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GOD AND THE PROFITS: IS THERE RELIGIOUS LIBERTY FOR MONEymAKERS?

*Mark L. Rienzi**

No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other. You cannot serve both God and Money.

— The Gospel According to Matthew, circa 80 A.D.¹

Hercules Industries's overriding purpose is to make money . . . [T]here is nothing to indicate that Hercules Industries is anything other than a for-profit, secular employer. . . . By definition, a secular employer does not engage in any "exercise of religion."

— United States Department of Justice, June 8, 2012.²

INTRODUCTION

Religion and business have been closely intertwined throughout the American experience. The original corporate charter for the Virginia Company in 1606 addressed both commercial matters like the granting of mining rights,³ and religious matters like the propagation of the Christian faith.⁴ Puritan merchants in New England started each new ledger with the inscription:

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¹ *Matthew* 6:24 (New Int'l Version).

² Defendants' Memorandum in Support of Their Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction at 17, *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-01123-JLK) [hereinafter DOJ Hercules Motion to Dismiss] (internal citations omitted).

³ *The First Charter of Virginia; April 10, 1606*, THE AVALON PROJECT, http://avalon.law.yale.edu/17th_century/va01.asp (last visited Oct. 2, 2013) (granting the corporation the right "to dig, mine, and search for all Manner of Mines of Gold, Silver, and Copper").

⁴ *Id.* (referring to the corporation's "noble . . . [w]ork" that would include "propagating of Christian Religion" so as to bring Native Americans to "the true Knowledge and Worship of God"); see also JAMES H. HUTSON, *RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC* 17 (1998) (noting that Virginia was founded by entrepreneurs who also viewed themselves as "militant Protestants").

“[I]n the name of God and profit.”⁵ So long as God came first in their lives and businesses, they saw nothing wrong with pursuing financial success.⁶

Over the centuries, the nation’s religious diversity has increased. The United States is now home to many different religious traditions and many different religious views on moneymaking. Some groups profess God wants them to be fabulously wealthy,⁷ while others seek God by adopting a life of poverty.⁸ In a religiously pluralistic society, such a diversity of views on religion and moneymaking is hardly surprising.

One result of this religious diversity is that some participants in our market economy attempt to exercise religion and make money at the same time. This juxtaposition of religion and moneymaking raises potentially thorny questions of religious liberty law. Can a for-profit business—which today will often be organized as a corporation—engage in a protected “exercise of religion”? Can government regulation of that profit-making business be understood to impose a burden on the business owner’s religion? Or is it the case that, to borrow a phrase from the Gospel of Matthew, one “cannot serve both God and Money”?⁹

These questions are not entirely new. The Supreme Court has previously recognized religious liberty rights for people earning a living,¹⁰ including some business owners.¹¹ And the Court has repeatedly recognized that the corporate form itself is not inherently incompatible with religious exercise, at least in the context of nonprofit corporations.¹² But these decisions have

⁵ JOHN STEELE GORDON, *AN EMPIRE OF WEALTH: THE EPIC HISTORY OF AMERICAN ECONOMIC POWER* 27 (2004).

⁶ *Id.* In his biography of Benjamin Franklin, Walter Isaacson explains that Puritans viewed religion and commerce as closely connected. See WALTER ISAACSON, *BEN FRANKLIN: AN AMERICAN LIFE* 8-10 (2003) (“But to set up such a sharp dichotomy is to misunderstand the Puritans—and America. For most Puritans, ranging from rich John Winthrop to poor Josiah Franklin, their errand into the wilderness was propelled by considerations of both faith and finance. . . . These Puritans would not have made an either/or distinction between spiritual and secular motives.”).

⁷ See David Van Biema & Jeff Chu, *Does God Want You to Be Rich?*, *TIME* (Sept. 10, 2006), <http://www.time.com/time/magazine/article/0,9171,1533448,00.html>.

⁸ P.D. Premasiri, *Religious Values and the Measurement of Poverty: A Buddhist Perspective* 4 (Jan. 1999) (manuscript), available at <http://siteresources.worldbank.org/INTPOVERTY/Resources/WDR/johannesburg/buddhist.pdf>.

⁹ *Matthew* 6:24 (New Int’l Version).

¹⁰ See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (concluding that a state government could not force a Seventh Day Adventist “to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand”).

¹¹ See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (recognizing the religious burden imposed on Jewish store owners by a Sunday closing law).

¹² See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006), (allowing a New Mexico corporation to prevail on a RFRA claim); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (*Lukumi*), 508 U.S. 520, 525, 547 (1993) (awarding a Florida nonprofit corporation relief under the Free Exercise Clause).

not directly addressed the question of claimed religious exercise by for-profit business organizations and their owners.¹³

Recent litigation over the Department of Health and Human Services (“HHS”) contraceptive mandate has now placed this issue squarely before the courts. In at least thirty-seven cases filed since the beginning of 2012, businesses and their owners have asserted that they have religious exercise rights while earning profits.¹⁴ The federal government’s position is that federal religious liberty law does not protect for-profit business organizations and the individuals who own and operate those businesses.¹⁵

The crux of the government’s argument is its claim that a for-profit business’s “overriding purpose is to make money.”¹⁶ Making money is a goal the government labels “secular,” so that “by definition” profit-making businesses “do[] not engage in any ‘exercise of religion.’”¹⁷ Business owners are also unprotected under this view because they “have voluntarily chosen to enter into commerce” by operating a profit-making business as a distinct legal entity.¹⁸ Any claim that owners experience pressure when the government penalizes their businesses is dismissed as a “type of trickle-down theory” of religious liberty for profit makers which courts should reject out of hand.¹⁹

¹³ See generally *O Centro Espirita*, 546 U.S. 418; *Lukumi*, 508 U.S. 520.

¹⁴ See *infra* Part III.A. The cases concern the recently issued HHS requirement that employers provide coverage for all FDA-approved contraceptive drugs and devices.

¹⁵ Private parties and state governments have recently made similar claims that profit makers do not have a right to exercise religious liberty. See, e.g., *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (“Intervenors argue that Stormans, a for-profit corporation, lacks standing to assert a claim under the Free Exercise Clause.”); Reply Brief of Defendants-Appellants, *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160 (Ill. App. Ct. 2012) (No. 05-CH-494) (“A State-licensed community pharmacy is a secular entity that, by definition, does not ‘exercise’ a religion. And the individual plaintiffs’ claims fare no better, as the rule imposes a burden . . . upon pharmacies, not pharmacists.” (citation omitted)). Additionally, several states have recently enacted same-sex marriage laws with conscience protections for nonprofit, but not for-profit, religious objectors. See, e.g., CONN. GEN. STAT. ANN. § 46b-35a (West 2011); D.C. CODE § 46-406(e)(1) (2012 pocket pt.); N.H. REV. STAT. ANN. § 457:37(II)-(III) (2011); N.Y. DOM. REL. LAW § 10-b(1) (McKinney 2013 pocket pt.); WASH. REV. CODE ANN. § 26.04.010(2), (4) (West 2012); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012); see also Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1442 (2012).

¹⁶ DOJ Hercules Motion to Dismiss, *supra* note 2, at 17.

¹⁷ *Id.* In the Hercules case, the government has emphasized the secular nature of the company’s products. *Id.* at 16 (“Hercules Industries . . . is an ‘HVAC manufacturer.’ The company’s pursuits and products are not religious.”). The government has pursued the same arguments, however, against for-profit businesses with clearly religious products and pursuits, such as Mardel Christian and Education Stores (a Christian bookstore) and Tyndale House Publishers (a Bible publisher). See, e.g., Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction at 14, *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012) (No. 1:12-CV-1635-RBW). Despite the obvious religious focus of these businesses, the government has argued that their profit-making nature automatically renders them “secular” and therefore incapable of religious exercise. *Id.* at 15.

¹⁸ Defendants’ Opposition, *supra* note 17, at 15.

¹⁹ DOJ Hercules Motion to Dismiss, *supra* note 2, at 34.

Over the past year, courts in the HHS mandate cases have split on the question of religious liberty for profit-making businesses and their owners, finding it to be an issue of first impression.²⁰ The two courts of appeals to decide the issue on the merits have reached opposite conclusions, with one finding the government must respect the religious exercises of a profit-making business,²¹ and another denying such religious exercises can even happen within a profit-making organization.²² Other cases were poised to be decided by other circuits in fall 2013.²³

As this issue proceeds through the courts, this Article aims to provide a broader foundation for courts, scholars, and litigants thinking about how and whether profit-making businesses and their owners can exercise religion. The analysis will begin with the question whether, as a factual matter, for-profit business organizations and their owners engage in religious activities. In doing so, this Article will consider some examples of religious rules from various faiths concerning profit-making activities, and examples of businesses that appear to operate based on such religious principles.

Next, the Article will examine how our legal system generally treats for-profit businesses and their owners in other contexts. The goal is to test the underlying assumptions of each side's argument. The claim that for-profit business organizations can actually engage in legally protected "religious exercise" would require the law to recognize the organization itself as capable of forming and acting upon a religious belief.²⁴ In other contexts, do our laws

²⁰ Compare *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *5 (7th Cir. Dec. 28, 2012) (granting preliminary injunction to business owner and business), with *Autocam Corp. v. Sebelius*, No. 1:12-CV-1096, 2012 WL 6845677, at *12 (W.D. Mich. Dec. 24, 2012) (denying preliminary injunction to business owner and business), *aff'd*, No. 12-2673, 2013 WL 5182544 (6th Cir. Sept. 17, 2013); see also *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012) ("These arguments pose difficult questions of first impression.").

²¹ *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103, at *17 (10th Cir. June 27, 2013) ("No one disputes in this case the sincerity of Hobby Lobby and Mardel's religious beliefs. And because the contraceptive-coverage requirement places substantial pressure on Hobby Lobby and Mardel to violate their sincere religious beliefs, their exercise of religion is substantially burdened within the meaning of RFRA.").

²² *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, 2013 WL 3845365, at *5 (3d Cir. July 26, 2013) ("[W]e simply cannot understand how a for-profit, secular corporation—apart from its owners—can exercise religion.").

²³ The Sixth Circuit ruled in September 2013 that a secular, for-profit company was incapable of "religious exercise" and therefore not exempt from the HHS Mandate. See *Autocam Corp. v. Sebelius*, No. 12-2673, 2013 WL 5182544 (6th Cir. Sept. 17, 2013). See also *Korte v. U.S. Dep't of Health & Human Servs.*, No. 12-3841 (7th Cir.); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir.).

²⁴ See, e.g., ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 202-05 (2010) (arguing for conscience rights in for-profit businesses); Ronald Colombo, *The Naked Private Square*, 51 HOUS. L. REV. (forthcoming Fall 2013) (manuscript at 79), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2173801 ("It is time to connect the dots, and explicitly recognize the ability of for-profit corporations to invoke the protections of the Free Exercise Clause.").

treat for-profit businesses as capable of forming and acting on subjective religious, philosophical, or ethical beliefs? Those opposing religious liberty rights for profit makers build their argument on a categorical distinction between nonprofit and for-profit entities, and a strict separation between business owners and their businesses.²⁵ Do we treat the distinction between nonprofits and for-profits as categorical and determinative in other areas of the law? Do we generally treat business owners themselves as completely insulated from penalties imposed on their businesses?

This Article will conduct the analysis across five different contexts: corporate ethical decision making, criminal law, Title VII discrimination law, tax law, and constitutional law. Understanding how the law treats for-profit businesses in these varied contexts will shed light on whether there is something inherent in the nature of operating a for-profit business which precludes religious liberty claims by businesses and their owners.

When this type of broad analysis is conducted, a very strong argument emerges that profit-making businesses and their owners are capable of engaging in protected religious exercise under federal law. For-profit businesses are widely understood as capable of forming subjective intentions for their actions.²⁶ The law recognizes this capability in various ways: businesses are allowed to act on ethical principles, are capable of forming mental intent for crimes, and are held liable for racial, sexual, or religious discrimination. The law also acknowledges that for-profit businesses can speak with a particular viewpoint.²⁷ There is no basis to view these same entities as incapable of forming and acting upon beliefs about religion. Observable facts confirm that at least some businesses take actions based on religious beliefs. Examples include closing on the Jewish Sabbath, seeking out loans that comply with Islamic law, or urging the public to accept Jesus Christ as Lord and Savior.²⁸ These actions are manifestly exercises of religion.²⁹

The fact that the organization urging the public to accept Jesus Christ as Lord and Savior also generates profits does not make the evangelization any less an exercise of religion. In fact, the for-profit/nonprofit distinction carries little or no weight in most areas of the law, including constitutional law.³⁰ Where the distinction matters at all, it is often just one factor among many.

²⁵ See, e.g., Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1547 (2012) (arguing that “[w]ithin for-profit businesses, even though moral convictions might come into play, the profit motive (in some cases, an obligation to maximize shareholder wealth) must drive decisionmaking”).

²⁶ See *infra* Part III.

²⁷ See *infra* Part III.

²⁸ See *infra* Part I.B.

²⁹ See, e.g., *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 876-78 (1990) (noting that the free exercise of religion “first and foremost” includes “the right to believe and profess whatever religious doctrine one believes”), *superseded by statute*, Religious Land Use & Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* *Sossamon v. Texas*, 131 S. Ct. 1651, 1655-56 (2011).

³⁰ See *infra* Part II.E.

The distinction does not operate in ways that suggest profit making is categorically incompatible with religious exercise. Moreover, many areas of the law—including corporate criminal law, Title VII, and tax law—operate on the assumption that business owners will be sensitive to pressures imposed on their businesses. There is no reason to believe for-profit businesses behave any differently in the religious liberty context, or that religious business owners will not feel pressure to abandon their religious practices when the government penalizes their businesses.

For these reasons, the government's argument against religious liberty for profit-making businesses and their owners should be rejected. Denying religious liberty in this context would require abandoning longstanding legal principles, breaking with our usual treatment of for-profit businesses and their owners, and ignoring the real-world practice of many religions and businesses. The better course is to protect religious exercise wherever it occurs regardless of the identity, ownership structure, or tax status of the party engaged in the exercise. In truth, this is the only course permitted under the Free Exercise Clause and federal religious freedom laws.

Part I of this Article addresses the factual question whether for-profit businesses and their owners engage in the exercise of religion by looking at examples of actual businesses and religious teachings. Part II explores the law's treatment of for-profit businesses, their owners, and the for-profit/non-profit distinction in other areas of the law to determine whether there is something about for-profit businesses that is incompatible with religious exercise. In light of Parts I and II, Part III considers the argument from the HHS Mandate cases that for-profit businesses and their owners cannot exercise religion. Part III concludes that both for-profit businesses and their owners can exercise religion and are protected by federal religious liberty laws.

I. RELIGION AND BUSINESS IN PRACTICE

This Part examines whether for-profit businesses actually do “exercise” religion, as that concept is generally understood in religious liberty law. The analysis proceeds in three parts. Part I.A addresses the legal understanding of religious exercise as an act or abstention based on a religious belief. Part I.B briefly considers three religious traditions to examine whether they in fact impose religious requirements on believers' profit-making activities. Part I.C. presents three examples of modern for-profit businesses that take actions that seem to qualify as religious exercise under federal law.

A. *What Is a “Religious Exercise” Under Federal Law?*

Both the First Amendment and federal religious liberty laws protect the “exercise” of religion.³¹ The Supreme Court has explained that the free exercise of religion “means, first and foremost, the right to believe and profess whatever religious doctrine one desires.”³² The Free Exercise Clause prohibits the government from compelling affirmation of any particular religious belief,³³ punishing expression of disfavored religious doctrines,³⁴ or giving its power to any side of controversies over religious authority or dogma.³⁵

The “exercise of religion,” however, is broader than the freedom of belief and profession. The Court has explained that exercising religion often involves “not only belief and profession but the performance of (or abstention from) physical acts” including “proselytizing” or “abstaining from certain foods or certain modes of transportation.”³⁶ The Court has thus upheld as religious “exercise” religiously motivated decisions to abstain from working on the Sabbath,³⁷ to keep one’s children out of public schools after a certain age,³⁸ and to refrain from manufacturing items that other people may later use in war.³⁹ The exercise of religion is not limited to actions or abstentions *required* by a person’s religion, but rather includes actions and abstentions *motivated* by religion.⁴⁰ Federal statutory law makes clear “religious

³¹ U.S. CONST. amend. I; Religious Freedom Restoration Act, 42 U.S.C. § 2000cc(a)(1) (2006) (imposing a compelling interest test when government imposes a “substantial burden” on religious exercise); Title VII, 42 U.S.C. § 2000c (2006) (barring employers from discriminating against an employee based on his or her religious practices or beliefs).

³² *Smith*, 494 U.S. at 876-78.

³³ *See, e.g.,* *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

³⁴ *See, e.g.,* *United States v. Ballard*, 322 U.S. 78, 86-88 (1944).

³⁵ *See, e.g.,* *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 445 (1969).

³⁶ *Smith*, 494 U.S. at 877-78.

³⁷ *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

³⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

³⁹ *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 720 (1981).

⁴⁰ *See, e.g., Smith*, 494 U.S. at 877 (“acts or abstentions . . . engaged in for religious reasons, or . . . because of the religious belief that they display”); *id.* at 881 (“religiously motivated action”); *id.* at 886 (“Nor is it possible to . . . requir[e] a ‘compelling state interest’ only when the conduct prohibited is central to the individual’s religion.”). Other decisions by the Court confirm that religious exercise extends to religiously motivated conduct. *See, e.g., Yoder*, 406 U.S. at 215 (“[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief.”); *Sherbert*, 374 U.S. at 404 (condemning a state ruling that forced a Seventh Day Evangelist to choose between “following the precepts of her religion and forfeiting benefits”); *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (“action . . . in accord with one’s religious convictions”); *Cleveland v. United States*, 329 U.S. 14, 20 (1946) (noting that an act “motivated by a religious belief” is religious exercise). These decisions are discussed in a letter from the Congressional Research Service submitted during congressional consideration of RFRA. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 230-36 (1994) (citing Letter from the Am. Law Div. of the Cong. Research Serv. to the Hon. Stephen J. Solarz (June 11,

exercise” is not limited to actions compelled by religion. Rather, “religious exercise” extends to “*any* exercise of religion, *whether or not compelled by*, or central to, a system of religious belief.”⁴¹

Thus the key to determining whether a particular action is a religious exercise is determining whether religious belief motivates the act.⁴² If the conduct or abstention occurs because of the actor’s religious beliefs, it is a religious exercise.⁴³ If the action is not based on religious beliefs, it is not a religious exercise.⁴⁴

B. *Religious Teachings on Religious Exercise, Profit Making, and Corporations*

In order for a profit-making business and its owner to plausibly assert they are engaged in religious exercise, they must first show that their religious beliefs have something to say about the conduct of business. If the owner’s religion imposes no requirements on business conduct, a claim of religious exercise in that sphere becomes significantly less likely.⁴⁵

The United States is home to a wide variety of different faiths.⁴⁶ While it would be impossible to catalogue the full range of views on religion and moneymaking across the American religious spectrum—or even within any particular religious tradition—this Section will briefly examine some teachings on the subject from Judaism, Christianity, and Islam. The goal here is not to give a comprehensive analysis of the faiths described. The goal is simply to examine whether these traditions have teachings that impose requirements on their adherents’ moneymaking activities, such that claims of religious liberty in the profit-making context are plausible.

1992), reprinted in *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 131-33 (1992)) (discussing meaning of religious exercise under the Free Exercise Clause and RFRA).

⁴¹ 42 U.S.C. § 2000cc-5(7)(A) (2006) (emphasis added). Similarly, Title VII defines “religion” to “include[] all aspects of religious observance and practice, as well as belief.” *Id.* § 2000c(j).

⁴² *Yoder*, 406 U.S. at 215 (“A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”).

⁴³ See Laycock & Thomas, *supra* note 40, at 232 (noting that RFRA’s “legislative history is relatively clear” that both “supporters and opponents agreed that the bill would protect conduct that was religiously ‘motivated’”).

⁴⁴ *Yoder*, 406 U.S. at 215.

