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QUESTIONING SINCERITY: THE ROLE OF THE COURTS AFTER *HOBBY LOBBY*

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INTRODUCTION

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court extended the protections of the Religious Freedom Restoration Act (RFRA) to Hobby Lobby, Mardel, and Conestoga Wood Specialties, three closely held corporations, and held that the contraception mandate of the Affordable Care Act substantially burdened their religious exercise.[1] The sincerity of their religious beliefs was never disputed.[2] As such, they had no difficulty meeting RFRA's requirement that their asserted beliefs be both sincere and religious in nature.[3] In the wake of the decision, however, critics have expressed concern that future courts will be powerless to block insincere RFRA claims brought by wholly secular corporations seeking to evade generally applicable laws.[4]

In her powerful dissent, Justice Ginsburg proclaimed an "overriding interest" in "keeping the courts 'out of the business of evaluating' . . . the sincerity with which an asserted religious belief is held."[5] Under that view, a court "must accept as true" any assertion that one's "beliefs are sincere and of a religious nature" when evaluating a RFRA claim.[6] Justice Ginsburg's approach treats the merits of a religious belief much the same as the sincerity with which a belief is held; evaluating either, in her view, would make the courts arbiters of scriptural interpretation. If unable to evaluate sincerity, courts would indeed be powerless to identify fraudulent claims.

Fortunately, courts historically have demonstrated that they are able to ferret out insincere religious claims. There is a long tradition of courts competent-

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

2. *Id.* at 2774 ("[N]o one has disputed the sincerity of their religious beliefs.").

3. *See id.* at 2774 & n.28.

4. *See, e.g.*, Michael Hiltzik, *Danger Sign: The Supreme Court Has Already Expanded Hobby Lobby Decision*, L.A. TIMES (July 2, 2014, 12:37 PM), http://www.latimes.com/business/hiltzik/la-fi-mh-expanded-hobby-lobby-20140702-column.html#page=1.

5. *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting) (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1981) (Stevens, J., concurring in the judgment)).

6. *Id.* at 2798 (quoting Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008)) (internal quotation mark omitted).

ly scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity. The difference is this: Suppose someone claims a religious objection to eating broccoli, but that same person knowingly eats broccoli each week. A court, without asking whether there is any moral truth behind a religious objection to broccoli consumption, may nonetheless ask whether the claimant actually holds that religious belief. The former, spiritual question is one no court should ever ask. The latter, factual inquiry into fraud is something courts are well equipped to do by examining objective criteria. As courts face future RFRA claims from for-profit corporate litigants, they can continue to use objective criteria to give teeth to RFRA's "sincere belief" requirement.[7]

I. JUDICIAL EXPERIENCE FERRETING OUT RELIGIOUS INSINCERITY

Looking back on how courts have historically evaluated the sincerity of religious objections sheds light on how they can do so in the future. When Justice Alito, writing for the *Hobby Lobby* majority, concluded that a for-profit corporation's "pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail,"[8] he was drawing on deep judicial experience identifying fraudulent claims—religious and otherwise.

The sincere belief requirement has its roots in a long tradition of exempting conscientious objectors from conscripted military service.[9] That policy created a strong incentive to feign religious sincerity—and forced draft boards and courts to conduct rigorous factual inquiries into religious claims.[10] In *Witmer v. United States*, the Court observed that "the ultimate question" in such cases is "the sincerity of the registrant" objecting to military service.[11] During that inquiry, "any fact which casts doubt on the veracity of the registrant is relevant."[12]

Since then, courts have questioned religious sincerity in a variety of contexts, notably in criminal cases. Religious objections to drug laws have some-

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7. We limit our analysis to claims under statutes like RFRA, recognizing First Amendment claims involve different considerations that may weigh against asking courts to question the religious sincerity of claimants. *See infra* Part II and note 45.

8. *Hobby Lobby*, 134 S. Ct. at 2774 n.28.

9. *See* 50 U.S.C. app. § 456(j) (2012) (exempting from service anyone who "by reason of religious training and belief, is conscientiously opposed to participation in war in any form"). For a discussion of the early history of conscription in America, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1468-69 (1990).

