfy the organizational and operational tests established under section 501(c)(3). This distinction in turn is important because of the vital role economics played in the *Hobby Lobby* Court's analysis of the contraceptive mandate as a burden on the *Hobby Lobby* Corporations' religious exercise.[248] It would be difficult to understand how economics can be critically important in the burden analysis, but deemed trivial when comparing the fundamental purposes for which nonprofit and business corporations are formed.

While seeming to rely heavily on an aggregate theory justification of corporate RFRA rights,[249] the *Hobby Lobby* Court did not deny the separateness and fundamental personhood of each corporation under the law.[250] This separateness provided the predicate upon which the Court

243. *Id.* at 132 (noting that early corporations "were chartered to do work that was traditionally public" and "tended to vest exclusive control over a public asset, a natural resource, or a business opportunity in one group of favorites or investors").

244. Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 181 (1985).

245. MODEL NONPROFIT CORP. ACT § 3.01 cmt. (AM. BAR ASS'N 2009).

246. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 713 (2014) (citing OKLA. STAT. ANN. tit. 18, §§ 1002, 1005 (West 2012)).

247. OKLA. STAT. ANN. tit. 18, § 1006(A)(4), (7) (West 2017).

248. *Hobby Lobby*, 573 U.S. at 722.

249. *See supra* notes 129–30 and accompanying text.

250. *Hobby Lobby*, 573 U.S. at 724 ("[T]he Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations

recognized the *Hobby Lobby* Corporations' standing.[251] As Justice Ginsburg cautioned, corporate personhood is not simply a convenience that organizational stakeholders are free to apply when convenient and disregard when seemingly obstructing particular objectives.[252] Personhood allows certain entities to shield their owners and management from personal liability.[253] In contrast, sole proprietorships and partnerships expose the individual owners to unlimited personal liability for the business's debts and obligations.[254] The federal tax code also exemplifies this "separateness" doctrine. Corporations generally pay entity level income tax and shareholders pay individual taxes on their respective share of distributed corporate income.[255] This "double taxation" is a natural consequence of the corporation's separateness. Both business and nonprofit corporations must also satisfy longstanding formalities, including established meeting times, quorum requirements for conducting business at those meetings, and the required taking of formal minutes from those meetings.[256] A business or nonprofit

lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial.").

251. *Id.* at 706–10.

252. *Id.* at 756 (Ginsburg, J., dissenting) ("By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation.").

253. *See* NLRB v. Greater Kan. City Roofing, 2 F.3d 1047, 1052 (10th Cir. 1993) ("The 'separate corporate identity' prong is meant to determine whether the stockholder and the corporation have maintained separate identities. There are strong public policy reasons for upholding the corporate fiction. Where stockholders follow the technical rules that govern the corporate structure, they are entitled to rely on the protections of limited liability that the corporation affords.").

254. Under the repealed Uniform Partnership Act ("UPA"), partners' liability is joint and several for torts and joint but not several for contracts. Under the current UPA, partners are jointly and severally liable for all partnership obligations. UNIF. P'SHIP ACT § 306(a) cmt. (UNIF. LAW COMM'N 1997) (amended 2013); UNIF. P'SHIP ACT § 15 (UNIF. LAW COMM'N 1914) (repealed 1997, amended 2013).

255. *See* WILLIAM K. SJOSTROM, JR., BUSINESS ORGANIZATIONS: A TRANSACTIONAL APPROACH 15 (Vicki Been et al. eds., 2013) ("A C-corporation is considered a separate taxpaying entity. Thus, it must file an annual income tax return (usually on Form 1120) reporting its income, deductions, and credits for the year and pay any resulting income tax at corporate income tax rates. If a C-corporation distributes money to its shareholders, the shareholders must include the distribution in their taxable incomes."). Variations on these entities have been developed to minimize the consequences of entity separateness while maintaining and maximizing the associated benefits. These include the development of the S-Corporation, various forms of limited partnerships, and limited liability companies. *Id.* at 15–16.