⁴⁵ See *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 716-17 (1981) (quoting *Sherbert*, 374 U.S. at 404).

⁴⁶ See THE PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 10 (2008) [hereinafter PEW FORUM], available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf> (“The Landscape Survey details the great diversity of religious affiliation in the U.S. at the beginning of the 21st century. The adult population can be usefully grouped into more than a dozen major religious traditions that, in turn, can be divided into hundreds of distinct religious groups.”).

While the religious teachings below differ in many respects, important similarities emerge. First, each faith imposes religious obligations on the conduct of business. Second, each religion rejects the notion of separation whereby a business owner is not morally responsible for the actions of the business. Third, each prohibits businesses from providing harmful products or services that others would use to engage in harmful conduct.

1. Judaism

In the Old Testament, financial success at times appears to be a manifestation of divine favor, a reward for those who faithfully follow God's will.⁴⁷ Judaism's founding thus reflects a connection between religion and wealth, as God made Abraham, Isaac, Jacob, and Solomon wealthy, at least in part because they obeyed God.⁴⁸

Judaism views earning a living as a necessary aspect of the human experience.⁴⁹ The Jewish faith dictates that wealth, as a blessing from God, must be earned and used in accordance with religious laws.⁵⁰ Therefore, Jewish businesses must be conducted with honesty and integrity.⁵¹ Some Jewish authorities believe this means that Jewish businesses must avoid providing materials that are harmful to human health, such as tobacco.⁵² Additionally, Jewish law prohibits working, as well as causing others to work, during the Sabbath.⁵³ Thus, a religiously observant Jew must close his business from Friday at sundown until Saturday at sundown. The devout Jew may not circumvent Jewish law by hiring non-Jews to work these hours.⁵⁴ Devout Jews view following these religious requirements while engaging in profit-making activities as critically important.⁵⁵ The Talmud, a sacred Jewish text, "suggests that

⁴⁷ Ronald M. Green, *Guiding Principles of Jewish Business Ethics*, 7 BUS. ETHICS Q. 21, 23 (1997); see also Genesis 24:35 (New Rev. Standard Version) ("The Lord has greatly blessed [Abraham], and he has become wealthy . . .").

⁴⁸ Meir Tamari, *The Challenge of Wealth: Jewish Business Ethics*, 7 BUS. ETHICS Q. 45, 48 (1997).

⁴⁹ Green, *supra* note 47, at 22-23.

⁵⁰ See Tamari, *supra* note 48, at 48 ("Holders of wealth are not possessors but stewards."). In recognition that all wealth stems from God, an old ritual required Jewish farmers to present their first fruits of the season to God. *Id.* at 49.

⁵¹ Green, *supra* note 47, at 23.

⁵² *Id.* at 29.

⁵³ See *The Shabbat Laws*, CHABAD.ORG, http://www.chabad.org/library/article_cdo/aid/95907/jewish/The-Shabbat-Laws.htm (last visited Oct. 4, 2013); see also Elliot N. Dorff, *Jewish Businesses Open on Shabbat and Yom Tov: A Concurring Opinion*, RABBINICAL ASSEMBLY, 64, 65 (1995), http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/tcshuvot/19912000/dorff_business.pdf.

⁵⁴ Dorff, *supra* note 53, at 65 ("[I]t would be forbidden for the Jew to gain from the non-Jew's sales on those days.").

⁵⁵ *Id.* at 64.

the first question asked in the world to come is—‘have you been honorable in business?’”⁵⁶

In applying religious principles to profit making, Judaism does not distinguish between the business owner’s actions and the actions of the business itself.⁵⁷ Rather, Jewish law emphasizes that the profit-making business corporation is not separate from the individual shareholder or owner.⁵⁸ Judaism rejects the notion of “separation of identity” on religious matters, because such separation “creates moral problems since the same person who in his private life would not think of stealing or robbing or breaking the law sees nothing wrong with doing exactly those things in his role as a director or an official of a corporation.”⁵⁹

In similar fashion, Judaism prohibits even Jewish *consumers* from facilitating a business owner’s violation of Jewish law.⁶⁰ For this reason, Jews are instructed not to purchase bread from Jewish-owned businesses immediately after Passover. The Jewish business owner should not possess grains during Passover, and the Jewish customer is forbidden from rewarding the Jewish business’s violation of that law.⁶¹ The corporate form does not insulate the Jewish business owner from the conduct of the business as a religious matter, nor does it insulate the Jew as a customer. Just as religious requirements prohibit the Jewish customer from purchasing bread from an individual Jewish storeowner, she also cannot purchase from a large corporate store owned by Jewish shareholders.⁶²

⁵⁶ Moses L. Pava, *Developing a Religiously Grounded Business Ethics: A Jewish Perspective*, 8 BUS. ETHICS Q. 65, 65 (1998) (citing Shabbat 31a).

⁵⁷ *Id.* at 80.

⁵⁸ *Id.*

⁵⁹ *Business Ethics: The Role of Wealth*, JEWISH VIRTUAL LIBRARY, http://www.jewishvirtuallibrary.org/jsourc/judaica/cjud_0002_0004_0_03774.html (last visited Oct. 4, 2013) (“Judaism . . . cannot accept the separation between the corporation and the individual when it comes to abrogate the responsibilities of the latter as seen in Jewish business law. . . . Jews are not allowed to own leavened bread during Passover, so a corporation which has a majority of Jewish shareholders would likewise be forbidden from possessing such leavened bread. In the same way, the view that since the corporation is not a human being, the biblical injunction against interest does not apply to loans between two corporations or between an individual and a corporation has been rejected by most rabbinic authorities. So, a corporation whose shareholders are Jewish would suffer the same restriction on lending money at interest as do individual Jews. This means that the limitations on business activities imposed by Jewish moral teachings and rabbinic law, and the social obligations flowing from the possession of wealth, which apply to the individual, are binding on the corporation as well.” (citation omitted)).

⁶⁰ See *Chometz After Pesach*, YOUNG ISRAEL SHOMRAI EMUNAH OF GREATER WASH., <http://wp.yisc.org/chometz-after-pesach/> (last visited Oct. 4, 2013).

⁶¹ See *id.* (“All Jews are prohibited from benefitting from chametz owned by another Jew over Pesach. . . . One should not purchase bread or other chametz for 2 weeks after Pesach from a store owned by Jews that did not sell their chametz before Pesach or from a store which purchases chametz from Jewish distributors that did not sell their chametz before Pesach. This currently includes Giant, Safeway, Superfresh and Target.” (emphasis omitted)).

⁶² See *id.*

These teachings suggest that at least some members of the Jewish faith do not view profit making as inherently separate from religious exercise. To the contrary, some observant Jews are likely to feel required to follow a host of religious requirements on their profit-making activities. And these requirements apply equally to a Jewish business owner and the Jewish-owned business itself.

2. Christianity

Christian scriptures offer a variety of messages about the proper relationship between profit making and religion. In one part of Matthew's Gospel, for example, Jesus tells the parable of the talents in which a wealthy man leaves three servants in charge of varying sums of money.⁶³ Two of the servants "put his money to work" and doubled their sums.⁶⁴ The third "went off, dug a hole in the ground and hid his master's money."⁶⁵ When the master returned, the two profit-making servants were celebrated, while the third was cast out "into the darkness, where there [was] weeping and gnashing of teeth."⁶⁶

Other parts of the same Gospel, however, indicate a much less favorable view of profit seeking. For example, Jesus expels people who are "buying and selling" from the temple and warns them not to make the temple a "den of robbers."⁶⁷ Jesus also preaches that it is not possible to "serve both God and Money,"⁶⁸ that it is exceedingly hard for a rich person to enter heaven,⁶⁹ and that his followers should sell off all their possessions and give the money to the poor.⁷⁰

As might be expected, these very different statements in the Gospels give rise to a variety of approaches to religion and profit making among modern Christian groups. Christian approaches to the issue run the gamut. Some preach that God wants to show his people how to be wealthy.⁷¹ There are also

⁶³ *Matthew* 25:14 to :30 (New Rev. Standard Version).

⁶⁴ *Matthew* 25:16 to :17 (New Int'l Version).

⁶⁵ *Id.* at 25:14 to :18.

⁶⁶ *Id.* at 25:21 to :30.

⁶⁷ *Id.* at 21:12 to :13 (internal quotation marks omitted).

⁶⁸ *Id.* at 6:24

⁶⁹ *Id.* at 19:23 to :24.

⁷⁰ *Matthew* 19:21.

⁷¹ Prosperity Theology is one example of this belief. See JOEL OSTEEN, *YOUR BEST LIFE NOW: 7 STEPS TO LIVING AT YOUR FULL POTENTIAL* 3-4 (2004); ORAL ROBERTS, *GOD'S FORMULA FOR SUCCESS AND PROSPERITY* 12-13 (Abundant Life Publ'n rev. ed. 1966) (1955); *GOD'S PROMISE OF WEALTH*, <http://godswalth.webs.com> ("Welcome to God's Promise of Wealth. . . . [T]he underlying principle for this site is at Deuteronomy 8-18. His words are very easy to understand and lay the foundation for us amassing wealth. He tells us, 'But remember the Lord your God, for it is He who gives you the ability to produce wealth.'") (last visited Oct. 4, 2013).

Christian religious orders that take a vow of poverty, believing that forsaking worldly wealth makes it easier for them to commune with God.⁷² Intense discussion of the proper relationship between Christianity and profit making remains ongoing.⁷³

One group with a particularly well-developed set of teachings on this issue is the Catholic Church, the largest Christian denomination in the United States.⁷⁴ Catholic teaching makes clear that business and profit making are not viewed as inconsistent with religious exercise.⁷⁵ Rather, “[t]he vocation of the businessperson is a genuine human and Christian calling.”⁷⁶ When properly managed, profit-making businesses “actively enhance the dignity of employees and the development of virtues such as solidarity, practical wisdom, justice, discipline, and many others.”⁷⁷ In this regard, Christian business leaders are urged to pursue their vocation, “motivated by much more than financial success.”⁷⁸

The Church views the business leader’s development of the corporate business organization as vocational: “Business leaders have a special role to

⁷² See, e.g., *Vows*, SISTERS OF CHARITY OF OUR LADY MOTHER OF THE CHURCH, <http://sister-sofcharity.com/vows> (last visited Oct. 4, 2013) (“By her vow of poverty, following in the footsteps of Christ, a Sister professes to live a life that is poor in fact and in spirit. It is a life of labor lived in moderation and simplicity, rejecting the lure of earthly riches, a life that proclaims to the world that God is the *one* thing necessary.”).

⁷³ For example, Rick Warren, a popular evangelical pastor, presented a series of sermons on the subject titled “Doing Business With God” in late 2012. See Rick Warren, *Doing Business with God*, SADDLEBACK RESOURCES, http://www.saddlebackresources.com/024300_Doing-Business-With-God-C3202.aspx (last visited Oct. 4, 2013); see also RANDY ALCORN, *MONEY, POSSESSIONS AND ETERNITY* 86 (rev. ed. 2003) (encouraging Christians to “say no to prosperity theology, obey Christ, and share your abundance with others”); LARRY BURKETT, *BUSINESS BY THE BOOK: THE COMPLETE GUIDE OF BIBLICAL PRINCIPLES FOR THE WORKPLACE* 4 (1998) (promoting a business philosophy that is “more concerned with eternity than with profits”); TIMOTHY KELLER & KATHERINE LEARY ALSDORF, *EVERY GOOD ENDEAVOR: CONNECTING YOUR WORK TO GOD’S WORK* 19 (2012) (“[O]ur work can be a calling only if it is reimagined as a mission of service to something beyond merely our own interests.”).

⁷⁴ See PEW FORUM, *supra* note 46, at 12-13.

⁷⁵ See generally PONTIFICAL COUNCIL FOR JUSTICE & PEACE, *VOCATION OF THE BUSINESS LEADER: A REFLECTION* (3d ed. 2012) [hereinafter *VOCATION OF THE BUSINESS LEADER*], available at <http://www.stthomas.edu/cathstudies/cst/VocationBusinessLead/VocationTurksonRemar/VocationBk3rdEdition.pdf> (summarizing Catholic teaching on religion and business). Pope Benedict XVI also addressed the relationship between business and religion in his 2009 papal encyclical “Charity in Truth.” Under the heading of “The Development of People—Rights and Duties—The Environment,” the Pope explained that the “Church’s social teaching is quite clear on the subject” that “the economy, in all its branches, constitutes a sector of human activity” and therefore is subject to religious ethical norms. Encyclical Letter, *Caritas in Veritate*, of the Supreme Pontiff Benedict XVI to the Bishops, Priests and Deacons, Men and Women Religious, the Lay Faithful, and All People of Good Will on Integral Human Development in Charity and Truth ¶ 45 (June 29, 2009), available at http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html.

⁷⁶ *VOCATION OF THE BUSINESS LEADER*, *supra* note 75, at 5.

⁷⁷ *Id.* at 4.

⁷⁸ *Id.* at 3.

play in the unfolding of creation . . . [by] help[ing] to shape organisations that will extend this work into the future.”⁷⁹ By creating and sustaining corporate entities, business leaders “are participating in the work of the Creator through their stewardship of productive organisations” that the Church views as an “awesome responsibility of their vocation.”⁸⁰ At the same time, Catholic business leaders are to avoid thinking of themselves as morally separate from the actions of their businesses.⁸¹ Church teaching urges business leaders to overcome this divide and “integrate the gifts of the spiritual life” into their business dealings.⁸²

The Vatican teaches that principles of justice, rather than mere profit maximization, should guide Catholic business organizations.⁸³ Businesses and their leaders are also urged to “find ways to make a just distribution of . . . wealth”—not only to shareholders—but also “to employees (following the principle of the right to a just wage), customers (just prices), owners (just returns), suppliers (just prices) and the community (just tax rates).”⁸⁴ Businesses must avoid actions that undermine the common good because “we are all really responsible for all.”⁸⁵ Therefore, “[a]t the very least, a good business

⁷⁹ *Id.* at 5.

⁸⁰ *Id.* The Church views corporations and companies as “communit[ies] of persons.” *Id.* at 18 (“[T]he purpose of business, [as] Blessed John Paul II stated ‘is not simply to make a profit, but is to be found in its very existence as a *community of persons* who in various ways are endeavouring to satisfy their basic needs, and who form a particular group at the service of the whole of society.’ . . . When we consider a business organization as a community of persons, it becomes clear that the bonds which hold us in common are not merely legal contracts or mutual self-interests, but commitments to real goods, shared with others to serve the world.” (footnote omitted)).

⁸¹ *Id.* at 6 (stating that “[d]ividing the demands of one’s faith from one’s work in business is a fundamental error” and leads to a “divided life” that “is fundamentally disordered, and thus fails to live up to God’s call.”).

⁸² VOCATION OF THE BUSINESS LEADER, *supra* note 75, at 3. See also Warren, *supra* note 73 (explaining that profits should not be an end in themselves and that Christians should avoid separating their faith from their business dealings).

⁸³ VOCATION OF THE BUSINESS LEADER, *supra* note 75, at 17 (“While profitability is an indicator of organisational health, it is neither the only one, nor the most important by which business should be judged. Profit is necessary to sustain a business; however, ‘once profit becomes the exclusive focus, if it is produced by improper means and without the common good as its end, it risks destroying prosperity and creating poverty.’ Profit is like food. An organism must eat, but that is not the overriding purpose of its existence. Profit is a good servant, but it makes a poor master.” (footnotes omitted)).

⁸⁴ *Id.* at 18 (“Just as financial resources are important, so too is stewardship of the environment, both physical and cultural. . . . As collaborators with God in the unfolding of creation, . . . we have a duty to respect and not to attack the world around us.”).

⁸⁵ *Id.* at 11 (quoting Encyclical Letter, *Sollicitudo Rei Socialis*, from Pope John Paul II to the Bishops, Priests, Religious Families, Sons and Daughters of the Church, and All People of Good Will for the Twentieth Anniversary of *Populorum Progressio* ¶ 38 (Dec. 30, 1987), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis_en.html) (internal quotation marks omitted); see also *id.* (asserting that “each of us has a duty to avoid actions which impede the flourishing of others”). In explaining how businesses should seek human

carefully avoids any actions that undermine the local or global common good.”⁸⁶ This prohibition on harming the common good includes avoiding providing products that can “be detrimental to human well-being as, for example, in the sale of non-therapeutic drugs, pornography, gambling, violent video games, and other harmful products.”⁸⁷

Thus, as with Judaism, these teachings suggest at least some Christians do not view profit making as inherently separate from religious exercise. To the contrary, at least some Christians presumably feel required to follow a host of religious requirements on their profit-making activities and understand those requirements to extend to the corporations they own and operate.

3. Islam

Like Judaism and Christianity, Islam imposes religious requirements on business owners and their for-profit businesses. These requirements extend to issues concerning pricing and profits, general treatment of customers, sales of forbidden goods, and borrowing or lending money at interest.

Islam views business as having not merely economic functions, but also social and religious functions.⁸⁸ While pursuit of profits is permitted and encouraged,⁸⁹ profitability must always be balanced with other social and religious needs, such as providing efficient and courteous service.⁹⁰ Profitability

flourishing, the Church teaches as a “foundational ethical principle for business” that “each person, regardless of age, condition, or ability, is an image of God and so endowed with an irreducible dignity or value. Each person is an end in him or herself, never merely an instrument to be valued only for its utility—a *who*, not a *what*; a *someone*, not a *something*. This dignity is possessed simply by virtue of being human. It is never an achievement, nor a gift from any human authority; nor can it be lost, forfeited, or justly taken away.” *Id.* (footnote omitted).

⁸⁶ *Id.* at 12. The obligation to avoid having any involvement at all in someone else’s sinful acts has long been the subject of Protestant Christian teachings as well. See, e.g., JOHN CALVIN, COMMENTARIES ON THE EPISTLE OF PAUL TO THE GALATIANS AND EPHESIANS 262 (William Pringle trans., 2009), available at http://www.ccel.org/ccel/calvin/comment3/comm_vol41/hm/iv.vi.iii.htm (“It is not enough that we do not, of our own accord, undertake anything wicked. We must beware of joining or assisting those who do wrong. In short, we must abstain from giving any consent, or advice, or approbation, or assistance; for in all these ways we have fellowship.”).

⁸⁷ VOCATION OF THE BUSINESS LEADER, *supra* note 75, at 14.

⁸⁸ NIK MOHAMED AFFANDI BIN NIK YUSOFF, ISLAM & BUSINESS 85 (Ismail Noor ed., 2002).

⁸⁹ Zubair Hasan, *Theory of Profit: The Islamic Viewpoint*, 1 J. RES. ISLAMIC ECON. 3, 8 (1983) (“Islam exhorts the believers to excel in this life no less than in the life hereafter. It urges them to engage in almost every material pursuit, especially trade and eulogizes profit and God’s bounty.”). The Qur’an encourages Muslims to generously spend their wealth. See THE MEANING OF THE HOLY QUR’AN 105 (Abdullah Yusuf Ali trans., 9th ed. 1997) (Surah 2:254: “Spend out of (the bounties)/We have provided for you . . .” (footnote omitted)); *id.* at 1697 (Surah 104—Al Humazah: “Woe to the miser who blocks up the channels/Of use and service and dams up his wealth,/As if he could remain in possession/For all time! The Fire of Wrath will envelop them/And wither up their hearts and minds, and consume/That largeness of life which is the portion of mankind.”); YUSOFF, *supra* note 88, at 85.