10. *See* United States v. Seeger, 380 U.S. 163, 185 (1965) ("[W]hile the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact . . . .").

11. 348 U.S. 375, 381 (1955).

12. *Id.* at 381-82.

times succeeded,[13] but criminal courts are generally skeptical,[14] wary that claimed "churches" exist for "the desire to use drugs and to enjoy drugs for their own sake, regardless of religious experience."[15] For example, in his *Hobby Lobby* opinion, Justice Alito cited to *United States v. Quaintance*,[16] in which the defendants claimed RFRA barred their drug prosecutions because "they [we]re the founding members of the Church of Cognizance, which teaches that marijuana is a deity and sacrament."[17] The Tenth Circuit rejected that claim as insincere, observing that the evidence "strongly suggest[ed]" that the defendants' marijuana dealings stemmed from "commercial or secular motives rather than sincere religious conviction."[18] Outside the drug context, courts have also rejected insincere RFRA claims in a variety of animal-related prosecutions, such as for possessing and trading in eagle feathers[19] and for importing parts of endangered African primate species.[20] Ultimately, these cases show that where there is a financial or otherwise self-interested motive to lie about a religious belief, courts are willing and able to evaluate sincerity.

In *Hobby Lobby*, Justice Alito also noted Congress's belief that federal courts are "up to the job of dealing with insincere prisoner claims," referencing the vast judicial experience exposing insincere religious claims by prisoners.[21] In the prison environment, both sincere and insincere religious accommodation claims are common, as intense regulation of mundane details of daily life gives rise to frequent conflict between government and religious interests. Prisoners have challenged prison dietary restrictions,[22] grooming restrictions,[23] housing

13. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (holding that the government did not have a compelling interest in enforcing the Controlled Substances Act against a sect with a sincere religious belief that required the use of a controlled substance).

14. *See* John Rhodes, *Up in Smoke: The Religious Freedom Restoration Act and Federal Marijuana Prosecutions*, 38 OKLA. CITY U. L. REV. 319, 356 (2013) ("[F]ederal marijuana defendants have invoked [RFRA] as a defense with limited success, which appears reasonable at first glance because many defendants have raised seemingly fanciful explanations for their religious marijuana use.").

15. United States v. Kuch, 288 F. Supp. 439, 444 (D.D.C. 1968).

16. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 n.28 (2014) (citing United States v. Quaintance, 608 F.3d 717, 718-19 (10th Cir. 2010)).

17. *Quaintance*, 608 F.3d at 718.

18. *Id.* at 722.

19. United States v. Winddancer, 435 F. Supp. 2d 687, 695 (M.D. Tenn. 2006).

20. United States v. Manneh, 645 F. Supp. 2d 98, 100, 112-14 (E.D.N.Y. 2008).

21. *Hobby Lobby*, 134 S. Ct. at 2774.

22. Abate v. Walton, 77 F.3d 488, 1996 U.S. App. LEXIS 624, at *14 (9th Cir. Jan. 5, 1996) (unpublished table decision) (finding "doubts about the consistency and sincerity of Abate's dietary demands").

23. Gartrell v. Ashcroft, 191 F. Supp. 2d 23, 25 (D.D.C. 2002) (finding that the plaintiffs "hold sincere beliefs that shaving off their beards violates a fundamental tenet of Islam").

policies,[24] and a host of other prison rules.[25] Both prison officials and courts have proven able to reject insincere religious claims, whether by evaluating the consistency of the prisoner's actions or the context in which the objection was raised.

Bankruptcy proceedings provide yet another window into the sincerity inquiry.[26] For instance, large pre-petition donations to religious organizations can be invalidated or "avoided" as fraudulent transfers.[27] While the Religious Liberty and Charitable Donation Protection Act of 1998 protected smaller donations from creditors,[28] Congress left § 548(a)(1) of the Bankruptcy Code intact, allowing the avoidance of *any* transfer, regardless of size, when made with "actual intent to hinder, delay, or defraud."[29] This forces bankruptcy courts to determine whether religious contributions are motivated by sincere religious belief.

