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ARTICLE

FOR-PROFIT RELIGIOUS CORPORATIONS AND QUALIFYING FOR A TITLE VII 702 EXEMPTION: EITHER REDEFINE 'RELIGIOUS CORPORATIONS' OR BRING A RFRA ACTION

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I. INTRODUCTION

Can a for-profit corporation qualify as a "religious corporation or association" pursuant to section 702 of the Civil Rights Act of 1964? *Townley* held no, and courts have followed that precedent.[1] Under the *Townley* test, the "for-profit" factor has turned into a categorical bar regarding for-profit corporations.[2] The question then becomes whether the holding in *Hobby Lobby*—that for-profit corporations have religious freedom rights—changed the precedent and allows for-profit corporations, after meeting certain qualifications, to be defined as religious.[3]

Section Two of this article presents hypothetical facts that illustrate the need for "religious corporations or associations."[4] Section Three provides the legal framework regarding the section 702 exemption of the Civil Rights Act of 1964, including an analysis of *World Vision* and *Townley*. Section Four discusses the theory of Corporate Social Responsibility (CSR), how there is an increased demand for CSR, and how religious corporations meet the demand for CSR initiatives. Section Five analyzes *Hobby Lobby* by focusing on the historical landscape of the separation of church and commerce doctrine and the impact that *Hobby Lobby* made regarding religion in the marketplace. Section Six addresses the clash between the religious freedom rights of a corporation and Title VII of the Civil Rights Act of 1964. Finally, Section Seven synthesizes the article for the business planning of a religious corporation.

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[1] EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615–16, 619 (9th Cir. 1988).

[2] *Id.* at 619, 623*; see* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 716 (2014); Spencer v. World Vision, Inc., 633 F.3d 723, 734–35 (9th Cir. 2011).

[3] *Hobby Lobby*, 573 U.S. at 690–91.

[4] *See* 42 U.S.C. § 2000e-1(a).

II. A BUSINESS ON A MISSION

Beau is a business owner. Beau is also a Christian. While managing his manufacturing business, he makes decisions that are in accord with his belief system. Beau derives the foundation of his business from the framework set forth by the Bible regarding Christian business owners.[5] Beau aligns all aspects of his business in a way that reflects his Christian beliefs. Therefore, Beau's marketing department advertises in a wholesome manner, the products and services Beau offers add value to the consumer at a reasonable price, Beau treats his employees fairly, and at times, Beau donates to the needs of his employees out of his profits. Beau pays his employees for a thirty-minute devotional and prayer time once a week. Beau also donates a certain percentage of his profits to his church and a Christian youth camp in his hometown.

In order to ensure that his business continues to run in a way that reflects his Christian beliefs, Beau only hires Christian managers. Beau believes managers are the key employees that uphold and execute the Christian vision, mission, and strategy of the business. Therefore, it is essential that Beau only hire Christian managers to maintain the mission and culture of his company.

Yosef owns a bagel shop. Yosef is a practicing Jew. The mission of Yosef's bagel shop is to share his Jewish faith. Yosef's bagel shop is completely kosher. All of his employees follow strict guidelines to ensure that kosher standards are met. Additionally, Yosef only orders from kosher suppliers. Yosef hires students from the local synagogue to serve and engage his customers. His goal is to create an environment and culture where the customers feel comfortable talking to the servers about the important things in life. Yosef hopes the servers will have an opportunity to share their faith. Yosef also gives money from his bagel shop to the local Jewish community center. The community center is a nonprofit organization. The center's building is physically connected to the synagogue; however, the center is managed and staffed separately from the synagogue. Sharing his Jewish faith and giving to the community center from his profits are essential to Yosef's brand.

Yosef believes the best way to accomplish the mission of his business is to hire only practicing Jews. He believes that employees who are Jewish will understand the importance of a kosher environment. Practicing Jews are in the best position to share the Jewish faith. Lastly, Yosef believes that only hiring individuals who share his faith will create the type of culture that will allow his business to flourish.

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[5] *See generally* JEFF VAN DUZER, WHY BUSINESS MATTERS TO GOD: AND WHAT STILL NEEDS TO BE FIXED (2010).

Jessica owns a yoga retreat center. Jessica does not subscribe to any particular religion; however, she does believe that there is a cosmic energy that can be accessed through different levels of consciousness. It is this cosmic energy that Jessica uses to heal her clients during yoga sessions. Jessica calls it spiritual yoga. From the moment Jessica's clients come to the retreat they feel a sense of this energy. The clients feel it through the décor, landscaping, building architecture, and Jessica's employees. Each employee has experienced the cosmic energy and believes it can help all those that seek it. Early on, Jessica decided to hire only people who have been healed by the cosmic energy. She made this decision because she wanted to create an environment that could best channel that cosmic energy. Jessica believes that hiring only those healed by the energy can best accomplish that goal.