⁹⁰ YUSOFF, *supra* note 88, at 85.

must also be balanced against providing only beneficial, good-quality, and reasonably priced goods to consumers.⁹¹ Practiced in this manner, Islamic business “is an essential and indispensable service to mankind.”⁹²

One of these requirements is the obligation to conduct business with absolute honesty.⁹³ Muslims must observe “absolute honesty in all business transactions in order to obtain Allah’s blessings.”⁹⁴ Muslim business owners who conduct business honestly “not only create economic prosperity and social harmony but also bring them[selves] closer to Allah.”⁹⁵ Allah fixes prices charged to customers through the market mechanism of supply and demand.⁹⁶ Islamic religious teachings also impose limitations on the types of loans Muslims may offer or accept. In particular, the Qur’an prohibits lending or borrowing money at interest.⁹⁷

Islamic rules for business also include a prohibition on providing illicit goods to others. The rationale behind this prohibition is “whatever is conducive towards what is prohibited is itself forbidden.”⁹⁸ Muslim businesses cannot be “avenues for what is forbidden.”⁹⁹ Thus, a Muslim is not permitted to sell alcohol to others in his store, because Allah prohibits the use of alcohol.¹⁰⁰ Likewise, Islam prohibits providing other illicit goods, such as pigs and improperly slaughtered animals. “Business is meant by Allah to provide goods and services beneficial to mankind” and therefore “prohibits transactions in forbidden goods and services” with others.¹⁰¹

⁹¹ *Id.*; see also Hasan, *supra* note 89, at 8 (“Islam aims at shaping all exchange relations among people on the principle of cooperation, mutual benefit, and fair play.”).

⁹² YUSOFF, *supra* note 88, at 85.

⁹³ THE MEANING OF THE HOLY QUR’AN, *supra* note 89, at 112 n.314 (“Islam will have nothing to do with tainted property. Its economic code requires that every gain should be honest and honourable.”).

⁹⁴ YUSOFF, *supra* note 88, at 88; see also Hasan, *supra* note 89, at 8 (“[Islam] advocates absolute honesty in business to the extent that one is enjoined not to falsely praise his merchandise, but to reveal to the customer.”).

⁹⁵ YUSOFF, *supra* note 88, at 85.

⁹⁶ *Id.* at 88 (“This is a concept of business also accepted by the West. The difference is that Western economists regard the forces of supply and demands as ‘an invisible hand’ whereas Islam recognises it as Allah’s Will.”).

⁹⁷ THE MEANING OF THE HOLY QUR’AN, *supra* note 89, at 115 nn.324-25 (stating that “usury is condemned and prohibited in the strongest possible terms” because “a dependence on usury would merely encourage a race of idlers, cruel blood-suckers, and worthless fellows”); Hasan, *supra* note 89, at 9 (“Barring a few discordant voices, learned opinion in the Muslim world holds, as an axiom, that the prohibition on *riba* is total and complete in Islam.”). But see Mohammad F. Fadel, *Riba, Efficiency, and Prudential Regulation: Preliminary Thoughts*, 25 WIS. INT’L L.J. 655, 656 (2008) (“It is now generally recognized, at least among scholars, that Islamic law permits numerous transactions which at the very least incorporate implicit interest in their structure.”).

⁹⁸ YUSOFF, *supra* note 88, at 231.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 230 (“The Prophet stated: *When Allah prohibits a thing, He prohibits (giving and receiving) the price of it as well.* (Ahmad and Abu Daud) *Surely Allah and His Messenger have prohibited the sale of wine, the flesh of dead animals, swine and idols.* (Al-Bukhari and Muslim).”).

¹⁰¹ *Id.*

C. *Three Examples of Religious Exercise by Profit-Making Corporations and Their Owners*

In light of the religious teachings set forth above, it is not surprising that there are some businesses and business owners who engage in religiously motivated actions during their profit-making activities. Some of these examples are unsurprising. Tyndale Publishing House, Inc., for example, publishes Bibles.¹⁰² Mardel Christian and Education is a Christian-themed bookstore.¹⁰³ Although not legally organized as nonprofit entities, these businesses are religious in nature and necessarily involve some religiously motivated conduct. Religious beliefs seem very likely to motivate everyday decisions. For example, these businesses must decide which Bible translations to publish and which religious products to carry in a religious store.

This Section will consider three somewhat less obvious examples of profit-making businesses that purport to exercise religion: a gas station, a grocery store, and a craft store. Is it possible for businesses of this nature to exercise religion in the course of their profit-making endeavors? The business descriptions set forth below suggest that it is possible, and that at least some profit-making businesses engage in what can only fairly be called exercises of religion.

1. Rio Gas Station and Heimeshe Coffee Shop, Brooklyn, New York

As described above, Jewish religious sources impose several religious requirements for the conduct of business.¹⁰⁴ Observant Jews seeking to comply with such requirements must take certain actions, and avoid certain actions, in accordance with religious requirements. Rio Gas Station in the Borough Park section of Brooklyn, New York, is operated according to such requirements. Borough Park is an area heavily populated with Hasidic Jews. When the owner, an observant Jew, purchased the gas station in 2005, he turned one bay of the garage into a kosher coffee shop, Heimeshe Coffee Shop.¹⁰⁵

¹⁰² Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 111 (D.D.C. 2012).

¹⁰³ See *About Us*, MARDEL CHRISTIAN & EDUC., <http://www.mardel.com/about/> (last visited Oct. 4, 2013).

¹⁰⁴ See *supra* Part I.A.1.a.

¹⁰⁵ See Reuven Fenton, *B'klyn Gas Stop a Kosher Delight*, N.Y. POST (May 11, 2009, 5:35 AM), <http://nypost.com/2009/05/11/bklyn-gas-stop-a-kosher-delight/>. “Heimeshe” (or “heimish”) is Yiddish for “homey,” in reference to the atmosphere, although its meaning and usage has evolved. See *Heimish: What Does It Mean to You?*, YESHIVA WORLD, <http://www.theyeshivaworld.com/coffeeroom/topic/heimish-what-does-it-mean-to-you> (last visited Oct. 4, 2013).

The gas station/kosher coffee shop is run according to at least two religious requirements. First, it serves only food prepared according to Jewish kosher restrictions.¹⁰⁶ Second, it shuts down on for the Sabbath.¹⁰⁷ These requirements are followed because the owner is an observant Jew who understands that his faith requires him to run his business in this manner.¹⁰⁸

2. Abdi Aden, Afrik Grocery, Inc., and Minneapolis's Alternative Financing Program

Abdi Aden is a Somali immigrant who lives in Minneapolis, Minnesota.¹⁰⁹ In 1998, he fled a civil war in Somalia that took the lives of members of his family.¹¹⁰ After traveling thousands of miles to Minneapolis, Aden set out to establish a small grocery store, just as he had owned in Mogadishu.¹¹¹

Aden now owns Afrik Grocery and Halal Meat through a for-profit corporation, Afrik Grocery, Inc., which he established in 2004. Aden is the sole shareholder and chief executive officer.¹¹² Aden operates Afrik Grocery in accordance with his Muslim religious beliefs.¹¹³ Aden's religious obligations prohibit him from allowing his business to participate in activities that would violate Islamic law.¹¹⁴ Thus, the halal meat at Afrik is prepared in accordance with Islamic requirements derived from the Qur'an.¹¹⁵ Likewise, Afrik Grocery cannot sell items like liquor, pork, or pornographic magazines.¹¹⁶ Aden's Muslim faith forbids him from providing these products to anyone else, as well as from personally consuming them.¹¹⁷

Aden's obligation to run Afrik Grocery according to his Muslim faith also controls the types of business loans his corporation may accept.¹¹⁸ In

¹⁰⁶ Fenton, *supra* note 105.

¹⁰⁷ *Id.*

¹⁰⁸ Telephone Interview with Manager, Rio Gas Station, Brooklyn, N.Y. (Feb. 26, 2013).

¹⁰⁹ Telephone Interview with Abdi Aden, Owner, Afrik Grocery, Inc., Minneapolis, Minn. (Feb. 26, 2013).

¹¹⁰ Gwendolyn Freed, *Careers Set Aside to Get Ahead in Life: East African Immigrants Often Work Far Below Their Skills to Get a Start Here*, MINNEAPOLIS STAR TRIB., June 30, 2003, at A1, available at 2003 WLNR 14268362; see also Mark Anderson, *Nonprofit Lenders Boost Immigrant Entrepreneurs*, DULUTH NEWS-TRIB. (June 3, 2008), available at 2008 WLNR 10455846.

¹¹¹ Anderson, *supra* note 110.

¹¹² See Business Record of Afrik Grocery Inc., MINN. SEC. OF STATE, <http://mblsportal.sos.state.mn.us/Business/SearchDetails?filingGuid=c661d22d-88d4-e011-a886-001cc94ffc7f> (last visited Oct. 4, 2013) (showing formation of Afrik as a "domestic business" corporation in 2004); Telephone Interview with Aden, *supra* note 109.

¹¹³ Telephone Interview with Aden, *supra* note 109.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

particular, due to his religious obligations, Aden is not permitted to allow Afrik Grocery, Inc. to take a loan that would require payment of interest.¹¹⁹

Fortunately for Aden, Minneapolis is home to a large number of Muslim immigrants, and the city has taken steps to make loans available that comply with Islamic law.¹²⁰ Minneapolis has partnered with a local nonprofit, the African Development Center, to create the Alternative Financing Program.¹²¹ The Alternative Financing Program matches loans provided by small lenders and structures the loans in a way that is permissible under Islamic law.¹²² The program is not limited to Muslims but is open to applicants of any faith or no faith at all.¹²³ The loans are structured in a way that avoids the Islamic prohibition on earning or paying interest, while still providing a fair market rate of return for the lender.¹²⁴ According to the city, most loans are for between \$5,000 and \$10,000 and are repaid within three years.¹²⁵

In 2005, Aden wanted to move Afrik Grocery down the street and expand his store to better serve his customers.¹²⁶ In particular, Aden wanted to be able to expand his halal meat offerings but needed a loan that would comply with Islamic religious requirements to fund the expansion.¹²⁷ Accordingly, Afrik Grocery took out a loan from Minneapolis's Alternative Financing Program.¹²⁸ Aden was able to both secure the financing his business needed and to keep his business compliant with Islamic law.¹²⁹ Aden borrowed \$42,000, expanded and relocated his store, and paid back the loan in full in 2009.¹³⁰ Aden and Afrik Grocery clearly benefited from the availability of a business loan program recognizing that some for-profit businesses engage in religious exercise by conducting themselves in accordance with religious requirements.¹³¹

¹¹⁹ Telephone Interview with Aden, *supra* note 109.

¹²⁰ See Rachel Stassen-Berger, *Banking on Trust*, ST. PAUL PIONEER PRESS, Apr. 20, 2000, at 1B, available at 2000 WLNR 2239313 (noting "evidence points to a huge boom" of immigrant businesses in Minneapolis).

¹²¹ Nick Sudheimer, *Minneapolis Helps Muslim Businesses Follow Sharia Law*, MINNESOTA DAILY (Feb. 7, 2012), <http://www.mndaily.com/2012/02/07/minneapolis-helps-muslim-businesses-follow-sharia-law>; Press Release, African Development Center, ADC Partners with Minneapolis on New Business Financing Program (Mar. 22, 2007), available at <http://www.adcminnesota.org/page/adc-updates/business-financing-program>.

¹²² Sudheimer, *supra* note 121.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Sudheimer, *supra* note 121.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Not incidentally, the City of Minneapolis also benefits from this program. According to the City, as of 2009, the Alternative Financing Program had made 54 loans, only one of which ended in default. *Id.*; Request from the Dept. of Cmty. Planning & Econ. Dev. to Council Member Lisa Goodman, Cmty.

3. The Green Family and Hobby Lobby Stores, Inc.

Like Abdi Aden, David Green started his business with a small loan from a local bank. Green used his \$600 loan to start a small frame company in 1970, which he originally operated out of his garage in Oklahoma.¹³² Today, Hobby Lobby Stores, Inc. is a craft store empire, with more than 500 stores, and more than 25,000 employees, spread over forty-five states.¹³³ The stores are enormously successful financially, with annual sales over \$2 billion.¹³⁴ In 2013, Green was listed as number seventy-nine in *Forbes* magazine's list of the wealthiest people in America, with a net worth of \$4.5 billion.¹³⁵

From its inception, Hobby Lobby has been a family business which the Green family runs according to their Christian beliefs.¹³⁶ The company's statement of purpose announces its commitment to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles."¹³⁷ The family members who run the company each sign a state-

Dev. Comm., and Council Member Betsy Hodges, Ways and Means/Budget Comm. 3 (Jan. 18, 2011), available at http://www.minneapolismn.gov/www/groups/public/@council/documents/webcontent/convert_272900.pdf. This compares favorably with the much higher default rate on small business loans, which the Small Business Administration estimated at approximately 12 percent in 2009. Sudheimer, *supra* note 121. Furthermore, these loans presumably help individual businesses, their owners, their employees, and their families to be more prosperous and productive citizens and less likely to need government assistance in other ways.

¹³² Suzanne Jordan Brown, *The Modest Billionaire*, CHARISMA MAG. (Oct. 5, 2012, 9:55 AM), <http://www.charismamag.com/life/business-finance/1476-the-modest-billionaire>.

¹³³ Press Release, Congressmen Diane Black, Jeff Fortenberry, and John Fleming, Black, Fortenberry, and Fleming Introduce Health Care Conscience Rights Act to Stop Obama Administration's Assault on Religious Freedom (Mar. 5, 2013), available at <https://black.house.gov/press-release/black-fortenberry-fleming-introduce-health-care-conscience-rights-act-stop-obama>; *Our Company*, HOBBY LOBBY, http://www.hobbylobby.com/our_company/ (last visited Oct. 4, 2013); *Our Stores*, HOBBY LOBBY, <http://www.hobbylobby.com/stores/stores.cfm> (last visited Oct. 4, 2013).

¹³⁴ Eric Marropodi, *Hobby Lobby Finds Way Around \$1.3-Million-a-Day Obamacare Hit—for Now*, CNN BELIEF BLOG (Jan. 11, 2013, 3:40 PM), <http://religion.blogs.cnn.com/2013/01/11/hobby-lobbys-1-3-million-obamacare-loophole/comment-page-41/>.

¹³⁵ *400 Richest Americans—David Green*, FORBES, <http://www.forbes.com/profile/david-green/> (last visited Oct. 4, 2013).

¹³⁶ See Verified Complaint at 2, *Hobby Lobby v. Sebelius*, 870 F.Supp.2d 1278 (W.D. Okla. 2012) (No. CIV-12-1000-HE) [hereinafter *Hobby Lobby Complaint*] (stating that the Green family's business operations "reflect their Christian faith in unmistakable and concrete ways" because they "believe[] they are obligated to run their businesses in accordance with their faith"). See also DAVID GREEN & DEAN MERRILL, *MORE THAN A HOBBY: HOW A \$600 START-UP BECAME AMERICA'S HOME & CRAFT SUPERSTORE* 198 (2005) ("There is a God, and he's not averse to business. He's not just a 'Sunday deity.' He understands margins and spreadsheets[,] competition and profits. Pleasing customers is important, but pleasing God through the way I run the business is even more important.").

¹³⁷ *Statement of Purpose*, HOBBY LOBBY, http://www.hobbylobby.com/our_company/purpose.cfm (last visited Oct. 4, 2013).

ment of faith and commitment, obligating them to conduct the business according to their religious beliefs and to “use the Green family assets to create, support, and leverage the efforts of Christian ministries.”¹³⁸

Hobby Lobby frequently takes action based on the Greens’ Christian religious beliefs.¹³⁹ All stores close on Sundays, at a cost of millions per year, to allow employees a day of rest.¹⁴⁰ Christian music plays in the stores.¹⁴¹ The company pays for all employees to have cost-free access to chaplains, spiritual counseling, and religiously themed financial courses.¹⁴² Company profits provide millions of dollars per year to Christian ministries around the world.¹⁴³

Hobby Lobby also frequently abstains from certain business practices, because the Greens’ religious beliefs preclude them. For instance, because the Greens are religiously prohibited from promoting or facilitating alcohol use, Hobby Lobby does not sell shot glasses.¹⁴⁴ Similarly, when a liquor store offered to assume a building lease in a deteriorating neighborhood, Hobby Lobby had to refuse—even though it would cost the company \$3.3 million dollars over the life of the lease.¹⁴⁵ The Greens’ religious beliefs also preclude them from allowing their trucks to “back-haul” beer, forcing them to forego substantial profits when they refuse offers from distributors.¹⁴⁶ And while the Greens have no religious objection to standard contraception, their religion forbids them from providing insurance coverage for abortion or emergency contraception. The Greens, therefore, exclude those items from the company’s health insurance offerings.¹⁴⁷ As a matter of faith, the Greens cannot

¹³⁸ Hobby Lobby Complaint, *supra* note 136, at 9 (internal quotation marks omitted); see also GREEN & MERRILL, *supra* note 136, at 196 (“In order to keep giving, we need to keep growing Hobby Lobby and its affiliate companies. This is what energizes my day-to-day work in retailing now—the knowledge that if we can add stores and thereby boost profits, we can give away that much more to make a difference eternally. I’ll *definitely* get out of bed in the morning to see that happen!”).

¹³⁹ Hobby Lobby Complaint, *supra* note 136, at 2 (stating that the Greens diligently “monitor their merchandise, marketing, and operations to make sure all are consistent with” their religious obligations).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 11.

¹⁴² See *id.* at 13–14.

¹⁴³ *Id.* at 2.

¹⁴⁴ *Id.* at 11.

¹⁴⁵ GREEN & MERRILL, *supra* note 136, at 143 (“I thought to myself, ‘You know, that’s just about the last thing this neighborhood needs. It’s already got a bunch of problems—they don’t need another big provider of alcohol in the community.’”).

¹⁴⁶ *Id.* at 144 (“[O]ur trucks returning from our Colorado stores could have back-hauled Coors Beer to Oklahoma City on a long-term contract that would have netted us \$300,000 a year. It was a time when we really could have used the cash. But again, we said no thank you, preferring to let our trucks come back empty until we could find an alternative. Let someone else haul the beer and take the responsibility for what people do with it.”).

¹⁴⁷ Hobby Lobby Complaint, *supra* note 136, at 29. This is the religious exercise that has led to Hobby Lobby’s current lawsuit against the federal government. *Id.* If Hobby Lobby and the Greens do

engage in actions that run counter to their religion. Nor can they facilitate such actions through the behavior of their businesses.

Perhaps Hobby Lobby's most public religious exercise is its series of holiday ads, which began in 1997. The ads stem from David Green's belief that if his store spends money on advertising to sell its products fifty weeks a year, it should also be willing to spend money twice a year to tell people about the religious meaning of Christian religious holidays.¹⁴⁸ The corporation's first ad, which appeared at Easter 1997, encouraged readers to "believe in the love that sent Jesus Christ. Accept the hope. Accept the joy. Accept the LIFE!"¹⁴⁹ Hobby Lobby Stores, Inc. placed, paid for, and signed the ad.¹⁵⁰

The corporation has continued placing ads each Easter and Christmas since that time. Hobby Lobby's ads encourage people to know Jesus as Lord and Savior, and to call a provided phone number for religious counseling.¹⁵¹

Thus, as with Rio Gas Station and Afrik Grocery, Hobby Lobby demonstrates that some businesses are conducted according to religious beliefs. Actions taken, or abstained from, based on sincere religious beliefs are "religious exercises" under federal law. When Afrik Grocery makes a decision not to sell pork or not to take out standard and easily available loans, the business is clearly taking action based on religious beliefs. Indeed, it is difficult to fathom why the corporation would take these actions *other than* for a religious reason. When Rio Gas Station serves food prepared in accordance with ancient Jewish laws and stops serving food and pumping gas for the Sabbath, it too is taking actions based on religious beliefs.

Hobby Lobby's decisions about what products to sell and what activities the company will conduct are similarly based on religious beliefs. When the company creates advertisements encouraging people to know and love Jesus Christ, the business is engaged in the quintessential exercise of religion, namely, profession of faith. Indeed, it is difficult to think of a clearer example of a profit-making business engaging in a religious exercise than Hobby

not cease this religious exercise by July 2014, they face fines that could run as high as \$1.3 million per day. *Id.*

¹⁴⁸ See GREEN & MERRILL, *supra* note 136, at 160 ("Every week I was already paying money to put out my message about the coming week's sale items. Couldn't I spend more of my money to spotlight the eternal importance of Christmas?").