These examples show that courts have meaningful experience questioning religious sincerity. This experience has also demonstrated that courts are best able to examine sincerity "where extrinsic evidence is evaluated" and objective factors dominate the analysis.[30] First, courts look for any secular self-interest that might motivate an insincere claim.[31] In *Quaintance*, for instance, the defendant's desire to avoid prison and continue selling drugs offered an obvious

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24. Ochs v. Thalacker, 90 F.3d 293, 296 (8th Cir. 1996) ("[W]e are skeptical that Ochs's request to be racially segregated, first made in the midst of prison racial disturbances, reflected a sincerely held religious belief.").

25. *See, e.g.*, Green v. White, 525 F. Supp. 81, 83-84 (E.D. Mo. 1981) ("[I]t does not necessarily follow that . . . defendant denied the plaintiff the ability to exercise his religion in violation of the Constitution by denying him conjugal visits, banquets, or the ability to distribute his newspaper. In light of plaintiff's reputation and his actions a responsible person would very well conclude his religion was no more than a sham."), *aff'd*, 693 F.2d 45 (8th Cir. 1982).

26. For a discussion of the role of religious donations in bankruptcy proceedings, see Kenneth N. Klee, *Tithing and Bankruptcy*, 75 AM. BANKR. L.J. 157, 181 (2001) ("[C]haritable donations or tithes are involved in twenty-two percent of Chapter 13 cases and eleven percent of Chapter 7 cases.").

27. *See* Stein v. Zarling (*In re* Zarling), 70 B.R. 402, 404-05 (Bankr. E.D. Wis. 1987) ("The debtor's attempts to portray himself as an unsophisticated individual acting out of sincere religious convictions are unconvincing.").

28. Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, sec. 3(b)(2), § 544(b), 112 Stat. 517, 518 (codified at 11 U.S.C. § 544(b)(2) (2013)).

29. 11 U.S.C. § 548(a)(1)(A) (2013); *see also* 144 CONG. REC. 8941 (1998) (statement of Sen. Grassley) ("Only genuine charitable contributions and tithes are protected by S. 1244.").

30. Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981).

31. *Id.* (looking for "evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine").

motive to fabricate religious belief.[32] This factor is particularly probative where the purported religious belief arose only after the benefit of claiming such a belief became apparent.[33] On the flip side, not "all accommodations [will] be perceived as 'benefits.'"[34] For example, in *Jolly v. Coughlin*, there was little reason to question the sincerity of a prisoner who had endured "the conditions of medical keeplock for over three and a half years based on what he claims are the tenets of his religion."[35]

Second, courts look to the claimant's behavior. Witnesses might testify about regular attendance at services or religious study.[36] More controversially, courts might also look for inconsistencies between a litigant's purported beliefs and his behavior.[37] For example, evidence that a prisoner regularly violates the requirements of his religiously mandated diet can reveal insincerity.[38] The obvious challenge here is that no one is perfect; simply because someone fails to live up to his religious ideals does not mean those beliefs are insincere.[39] Particularly for religions with stringent requirements, imperfect compliance may be the norm. Nevertheless, actions can be strongly probative of sincerity.[40] Courts should weigh this evidence carefully to avoid improperly concluding that new or erratically followed beliefs are insincere.

Claims of religious sincerity are ultimately questions of fact,[41] and courts have a wealth of experience weighing witness credibility. They are "seasoned

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32. United States v. Quaintance, 608 F.3d 717, 722 (10th Cir. 2010) ("[T]he Quaintances considered themselves in the marijuana 'business.'").

33. *See, e.g.*, United States v. Messinger, 413 F.2d 927, 928-30 (2d Cir. 1969) (citing a Justice Department recommendation that a draftee's "long delay in asserting his conscientious objector claim" was evidence of insincerity where his religious claim came two years after his initial registration for Selective Service).

34. Cutter v. Wilkinson, 544 U.S. 709, 721 n.10 (2005) ("[C]ongressional hearings on RLUIPA revealed that one state corrections system served as its kosher diet 'a fruit, a vegetable, a granola bar, and a liquid nutritional supplement—each and every meal.'").

35. 894 F. Supp. 734, 742-43 (S.D.N.Y. 1995), *aff'd*, 76 F.3d 468 (2d Cir. 1996).