256. *See* MODEL BUS. CORP. ACT §§ 7.01–.25, 8.20–.24 (AM. BAR ASS'N 2002) (establishing, inter alia, meeting, notice, quorum, and voting requirements for corporate

corporation that fails to observe corporate formalities runs the risk of losing its valuable liability shield, leaving corporate stakeholders exposed to personal liability for corporate debts and liabilities.[257]

The *Hobby Lobby* Court's dismissal of concerns over potential extension of the *Hobby Lobby* RFRA doctrine to public companies further highlights the problems *Hobby Lobby* invites in its analogous treatment of nonprofit and business corporations. The *Hobby Lobby* Court seems to imply that limiting the category of corporations it deemed protected by RFRA to closely held corporations would somehow limit the number of potential claimants to some manageable number, avoiding a presumably unwieldy number of public companies.[258] However, even assuming this to be an otherwise valid limitation, a Forbes study found that closely held (or "privately held") companies comprise 99% of U.S. businesses.[259]

Further, corporations do not attain characterizations as "public companies" under state general corporate law, but rather in accordance with federal and state securities laws.[260] The Securities and Exchange Act of 1934 ("Exchange Act") provides the private/public line of demarcation in determining whether the corporation deals in securities requiring registration.[261] The Exchange Act requires a company to register as a public company if (1) the securities are listed on a national securities exchange;[262] (2) the company has $10 million or more in total assets and a class of equity securities held of record by (a) 2000 or more

shareholders and directors); *Id.* at §16.01(a) (requiring maintenance of all corporate shareholder and director meeting minutes); *see also* MODEL NONPROFIT CORP. ACT §§ 7.01–.24, 8.20–.24 (AM. BAR ASS'N 2009) (establishing, inter alia, meeting, notice, quorum and voting requirements for nonprofit members and directors); *id.* at §16.01(a) (requiring maintenance of all corporate member and director meeting minutes).

257. *See, e.g.*, Kan. Gas & Elec. Co. v. Ross, 521 N.W.2d 107, 112–13 (S.D. 1994) (discussing the factors that justify piercing the corporate veil, including failure to observe corporate formalities).

258. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717–18 (2014).

259. Mary Ellen Biery, *4 Things You Don't Know About Private Companies*, FORBES (May 26, 2013, 6:45 AM), https://www.forbes.com/sites/sageworks/2013/05/26/4-things-you-dont-know-about-private-companies/#26f90060291a.

260. *See* MODEL BUS. CORP. ACT §1.40(18A) (defining a public company as "a corporation that has shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national securities association"); WILLIAM K. SJOSTROM, JR., BUSINESS ORGANIZATIONS: A TRANSACTIONAL APPROACH 27 (Erwin Chemerinsky et al. eds., 2d ed. 2016); *see also* Oklahoma Uniform Securities Act of 2004, OKLA. STAT. ANN. tit. 71, §§ 1-101 to -701 (West 2004); *id.* § 1-301 ("Securities registration requirement"); Pennsylvania Securities Act of 1972, 70 PA. STAT. AND CONS. STAT. ANN. § 1-101 to 1-705 (West 1972); *id.* § 1-201 ("Registration Requirement").

261. Securities Exchange Act of 1934, 15 U.S.C. § 78a–78(qq) (2012).

262. *See id.* § 78*l*(b).

persons, or (b) 500 or more persons who are not accredited investors;[263] or (3) the company has filed a registration statement under the Securities Act that became effective.[264] Oklahoma general corporate law does not provide criteria that would determine whether Hobby Lobby would be categorized as public vs. private. Oklahoma Blue Sky Laws govern those securities related matters.[265] Hobby Lobby could convert from a private to a public company without violating Oklahoma law or amending its corporate charter. This is not true regarding any conversion to and from a nonprofit corporation under pre-*Hobby Lobby* state and federal statutes.[266] Perhaps that is the reason the *Hobby Lobby* decision did not directly address concerns regarding *Hobby Lobby* application to public companies, dismissing that potential as irrelevant to the controversy before the Court.[267] It leaves unanswered the question of how the *Hobby Lobby* Court was able to rationalize blurring the most important business/nonprofit distinctions embedded in state general corporate law, but summarily dismiss concerns rooted in the otherwise indistinguishable nature of corporations who might be required to comply with federal and state securities law. If the *Hobby Lobby* Court is willing to take this step in advancing the religious exercise rights of a business corporation, it is plausible that a future Court would extend this logic in upholding a section 501(c)(3)-based religious tax exemption claim by a corporation that would not qualify under pre-*Hobby Lobby* jurisprudence.