The business owner's faith and religion are intrinsic to each of these three hypothetical businesses (HBs). The faith of the business owner cannot be separated from his or her HB. As opposed to merely making a profit, the primary purposes for each of the HBs are sharing the owner's faith and creating a culture and environment where that faith can be experienced in the marketplace.

Each HB has found success and just hired its fifteenth employee. The business owners have no idea that they just stepped on a landmine that could destroy the essence of why their businesses were created. By hiring its fifteenth employee, each business has subjected itself to Title VII of the Civil Rights Act of 1964, and the employers can no longer discriminate based on religion.

III. THE LEGAL FRAMEWORK

A. *Background: Civil Rights Act of 1964*

In the face of serious national crises of racial tension, segregation, and discrimination, Congress passed the Civil Rights Act of 1964 (CRA) to address the discrimination occurring throughout the nation. The scope of the CRA included voting rights, the desegregation of schools, and labor laws. Title VII of the Civil Rights Act dealt with employment law and applied to employers with fifteen or more employees.[6] One of the main purposes of Title

[6] 42 U.S.C. § 2000e(b). Note, throughout this article and in practice, two citations are used to refer to the same law: The Civil Rights Act of 1964. One citation refers to the United States Code, and those references will refer to the Act as codified under Subchapter VI of Chapter 21 of Title 42 of the United States Code (*e.g.*, 42 U.S.C. § 2000e(b)). The other citation will refer to the specific section of the Civil Rights Acts as enacted (*e.g.*, section 702 of the CRA, or simply referenced as "section 702," "section 702 exemption," or "702 exemption.") *See* EQUAL EMP. OPPORTUNITY COMM'N, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964 (last visited Feb. 10, 2021).

VII was to prevent employers from discriminating against certain protected classes of people.[7] Section 703 of the CRA states that it is unlawful for an employer to discriminate based on an individual's "race, color, religion, sex, or national origin."[8] Congress intended to stop all employment discrimination—not only discriminatory hiring practices, but also discriminatory practices regarding firing, promotions, and other opportunities.[9]

Congress also passed two exemptions to Title VII of the CRA.[10] The first was section 702, which created an organizational-wide exemption.[11] The section 702 exemption states:

> This title shall not apply to an employer with respect to the employment of aliens outside any State, or 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.[12]

This section 702 exemption only applies to a "religious corporation, association, educational institution, or society."[13] Congress reasoned that religious organizations need to discriminate to fulfill their missions without significant government interference.[14] Religious organizations have a level of autonomy apart from the jurisdiction of the government.[15] The second exemption that Congress created was a bona fide occupational qualification exemption (BFOQ exception).[16] The BFOQ exception allows employers to discriminate regarding specific positions within an organization when there is a bona fide need to discriminate.[17] The courts created a third exception, the ministerial exception, which allows churches to discriminate when hiring

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[7] 42 U.S.C. § 2000e-2(a)–(b).

[8] *Id.* at § 2000e-2(a).

[9] *See id.* at § 2000e-2(d), (l).

[10] *See id.* at §§ 2000e-1(a), 2000e-2(e).

[11] *Id.* at § 2000e-1(a).

[12] *Id.* (emphasis added).

[13] 42 U.S.C. § 2000e-1(a).

[14] Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987).

[15] *See* Angela C. Carmella, *After* Hobby Lobby*: The "Religious For-Profit" and the Limits of the Autonomy Doctrine*, 80 MO. L. REV. 381, 381–82 (2015).

[16] 42 U.S.C. § 2000e-2(e).

[17] *Id.*

ministers.[18] Similar to the reasoning in the section 702 exemption, churches have autonomy in their decisions, and churches must have the ability to discriminate in their employment practices.[19]

B. *Applicable Law for the Hypothetical Businesses*

Currently, Title VII of the CRA would apply to the HBs set out above because they each employ fifteen employees. To discriminate, the HBs must qualify for one of the three exemptions to 42 U.S.C. § 2000e. First, the ministerial exception does not apply because the HBs are not churches and they are not hiring ministers. Second, the bona fide occupational qualification does not apply. The BFOQ exception is very narrow and only applies to specific positions within the organization that demand some flexibility to achieve the normal operations of the business.[20] Section 703(e)(1) of Title VII further explains the BFOQ exception: "an employer may discriminate on the basis of 'religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the *normal operation* of that particular business or enterprise.'"[21] Additionally, the BFOQ exception is not an organization-wide exemption but a position-specific exemption.[22] The HBs' owners need an organization-wide exemption, not just a positional exemption.

Since the ministerial and BFOQ exceptions do not apply, the best opportunity for the HBs is to qualify for the 702 exemption. In other words, each HB must be defined as a "religious corporation" or a "religious association." The following is an analysis of the current status of the 702 exemption and who qualifies for the 702 exemption.