36. *See, e.g.*, Howard v. United States, 864 F. Supp. 1019, 1021, 1024 (D. Colo. 1994) (noting that an inmate "educated himself in the area of Satanism through reading literature and attending lectures," and concluding as a factual matter that his beliefs were sincere).

37. *See, e.g.*, Dobkin v. District of Columbia, 194 A.2d 657, 659 (D.C. 1963) (finding that a member of the Jewish faith who worked on Saturdays was insincere when he challenged being compelled to appear in court on the Sabbath).

38. Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988) ("Evidence of nonobservance is relevant on the question of sincerity, and is especially important in the prison setting . . . .").

39. Kevin L. Brady, Comment, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431, 1458 (2011) ("Prior violations of accommodations would be weak evidence of inconsistency, since even sincere believers are imperfectly religious.").

40. *See, e.g.*, United States v. Zimmerman, 514 F.3d 851, 854 (9th Cir. 2007) (observing that a history of drug use and tattoos casts possible doubt on a prisoner's religious objection to drawing blood for DNA testing purposes).

41. *See* United States v. Seeger, 380 U.S. 163, 185 (1965).

appraisers of the 'motivations' of parties" and can observe the claimant's "demeanor during direct and cross-examination."[42] A religious claimant must convincingly explain in court the basis for his objection, and he can be pressed on inconsistencies. "Neither the government nor the court has to accept the defendants' mere say-so."[43]

II. HARNESSING OBJECTIVITY AFTER *HOBBY LOBBY*

Going forward, for-profit corporations raising RFRA claims must prove sincerity, and courts can put them to that proof, as they do in other contexts. It is important to recognize, however, that courts will be asked to perform an inquiry that can be "exceedingly amorphous, requiring the factfinder to delve into the claimant's most veiled motivations."[44] At the core of courts' apprehension to weigh religious beliefs is the dangerous temptation to confuse sincerity with the underlying truth of a claim. Particularly for unorthodox beliefs, the challenge is that "[p]eople find it hard to conclude that a particularly fanciful or incredible belief can be sincerely held."[45]

That challenge, however, should not dissuade courts from questioning the sincerity of RFRA claims. Congress could not have intended RFRA to be a blank check to opt out of government programs. A long history of courts competently questioning sincerity was part of the backdrop against which Congress legislated, and questioning sincerity is the least dangerous way to place reasonable limits on RFRA claims. While there is a risk that sincerity may be used as a proxy for verity, openly questioning the underlying truth of a religious claim surely would be worse. And were courts to examine the importance of an asserted belief, not only would they move closer to scriptural interpretation, but that test would run counter to Congress's intent to protect religious beliefs regardless of their centrality to a religious system.[46] Provided that courts take care that their test for sincerity is truly one for fraud, not verity or centrality, placing this limit on RFRA claims will best effectuate Congress's intent.

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42. United States v. Manneh, 645 F. Supp. 2d 98, 112 (E.D.N.Y. 2008) (quoting Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984)) (internal quotation mark omitted).

43. United States v. Bauer, 84 F.3d 1549, 1559 (9th Cir. 1996).

44. *Patrick*, 745 F.2d at 157.

45. Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981). These practical difficulties, combined with the different limits that constrain First Amendment claims, *see* Emp't Div. v. Smith, 494 U.S. 872 (1990), may well mean that courts should avoid questioning the religious sincerity of First Amendment claimants. This issue is beyond the scope of this Essay.

46. In 2000, Congress amended RFRA to incorporate the following definition: "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 8, 114 Stat. 803, 807 (codified at 42 U.S.C. § 2000cc-5(7)(A) (2013)); *see also id.* sec. 7(a)(3), § 5, 114 Stat. at 806 (codified at 42 U.S.C. § 2000bb-2(4)).

In doing so, courts should keep objective indicia of sincerity at the center of their analysis. The most important of those factors will be motivation to lie. If a religious exemption would save the corporation money, the court will need to carefully weigh the corporation's motives and decide in context whether its claim is merely a secular interest couched in religious language. For instance, there was little reason to question Hobby Lobby's sincerity, because the contraception mandate was unlikely to impose a monetary cost on the plaintiffs.[47] On the other hand, if publicly traded corporations are allowed to bring RFRA claims, the corporation's duty to maximize shareholder profit will also be relevant.