B. Section 501(c)(3) Organizational and Operational Tests Provide Adequate Protections Against Articulated Dangers

Critics might also argue that even if a future Court were to apply *Hobby Lobby* to section 501(c)(3), holding that business corporations can qualify for religious tax-exempt status, section 501(c)(3) and the corresponding regulations provide protections sufficient to prevent the problems described in this Article. In finding that the contraceptive mandate violated the RFRA, the *Hobby Lobby* Court asserted that the Mandating Agencies could have provided the same accommodation to the *Hobby Lobby* Corporations they were already providing to religious

263. *See id*. § 78*l*(g)(1)(A); 17 C.F.R. § 240.12g-1 (2018).

264. *See* Securities Exchange Act of 1934, 15 U.S.C. § 78o(d) (2012).

265. *See* Oklahoma Uniform Securities Act of 2004, OKLA. STAT. ANN. tit. 71, § 1-101 to -701 (West 2004). "Blue Sky Laws" refer to local state securities laws. *See Blue Sky Laws*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/fast-answers/answers-blueskyhtm.html (last modified Oct. 14, 2014).

266. *See* OKLA. STAT. ANN. tit. 71, §§ 1-303 to -305 (2018); tit. 18, §§ 1005–1006 (2018).

267. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717 (2014).

nonprofits. The *Hobby Lobby* Court did not expressly state that the religious nonprofits were entitled to the contraceptive mandate exemption; nor did it explicitly recognize the *Hobby Lobby* Corporations as having a fundamental right to the exemption provided for religious nonprofits.[268] Further, critics would point out that the *Hobby Lobby* Court held that the *Hobby Lobby* Corporations possessed the same—but no greater—rights and were entitled to the same—not greater—exemption as the religious nonprofits. Accordingly, critics would assert that even if a future Court held that a business corporation was entitled to a religion-based section 501(c)(3) tax exemption, the corporations would still be subject to organizational and operational tests for determining exemption eligibility. These critics might argue that the continued applicability of those tests would severely limit, if not effectively eliminate, the number of business corporations able to avail themselves of the exemption.

Initially, the forgoing might appear the most formidable, if not insurmountable challenge to the theories advanced in this Article. The author also acknowledges the need to assume the Court's willingness to stretch religious free exercise doctrine in unprecedented ways to reach this analytical crossroads. However, this Article suggests that the Court engaged in just that type of intellection contortionism to craft the *Hobby Lobby* decision.[269] The key findings that supported that decision could also support a future Court viewing section 501(c)(3) through a creative *Hobby Lobby*-styled RFRA lens.

As previously stated, section 501(c)(3) requires that a corporation be "organized and operated exclusively for [inter alia] religious . . . purposes" and provides that "no part of the net earnings of which inures to the benefit of any private shareholder or individual" for the corporation to qualify for an exemption.[270] This standard has been historically applied and interpreted with great deference to the Treasury Department and its congressionally delegated enforcement and rulemaking authority.[271] The Treasury Department has interpreted

268. One could argue in the alternative that the *Hobby Lobby* Court inferred that the religious nonprofits were entitled to such an exemption, but a broader exploration of that issue is beyond the scope of this Article.

269. *See Hobby Lobby*, 573 U.S. at 739–40 (Ginsburg, J., dissenting).

270. I.R.C. § 501(c)(3) (2018).

271. *See* I.R.C. § 7805 (2012) ("(a) Authorization. Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."); *see also* Bob Jones Univ. v. United

"exclusive" as meaning "primarily" in testing the purpose and operation of nonprofit entities.[272] However, the Treasury Department's interpretation of section 501(c)(3) requirements must be viewed under RFRA to ensure that it does not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[273] As explained in *Hobby Lobby*, Congress mandated that RFRA "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[274] Therefore, Treasury's enforcement of section 501(c)(3) must comply with RFRA.