¹⁴⁹ *Id.* at 160-61. The full ad read as follows: "For God so loved the world he gave acceptance, peace, mercy, confidence, purpose, forgiveness, simplicity, hope, relief, comfort, equality, life, his Son. This Easter, we encourage you to believe in the love that sent Jesus Christ. Accept the hope. Accept the joy. Accept the LIFE! Hobby Lobby Stores, Inc." *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See *Holiday Messages*, HOBBY LOBBY, http://www.hobbylobby.com/holiday_messages/ (last visited Oct. 4, 2013) (featuring a complete collection of Hobby Lobby's advertisements).

Lobby's holiday ads: if encouraging people to "know Jesus as Lord and Savior" is not an "exercise of religion," nothing is.¹⁵²

Therefore, many religions impose, and at least some businesses follow, religious requirements for their profit-making activities.

II. THE PROFIT DISTINCTION AND THE LAW

As Part I establishes, the argument against religious liberty for profit makers cannot be based on a factual claim about either the demands of religion or the actions of religious business owners and their businesses. As a legal matter, however, the government argues that profit-making businesses cannot engage in the "exercise of religion" sufficient to come within the protection of the First Amendment's Free Exercise Clause or the federal Religious Freedom Restoration Act.¹⁵³ In advancing this argument, the government relies on Title VII of the 1964 Civil Rights Act as its source for the categorical rule that profit-making entities cannot engage in religion.¹⁵⁴

This Part of the Article explores the significance of the distinction between for-profit and nonprofit entities more broadly. The goal is to determine how, when, and whether the law treats the for-profit/nonprofit distinction as determinative of an organization's legal rights and capabilities. Is there something about how the law treats profit-making businesses and their owners that is incompatible with recognizing religious liberty rights for profit makers? The significance of the profit distinction will be examined in five different areas: businesses' ethical decision making (Part II.A); criminal law (Part II.B); Title VII discrimination law (Part II.C); tax law (Part II.D); and constitutional law (Part II.E).

Three important principles emerge. First, for-profit businesses are generally treated as capable of making subjective decisions based on values other than mere profit seeking. Second, in most areas of the law, the for-profit/nonprofit distinction has no bearing on the rights and capabilities of an organization. In the few areas where the profit distinction seems to matter, it does not suggest the kind of categorical rule the government proffers in the HHS mandate context—namely, that profit making and religious exercise are fundamentally incompatible. Third, business owners are regularly treated as responsive to, and capable of being pressured by, penalties imposed on their businesses.

¹⁵² Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) (noting that the free exercise of religion "first and foremost" includes "the right to believe and profess whatever religious doctrine one desires").

¹⁵³ See DOJ Hercules Motion to Dismiss, *supra* note 2, at 17.

¹⁵⁴ See Appellee's Opening Brief at 16, *Newland v. Sebelius*, No. 12-1380 (10th Cir. Feb. 22, 2013) [hereinafter *Hercules App. Br.*]; see also *Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013) (to be codified at 45 C.F.R. pts. 147, 148, & 156).

A. *Ethical Decision Making by Profit-Making Businesses*

There is no doubt that nonprofit organizations may organize around ethical, philosophical, or religious commitments other than profit making.¹⁵⁵ Can profit-making businesses incorporate such principles into their decision making as well?

Famed economist Milton Friedman once proclaimed: “[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase profits”¹⁵⁶ This view is not unique to Friedman. In fact, several courts embracing the government’s theory that business cannot engage in religious exercise have made the same claim: the only goal of a profit-making business is making profits.¹⁵⁷

On the other hand, in common parlance, society often asks and expects businesses to “do the right thing” and avoid “irresponsible” behavior.¹⁵⁸ Businesses are regularly referred to as being “greedy”¹⁵⁹ or “generous,”¹⁶⁰ “ethical”¹⁶¹ or “unethical.”¹⁶² President Obama recently urged future business leaders to avoid simply pursuing profits and instead think about “what broader purpose your business might serve, in putting people to work or transforming a neighborhood.”¹⁶³

¹⁵⁵ See I.R.C. § 501(c)(3) (2006 & Supp. V 2012) (providing exempt status for groups pursuing, *inter alia*, religious, charitable, literary, or educational goals).

¹⁵⁶ See Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM17 (quoting MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (2002)) (internal quotation marks omitted).

¹⁵⁷ See, e.g., *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, slip op. at 3 (3d Cir. Jan. 29, 2013) (Garth, J., concurring) (noting that the mission of Conestoga, “like that of any other for-profit, secular business, is to make money in the commercial sphere”).

¹⁵⁸ See, e.g., President Barack Obama, Weekly Address (Jan. 26, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/01/25/weekly-address-two-nominees-who-will-fight-american-people>) (citing the need to “make sure businesses and individuals who do the right thing aren’t undermined by those who don’t”).

¹⁵⁹ See, e.g., John Hendren, *Obama: Wall Street ‘Arrogance and Greed’ Won’t Be Tolerated*, ABC NEWS (Jan. 31, 2009), <http://abcnews.go.com/Politics/CEOProfiles/story?id=6778419&page=1> (quoting President Obama saying the American people will not excuse “arrogance and greed” from “Wall Street firms” that have acted “shamefully” by paying large bonuses after accepting taxpayer bailouts).

¹⁶⁰ See, e.g., Matthew Kirdahy, *America’s Most Generous Corporations*, FORBES.COM (Oct. 16, 2008, 6:00 PM), http://www.forbes.com/2008/10/16/most-generous-corporations-corprespns08-lead-cx_mk_1016charity.html (citing research by the *Chronicle of Philanthropy* about the “giving habits” of seventy-eight of the nation’s largest corporations).

¹⁶¹ See, e.g., Jacquelyn Smith, *The World’s Most Ethical Companies*, FORBES.COM (Mar. 15, 2012, 10:09 AM), <http://www.forbes.com/sites/jacquelynsmith/2012/03/15/the-worlds-most-ethical-companies/> (ranking 150 of the world’s “most ethical companies”).

¹⁶² See, e.g., Beth Braverman, *‘Unethical Behavior’ to Blame for Gas Prices—Poll*, CNN.COM (June 11, 2008, 3:15 PM), http://money.cnn.com/2008/06/11/news/economy/gas_poll/index.htm (“A poll released Wednesday finds that 62% of Americans blame ‘unethical behavior’ by industry players.”).

¹⁶³ President Barack Obama, Remarks at Morehouse College Commencement Ceremony (May 19, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/19/remarks-president-morehouse-college->

For nearly a century, scholars have discussed the role of “corporate social responsibility,” or (“CSR”), in business management.¹⁶⁴ The idea behind CSR is that directors of a business corporation should not focus exclusively on profit making. Instead, businesses should consider the impact of the business’s actions on a variety of stakeholders, such as the company’s employees, its customers, the community, or the environment.¹⁶⁵ The notion of CSR is not limited to corporations, but rather extends to any business entity “regardless of the specific form of the business—partnership, contractual joint venture, entity joint venture, or even . . . loosely affiliated individuals coming together in a temporary constellation for a particular project.”¹⁶⁶ Vigorous debates remain ongoing about how, and whether, CSR should become a legally required part of business decision making.¹⁶⁷

As a practical matter, many profit-making businesses do consider broader interests when making decisions, regardless of whether they have a legal duty to do so.¹⁶⁸ State corporate laws broadly allow for-profit businesses to pursue any lawful purpose.¹⁶⁹ Several states and the federal government

commencement-ceremony. The President’s remarks echoed his remarks a year earlier at a National Prayer Breakfast, in which he urged, “We can’t leave our values at the door. If we leave our values at the door, we abandon much of the moral glue that has held our nation together for centuries.” President Barack Obama, Remarks at National Prayer Breakfast (Feb. 2, 2012), <http://www.whitehouse.gov/the-press-office/2012/02/02/remarks-president-national-prayer-breakfast>.

¹⁶⁴ See C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 78 (2002) (dating scholarly debate to the 1930s); see generally LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* (2011); Lynn A. Stout, *On the Proper Motives of Corporate Directors (Or, Why You Don’t Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1 (2003).

¹⁶⁵ See Wells, *supra* note 164, at 78; see also J. MARK RAMSEYER, *BUSINESS ORGANIZATIONS* 113 (2012) (“[M]any of the people with the most lucrative business plans discover those plans because they love what they do. They do not work to make money. They work to have fun or do good. . . . Some of the most wildly creative and profitable ideas in business, in other words, come from men and women who do not self-consciously try to maximize their profits.”).

¹⁶⁶ Joe W. (Chip) Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J.L. & PUB. POL’Y 334, 421 (2009).

¹⁶⁷ See, e.g., Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 *passim* (1999) (suggesting that corporate boards are required to balance interests of shareholders with those of management and employees); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 *passim* (1999) (suggesting that the SEC require corporations to provide a public social disclosure).

¹⁶⁸ See, e.g., Z. Jill Barclift, *Too Big to Fail, Too Big Not to Know: Financial Firms and Corporate Social Responsibility*, 25 J. C.R. & ECON. DEV. 449, 467 (2011) (“In the U.S and internationally, CSR is now recognized as a part of overall corporate business strategy, as evidenced by the many organizations and companies touting CSR as an appropriate business model, the increased number of consultants advising businesses on the appropriate CSR focus, and the number of companies advertising CSR initiatives. Business leaders have embraced CSR as a moral imperative because corporations have significant economic and political power in society. Firms are expected to utilize corporate powers in a socially responsible way.” (footnotes omitted)).

¹⁶⁹ See, e.g., 1A WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 102 (rev. ed. 2010) (“[A]ll jurisdictions permit the formation of a corporation for any

have taken steps to ensure their laws expressly embrace the notion of the conscientious profit-making business.¹⁷⁰

Many for-profit businesses voluntarily operate in a socially conscious manner. Whole Foods Market, Inc., for example, strives to “balance our needs with the rest of the planet” by promoting “environmental stewardship so that the earth continues to flourish for generations to come.”¹⁷¹ The store has adopted a set of “animal welfare standards” concerning the treatment of animals used for meat in their stores.¹⁷² Chipotle Mexican Grill, Inc. takes similar stands, promising to serve only foods “that are grown or raised with respect for the environment, animals and people who grow or raise the

lawful purpose or business . . .”). For example, Oklahoma’s corporations statute is “applicable to every corporation, whether profit or not for profit” and allows corporations to “promote any lawful business or purposes.” OKLA. STAT. tit. 18, §§ 1002, 1005 (West 1999). The State of Oklahoma recently filed a brief in the Hobby Lobby litigation arguing that, under this provision, Hobby Lobby is permitted under state law to exercise religion while earning profits. See Brief of the State of Oklahoma as Amicus Curiae in Support of Plaintiffs-Appellants and in Favor of Reversal of the Judgment Below at 7, *Hobby Lobby, Inc. v. Sebelius*, 2013 WL 3216103 (10th Cir. June 27, 2013) (No. 12-6294), available at <http://www.beckett-fund.org/wp-content/uploads/2013/02/State-of-Oklahoma.pdf> (“[A] lawful purpose of any corporation organized under the Oklahoma General Corporation Act may be to express the views and even the religious beliefs and actions of its owners and the persons who operate it.”).

¹⁷⁰ See, e.g., Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 85 (stating that since the 1980s, more than thirty states have enacted “constituency statutes,” expressly permitting directors to consider broader interests than mere shareholder profit-maximization). More recently, states have been experimenting with new corporate forms to further encourage the use of profit-making entities to pursue publicly beneficial goals. See, e.g., Felicia R. Resor, Comment, *Benefit Corporation Legislation*, 12 WYO. L. REV. 91, 92 (2012) (“In a growing number of states, lawmakers have passed legislation creating various new business entities to house social enterprise and organizations that blend for-profit and not-for-profit purposes.”). Ronald Colombo has discussed these changes to corporate law in detail and argued for free exercise rights for corporations. See Colombo, *supra* note 24 (manuscript at 5). The Securities and Exchange Commission recently promulgated regulations concerning trade in “conflict minerals” to address congressional concerns about their role in fueling a humanitarian crisis in the Democratic Republic of the Congo. Conflict Minerals, 77 Fed. Reg. 56274, 56275 (Sept. 12, 2012) (to be codified at 17 C.F.R. §§ 240, 249 & 249b) (“To accomplish the goal of helping end the human rights abuses in the DRC caused by the conflict, Congress chose to use the securities laws disclosure requirements to bring greater public awareness of the source of issuers’ conflict minerals and to promote the exercise of due diligence on conflict mineral supply chains.”).

¹⁷¹ See *Declaration of Interdependence*, WHOLE FOODS, <http://www.wholefoodsmarket.com/misison-values/core-values/declaration-interdependence> (last visited Oct. 4, 2013).

¹⁷² See *Animal Welfare Standards*, WHOLE FOODS, <http://www.wholefoodsmarket.com/about-our-products/quality-standards/animal-welfare-standards> (last visited Oct. 4, 2013) (“It’s often easy to forget that the burger, steak or drumstick on your plate was once an animal. How was that animal raised? How was it treated? Where did it come from? What about added hormones and antibiotics? Was its growth artificially accelerated to get to market sooner and reduce feed cost?”). Under these standards, there are certain types of meat that the store simply will not sell based on its beliefs about animal treatment. *Id.* Further, when the company does sell meat, it is carefully labeled according to a color-coded system to reflect how well the animal was treated during its life. *Id.* The company has partnered with an independent auditor to oversee and verify that it does not purchase meat from animals that have not met the company’s animal welfare standards. *Id.*

food.”¹⁷³ NOOCH Vegan Market, LLC in Denver sells no animal products at all because its owners “believe that animals have the right to be free from human use and see NOOCH as an extension of that ideology.”¹⁷⁴

In addition to such profit-making businesses making subjective, values-based decisions, there are also nonprofit organizations that use investment in for-profit businesses as a way of advancing socially beneficial goals. For example, the Healthstore Foundation is a nonprofit entity that invests in for-profit businesses “[t]o improve access to essential drugs, basic healthcare, and prevention services for children and families in the developing world.”¹⁷⁵ A 2012 Harvard Business School case study suggests the organization is considering becoming a for-profit enterprise based on the belief of some in the organization that “only a for-profit could attract investor capital . . . to rapidly grow the business and ultimately enable HSF to scale to the size of large commercial franchise businesses.”¹⁷⁶ Acumen Fund is a nonprofit investment fund investing in profit-making enterprises in the developing world because of its belief that “[m]arket-based approaches have the potential to grow when charitable dollars run out, and they must be part of the solution to the big problem of poverty.”¹⁷⁷ These entities further demonstrate the use of the profit-based model for purposes other than wealth maximization.

Although none of these organizations purports to be exercising religion, the examples are important to the religious liberty question because they suggest Americans regularly encounter, and accept, the notion of profit-making businesses taking actions based on ethical, philosophical, and moral commitments. If profit-making businesses are capable of forming subjective beliefs about such issues and acting on them, it is difficult to see how or why they would be precluded from forming and acting upon subjective beliefs about religion. In short, the example of companies like Acumen Fund suggests there is nothing inherent in the nature of for-profit businesses which forces those organizations to pursue profit and forsake all other values.¹⁷⁸

¹⁷³ Chipotle, Annual Report (Form 10-K) (Feb. 8, 2013).

¹⁷⁴ *About*, NOOCH VEGAN MARKET, <http://noochveganmarket.tumblr.com/about> (last visited Oct. 4, 2013).

¹⁷⁵ *Our Mission*, HEALTH STORE FOUND., <http://www.cfwshops.org/> (last visited Oct. 4, 2013).

¹⁷⁶ *See* V. KASTURI RANGAN & KATHERINE LEE, CFW CLINICS IN KENYA: TO PROFIT OR NOT FOR PROFIT 1 (2012).

¹⁷⁷ ACUMEN FUND, DISCUSSION GUIDE FOR *THE BLUE SWEATER* 10 (2009), <http://acumen.org/bluesweater/Book%20club%20discussion%20guide.pdf> (stating Acumen Fund’s philosophy).

¹⁷⁸ *See also* VISCHER, *supra* note 24, at 180 (arguing for corporate conscience and discussing Wal-Mart’s various conscience-based decisions, including a now-abandoned decision not to sell emergency contraceptives for moral reasons). In addition to such profit-making businesses making subjective, values-based decisions, there are also nonprofit organizations that use investment in for-profit businesses as a way of advancing socially beneficial goals. *See, e.g., Our Mission*, *supra* note 175 (stating that Healthstore Foundation’s mission is “[t]o improve access to essential drugs, basic healthcare, and prevention services for children and families in the developing world”). A 2012 Harvard Business School case study suggests the organization is considering becoming a for-profit enterprise based on the belief of some in the organization that “only a for-profit could attract investor capital . . . to rapidly grow the business and ultimately

B. *Profit-Making Businesses and Criminal Liability*

Generally speaking, criminal law assigns punishment in accordance with moral responsibility. While other values are of course at work, criminal punishment is deemed acceptable because of a belief that the perpetrator was morally responsible for doing wrong.¹⁷⁹ This notion of moral responsibility explains why criminal laws treat children differently from adults, and the mentally ill differently from the unimpaired.¹⁸⁰

Can a for-profit entity have “moral” responsibility for its actions, such that it is appropriate to hold the entity criminally liable? Do our laws treat organizations as capable of acting with the relevant mental state or *mens rea* required for criminal liability? Is there a categorical distinction between for-profits and nonprofits in this field?

After some early disputes on the matter, the modern answers are clear: both for-profit and nonprofit entities can be held criminally liable for their actions.¹⁸¹ Some early Supreme Court decisions rejected the notion that corporations could be treated similarly to natural persons, even for purposes of suing and being sued in federal court under diversity jurisdiction.¹⁸² For example, Chief Justice Marshall explained in 1809 that a corporation is an “invisible, intangible, and artificial being, [a] mere legal entity . . . certainly not

enable HSF to scale to the size of large commercial franchise businesses.” RANGAN & LEE, *supra* note 176, at 1. Similarly, Acumen Fund is a nonprofit investment fund investing in profit-making enterprises in the developing world because of its belief that “[m]arket-based approaches have the potential to grow when charitable dollars run out, and they must be part of the solution to the big problem of poverty.” ACUMEN FUND, *supra* note 177, at 10. These entities further demonstrate the use of the profit-based model for purposes other than wealth maximization.

¹⁷⁹ See, e.g., *Old Chief v. United States*, 519 U.S. 172, 187-88 (1997) (noting that a criminal prosecutor must not only prove facts, but must do so in a way sufficient “to implicate the law’s moral underpinnings and a juror’s obligation to sit in judgment. Thus, the prosecutor may fairly seek to place its evidence before the jury . . . to convince the jurors that a guilty verdict would be morally reasonable”); *Tison v. Arizona*, 481 U.S. 137, 171 (1987) (Brennan, J., dissenting) (noting “‘the relation between criminal liability and moral culpability’ on which criminal justice depends”) (quoting *People v. Washington*, 62 Cal. 2d 777, 783 (1965)); *Furman v. Georgia*, 408 U.S. 238, 342-43 (1972) (Marshall, J., concurring) (“Men may punish for any number of reasons, but the one reason that punishment is morally good or morally justifiable is that someone has broken the law.”).

¹⁸⁰ See *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (finding capital punishment is impermissible for juveniles because “[t]he susceptibility of juveniles to immature and irrational behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult’”) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)); *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (finding capital punishment impermissible for the mentally impaired because “cognitive and behavioral impairments make these defendants less morally culpable”).

¹⁸¹ See, e.g., *United States v. Cincotta*, 689 F.2d 238, 241 (1st Cir. 1982); *Chames v. Cent. City Opera House Ass’n*, 773 P.2d 546, 553-54 (Colo. 1989) (en banc); *In re Rule Amendments to Rules 5.4(a) and 7.2(c) of the Rules of Prof’l Conduct*, 815 A.2d 47, 49, 52 (R.I. 2002) (per curiam).