Corporate behavior, just like individual behavior, provides the second basket of objective factors. A for-profit corporation's public activities will often provide extensive evidence of sincerity. Hobby Lobby's and Mardel's behavior, for example, reveals their religious convictions: they close their doors on Sundays (losing millions in annual sales), refuse to sell alcohol, donate to Christian groups, and buy hundreds of religious newspaper ads.[48] Conestoga's corporate mission statement publicly proclaims its commitment to Christian values.[49] If the government disputes sincerity in other cases, internal records of corporate decisionmaking and witness testimony can help resolve doubts.

To be sure, *Hobby Lobby* leaves plenty of questions unanswered. Even when weighing the sincerity of individual religious beliefs, "[c]ourts are often unclear about which party bears the burden of proof and what evidence is permissible."[50] *Hobby Lobby* is silent as to who will adjudicate religious exemptions claimed by for-profit corporations; in both the draft and prison contexts, courts are generally involved only after government administrators conduct an initial sincerity inquiry.[51] *Hobby Lobby* also addresses only closely held corporations,[52] the owners of which are unanimous in their beliefs, where the number of owners is small enough that a court could hear testimony and other evidence regarding their beliefs. If publicly traded or nonuniform corporations raise

47. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2763 (2014) ("HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services.").

48. *Id*. at 2766. Hobby Lobby received a great deal of criticism for its admission that prior to litigation, it funded some (but not all) of the contraceptives to which it now objects. This inconsistency may be probative of insincerity but not dispositive, as the owners of Hobby Lobby alleged they were unaware of the presence of objectionable drugs in their insurance coverage. Complaint at 14-15, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (Civil Action No. CIV-12-1000-HE), 2012 WL 4009450.

49. *Hobby Lobby*, 134 S. Ct. at 2764.

50. Brady, *supra* note 39, at 1452.

51. *See, e.g.*, Beerheide v. Suthers, 82 F. Supp. 2d 1190, 1198-1200 (D. Colo. 2000) (finding the plaintiffs' religious claims sincere, but noting favorably a prison policy that established criteria for the review and cancellation of special dietary requests), *aff'd*, 286 F.3d 1179 (10th Cir. 2002).

52. *Hobby Lobby*, 134 S. Ct. at 2774.

RFRA claims, courts will face unique questions about how to weigh their religious sincerity.

Congress could assist courts in answering these questions by clarifying RFRA's requirements. In the bankruptcy context, the Religious Liberty and Charitable Donation Protection Act essentially creates a presumption of sincerity where a religious contribution is either less than fifteen percent of a debtor's income or where it is "consistent with the practices of the debtor in making charitable contributions."[53] Similarly, Congress could identify objective factors that demonstrate a presumption of religious sincerity in the for-profit context, such as a history of expressing similar positions prior to the instant litigation or lack of economic benefit from adhering to the asserted belief. Congress could also limit RFRA claims to certain types of for-profit corporations, such as those whose owners are uniform in their beliefs or that have previously expressed a religious commitment. Ultimately, RFRA is Congress's creation, and it is up to Congress to "pass upon its wisdom [and] fairness" and guide courts in how to draw these difficult lines.[54]

CONCLUSION

It is broadly accepted that the judiciary has no business evaluating the moral truth underlying religious claims.[55] The challenge for courts is how to apply that principle without extending RFRA's protections to any and all claimants. The answer lies in objectivity. As courts face RFRA claims from for-profit corporations, they can and should evaluate the factual sincerity of asserted religious beliefs as they historically have done in other contexts. Doing so certainly involves risks that courts will improperly slip into questions of verity or centrality, but this path offers the best chance at shielding the religious principles Congress intended to protect while blocking fraudulent claims by for-profit corporations seeking to evade generally applicable laws.

53. 11 U.S.C. § 548(a)(2) (2013).

54. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012).

55. *See Hobby Lobby*, 134 S. Ct. at 2798 (Ginsburg, J., dissenting) ("[C]ourts are not to question where an individual 'dr[aws] the line' in defining which practices run afoul of her religious beliefs." (alteration in original) (quoting Thomas v. Review Bd., 450 U.S. 707, 715 (1981))).