As discussed above and cited in *Hobby Lobby*, many states now allow nonprofit and business corporations to be formed for "any lawful" purpose.[275] Under its organizational test, the Treasury Department requires that a corporate charter limit the corporation's purposes to a permitted charitable purpose, including religion.[276]

The *Hobby Lobby* Court engaged in a painstaking description of the manner in which the *Hobby Lobby* Corporations' owners formed the companies to analogize their corporate religion to that manifested by religious nonprofits. The *Hobby Lobby* Court pointed to Hobby Lobby's statement of purpose, which commits its owners to "[h]onoring the Lord in *all* [they] do by operating the company in a manner consistent with Biblical principles. . . . Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs."[277] The *Hobby Lobby* Court also noted that Conestoga Wood Specialty's "'Vision and Values Statements' affirms that Conestoga endeavors to [operate] . . . in [a] manner that reflects [the Hahns'] Christian heritage."[278] A future Court could interpret such statements of purpose, vision and values, and family pledges as satisfying the spirit of the Treasury Department's organizational test, conclusive expressions of

States, 461 U.S. 574, 596 (1983) ("[E]ver since the inception of the tax code, Congress has seen fit to vest in those administering the tax laws very broad authority to interpret those laws. In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems.")

272. Treas. Reg. §1.501(c)(3)-1(c) (2018).

273. *See* 42 U.S.C. §§ 2000bb-1(a), 2000bb-2(1) (1994) (defining "government" to include any "department" or "agency" of the United States).

274. *See Hobby Lobby*, 573 U.S. at 696 (citing 42 U.S.C. § 2000cc-3(g)).

275. *See supra* notes 53, 246 and accompanying text.

276. Treas. Reg. § 1.501(c)(3)-1(a) (2018).

277. *Hobby Lobby*, 573 U.S. at 703 (emphasis added).

278. *Id.* at 701.

corporations' religious commitment traditionally expressed in the language of the articles of incorporation.[279]

The *Hobby Lobby* Court also meticulously accounted for the manner in which the *Hobby Lobby* Corporations operated in vindicating their corporate religious exercise:

> Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so. The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior."[280]

Just as the *Hobby Lobby* Court found these practices to qualify as religious exercise, a future Court could utilize RFRA's breadth to deem these types of activities sufficient to meet the operational test.

The private inurement prohibition seems the most challenging hurdle as it initially appears to be a very strict requirement. However, underlying policy considerations illuminate how business corporations can satisfy even this test under a *Hobby Lobby* RFRA exemption analysis. The private inurement aims to prevent resources, otherwise available for advancing articulated charitable goals, from instead serving stakeholders' personal (selfish) objectives.[281] At least one view of the *Hobby Lobby* decision yields that the type of personal purposes deemed antithetical to granting tax-exempt status would not apply to the *Hobby Lobby* Corporations. According to the *Hobby Lobby* Court, these companies and their owners have committed their resources, including profits, to their religious purposes, arguably satisfying the spirit of the private inurement test.[282] As stated above, the *Hobby Lobby* Court provided intricate detail on the *Hobby Lobby* Corporations' religious practices.[283] In addition to the aforementioned financial sacrifices Hobby Lobby and its owners make in advancing their Christian faith, the

279. I.R.C. § 501(c)(3) (2018); Treas. Reg. § 1.501(c)(3)-1 (2018).

280. *Hobby Lobby*, 573 U.S. at 703 (citations omitted).

281. *See* FRANCES R. HILL & DOUGLAS M. MANCINO, TAXATION OF EXEMPT ORGANIZATIONS ¶ 4.03[2], at 4–20 (2003 & Supp. 2014) ("The prohibition against inurement of net earnings appears to have been intended to differentiate the types of organizations that should be entitled to exemption from those that do not rather than to serve as a separate test of exemption.").

282. *Hobby Lobby,* 573 U.S. at 703.

283. *See supra* Part III.A.

Greens had committed "'to honor God with all that has been entrusted' to the Greens and to 'use the Green family assets to create, support, and leverage the efforts of Christian ministries.'"[284] A future Court could find it difficult to vindicate withholding tax exempt status from corporations and shareholders who make a *Hobby Lobby*-level of commitment to their faith because the shareholders serve as a conduit of the religious exercise. This future Court could find traditional interpretations outdated and inoperable and interpret these *Hobby Lobby*-compliant activities sufficient for gaining tax-exempt status.