¹⁸² *Bank of the United States v. DeVeaux*, 9 U.S. (5 Cranch) 61, 86-87 (1809).

a citizen”¹⁸³ Therefore, Marshall concluded that a corporation “cannot come within the description of those who are entitled to sue in the circuit courts of the United States.”¹⁸⁴

By 1853, the Court reversed itself and held that corporations can be citizens for diversity purposes.¹⁸⁵ And as business corporations grew in prominence throughout the nineteenth century, so too did efforts to regulate corporations with criminal law.¹⁸⁶ The issue reached the Supreme Court again in *New York Central & Hudson River Railroad Co. v. United States*.¹⁸⁷ The case concerned a New York criminal law punishing the railroad company for paying illegal rebates.¹⁸⁸ The Court noted early authorities’ finding that a corporation could not be held liable for a crime.¹⁸⁹ But, the Court found that “[t]he modern authority, universally, so far as we know, is the other way.”¹⁹⁰ Rejecting corporate criminal liability could only be supported by “the old and exploded doctrine that a corporation cannot commit a crime.”¹⁹¹

Today, for-profit businesses can be held liable for a wide variety of crimes.¹⁹² By definition, this means that the law recognizes it is possible for a corporation to form the relevant criminal law *mens rea* for various crimes.¹⁹³ There are two predominant models for such corporate criminal liability. First,

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. 314, 328-29 (1853).

¹⁸⁶ See George Skupski, *The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability*, 62 CASE W. RES. L. REV. 263, 266-67 (2011) (“Throughout the nineteenth century, the ‘corporation as a fiction’ view was progressively rejected as the corporation became more dominant in American society.”).

¹⁸⁷ 212 U.S. 481, 494-96 (1909).

¹⁸⁸ *Id.* at 489-92.

¹⁸⁹ *Id.* at 491-93.

¹⁹⁰ *Id.* at 492.

¹⁹¹ *Id.* at 495-96.

¹⁹² See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1488 (1996) (“The scope of corporate criminal liability in the United States is very broad. A corporation may be criminally liable for almost any crime except acts manifestly requiring commission by natural persons, such as rape and murder.”). For example, the federal government recently filed an information against British Petroleum, accusing the corporation of felony manslaughter during the Deepwater Horizon accident. Mike Scarcella, *BP Agrees to Record Criminal Penalty in Gulf of Mexico Oil Spill*, NAT’L L.J. (Nov. 15, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202578529316> (“‘The explosion of the rig was a disaster that resulted from BP’s culture of privileging profit over prudence; and we allege that BP’s most senior decisionmakers onboard the Deepwater Horizon negligently caused the explosion,’ Assistant Attorney General Lanny Breuer, the head of the DOJ Criminal Division, said in a statement.” (emphasis omitted)).

¹⁹³ William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1059 (1992) (“[I]t is axiomatic that theories of criminal punishment require the finding of mens rea.”); see also Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL’Y 833, 848 (2000) (“The modern corporation also can be substantively distinguished from its owners, managers and employees by its capacity to express independent moral judgments in the discourse of the public square, and so to participate in the process of creating and defining social norms.”).

and most commonly, courts sometimes find the corporation liable for their employees' criminal actions through the doctrine of respondeat superior.¹⁹⁴ The mental state of the employee acting within the scope of his or her employment and for the company's benefit is imputed to the corporation itself.¹⁹⁵ Some jurisdictions take a somewhat narrower view and hold the corporation liable only if an officer or manager of the company forms the mental state.¹⁹⁶

An entity's status as a for-profit or nonprofit organization has no bearing on whether the entity can be held liable under criminal law. For example, the Colorado Supreme Court has rejected claims that a nonprofit corporation should be considered categorically incapable of violating a state criminal statute prohibiting gambling.¹⁹⁷ The nonprofit argued its status was dispositive. It claimed the fundraising gala could not have violated the criminal law, because the nonprofit could not form the requisite intent to profit from gambling. The court rejected the nonprofit's claim, finding that even a nonprofit entity could form the requisite mental intent to be found guilty of profiting from illegal gambling.¹⁹⁸

Notably, the organization's criminal liability does not have any impact on the liability of the employees or officers involved, who may also be separately held liable under criminal law.¹⁹⁹ In the corporate realm, the law often

¹⁹⁴ Federal law tends to follow this respondeat superior theory of corporate criminal liability. See Laufer, *supra* note 193, at 1055 ("Courts interpreting federal statutory law find corporations criminally liable for the conduct of employees acting within the scope of employment or with apparent authority, and with an intent to benefit the corporation.").

¹⁹⁵ *Id.* at 1055-56.

¹⁹⁶ This approach is taken in some states, and is the approach suggested by the Model Penal Code. See *id.* at 1058 (noting that under state law, liability is available either through respondeat superior theory, or where "the 'offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment'" (quoting MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962))).

¹⁹⁷ *Charnes v. Cent. City Opera House Ass'n*, 773 P.2d 546, 553-54 (Colo. 1989) (en banc).

¹⁹⁸ *Id.* at 554 ("The fact that the revenues generated by the Gala were not distributed to members, directors, or officers of the association did not preclude the association from realizing or from intending to realize a 'benefit,' and thus a profit, from the Gala. We thus conclude that the Opera House Association aided the Gala invitees in gambling, that it did so with the intent to realize a direct profit therefrom, and that it thereby participated in 'professional gambling.'"). The Rhode Island Supreme Court has likewise indicated that nonprofit corporations can violate criminal law. See *In re Rule Amendments to Rules 5.4(a) & 7.2(c) of the Rules of Prof'l Conduct*, 815 A.2d 47, 52 (R.I. 2002) (noting that an agreement by a nonprofit corporation unauthorized to practice law to receive a share of attorney's fees would be impermissible in its own right and "as a conspiracy, a separate criminal offense that is committed at the very moment the agreement is made").

¹⁹⁹ See 18B AM. JUR. 2D *Corporations* § 1841 (2004) ("Although a corporate crime is based on the acts of its employees or agents, the corporation is a separate entity and is severally liable . . . for its crimes. . . . [B]ecause its liability is separate from that of its officers or employees, both the corporation and the individual who committed the act may be found guilty, and the conviction of the responsible officers is not a bar to the prosecution of the corporation itself." (footnotes omitted)).

treats *both* the individual actor and the corporate entity as criminally responsible when an actor engages in a criminal act for the company.²⁰⁰ A business owner who commits a crime for the business may find that both he and his business are criminally liable. In fact, many states have statutes expressly addressing the subject and clarifying that an individual who commits a crime for a corporation remains personally liable for the offense.²⁰¹

Why would the law impose liability on both the organization and the individual actor? Liability for the employees or managers imposes an individualized deterrent on that particular actor. Liability for the corporation, however, reduces the corporation's net worth and thereby can impose substantial pressure on the corporation's owners (i.e., shareholders).²⁰² Shareholders will then have an incentive to encourage managers not to engage in the proscribed behaviors.²⁰³ As Judge Richard Posner has explained, "if the

²⁰⁰ *Id.*; see also Press Release, U.S. Dep't of Justice, Canadian Citizen Sentenced in Scheme to Defraud Consumers Purchasing Pharmaceuticals Online (Jan. 9, 2013), available at <http://www.justice.gov/opa/pr/2013/January/13-civ-035.html> (noting that a target was sentenced to four years in prison for "conspiracy to commit mail fraud in connection with his role as owner and president of Mediplan Health Consulting, Inc., a Canadian company"). Indeed, the Supreme Court has unanimously held that the sole shareholder of a corporation can be found separately guilty of illegally conspiring with the corporation under the Racketeer Influence and Corrupt Organizations Act (RICO), even when the shareholder acted within the scope of his corporate employment. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164-66 (2001).

²⁰¹ See, e.g., ALA. CODE § 13A-2-26 (2012); see also COLO. REV. STAT. § 18-1-607 (2012) ("A person is criminally liable for conduct constituting an offense which he performs or causes to occur in the name of or in behalf of a corporation to the same extent as if that conduct were performed or caused by him in his own name or behalf."); KY. REV. STAT. ANN. § 502.060 (West Supp. 2007) ("A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation to the same extent as if the conduct were performed in his own name or behalf.").

²⁰² Khanna, *supra* note 192, at 1495 ("Direct liability, as its name indicates, directly influences managers' or employees' behavior by imposing penalties on these agents whenever they commit certain undesirable acts. Corporate liability works more indirectly. Imposing sanctions on a corporation for the acts of its managers or employees presumably decreases the corporation's net worth. Shareholders, who bear the brunt of such a decrease, have an incentive to encourage managers not to commit undesirable acts (assuming that any benefits from the acts do not outweigh the costs to the shareholders). Shareholders can influence the behavior of corporation managers and employees in a number of ways, such as by modifying employment contracts to provide incentives not to engage in certain types of activities." (footnotes omitted)); see also *id.* at 1494 (noting that many commentators and judges view deterrence, not retribution, as the aim of corporate criminal and civil liability).

²⁰³ See, e.g., *SEC v. Med. Comm. for Human Rights*, 404 U.S. 403, 404-06 (1972) (addressing a shareholder proxy proposal to prohibit Dow Chemical Company from selling napalm during the Vietnam War); Katherina Glac, *The Influence of Shareholders on Corporate Social Responsibility* 11 (Ctr. for Ethical Bus. Cultures, Working Paper No. 2, 2010), available at http://www.cebcglobal.org/uploaded_files/Glac_paper_on_Social_Investment_FINAL.pdf (describing how "faith-based" institutional investors use shareholder proposals to influence companies); see also RESPONSIBLE ENDOWMENTS COALITION, <http://cndowmentethics.org> (last visited Oct. 4, 2013) ("Responsible investment means recognizing that our finances have major social and environmental impacts worldwide—from peoples' working conditions, to their health, to the very land they live on.").

shareholders bear no responsibility for a manager's crime they will have every incentive to hire managers willing to commit crimes on the corporation's behalf."²⁰⁴ In this respect, the entire concept of criminal liability for for-profit corporations depends on the view that a corporation's owners can be pressured by penalties imposed upon the business.²⁰⁵

Thus it is clear that for-profit and nonprofit businesses can be held liable for their crimes, and are understood as able to form the subjective mental intent necessary for criminal liability. This application of criminal law is driven, at least in part, by a view that the criminal corporation has done something morally wrong and by a desire to impose pressure on shareholders to encourage more responsible behavior. Moreover, this criminal liability for the business is in addition to liability faced by the natural persons who engaged in criminal activity on behalf of the corporation.

Engaging in religious exercise, of course, is not a criminal offense. Still, criminal law's treatment of for-profit businesses and their owners is relevant to the religious liberty question. It is unclear what principled reason would justify viewing a corporation as capable of forming and acting upon criminal intentions but incapable of forming and acting upon religious ones. Moreover, it is at the very least odd to think that American criminal laws would deem a business and responsible individuals *both* criminally responsible for their crimes, but that religious liberty law would treat *neither* as capable of asserting civil rights under religious liberty law. Finally, the corporate criminal law exists as a system designed to penalize companies and thereby create incentives for owners to behave in particular ways. The owners of businesses are, therefore, understood as responsive to penalties imposed on their businesses. This suggests, in the religious liberty context, the threat of a penalty against the business should be expected to create substantial pressure on the business owner.

C. Title VII Discrimination Law

The government relies on a reference to Title VII discrimination law as the basis for treating for-profit businesses as incapable of exercising religion.²⁰⁶ The government argues that because there are no decisions finding that for-profit businesses qualify under Title VII's "religious organization" exception (which allows organizations to discriminate based on religion when hiring employees), for-profit businesses must be categorically incapable of religious exercise of any kind under any federal law.²⁰⁷ This Section will explore whether Title VII discrimination law actually treats for-profit

²⁰⁴ RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 398 (3d ed. 1986).

²⁰⁵ *Id.*

²⁰⁶ DOJ Hercules Motion to Dismiss, *supra* note 2, at 17 (citing 42 U.S.C. § 2000bb-1(a) (2006)).

²⁰⁷ *Id.*; 42 U.S.C. § 2000e-1(a).

businesses as incapable of exercising religion, and whether Title VII supports the broad exclusion of for-profit businesses from other religious liberty laws.

1. Title VII's Prohibition on Religious Discrimination Against Employees

Title VII generally prohibits employment discrimination based on certain protected traits, including religion.²⁰⁸ Title VII's broad definition of "religion" includes not just religious belief or identity but "all aspects of religious observance and practice, as well as belief."²⁰⁹ Employers must reasonably accommodate all of their employees' religious practices unless accommodations would cause undue hardship.²¹⁰ In this respect, Title VII's primary impact on religious liberty is to ensure that employees can earn money without facing discrimination and unnecessary burdens on their religious practices and beliefs.

To achieve this goal, Title VII imposes liability on the employer, rather than the individual supervisor engaged in religious discrimination.²¹¹ Why impose liability on the employer? The answer is the same as in the corporate crime analysis: imposing liability on the company puts pressure on the company's owners to take action to eliminate discrimination.²¹² As the Supreme Court has explained, the prospect of damages awarded against the company under Title VII is designed to "provide[] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."²¹³ Congress

²⁰⁸ 42 U.S.C. § 2000e-2.

²⁰⁹ *Id.* § 2000e-(j).

²¹⁰ *Id.*; see also Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 742 (1996) (noting that religion is the only trait singled out for this type of accommodation under Title VII).

²¹¹ See generally Tammi J. Leas, Note, *The Individual vs. the Employer: Who Should Be Held Liable Under Employment Discrimination Law?*, 54 CASE W. RES. L. REV. 861 (2004) (explaining that federal law does not include individual liability, but that some state laws do).

²¹² See, e.g., *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) ("The purposes underlying Title VII are similarly advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions."); Craig Robert Senn, *Ending Discriminatory Damages*, 64 ALA. L. REV. 187, 201 (2012) (stating that a purpose of heightened damages awards against employers is "to deter discriminatory employers by more severely punishing unlawful conduct").

²¹³ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (quoting *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)) (internal quotation marks omitted).

has increased the penalties Title VII imposes on the company in order to increase the pressure on owners to root out impermissible discrimination because Title VII's original provisions provided insufficient deterrence.²¹⁴

2. The Religious Organization and BFOQ Exceptions

Within this broad protection of religious liberty for moneymaking employees, Title VII recognizes two limited exceptions in situations where the employee's right to earn money without facing religious discrimination comes into conflict with an employer's right to exercise religion in hiring decisions. First, Title VII's prohibition on religious discrimination does not apply at all to "a religious corporation, association, educational institution or society" if that organization seeks to hire and fire based on religion.²¹⁵ Second, even for employers who are not covered by this "religious corporation" exemption, Title VII provides that religious discrimination can be permissible if religion is a "bona fide occupational qualification," or ("BFOQ.")²¹⁶

On its face, the text of the religious corporation exemption does not distinguish between nonprofit and for-profit employers.²¹⁷ Thus, nothing statutorily precludes an exempted "religious corporation" from earning profits while practicing or preaching religion. Further, the BFOQ provision expressly states that it is designed to include "businesses," thereby suggesting that Congress viewed profit-making businesses as capable of engaging in at least some religious exercises.²¹⁸ Thus from the face of the statute, it is clear that businesses are entitled under Title VII to exercise religion in at least one respect—namely, by having jobs for which particular religious beliefs constitute a BFOQ.

The government observes that there are no reported cases in which for-profit companies successfully obtained the right to engage in religious discrimination under the exception.²¹⁹ While this observation is correct, it is also incomplete. The government cites to one reported case in which a for-profit

²¹⁴ See H.R. REP. NO. 102-40, pt. 2, at 1-3, 24-25 (indicating that the punitive damages remedy added to Title VII by the Civil Rights Act of 1991 was needed to deter unlawful harassment and intentional discrimination in the workplace).

²¹⁵ 42 U.S.C. § 2000e-1(a) (2006) ("This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.").

²¹⁶ *Id.* § 2000e-2(e) ("Businesses . . . with personnel qualified on the basis of religion . . . [may hire] on the basis of [one's] religion . . . in those certain instances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.").

²¹⁷ *Id.* § 2000e-1.

²¹⁸ *Id.*

²¹⁹ DOJ Hercules Motion to Dismiss, *supra* note 2, at 17.

employer actually *sought* the Title VII religious employer exemption.²²⁰ In *Equal Employment Opportunity Commission v. Townley Engineering & Manufacturing Co.*,²²¹ the Ninth Circuit determined that Townley was not a religious employer.²²² Notably, although Townley was a for-profit employer, the court did not articulate a categorical rule. Rather, the court determined that the outcome of “each case must turn on its own facts” and “[a]ll significant religious and secular characteristics” should be considered.²²³ In other words, the court in *Townley* did not apply a categorical rule that profit-making businesses can never receive the Title VII exemption. Nor did it suggest, having failed to qualify for that one exemption, Townley was categorically incapable of religious exercise in other contexts. To the contrary, even while denying Townley’s request for the exemption, the court *did* permit the company to assert Free Exercise rights to act according to the religious beliefs of its owner.²²⁴ *Townley* thus suggests Free Exercise rights are not limited only to those entities permitted to hire and fire based on religion under Title VII, and that profit making is simply one factor among many that should be considered under Title VII.

In fact, there do not appear to be any courts in the Title VII area that approach the religious organization exception with anything like a blanket rule prohibiting profit makers’ religious exercise.²²⁵ Two Justices referenced the issue of profit-making activities by religious organizations in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,²²⁶ but those concurrences do not suggest a blanket rule and emphasize that the question was left open. The discussion of the issue in *Amos* in fact strongly suggests the Justices understood that religious institutions *would*

²²⁰ Brief for the Appellants at 17, *Newland v. Sebelius*, No. 12-1380 (10th Cir. Jan. 18, 2013) (citing *Equal Emp’t Opportunity Comm’n v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 617 (9th Cir. 1988)).

²²¹ 859 F.2d 610 (9th Cir. 1988).

²²² *Id.* at 619.

²²³ *Id.* at 618.

²²⁴ *Id.* at 619-20 & n.15 (“Because Townley is merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs, it is unnecessary to address the abstract issue whether a for profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers. . . . [Thus] Townley has standing to assert Jake and Helen Townley’s Free Exercise rights.”); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (“[A] corporation has standing to assert the free exercise right of its owners.”).

²²⁵ *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226-27 (3d Cir. 2007) (noting profit-making status as just one of nine factors to be considered because “whether an organization is ‘religious’ for purposes of the exemption cannot be based on its conformity to some preconceived notion of what a religious organization should do, but must be measured with reference to the particular religion identified by the organization. Thus not all factors will be relevant in all cases, and the weight given each factor may vary from case to case”).

²²⁶ 483 U.S. 327 (1987).

sometimes engage in profit-making activities, which suggests religious exercise and profit making are not fundamentally incompatible.²²⁷ Furthermore, the federal government's own EEOC Compliance Manual suggests profit making is one factor to consider but notes "[a]ll significant religious and secular characteristics" must be considered and that "*no one factor is dispositive*."²²⁸

3. For-Profit Businesses as Victims and Perpetrators of Religious Discrimination

Rather than reaching out to help immigrant Muslim business owners like Abdi Aden, suppose the City of Minneapolis instead vowed that it would never conduct business with Afrik Grocery, Inc. or any other Muslim-owned business. Or imagine a state government does not like Hobby Lobby's advertisements inviting people to "know and love Jesus" and penalizes the company in some way. In those circumstances, it would be fairly easy to see the for-profit business as the victim of obvious religious discrimination. Generally speaking, American laws recognize that businesses can be victimized by such discrimination in the race context, and the government regularly adopts programs designed to eradicate such discrimination against businesses.²²⁹

²²⁷ *Id.* at 345 n.6 (Brennan, J., concurring). Justice Brennan's concurrence expressly notes that "[i]t is also conceivable that some for-profit activities could have a religious character, so that religious discrimination with respect to these activities would be justified in some cases." *Id.* Justice O'Connor explained that the decision left the Title VII/profit question open and expressed her uncertainty as to whether "activities conducted by religious organizations solely as profit-making enterprises will be as likely to be directly involved in the religious mission of the organization." *Id.* at 349 (O'Connor, J., concurring). Justice O'Connor's uncertainty as to how profit-making activities of a religious nonprofit should be analyzed is telling. Just three years earlier, in *Roberts v. U.S. Jaycees*, Justice O'Connor wrote a concurrence suggesting that she believed the presence of substantial commercial activity would completely disqualify a group from treatment as an "expressive association" under the First Amendment's freedom of association. 468 U.S. 609, 635-36 (1984) (O'Connor, J., concurring). *But see* Colombo, *supra* note 24 (manuscript at 55-57) (noting that no other Justices joined in Justice O'Connor's *Roberts* opinion, and that her approach "betrays quite narrow and unimaginative thinking" about the range of possible commercial organizations). Justice O'Connor's unwillingness to assert a similar blanket rule in *Amos* suggests a possible softening from her position in *Roberts*.

²²⁸ EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 12 (RELIGIOUS DISCRIMINATION), at 16-17 (2008) (alteration in original) (emphasis added) (internal quotation marks omitted), available at <http://www.eeoc.gov/policy/docs/religion.pdf>.

²²⁹ *See, e.g., About the 8(a) Business Development Program*, SBA.GOV, <http://www.sba.gov/content/8a-business-development-0> (last visited Oct. 4, 2013) ("The 8(a) program offers a broad scope of assistance to firms that are owned and controlled at least 51% by socially and economically disadvantaged individuals."); *Socially Disadvantaged Eligibility*, SBA.GOV, <http://www.sba.gov/content/socially-disadvantaged-eligibility> (last visited Oct. 4, 2013) ("Under federal law, socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias . . ."); *see also* Exec. Order No. 11625, 36 C.F.R. 19967 (1971) (creating Minority Business Development Agency and explaining that "[t]he opportunity for full participation in our free enterprise system by socially and economically

Although it seems less frequent, businesses discriminated against based on religion can similarly bring claims for unconstitutional discrimination.²³⁰ This suggests, both legally and socially, businesses are understood to be capable of having a religious identity if that identity is relevant to their status as a victim of discrimination.²³¹

Likewise, there appears to be no difficulty in believing that a for-profit business can form and act upon subjective views about religion when those views are used to discriminate against an employee on religious grounds. Suppose that a large publicly traded corporation decided it would no longer hire Muslims or Catholics because it disagrees with their religion. In this case, it would be easy to see that the for-profit business reached a subjective belief about religion and acted on that belief in a way the law deems impermissible. Indeed, courts have no trouble accepting that for-profit businesses can form and act on subjective beliefs about religion in these contexts.²³²

Thus, discrimination law recognizes that a for-profit business can have a religious identity when it is discriminated against, and can form and act on beliefs about religion when it is found guilty of religious discrimination. Viewed in combination with Title VII's broad protection of the right to earn money without undue religious burdens, and its express inclusion of "businesses" within the religious BFOQ provision, religious discrimination law seems to support the notion that there is no fundamental incompatibility between profit making and religious exercise. The only place a for-profit/non-profit distinction appears to have any weight is in courts' analysis of Title VII's religious organization exemption. But even there, all courts to address

disadvantaged persons is essential if we are to obtain social and economic justice for such persons and improve the functioning of our national economy"); *cf. Atheist Marketplace*, 4 ATHEISTS, <http://www.4atheists.com/atheist-market.html> (last visited Oct. 4, 2013) (providing support for "the atheist community and atheist owned businesses" and urging readers to "please give these folks your support by simply doing business with them rather than theist firms").

²³⁰ See, e.g., *Sherwin Manor Nursing Ctr., Inc. v. McAuliffe*, 37 F.3d 1216, 1221 (7th Cir. 1994) ("Sherwin presents a cognizable equal protection claim since it alleges that it was subjected to differential treatment by the state surveyors based upon the surveyors' anti-Semitic animus."); see also *The Amber Pyramid, Inc. v. Buffington Harbor Riverboats, L.L.C.*, 129 F. App'x. 292, 295 (7th Cir. 2005) (holding that "[a] minority-owned corporation, like Amber Pyramid, assumes an 'imputed racial identity' from its shareholders" (quoting *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1059 (9th Cir. 2004))).

²³¹ The recognition that a business may be targeted based on the religious beliefs of its owners is, sadly, one with a long history. For example, in the *Kristallnacht* attacks of 1938, Nazis not only attacked Jewish homes and synagogues but also destroyed thousands of Jewish-owned businesses. See Louis L. Snyder, *Kristallnacht*, in 1 *THE ENCYCLOPEDIA OF THE THIRD REICH* 515 (Christian Zetner & Friedmann Bedürftig eds., MacMillan Publ'g Co. 1991) (1985). The attackers obviously expected that attacking a business would put pressure on its owners.

²³² See, e.g., *Fischer v. Forstwood Co.*, 525 F.3d 972, 986-87 (10th Cir. 2008) (allowing a claim that a for-profit business corporation refused to hire plaintiff unless he would join a particular church); *Ollis v. Hearthstone Homes, Inc.*, 495 F.3d 570, 575-76 (8th Cir. 2007) (affirming a jury verdict for plaintiff in a religious discrimination case against a for-profit corporation).

the question and the EEOC have rejected the idea that profit making makes an organization categorically ineligible for the exemption. And none suggests that ineligibility for that particular exemption renders a business incapable of all other forms of religious exercise.

These facts severely undermine any claim that a categorical for-profit/nonprofit distinction exists within Title VII or can be borrowed from Title VII and applied as a categorical bar to all other religious freedom claims by for-profit businesses and their owners.

D. Tax Law

The federal tax code provides a statutory basis for at least one categorical distinction between nonprofits and for-profits: eligibility for tax-exempt status under 26 U.S.C. § 501(c)(3).²³³ Even this distinction, however, does not suggest any type of categorical rule that religious exercise and profit making can never coexist. Moreover, the tax code's allowance of pass-through taxation for most for-profit business organizations undermines any claim that business owners are not receptive to pressures imposed on, or incentives offered to, their businesses.

1. Tax Exempt Status and Profit Making

Organizations are eligible for tax-exempt status under Section 501(c)(3) if they are organized for certain approved purposes²³⁴ and if “no part of the net earnings” of the organization “inures to the benefit of any private shareholder or individual.”²³⁵ Many exempt organizations are religious in nature.²³⁶ The profit distinction is categorical in the sense that even an organization

²³³ I.R.C. § 501(c)(3) (2006 & Supp. V 2012).

²³⁴ *Id.* (requiring that the organization be “organized and operated exclusively for 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”).

²³⁵ *Id.* Exempt organizations under 501(c)(3) must also comply with certain limitations on their activities: “no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.” *Id.*

²³⁶ *Id.* (noting that “religious” purposes are permissible). For example, the Little Sisters of the Poor run nursing homes for the elderly and poor and have exempt status. See *Our Home*, LITTLE SISTERS OF THE POOR, <http://www.littlesistersofthepoordelaware.org/our-home> (last visited Oct. 4, 2013) (“As Little Sisters of the Poor we care for the elderly poor in the spirit of humble service we have received from our foundress, Saint Jeanne Jugan. We welcome the elderly as we would Jesus Christ himself and serve them with love and respect until God calls them home.”).

with approved purposes would not be exempt from taxation if it pays out earnings to owners.²³⁷

There are important ways, however, in which the profit distinction in this context does not suggest a categorical incompatibility between religious exercise and making money. For example, religious organizations are required to pay taxes if they earn what the IRS calls “unrelated business income.”²³⁸ According to the IRS: “Churches and religious organizations, like other tax-exempt organizations, may engage in income-producing activities unrelated to their tax-exempt purposes”²³⁹ If the religious organization makes money from activities “unrelated” to its mission, it must pay taxes on that money.²⁴⁰

This tax treatment for religious nonprofits is clearly built on the assumption that there is nothing fundamentally incompatible between religion and making money. Indeed, the IRS even acknowledges that some income-producing activity may be so closely tied to a religious mission that it is not taxed at all (i.e., because it is “substantially related” to that mission).²⁴¹ The tax code clearly suggests that religious exercise and taxable moneymaking are not mutually exclusive, or even unusual.

In a way, the same treatment applies to for-profit businesses themselves. Company profits that are distributed as profits are subject to ordinary corporate income taxes. However, if the company donates those profits to a church or other qualifying organization, the profits are no longer taxed.²⁴² In fact, the tax code is somewhat biased in favor of corporate charitable giving compared to shareholder giving: money the corporation donates avoids corporate income taxes, while money the shareholder donates does not.²⁴³

²³⁷ I.R.C. § 501(c)(3).

²³⁸ See *id.* §§ 511, 513; see also INTERNAL REVENUE SERV., PUBL’N 598, TAX ON UNRELATED BUSINESS INCOME OF EXEMPT ORGANIZATIONS 2 (rev. 2012), available at <http://www.irs.gov/pub/irs-pdf/p598.pdf>.

²³⁹ INTERNAL REVENUE SERV., PUBL’N 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 16 (2009), [hereinafter IRS RELIGIOUS ORGANIZATION TAX GUIDE], available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

²⁴⁰ *Id.* (“Many tax-exempt organizations sell advertising in their publications or other forms of public communication. Generally, income from the sale of advertising is unrelated trade or business income.”); see also I.R.C. § 512.

²⁴¹ I.R.C. § 513(a); see also *United States v. Am. Bar Endowment*, 477 U.S. 105, 109-10 (1986) (applying the “substantially related” test to determine that income from group insurance products offered to members by a nonprofit bar association was taxable as unrelated business income); IRS RELIGIOUS ORGANIZATION TAX GUIDE, *supra* note 239, at 16-17.

²⁴² See I.R.C. § 170(a), (c)(2)(B) (making a deduction available for corporate contributions to organizations “organized and operated exclusively for religious . . . purposes”). This deduction is available so long as contributions do not exceed 10 percent of the company’s taxable income. *Id.* § 170(b)(2)(A).

²⁴³ See Linda Suggin, *Encouraging Corporate Charity*, 26 VA. TAX REV. 125, 129 (2006) (“The tax law has long contained a bias in favor of charitable giving by corporations compared to charitable giving by individual shareholders following distributions by corporations. In a system with a separate corporate tax, a charitable contribution made by a corporation and deducted at the corporate level can generally be

Thus the federal tax treatment of both nonprofit and for-profit organizations suggests the IRS understands that the same entity may both engage in religious exercises and earn profits.

2. Pass-Through Taxation and Incentives for For-Profit Businesses and Business Owners

Most businesses do not pay income tax directly but rather use what is known as “pass through” taxation, where taxes are paid by the owners rather than by the business entity itself.²⁴⁴ For example, the tax code provides that “[a] partnership as such shall not be subject to the income tax” but that “partners shall be liable for income tax only in their separate or individual capacities.”²⁴⁵ Limited liability companies may elect to pay their taxes as partnerships,²⁴⁶ and most do so.²⁴⁷

Most for-profit corporations file their tax returns as “S corporations.”²⁴⁸ S corporations are corporations “that elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes.”²⁴⁹ Like partners in a partnership, shareholders of S corporations report the flow-through of income and losses on their personal returns, rather than on corporate returns. Shareholders then pay taxes only once, at individual rates.²⁵⁰ As of 2006, more than 66 percent of all corporate tax returns were for S corporations.²⁵¹

This tax treatment of most for-profit businesses suggests the owners of businesses are not viewed as completely separate from their businesses.²⁵²

larger than a contribution that an individual shareholder can make out of a corporate distribution of the same available funds because the corporate tax burdens the funds distributed to shareholders, but not the funds contributed to charity.”).

²⁴⁴ See *Thompson v. United States*, 87 Fed. Cl. 728, 730 (2009) (“[M]ost LLCs elect partnership taxation.”).

²⁴⁵ I.R.C. § 701 (2006).

²⁴⁶ Treas. Reg. § 301.7701-3(b)(1)(i) (2012).

²⁴⁷ See *Thompson*, 87 Fed. Cl. at 730.

²⁴⁸ See *id.*

²⁴⁹ *S Corporations*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/S-Corporations> (last updated Oct. 4, 2013); see also I.R.C. § 1361(b)(1)(A) (2006 & Supp. V 2012) (limiting participation to corporations with one hundred or fewer shareholders).

²⁵⁰ *S Corporations*, *supra* note 249 (“This allows S corporations to avoid double taxation on the corporate income. S corporations are responsible for tax on certain built-in gains and passive income.”).

²⁵¹ Heather Duffy Parisi, *S Corporation Returns, 2006*, STAT. INCOME BULL., Summer 2009, at 92, available at <http://www.irs.gov/pub/irs-soi/09sumbul.pdf>.

²⁵² Susan Kalinka, *Unresolved Issues Regarding Passthrough Entities, Community Property, and Federal Tax Law Create Headaches for Spouses in Louisiana*, 69 LA. L. REV. 861, 861 (2009) (“Because a disregarded entity is disregarded as a separate entity from its owner, transactions between the disregarded entity and its owner are not taken into account and have no tax consequences. Thus, distributions from a disregarded entity to its owner are not subject to income tax.”).

Not surprisingly, policymakers across the political spectrum have recognized that the flow-through arrangement enables government treatment of for-profit businesses to incentivize the owners of these for-profit companies to take certain actions.²⁵³

Thus while the tax code suggests one way in which the for-profit/non-profit distinction can be categorical (i.e., the availability of tax exempt status), it also makes clear that religion and profit making are not considered mutually exclusive. Nonprofit religious organizations actually are permitted to take part in unrelated moneymaking activities, so long as they pay taxes. Further, the tax code suggests there is not an absolute separation between most businesses and their owners for purposes of taxation. The tax code further suggests business owners are regularly expected to respond to pressures imposed upon, or incentives offered to, their businesses.

E. *Profit-Making Businesses and Constitutional Analysis*

The Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*²⁵⁴ highlighted the issue of whether corporations can exercise constitutional rights. The *Citizens United* decision confirms that corporations can exercise constitutional rights and,²⁵⁵ in the process, has prompted efforts to amend the Constitution to strip corporations of those rights.²⁵⁶

The question presented here, however, is not so much whether corporations have constitutional rights as a general matter, but whether nonprofit organizations have different and greater constitutional rights than for-profit

²⁵³ See, e.g., Karen Mills, *Encouraging Small Business Hiring Through Tax Credits*, WHITE HOUSE BLOG (Jan. 29, 2010, 2:32 PM), <http://www.whitehouse.gov/blog/2010/01/29/encouraging-small-business-hiring-through-tax-credits> (noting proposed legislation to "provide a \$5,000 tax credit to over a million small businesses for every net new employee they hire, with other tax incentives for increasing wages"); Press Release, Nat'l Fed'n of Indep. Bus., NFIB Thanks U.S. Senate for Approving Bipartisan Stimulus Package (2008), <http://www.nfib.com/press-media/press-media-item?cmsid=44913> (National Federation of Independent Business praising a "stimulus package that includes tax incentives small business owners can use to invest in their companies and hire new employees. . . . One of the most important provisions included in the stimulus package is increasing the dollar amount for small business expensing limits from \$125,000 to \$250,000. This will allow small business owners to immediately write off business purchases and will help small business owners expand their businesses and hire new employees." (internal quotation marks omitted)).

²⁵⁴ 558 U.S. 310 (2010).

²⁵⁵ *Id.* at 342-43.

²⁵⁶ See *I Support the People's Rights Amendment*, FREE SPEECH FOR PEOPLE, <http://www.peoplesrightsamendment.org/> (last visited Oct. 5, 2013) (proposing a "People's Rights Amendment"). The proposed amendment would declare that "rights protected by this Constitution" are "the rights of natural persons." *Id.* Furthermore, the amendment would provide a rule of construction that "[t]he words people, person, or citizen as used in this Constitution do not include corporations." *Id.* Notably, even the proposed People's Rights Amendment does not distinguish between for-profit and nonprofit corporations: it simply strips rights from all organizations, regardless of their profit structure. *Id.*

organizations. With the exception of some discussion of the matter in the Title VII context discussed above, the answer is clear: the profit distinction generally has no impact on constitutional analysis. In fact, the courts have repeatedly and expressly rejected the notion that any categorical distinction exists between nonprofits and for-profits in several areas of constitutional analysis.

1. Commerce Clause

Both the Supreme Court and lower courts have emphasized that an entity's status as for-profit or nonprofit has no bearing on whether its activities constitute "commerce" under the Commerce Clause. In *Camps Newfound/Owatonna v. Town of Harrison*,²⁵⁷ the Court explained that application of the Commerce Clause turns on the nature of the activities conducted, not on the for-profit or nonprofit nature of the entity engaged in the activities.²⁵⁸

The *Camps Newfound/Owatonna* case concerned two nonprofit church camps from Maine which were challenging a property tax exemption that favored institutions serving mostly Maine residents.²⁵⁹ The nonprofit camps, which served predominantly out-of-state campers, alleged the exemption was invalid under the dormant Commerce Clause.²⁶⁰ In finding the exemption invalid, the Court explained that the camps' nonprofit status did not control the Commerce Clause analysis. Rather, "the argument in favor of a *categorical* exemption for nonprofits is unpersuasive,"²⁶¹ and there is "no reason why the nonprofit character of an enterprise should exclude it from the coverage . . . of the Commerce Clause."²⁶² Other courts have found the same.²⁶³

²⁵⁷ 520 U.S. 564 (1997).

²⁵⁸ *Id.* at 584-86.

²⁵⁹ *Id.* at 567-70.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 588 n.21.

²⁶² *Id.* at 584. The Court further explained that it had "similarly held that federal antitrust laws are applicable to the anticompetitive activities of nonprofit organizations" and that "the National Labor Relations Act . . . applied to the Associated Press' (A. P.'s) news gathering activities . . . despite the fact that the A.P. 'does not sell news and does not operate for a profit.'" *Id.* at 583-84 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 129 (1937)). In the labor context, some courts have included profits as part of their analysis for determining whether a religious school is a "church-operated school" within the meaning of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979). See, e.g., *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343-44 (D.C. Cir. 2002). Perhaps not surprisingly, however, there do not appear to be any reported cases in which courts actually analyze the case of a for-profit church-operated school seeking exclusion from the National Labor Relations Act based on *Catholic Bishop*, presumably because virtually all churches and church-operated schools are nonprofits.

²⁶³ See *Edwards v. California*, 314 U.S. 160, 172 n.1 (1941) ("It is immaterial whether or not the transportation is commercial in character."); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 541 (4th Cir. 1998) (explaining "the dispositive inquiry is whether the *transaction* is commercial, not whether the *entity* engaging in the transaction is commercial").

2. Free Speech Clause

As *Citizens United* demonstrates, the Court takes a similar approach to First Amendment rights with respect to the Free Speech Clause. That is, the constitutional analysis does not turn on the identity of the speaker, whether that be an individual, a for-profit corporation, or a nonprofit corporation. Rather, the crux of the analysis is whether the speaker is engaged in protected speech.

The Court first articulated this principle as to profit-making corporate speakers in *First National Bank of Boston v. Bellotti*.²⁶⁴ There, the Court explained that “[t]he proper question . . . is not whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect.”²⁶⁵ The Court reiterated and expanded on this proposition in *Citizens United*, explaining that “political speech does not lose First Amendment protection ‘simply because its source is a corporation.’”²⁶⁶ Although the Court recognized corporations have “special advantages such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets,”²⁶⁷ it explained that “[i]t is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.”²⁶⁸ The Court also made clear that its ruling reached the First Amendment activities of corporations *regardless* of their status as for-profit or nonprofit entities,²⁶⁹ both of which of course enjoy the advantages of the corporate form.

Because the law at issue had an exception for media corporations, the Court considered whether the government could accord different speech rights to different corporations.²⁷⁰ The Court rejected such differentiation among corporate speakers as impermissible under the First Amendment:

²⁶⁴ 435 U.S. 765, 776-77 (1978).

²⁶⁵ *Id.*; see also *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (rejecting the argument that an “entity” should have lesser First Amendment rights: “The government’s power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker”).

²⁶⁶ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 342 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)).

²⁶⁷ *Id.* at 351 (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-59 (1990)) (internal quotation marks omitted).

²⁶⁸ *Id.* (quoting *Austin*, 494 U.S. at 680 (Scalia, J., dissenting)) (internal quotation marks omitted).

²⁶⁹ *Id.* at 365 (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”). The Court further explained that it overturned *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), because that decision allowed the government to “suppress[] the speech of manifold corporations, both for-profit and nonprofit,” thereby “prevent[ing] their voices and viewpoints from reaching the public.” *Id.* at 354.