C. Hobby Lobby Section 501(c)(3) Claims Are Unlikely

Critics might finally say that this extension of the *Hobby Lobby* doctrine, a dramatic shift in the longstanding precedent concerning nonprofit tax treatment, is highly unlikely. They will point to the painstaking efforts the *Hobby Lobby* Court took to limit its decision by its own terms.[285] The *Hobby Lobby* dissent certainly does not share that view.[286] Those critics should also recall President Trump's campaign promise to repeal the Johnson Amendment, and recent efforts to honor that pledge.[287] The President also reinforced the *Hobby Lobby* majority by appointing Justice Gorsuch, whose Tenth Circuit record firmly established him as a strong corporate religious freedom advocate.[288] An

284. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013) (en banc), *aff'd sub nom*. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

285. *Hobby Lobby*, 573 U.S. at 736 (limiting its decision to the contraceptive mandate, as applied to closely held corporations).

286. *Id.* at 756–57 (Ginsburg, J., dissenting) ("The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private.").

287. Sarah Pulliam Bailey, *Trump Promised to Destroy the Johnson Amendment. Congress is Targeting it Now.*, WASH. POST (July 14, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/06/30/trump-promised-to-destroy-the-johnson-amendment-congress-is-targeting-it-now/?utm_term=.7772f900d362 (discussing the Johnson Amendment and potential appeal); Elizabeth Dias, *President Trump Lost a Fight to Allow Churches to Get More Involved in Politics*, TIME (Dec. 15 2017), http://time.com/5067035/president-trump-lost-a-fight-to-allow-churches-to-get-more-involved-in-politics/. The Johnson Amendment, named after Senator and President Lyndon B. Johnson, prohibits tax exempt organizations from supporting or opposing political candidates, or otherwise participating in political campaigns. Interestingly, efforts by the Trump administration and Republican congressional leaders take specific aim at the Johnson Amendment's effect on religious organizations.

288. *See Hobby Lobby*, 723 F.3d at 1156 (Gorsuch, J., concurring); *see also* Little Sisters of the Poor Home for the Aged v. Burwell, 799 F.3d 1315, 1316–17 (10th Cir. 2015) (Hartz, J. & Gorsuch J., dissenting from denial of rehearing en banc).

expanded *Hobby Lobby* doctrine also finds contemporary support from certain scholarly advocates, which speaks to the timeliness of the foregoing discussion.[289]

D. Are the Articulated Dangers Unsolvable?

Critics might inquire as to how the problems this Article presents should be resolved or suggest that those problems might be unsolvable. This is a reasonable line of inquiry, particularly in light of *Hobby Lobby*'s recent vintage and the seeming reinforcing tendencies represented by the Gorsuch appointment. However, an important feature of the *Hobby Lobby* decision could provide the most important means of protecting against the potential problems described in this Article: congressional action. The *Hobby Lobby* Court relied heavily on RFRA to support its expansive reading of religious free exercise and the persons covered thereunder. It follows that Congress is in the best position to clarify, by amendment, RFRA's scope in both areas. Critics might point out that RFRA passed by an overwhelming majority in both congressional chambers. However, and unfortunately, broad bi-partisan support is not the only means by which our government creates law. The ACA, passed almost exclusively by a democratic majority in both houses,[290] and the TCJA, recently passed by an identical measure of republicans,[291] prove the dynamic nature of our federal legislative process might provide the most immediate corrective path. Other scholars have suggested this very solution as a means of avoiding similar identified problems the *Hobby*

289. *See, e.g.*, Eric Checketts, *Taking Free Exercise the Second Mile: Why Hobby Lobby Fails to Go Far Enough*, 41 J. CORP. L. 971, 974 (2016).

290. *See Timeline: Milestones in Obama's Quest for Healthcare Reform*, REUTERS (Mar. 21, 2010, 11:37 PM), https://www.reuters.com/article/us-usa-healthcare-timeline/timeline-milestones-in-obamas-quest-for-healthcare-reform-idUSTRE62L0JA20100322 ("November 7, 2009: The House of Representatives passes its version of healthcare reform legislation, including a public option, by a narrow 220–215 vote. In the end, thirty-nine Democrats vote against the bill and only one Republican votes for it. December 24, 2009: The Senate passes its bill on a party-line 60–39 vote. Democratic leaders muster the sixty votes needed to block Republican procedural hurdles after negotiations with holdout Democrats including a deal with Nebraska's Ben Nelson exempting his state from expansion costs for the Medicaid insurance program for the poor. The bill has no public option.").

291. *See* Thomas Kaplan & Alan Rappeport, *Republican Tax Bill Passes Senate in 51–48 Vote*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/us/politics/tax-bill-vote-congress.html ("On Tuesday afternoon, the House voted 227 to 203 to pass the bill, with 12 Republicans voting against it and no Democrats voting for it. . . . The Senate approved the bill early Wednesday morning. The Senate voted 51 to 48, with no Republican defections and no Democratic support.").

Lobby RFRA doctrine could create.[292] As one scholar noted, a benefit to the *Hobby Lobby* Court shaping its rationale around RFRA "is that Congress remains free to amend RFRA and its definition of religion [as well as personhood] if a majority of legislators are dissatisfied with the judicial outcome."[293] This is by no means the sole remedy to the problems this Article identifies.[294] Critics likely could identify other unintended consequences requiring management as a part any implemented solution.[295] Nevertheless, it is undeniable that the *Hobby Lobby* RFRA doctrine's extension potential warrants attention and serious consideration.

VI. CONCLUSION

The *Hobby Lobby* decision set a dangerous precedent that could extend to income tax exemptions for businesses based on the free exercise of their religion, exacerbating the strains on the American budget, and devastating the traditional nonprofit sector as well as the needy Americans they serve. Perhaps the *Hobby Lobby* Court unwittingly planted the seeds that could bear this fruit. Perhaps the Court attempted to tailor its decision to avoid this potential result. Maybe still, this is exactly what the *Hobby Lobby* Court intended as a byproduct of this and

292. *See, e.g.*, Alex J. Luchenitser, *A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 64 (2015) ("All told, given how much more value the *Hobby Lobby* Court gave to the religious concerns of employers than to the religious freedoms of their employees, it is not hard to imagine that a future Supreme Court decision could subordinate anti-discrimination laws to RFRA in a crippling way. To prevent this from occurring, as well as to address many other potential ways in which *Hobby Lobby* could be used to allow imposition of religious beliefs on persons who do not subscribe to them, RFRA should be amended to return the statute to what the members of Congress who voted for it thought they were approving: a measure that *truly* protects freedom of religion."); Mark Strasser, *Narrow Tailoring, Compelling Interests, and Free Exercise: On ACA, RFRA and Predictability,* 53 U. LOUISVILLE L. REV. 467, 507 (2016) ("Perhaps Congress will amend RFRA or the federal courts will construe *Hobby Lobby* so narrowly that its effects will be limited. Otherwise, *Hobby Lobby* creates the potential for a whole host of entities to be successful in their demands for exemptions to a huge number of federal requirements.").

293. Corey A. Ciocchetti, *Religious Freedom and Closely Held Corporations: The* Hobby Lobby *Case and Its Ethical Implications*, 93 OR. L. REV. 259, 336 (2014).

294. *See, e.g.*, Luchenitser, *supra* note 292, at 64 ("There are many options for repairing RFRA. For-profit businesses could be precluded from making claims under the statute. RFRA's 'substantial burden' requirement could be reinvigorated. The 'least restrictive means' analysis could be rendered more deferential to the government. Specific statutes could be excluded from RFRA's grasp. All the foregoing alternatives have drawbacks, however.").

295. *See id.*

other decisions. Speculation can abound as to what implications on religious tax exemptions the Court intended. The *Hobby Lobby* Court's apparent attempt to thread a fine needle eye in crafting its opinion to exempt for-profit businesses from the contraceptive mandate also necessarily exempted those corporations from the corresponding tax consequences. This RFRA-based tax exemption for businesses based on the exercise of their religion could extend into nonprofit law, creating upheaval and uncertainty for one of America's most important sectors. Congress should amend RFRA to better identify RFRA-covered persons and RFRA's relationship to tax policy. These clarifications should, at a minimum, prevent section 501(c)(3) related problems.