²⁷⁰ *Id.* at 350-52.

[T]he [media corporation] exemption results in a further, separate reason for finding this law invalid: Again by its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views. . . . This differential treatment cannot be squared with the First Amendment.²⁷¹

In the Free Speech context generally, the Court permits neither distinctions between corporate and non-corporate speakers, nor distinctions between different types of corporations.

3. Commercial Speech Doctrine

Nor do courts treat the for-profit/nonprofit distinction as significant when making determinations as to whether speech qualifies as “commercial speech” for First Amendment purposes. The Supreme Court has explained that what “defines commercial speech” is that it merely “*proposes* a commercial transaction”²⁷² or “relate[s] solely to the economic interests of the speaker and its audience.”²⁷³ Notably, this test turns on the content of the speech itself, rather than the nature or identity of the speaker.²⁷⁴

The Supreme Court has applied this test to determine whether speech is commercial or not, even when the speaker is a nonprofit.²⁷⁵ Lower courts applying this test have expressly recognized that whether speech is commercial does not depend on the speaker’s status as a for-profit or a nonprofit entity.²⁷⁶ For example, in *Aitken v. Communications Workers of America*,²⁷⁷ a union claimed that its speech could not be commercial speech because it was organized as a nonprofit entity. The court rejected the claim because “status as a for-profit or non-profit entity cannot control whether [speech] is commercial speech in First Amendment terms.”²⁷⁸ Thus, as with speech generally and the Commerce Clause, the relevant constitutional analysis turns not on the for-

²⁷¹ *Id.* at 352-53.

²⁷² *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989).

²⁷³ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

²⁷⁴ *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) (“[E]conomic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors or artists who sell their works would be correspondingly disadvantaged.”); *Fox*, 492 U.S. at 482 (“Some of our most valued forms of fully protected speech are uttered for a profit.”); *Adventure Commc’ns, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 440-41 (4th Cir. 1999) (“In and of itself, profit motive on the speaker’s part does not transform noncommercial speech into commercial speech.”).

²⁷⁵ *See, e.g., Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980) (performing commercial speech analysis to determine whether solicitation by a nonprofit corporation is commercial speech).

²⁷⁶ *See, e.g., O’Brien v. Mayor & City Council of Balt.*, 768 F. Supp. 2d 804, 813 n.9 (D. Md. 2011) *aff’d in part, vacated in part en banc sub nom. Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264 (4th Cir. 2013) (vacating grant of summary judgment for procedural defects).

²⁷⁷ 496 F. Supp. 2d 653 (E.D. Va. 2007).

²⁷⁸ *Id.* at 663.

profit or nonprofit nature of the actor, but on the nature of the activity in question.

4. Establishment Clause

Although the Court has never discussed the issue directly, it is clear that both for-profit and nonprofit entities can invoke the Establishment Clause of the First Amendment. For example, last Term the unanimous Court found that the Establishment Clause provides a “ministerial exception” for Hosanna-Tabor Lutheran Church and School, a nonprofit corporation.²⁷⁹

Other cases demonstrate that the Court does not limit its Establishment Clause jurisprudence to nonprofits. In fact, many of the Court’s paradigmatic Establishment Clause cases involved for-profit businesses as plaintiffs, including *Larkin v. Grendel’s Den, Inc.*,²⁸⁰ *Estate of Thornton v. Caldor, Inc.*,²⁸¹ and *Texas Monthly, Inc. v. Bullock*.²⁸² The for-profit/nonprofit distinction does not operate to bar for-profit businesses from asserting rights under the Establishment Clause.

As with the Commerce Clause, Free Speech Clause, and commercial speech doctrine, the Establishment Clause treatment of profit-making businesses confirms that the profit distinction does not drive constitutional analysis. Courts repeatedly reject the notion that any categorical rules about for-profits and nonprofits should be applied to control constitutional analysis. Instead of relying on the profit distinction, courts focus on the nature of the activity at issue, which governs the availability of constitutional rights. Thus, any argument to invest the profit distinction with determinative force in the religious liberty context would need to explain why a distinction that apparently carries no weight in other parts of the First Amendment—even elsewhere within the Religion Clause—should be viewed as categorical and dispositive where religious exercise rights are concerned.

²⁷⁹ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp’t Opportunity Comm’n*, 132 S. Ct. 694, 703 (2012) (“The Establishment Clause prevents the Government from appointing ministers . . .”). As explained by the Sixth Circuit, Hosanna-Tabor is “an ecclesiastical corporation affiliated with the Lutheran Church-Missouri Synod.” *Equal Emp’t Opportunity Comm’n v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010), *rev’d*, 132 S. Ct. 694 (2012).

²⁸⁰ 459 U.S. 116, 117 (1982) (holding that the state may not delegate power over liquor licenses to churches).

²⁸¹ 472 U.S. 703, 710–11 (1985) (holding that the state may not grant Sabbath observers an absolute and unqualified right not to work on their Sabbath).

²⁸² 489 U.S. 1, 14 (1989) (holding that the state may not grant an entangling sales tax exemption for religious periodicals).

III. THE PROFIT DISTINCTION AND THE HHS MANDATE

The federal government's recent arguments in the HHS Mandate cases provide the most prominent and comprehensive articulation of the argument against religious liberty for profit makers. In light of the information set forth in Parts I and II above, this portion of the Article will examine the government's argument that for-profit businesses "do not engage in the exercise of religion" and that the owner of a for-profit businesses can never experience a substantial burden on his religion when the government punishes his business.

A. *The Government's Argument Against Religious Liberty for Profit Makers in the HHS Mandate Context*

1. The HHS Contraceptive Mandate

The government's argument regarding the relationship between profits and religious liberty has been made in the preliminary stages of more than two dozen cases concerning what is popularly called the "HHS Mandate."²⁸³ The HHS Mandate refers to a regulatory requirement issued under the Patient Protection and Affordable Care Act (the "ACA").²⁸⁴ The ACA requires that all "group health plan[s]" cover "preventive care and screenings" for women without cost sharing.²⁸⁵ HHS, the Department of Labor, and the Internal Revenue Service have adopted guidelines defining "preventive care" to include "[a]ll [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."²⁸⁶

²⁸³ "HHS" stands for the U.S. Department of Health and Human Services, the agency that issued the administrative rule.

²⁸⁴ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

²⁸⁵ 42 U.S.C. § 300gg-13(a)(4) (2006 & Supp. V 2012).

²⁸⁶ *Women's Preventive Guidelines*, HEALTH RES. & SERVS. ADMIN., <http://www.hrsa.gov/womens-guidelines/> (last visited Oct. 5, 2013). FDA-approved contraceptives include the drugs levonorgestrel (commonly known as Plan B or the "morning-after pill") and ulipristal acetate (commonly known as Ella or the "week-after pill"), both of which can prevent implantation of a fertilized egg in the womb, thereby inducing an early-term abortion. *Birth Control: Medicines to Help You*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm> (last visited Oct. 5, 2013) (describing various FDA-approved contraceptives, including the emergency contraceptives Plan B and Ella). The Mandate also includes copper intrauterine devices, or IUDs, which are widely acknowledged to interfere with implantation. See Pam Belluck, *Abortion Qualms on Morning-After Pill May Be Unfounded*, N.Y. TIMES (June 5, 2012), <http://www.nytimes.com/2012/06/06/health/research/morning-after-pills-dont-block-implantation-science-suggests.html> (noting scientific arguments that emergency contraceptive drugs may not interfere with conception, but acknowledging that copper IUDs "can work to prevent pregnancy after an egg has been fertilized").

Under the ACA, employers with more than fifty employees must provide insurance coverage for these products and services.²⁸⁷ Failure to include this coverage triggers an assessment of \$100 per “affected individual” per day.²⁸⁸ Moreover, plan participants and beneficiaries may sue if a plan fails to cover the mandated products or services.²⁸⁹ Dropping employee health coverage altogether would subject the plan provider to an annual penalty of \$2,000 per employee.²⁹⁰

2. Exemptions and Accommodations For Nonprofits

From the outset, the HHS Mandate raised religious liberty concerns.²⁹¹ Certain employers objected to the Mandate, claiming their religion precluded them from offering the required insurance coverage.²⁹² In an attempt to address these concerns, the government has created two categories of religious objectors who will receive some protection. First, certain “nonprofit organization[s],” as described in the Internal Revenue Code, are deemed to be “religious employers” and therefore entirely exempt from the Mandate.²⁹³ This classification is limited to entities treated as churches or religious orders for tax purposes.²⁹⁴

Second, the government plans to offer other religious nonprofits an “accommodation” by which the coverage will not be mentioned in their insurance policies, but their insurer will directly provide it to their employees as a

²⁸⁷ 42 U.S.C. §§ 300gg-13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv) (2012).

²⁸⁸ I.R.C. § 4980D(b) (2006 & Supp. V 2012). *See also Penalties for Employers Not Offering Affordable Coverage Under the Affordable Care Act*, HENRY J. KAISER FAMILY FOUND., <http://kaiserfamilyfoundation.files.wordpress.com/2012/01/employer-penalty-flowchart-v3-071513.pdf> (last updated July 15, 2013).

²⁸⁹ 29 U.S.C. §§ 1132(a)(1)(B), 1185d(a)(1) (2006).

²⁹⁰ I.R.C. §§ 4980H(a), (c)(1).

²⁹¹ *See, e.g.*, President Barack Obama, Remarks on Preventive Care (Feb. 10, 2012) (noting that “the principle of religious liberty, an inalienable right that is enshrined in our Constitution” was at stake, and emphasizing it as a right he cherishes both “[a]s a citizen and as a Christian”), *available at* <http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care>.

²⁹² *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

²⁹³ *See* I.R.C. §§ 6033(a)(3)(A)(i), (iii) (2006) (exempting “churches, their integrated auxiliaries, and conventions or associations of churches [and] the exclusively religious activities of any religious order”); 45 C.F.R. § 147.130(a)(1)(iv)(B) (2012).

²⁹⁴ On February 6, 2013, the government issued a notice of proposed rulemaking that would eliminate prior requirements that a “religious employer” focus exclusively on indoctrination in the faith and hire and serve primarily members of that faith. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013) (to be codified at 45 C.F.R. pts. 147, 148 & 156). The government explained that eliminating these requirements “would not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules.” *Id.* This formulation issued as a final rule on June 28, 2013. *See* 45 C.F.R. § 147.130.

result of the issuance of the policy.²⁹⁵ Mechanically, the coverage would actually be part of a separate policy that the employer's insurer issues to the employee as an automatic consequence of the employer providing non-compliant health insurance.²⁹⁶ The stated goal of this approach is to "protect eligible organizations from having to contract, arrange, pay, or refer for contraceptive coverage to which they object on religious grounds."²⁹⁷

The government has emphasized that the exemption and accommodation described above are only available for *nonprofit* entities. The government explained that because "the exemption for religious organizations under Title VII of the Civil Rights Act of 1964" does not apply to for-profit organizations, it would be "appropriate" to accommodate nonprofit, but not for-profit, employers.²⁹⁸ In limiting the accommodation to nonprofit entities, the government expressly stated that the profit or nonprofit taxpaying status of an organization—rather than its particular corporate form—is the controlling factor.²⁹⁹ Whereas any for-profit business, no matter what form it takes, is compelled to comply with the Mandate, "an organization that is organized and operated as a nonprofit entity is not limited to any particular form of entity."³⁰⁰ Thus, corporate form, sincerity of religious conviction, and any other conceivable consideration are completely eclipsed by a single factor: profits.

3. The Government's Two-Part Argument Against Religious Liberty for Profit Makers

Because for-profit entities are not eligible for either the religious employer exemption or the accommodation, more than two dozen for-profit businesses and their owners have filed federal lawsuits seeking exemptions from the Mandate.³⁰¹ In defending these suits, the government has argued for-

²⁹⁵ 78 Fed. Reg. 8456, 8461.

²⁹⁶ *Id.* at 8462.

²⁹⁷ *Id.*

²⁹⁸ *Id.* Consistent with the government's positions in court, the notice of proposed rulemaking ("NPRM") appears to divide religious objectors into two types of organizations: "non-profit religious" organizations and "for-profit secular" organizations. *Id.* This is a shift even from the spring of 2012, when the same government entities publicly sought comments on "whether, as some religious stakeholders have suggested, for-profit religious employers with such objections should be considered as well." Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16501, 16504 (Mar. 21, 2012) (to be codified at 45 C.F.R. pt. 147). The 2013 NPRM contains no mention of the existence of a "for-profit religious employer," as if such an entity does not exist.

²⁹⁹ Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. at 8462.

³⁰⁰ *Id.*

³⁰¹ See, e.g., *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394 (E.D. Pa. 2013), *aff'd*, No. 13-1144, 2013 WL 3845365 (3d Cir. July 26, 2013); *Annex Med., Inc. v. Sebelius*, No. 12-2804(DSD/SER), 2013 WL 101927 (D. Minn. Jan. 8, 2013), *appeal docketed*, No. 13-1118 (8th Cir. Jan. 14, 2013); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012), *appeal docketed*, No. 12-1380

profit businesses and their owners are not eligible for religious freedom protection against the Mandate.³⁰²

The government's argument against religious liberty for profit makers has two separate components. First, the government argues a for-profit business corporation cannot itself exercise religion.³⁰³ And second, the government argues business owners are sufficiently separated from the business that they cannot allege a "substantial burden" on their religion sufficient to state a claim under federal religious freedom laws.³⁰⁴

a. *The Argument that a For-Profit Business Is Incapable of Engaging in Religious Exercises*

The government's argument against religious liberty for for-profit businesses is straightforward and simple: earning a profit is fundamentally incompatible with engaging in religious exercise. If an entity earns profits then, by definition, it cannot also engage in religious exercises.³⁰⁵ Profit making always crowds out religion.

The Hercules case provides a useful example. Hercules Industries, Inc. is a closely held Colorado corporation owned and operated by four Catholic siblings, the Newlands.³⁰⁶ Hercules manufactures and distributes HVAC systems.³⁰⁷ The Newlands and Hercules asserted that their religion forbids them

(10th Cir. Sept. 26, 2012); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106 (D.D.C. 2012), *appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013); Grote Indus., LLC v. Sebelius, 914 F. Supp. 2d 943 (S.D. Ind. 2012), *appeal docketed sub nom* Grote v. Sebelius, No. 13-1077 (7th Cir. Jan. 9, 2013); Yep v. U.S. Dep't of Health & Human Servs., No. 12-CV-06756 (N.D. Ill. 2012), *appeal docketed sub nom* Triune Health Grp., Inc. v. Sebelius, No. 13-1478 (7th Cir. Mar. 5, 2013); Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735 (S.D. Ill. 2012), *injunction pending appeal granted by* Korte v. Sebelius, No. 12-3841, 2013 WL 6757353 (Dec. 28, 2013); Monaghan v. Sebelius, 916 F. Supp. 2d 802 (E.D. Mich. 2012), *appeal docketed sub nom* Domino's Farms Corp. v. Sebelius, No. 13-1654 (6th Cir. May 17, 2013); Legatus v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012), *appeal docketed*, Nos. 13-1092, -1093 (6th Cir. Jan. 24, 2013); Autocam Corp. v. Sebelius, 1:12-CV-1096, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012), *aff'd*, No. 12-2673, 2013 WL 5182544 (6th Cir. Sept. 17, 2013); O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149 (E.D. Mo. 2012), *appeal docketed*, No. 12-3357 (8th Cir. Oct. 4, 2012); Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12-CV-92 (E.D. Mo. filed Dec. 20, 2012); Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs., No. 12-CV-3459-CV-S-RED, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012), *appeal docketed*, No. 13-1395 (8th Cir. Feb. 25, 2013); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *rev'd*, No. 12-6294, 2013 WL 3216103 (10th Cir. June 27, 2013).

³⁰² See Brief for the Appellees at 7, *Hobby Lobby*, 870 F.Supp.2d 1278 (No. CIV-12-1000-HE).

³⁰³ *Id.* at 11.

³⁰⁴ *Id.* at 12.

³⁰⁵ See DOJ Hercules Motion to Dismiss, *supra* note 2, at 17.

³⁰⁶ See *Newland*, 881 F. Supp. 2d at 1292.

³⁰⁷ *Id.* "HVAC" is an acronym for heating, ventilation, and air-conditioning.

from complying with the HHS Mandate.³⁰⁸ The government responded that the company's goal of making money precluded Hercules from engaging in any exercise of religion.³⁰⁹ The government asserted that "there [was] nothing to indicate that Hercules Industries [was] anything other than a for-profit, secular employer."³¹⁰ Under this one-size-fits-all approach, the government argued that profit-making status should be considered "conclusive."³¹¹

The government's argument is completely contingent upon the presence or absence of profits, rather than by any particular characteristics of the business at issue.³¹² For example, the government advanced the same argument against Mardel Christian and Education, a chain of Christian bookstores, and Tyndale House Publishers, a Bible publisher directing 96.5 percent of profits to a Christian nonprofit foundation.³¹³

The government derives this profit-based distinction from Title VII of the Civil Rights Act of 1964.³¹⁴ As discussed above, Title VII prohibits employers from discriminating against employees and applicants on the basis of certain protected characteristics, including religion.³¹⁵ However, the government argues that the exemption from Title VII for a "religious corporation,

³⁰⁸ *Id.* at 1292 (stating that the Newlands "seek to run Hercules in a manner that reflects their sincerely held religious beliefs" (internal quotation marks omitted)).

³⁰⁹ DOJ Hercules Motion to Dismiss, *supra* note 2, at 17-18. The government's intense focus on the issue of profits appears to be a relatively new strategy. Although in prior cases such as *United States v. Lee* the government did not argue that profit making was fundamentally inconsistent with religious exercise; indeed the word profit was not mentioned a single time. See Brief for the United States, *United States v. Lee*, 455 U.S. 252 (1981) (No. 80-767), 1981 WL 389829. In contrast, the government's brief in the Hercules case mentions "profits" more than 30 times. DOJ Hercules Motion to Dismiss, *supra* note 2, *passim*. Nor has the government offered this categorical argument in other recent cases arguably touching on religious liberty for profit makers. See, e.g., Brief for the Respondent, *Tony & Susan Alamo Found. v. Donovan*, 571 U.S. 290 (1985) (No. 83-1935), 1985 WL 669832; Brief for the United States, *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (Nos. 86-179, 86-401), 1987 WL 864781.

³¹⁰ DOJ Hercules Motion to Dismiss, *supra* note 2, at 17. This argument ignores that the Newlands are also plaintiffs. Cf. Order at 4, *Korte v. Sebelius*, No.12-3841 (7th Cir. Dec. 28, 2012), 2012 WL 6757353.

³¹¹ DOJ Hercules Motion to Dismiss, *supra* note 2, at 17

³¹² *Id.* ("By definition, a secular employer does not engage in any 'exercise of religion' . . .").

³¹³ See *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012) (including Mardel, Inc., d/b/a Mardel Christian and Education); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 111 (D.D.C. 2012).

³¹⁴ See Hercules App. Br., *supra* note 154, at 14-15; see also Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013) (to be codified at 45 C.F.R. pts. 147, 148 & 156).

³¹⁵ 42 U.S.C. § 2000e-2 (2006 & Supp. V 2012) (providing that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . religion").

association, educational institution, or society”—allowing such groups to engage in religious discrimination in hiring³¹⁶—is part of the “special solicitude to the rights of religious organizations” under the Free Exercise Clause.³¹⁷

The government argues only “religious organizations” that Title VII’s exemption permits to hire and fire based on religion under Title VII may exercise religion under federal law.³¹⁸ Because “[n]o court has ever found a for-profit corporation to be a religious organization”³¹⁹ for Title VII purposes, the government concludes that profit makers are also categorically barred from engaging in any other exercise of religion under religious freedom laws such as the Religious Freedom Restoration Act (“RFRA”).³²⁰ Instead, RFRA must be interpreted to include this distinction from Title VII.³²¹

At least at the preliminary injunction stage of the HHS Mandate litigation, some courts have accepted the argument that for-profit businesses cannot exercise religion.³²² For example, the *Hobby Lobby* trial court observed that businesses do not hold or exercise religious beliefs “separate and apart from . . . their individual owners or employees.”³²³ The court found that corporate entities are unable to “pray, worship, observe sacraments or take other religiously-motivated actions” independent of their business owners.³²⁴ The court then concluded that the personal nature of religious exercise precluded a business from any form of legal religious protection.³²⁵

b. *The Argument that Owners of For-Profit Businesses Cannot Engage in Religious Exercises During Profit Making*

Plaintiffs in HHS Mandate cases generally include both the businesses and their owners.³²⁶ The owners typically assert that the Mandate constitutes

³¹⁶ *Id.* § 2000c-1(a).

³¹⁷ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp’t Opportunity Comm’n*, 132 S. Ct. 694, 706 (2012).

³¹⁸ *Hercules App. Br.*, *supra* note 154, at 16.

³¹⁹ See Brief for the Appellees at 11, *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. 12-6294).

³²⁰ *Id.* at 12.

³²¹ See Opposition to Plaintiffs’ Emergency Motion for an Injunction Pending Appeal at 12, *Annex Med., Inc. v. Sebelius*, No. 13-1118 (8th Cir. Jan. 25, 2013) (arguing that “when Congress enacted RFRA in 1993, it did so against the backdrop of the federal statutes that grant religious employers alone the prerogative to rely on religion in setting the terms and conditions of employment”).

³²² See, e.g., *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013).

³²³ *Hobby Lobby*, 870 F. Supp. 2d at 1291.

³²⁴ *Id.*

³²⁵ *Id.* (concluding that “[r]eligious exercise is, by its nature, one of those ‘purely personal’ matters referenced in *Belotti* which is not the province of a general business corporation”).

³²⁶ See, e.g., *id.* at 1293.

a “substantial burden” under RFRA and the Free Exercise Clause. A substantial burden exists where the government imposes “substantial pressure” on an adherent to engage in conduct contrary to a sincerely held religious belief.³²⁷ The owners argue the Mandate creates substantial pressure on them by imposing severe financial penalties on their religious exercise of excluding certain services from insurance coverage.³²⁸ By forcing business owners to use their property (namely, the business) to include these services in insurance coverage, the owners argue the Mandate imposes substantial pressure on them to forfeit their religious objections and comply with the law.³²⁹

The government’s response targets the plaintiffs’ use of a for-profit company to earn their living. The government argues the owners voluntarily chose to conduct their business through a for-profit corporation, which is a separate legal entity.³³⁰ Accordingly, the owners have no right to complain about pressures imposed on them through that entity.³³¹ The government essentially argues that because the plaintiffs enjoy limitations on liability and other benefits from the corporate form, they should not be permitted to “selectively contend—when it suits their interests—that they and the corporation are one and the same.”³³² The government further criticized the notion that a business owner can have a legitimate claim against government pressure imposed through a sanction on the business itself, arguing that a substantial burden may not be established “by invoking this type of trickle-down theory.”³³³

B. *The Argument that Profit-Making Corporations and Their Owners Have Religious Liberty in the HHS Mandate Context*

The government’s argument against religious liberty for profit makers purports to borrow the profit distinction from other areas of the law and apply

³²⁷ See, e.g., *Abdulhasceb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010). This test is widely shared among the circuit courts applying RFRA. The Supreme Court has not yet needed to define “substantial burden” under RFRA, but has used similar language when describing actionable burdens under the Free Exercise Clause. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (“Here not only is it apparent that appellant’s declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.”).

³²⁸ See *Hercules App. Br.*, *supra* note 154, at 28.

³²⁹ *Id.*

³³⁰ DOJ *Hercules* Motion to Dismiss, *supra* note 2, at 20-21.

³³¹ *Id.* at 20.

³³² *Id.* at 20-21.

³³³ See Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction at 14, *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012) (No. 1:12-cv-1635).

it to religious freedom claims. In light of the information presented in Parts I and II above, the government's argument fails for four principal reasons.

1. For-Profit Businesses Exercise Religion

First, there can be no serious question about whether for-profit corporations "exercise religion." As discussed in Part I.A, a religious exercise is simply an action or abstention based on a religious belief. As a matter of observable fact, for-profit corporations do sometimes act based on religious beliefs, as described in Part II.C. Closing for the Sabbath, taking out certain types of loans to comply with Islamic law, and urging others to "know Jesus Christ as Lord and Savior" are all obvious religious exercises.³³⁴

Comparison with the treatment of for-profit corporations in other areas confirms that such entities are regularly understood as being capable of acting on a wide range of subjective beliefs or intentions: ethical views, philosophical views, criminal intentions, anti-religious animus, etc.³³⁵ A shopping trip to Whole Foods or a lunch at Chipotle confirms that businesses frequently have ethical, moral, or philosophical commitments beyond mere profit maximizing. Our law recognizes that businesses can form and act on these types of subjective beliefs, and often it encourages such behavior.³³⁶

There is no basis in law or logic to say that corporations can form moral views about ethics, philosophy, and the environment, but not about religion. If NOOCH Vegan Market can choose not to sell pork because of an ethical commitment to not killing animals, it makes no sense to say Afrik Grocery, Inc. is incapable of making a similar choice based on religious commitments. And it makes even less sense to say that a corporation is capable of forming and acting on beliefs about religion when holding the corporation liable for religious discrimination,³³⁷ but not when the corporation engages in other, more positive actions based on beliefs about religion. Indeed, efforts to limit permissible corporate purposes to exclude religion have been rightly rejected

³³⁴ See *supra* Part I.B. In fact, the Affordable Care Act recognizes that a "facility" can have a conscientious objection to providing or referring for abortions, without requiring the facility be nonprofit. 42 U.S.C. § 18023(b)(4) (2006 & Supp. IV 2011); see also 745 ILL. COMP. STAT. ANN. 70/10 (West 2010) (protecting any "person, association, or corporation" operating a "facility" from being forced to provide any healthcare services "which violate[] the healthcare facility's conscience," with no requirement that the facility be nonprofit); *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160, 1174 (Ill. App. Ct. 2012) (applying 745 ILL. COMP. STAT. ANN. 70/10 to protect a for-profit corporate pharmacy from regulation forcing it to dispense emergency contraceptives in violation of the pharmacy's conscience). The alternative financing program designed by Minneapolis further demonstrates that governments often recognize that some for-profit businesses are conducted according to religious requirements. See *supra* Part I.B.

³³⁵ See *supra* Part II.

³³⁶ See, e.g., *supra* Part II.B.

³³⁷ See *supra* Part II.B.

as unconstitutional.³³⁸ Such discrimination against religious motivations would be a clear violation of *Employment Division, Department of Human Resources of Oregon v. Smith*.³³⁹ In *Smith*, the Court said “[i]t would doubtless be unconstitutional” to target “acts or abstentions only when they are engaged in for religious reasons.”³⁴⁰ Thus the far better reading of these data points, and the only constitutional reading, is that for-profit businesses are quite capable of forming and acting upon religious beliefs and therefore engaging in religious exercise.

2. The Free Exercise Clause and RFRA Protect Religious Exercise by Profit Makers

Neither the Free Exercise Clause nor the Religious Freedom Restoration Act (“RFRA”) refers to profit-making status. Rather, the Free Exercise Clause broadly establishes that “Congress shall make no law . . . prohibiting the free exercise” of religion. There is no language to suggest limits as to whose free exercise is protected, or that it will be protected only in certain circumstances.³⁴¹ Likewise, RFRA broadly restricts all government actions that “substantially burden a person’s exercise of religion” with no indication that its protections are only available in nonprofit settings.³⁴² Indeed, both RFRA and the Free Exercise Clause can be understood as limitations on government power, rather than mere grants of rights to particular parties.

Supreme Court cases decided under the Free Exercise Clause and RFRA suggest the Court has understood neither profit making nor the corporate form to expand the government’s power to regulate religious exercise, or to interpose a categorical bar on religious liberty claims. For example, the Court has twice allowed commercial proprietors to assert religious claims against business regulation. In *United States v. Lee*,³⁴³ the Court allowed an Amish employer to assert religious objections to paying social security taxes in connection with his business.³⁴⁴ The Court found that Amish religious beliefs forbade both payment and receipt of social security benefits, and therefore “compulsory participation in the social security system interferes with their

³³⁸ See *Falwell v. Miller*, 203 F. Supp. 2d 624, 630 (W.D. Va. 2002) (invalidating a Virginia corporate statute prohibiting churches from incorporating). This makes sense. A law allowing a corporation to make decisions on other factors, but prohibiting it from making decisions based on religion, would obviously “impose special disabilities on the basis of religious views or religious status.” *Id.* (quoting *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)) (internal quotation marks omitted).

³³⁹ 494 U.S. 872 (1990).

³⁴⁰ *Id.* at 877-78.

³⁴¹ U.S. CONST. amend. I.

³⁴² 42 U.S.C. § 2000bb(a)(3) (2006 & Supp. V 2012).

³⁴³ 455 U.S. 252 (1982).

³⁴⁴ *Id.* at 257.

free exercise rights.”³⁴⁵ Likewise, in *Braunfeld v. Brown*,³⁴⁶ the Court allowed Jewish merchants to challenge a Sunday closing law because it “ma[d]e the practice of their religious beliefs more expensive.”³⁴⁷ In each case, the Court found that the particular burdens at issue satisfied the compelling interest test. In neither did the Court suggest any bar on profit makers asserting religious liberty claims, or suggest that the particular arrangement of ownership under state law (which was presumably sole proprietorship) had any impact on the reach of the federal Free Exercise Clause.³⁴⁸

To the extent those cases left doubt about the relevance of the corporate form, the Court’s decisions in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*³⁴⁹ and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*³⁵⁰ appear to have resolved the doubt: the corporate form does not foreclose assertion of Free Exercise and RFRA rights.³⁵¹ The *O Centro Espirita* Court’s implicit reading of RFRA’s reference to “person” to include corporations is consistent with the federal statutory presumption that “person” usually includes corporations.³⁵² As the Supreme Court explained in *Monell v. Department of Social Services of the City of New York*,³⁵³ this presumption is nothing new: “[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.”³⁵⁴

Furthermore, as Part II.E discussed, courts have routinely rejected arguments for categorical distinctions between nonprofit and for-profit entities for constitutional questions. That distinction carries no weight in Commerce Clause, Free Speech Clause, commercial speech, or Establishment Clause jurisprudence. There is no valid reason to invest the distinction with controlling weight only where the exercise of religion is concerned.

As a statutory matter, accepting the government’s argument would require selectively interpreting the word “person” in RFRA to include corporations, but only some corporations (nonprofits) and not others (for-profits).

³⁴⁵ *Id.*

³⁴⁶ 366 U.S. 599 (1961).

³⁴⁷ *Id.* at 605.

³⁴⁸ The Court’s application of the Free Exercise Clause in *Lee* and *Braunfeld* is also consistent with cases such as *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), both of which protect the Free Exercise right to earn a living without facing government-imposed penalties on religious exercise.

³⁴⁹ 508 U.S. 520 (1993).

³⁵⁰ 546 U.S. 418 (2006).

³⁵¹ *See id.* at 423 (deciding in favor of a New Mexico corporation on its RFRA claim); *Lukumi*, 508 U.S. at 524 (awarding a Florida nonprofit corporation relief under the Free Exercise Clause).

³⁵² *See* 1 U.S.C. § 1 (2006) (stating that “person” ordinarily “include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals”).

³⁵³ 436 U.S. 658 (1978).

³⁵⁴ *Id.* at 687.

Yet nothing in the statute's text suggests religious freedom rules are supposed to vary in this regard. To the contrary, the legislative history of RFRA strongly suggests one goal of RFRA was to impose a single, uniform standard for religious freedom claims across all contexts.³⁵⁵ In fact, when faced with a proposed amendment that would have lessened protection for prisoners, several representatives and senators argued that RFRA's uniform application of the compelling interest test must extend equally to everyone, even to people who are incarcerated.³⁵⁶ It is difficult to imagine that the same Congress that was concerned about ensuring uniform application of RFRA to prisoners was simultaneously (and silently) using the term "person" to selectively exclude some law-abiding businesses and their owners, simply because they earn profits.

3. Title VII Law and the Tax Code Suggest Profit Makers Can Exercise Religion

The government's attempt to use Title VII of the Civil Rights Act of 1964 to limit religious liberty for profit makers undermines the statute's principal function—protecting religious liberty for people earning a living.³⁵⁷ The statute provides no support for the government's argument that failure to qualify for Title VII's religious corporation exemption disqualifies an employer from all other exercises of religion. To the contrary, Title VII's religious exemption makes no reference to profit making at all.³⁵⁸ Courts interpreting that provision have not used profit making as a categorical bar but

³⁵⁵ See, e.g., Brief of Amici Curiae Sen. Orrin Hatch et al., *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294), 2013 WL 773280, at *20 (noting RFRA's "one-rule-for-everybody principle reflected in RFRA's text and structure"); *id.* at *16-17 ("RFRA's statutory structure—a single rule with a single exception—reflects the principle that Government should apply the same protective standard to all exercises of religion, by all persons."); *id.* at *18 ("Congress plainly wrote RFRA to include corporations . . .").

³⁵⁶ Senators of both parties opposed what Senator Lieberman termed the "dramatic proposal" to create "two separate standards for the protection of religious freedoms: protections afforded citizens out of jail and protections afforded incarcerated citizens." 139 CONG. REC. S14462 (daily ed. Oct. 27, 1993) (statement of Sen. Lieberman); see also 139 CONG. REC. S14465 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch) ("[T]his amendment sets a dangerous precedent for religious liberty. The real danger lies not so much in the exemption of prisoners, but in the choice we are making about exempting anyone from the principle of the free exercise of religion. Today we are asked only to exempt prisoners. Tomorrow, however, we will be asked to exempt others. . . . How far we will venture is a legitimate unanswered question."); 139 CONG. REC. S14466 (daily ed. Oct. 27, 1993) (statement of Sen. Danforth) ("Congress should not codify group exceptions to fundamental freedoms."); 139 CONG. REC. S14467 (daily ed. Oct. 27, 1993) (statement of Sen. Kennedy) ("As we vote today to restore broad protection for religious freedom envisioned by the Framers of the Constitution, let us not deny this fundamental right to persons in prison.").

³⁵⁷ See *supra* Part III.A.3.

³⁵⁸ See 42 U.S.C. § 2000e-1 (2006 & Supp. V).

instead have emphasized that all aspects of an organization must be considered.³⁵⁹ Moreover, Title VII's "BFOQ" provision expressly includes "businesses," an inclusion that would be incoherent if Congress understood businesses as categorically incapable of religious exercise.³⁶⁰ This presumably explains why the EEOC's Compliance Manual recognizes the possibility of for-profit religious exercise. The EEOC's Compliance Manual views profit making as simply one factor among many, no one of which is dispositive.³⁶¹ Title VII simply contains no categorical prohibition on a profit maker's religious exercise.

The IRS takes a similar approach to the profit distinction in tax law: nonprofit churches and religious organizations are permitted to sometimes earn profits, as long as they pay their taxes.³⁶² To take the most basic example, the IRS views ad sales on a church bulletin as an income-producing activity subject to taxation. Obviously the tax code recognizes the possibility that a tax-exempt religious nonprofit such as a church is capable of making money and paying taxes. If the tax code treated religion and profit making as fundamentally incompatible, these provisions would make no sense.

Furthermore, even if these other areas of the law suggested a categorically different treatment for nonprofit and for-profit entities, borrowing such distinctions from either Title VII or the Internal Revenue Code is particularly problematic in light of RFRA's express language stating that it trumps both pre-existing and future federal law. RFRA is a "super-statute,"³⁶³ which Congress expressly designed to control over other federal laws: "This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993."³⁶⁴

Because other areas of federal statutory law do not treat religion and profit making as categorically incompatible, the profit distinction cannot create a categorical bar in the religious liberty context, particularly where federal law expressly requires RFRA to apply broadly.

³⁵⁹ See *supra* Part III.A.3.

³⁶⁰ See 42 U.S.C. § 2000c-2(c).

³⁶¹ See *supra* Part II.C.2.

³⁶² See *supra* Part II.D.1.

³⁶³ "RFRA operates as a sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach. . . . [It] is thus a powerful current running through the entire landscape of the U.S. Code." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253-54 (1995).

³⁶⁴ 42 U.S.C. § 2000bb-3(a).

4. Owners of For-Profit Businesses Can Assert Religious Liberty Claims Under the Free Exercise Clause and RFRA

Nor is there support for the claim that owners of a corporate business can never suffer a burden on their religion by virtue of penalties imposed on that business. Under RFRA, all that is necessary for a “substantial burden” is that the government impose “substantial pressure” on a person to change a religious exercise.

The government argues the benefit of limited liability means business owners cannot experience pressure from punishment of their businesses. As a matter of logic, however, it is difficult to see how the imposition of large fines on a business would not create substantial pressure on the owner of that business, even though the owner and the business are separate entities.³⁶⁵ Threatening to harm a person’s business seems a very obvious way of imposing pressure on the person. This logic is confirmed by laws that impose punishments or offer incentives to corporations as ways of imposing positive or negative pressure on business owners.³⁶⁶

The separation argument is particularly inadequate in light of the tax treatment accorded to most corporations in the country as S corporations.³⁶⁷ If the government does not regard an owner as wholly separate from his closely held corporation for the important purpose of taxes, there is no reason to treat them as wholly separate when the same government is imposing tax penalties, which is how most of the HHS Mandate punishments are exacted.³⁶⁸

CONCLUSION

For the reasons set forth above, there is no basis for treating religion and profit making as mutually exclusive. Both for-profit businesses and their owners can assert religious freedom rights. Existing religious freedom law, observable facts about the behavior of businesses and business owners, and the general treatment of for-profit business organizations in a variety of circumstances all confirm that religious exercise by profit-making businesses and their owners are permitted and protected. The government has no greater power to prohibit free exercise in the profit-making context than it would to prohibit any other constitutional right—speech, establishment, abortion, or anything else—when practiced by people or organizations earning profits.

³⁶⁵ Indeed, the Court has previously recognized that far smaller financial penalties impose substantial burdens on religion. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (finding that a five-dollar fine on religious practice created “not only severe, but inescapable” pressure).

³⁶⁶ *See supra* Parts II.C-D, III.A.

³⁶⁷ *See supra* Part II.D.

³⁶⁸ *See, e.g., I.R.C. §§ 4980D, 4980H* (2006 & Supp. V) (penalties for failure to provide required insurance coverage).

Denying religious liberty rights in the profit-making context requires treating religious exercise as a special and disfavored activity at every turn. Businesses would have to be deemed able to act on subjective motivations about ethics, the environment, and other non-financial beliefs. Yet, those businesses would be deemed unable to act on beliefs about religion. Business owners would have to be viewed as responsive to penalties imposed on their businesses through criminal law, tax policy, and discrimination law. But, businesses would be viewed as completely immune from pressure created by direct punishment of those same businesses for religious exercise. The Constitution would need to be read to ignore the profit distinction for every other type of analysis but to strictly embrace that same distinction as controlling in only the Free Exercise Clause. Title VII would need to be read not as broadly protective of the right to exercise religion while making money (which is surely its primary purpose) but as the source of a broad incapacity of all profit makers to exercise religion in any context whatsoever.

There is no principled or permissible reason to treat religious exercise in this specially disfavored manner. Doing so turns religious liberty law on its head, singling out religious exercise for special burdens rather than special protections. The government has no such power to discriminate against acts on the basis of the religious motivation behind those acts.

A categorical rule prohibiting religious exercise during profit making would impose a one-size-fits-all approach to religious liberty that is incompatible with the nation's religious diversity. The far better approach, and indeed the only approach permissible under our Constitution and religious freedom laws, is for the law to recognize that different people will engage in different religious exercises in a nearly limitless variety of contexts, including the profit-making context. Whether the law protects a particular act as religious exercise turns not on the type of tax return the actor files, but on whether the action is based on a sincere religious belief.

Of course, as a matter of religious belief, individuals and religious groups may still choose to adopt a strict interpretation of the theological statement that one "cannot serve both God and Money." But as a matter of religious freedom law, the government may not.