C. *Scope of 702 Exemption*

Courts struggle to define the scope of the section 702 exemption. Two of the main issues courts wrestle with are how to define religious organizations and how to determine when the section 702 exemption applies to a religious

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[18] EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 581 (6th Cir. 2018), *aff'd sub nom*. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020)*; see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).

[19] Carmella, *supra* note 15, at 381–82.

[20] Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991).

[21] *Id.* at 200 (emphasis added) (quoting 42 U.S.C. § 2000e-2(e)(1)).

[22] *Id.* at 201.

organization.[23] Courts have no trouble applying the exemption to churches.[24] Outside of the context of a church, courts find it difficult to determine when to apply the exemption. The following case is an example of how the courts extend the definition of religious organization beyond a church.

1. *Spencer v. World Vision, Inc.*

In *World Vision*, the Ninth Circuit Court of Appeals analyzed the scope of a "religious corporation, association, . . . or society" pursuant to the section 702 exemption of the Civil Rights Act.[25] The employees of World Vision brought a complaint against World Vision for religious employment discrimination.[26] World Vision is a Christian, faith-based, humanitarian nonprofit organization "dedicated to working with children, families and their communities worldwide to reach their full potential by tackling the causes of poverty and injustice."[27] World Vision was a "parachurch" organization, meaning it had a religious purpose but was not closely tied to a particular church or churches.[28] As a condition of employment, employees submitted a personal statement that "acknowledged their 'agreement and compliance' with World Vision's Statement of Faith, Core Values, and Mission Statement."[29] The employees who brought the complaint were terminated after the employers discovered that the employees were not following the Statement of Faith of the organization.[30]

The court was tasked with determining whether World Vision fit into the category of a "religious corporation, association, . . . or society" pursuant to the section 702 exemption.[31] Judge Diarmuid O'Scannlain pointed out that each organizational exemption must be decided "on a case-by-case basis" by analyzing "whether the 'general picture' of an organization is 'primarily religious,' taking into account '[a]ll significant religious and secular characteristics.'"[32] The analysis should not simply "march down a checklist

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[23] *See* Spencer v. World Vision, Inc., 633 F.3d 723, 725–27 (9th Cir. 2011) (O'Scannlain, J., concurring); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 613, 618 (9th Cir. 1988).

[24] *World Vision*, 633 F.3d at 725–27 (O'Scannlain, J., concurring).

[25] *Id.* at 725.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 732.

[29] *Id.* at 725.

[30] *World Vision*, 633 F.3d at 725 (O'Scannlain, J., concurring).

[31] *Id.*

[32] *Id.* at 729 (quoting EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988)).

of considerations"—because each case is factually different.[33] *World Vision* was different than other cases; therefore, the factors that applied in other cases did not apply here.[34]

The court laid out a rule for when an organization meets the section 702 exemption. Under Judge O'Scannlain's test, an organization was exempted if it established that it "1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), 2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and 3) holds itself out to the public as religious."[35] Judge O'Scannlain reasoned that this test minimized the need for a court to inquire about "whether an activity is religious or secular in nature."[36]

Judge O'Scannlain determined that an important factor was whether the organization was a non-profit.[37] He reasoned that nonprofit organizations operate for non-pecuniary interests, as the net earnings are not distributed to the people with a personal interest in the organization but remain in the organization to achieve its purposes.[38] He also reasoned that not distributing its net earnings is an indication that "an entity is not operated simply in order to generate revenues . . . but that the activities themselves are infused with a religious purpose."[39] Requiring an organization to hold itself out as religious "'helps to ensure that only bona fide religious institutions are exempted.'"[40]

Judge O'Scannlain ultimately concluded that the "general picture" of World Vision was "primarily religious" and therefore qualified for the section 702 exemption.[41] He reasoned that World Vision was a nonprofit whose humanitarian operations flowed from its religious purpose.[42] World Vision operated in a manner consistent with its founding documents, which explained that it was a religious organization.[43]

In his concurrence, Judge Kleinfeld provided his analysis of the rule for a section 702 exemption.[44] Judge Kleinfeld argued that the test Judge

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[33] *Id.*

[34] *Id.* at 729–30.

[35] *Id.* at 734.

[36] *World Vision*, 633 F.3d at 734 (O'Scannlain, J., concurring).

[37] *Id.*

[38] *Id.*

[39] *Id.* (alteration in original) (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 344 (1987)).

[40] *Id.* at 735 (quoting Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1344 (D.C. Cir. 2002)).

[41] *Id.* at 741.

[42] *World Vision*, 633 F.3d at 741 (O'Scannlain, J., concurring).

[43] *Id.*

[44] *See id.* at 741 (Kleinfeld, J., concurring).

O'Scannlain created was too broad.[45] He argued that under Judge O'Scannlain's test, the manufacturing plant from *Townley* would meet the exemption if it registered as a nonprofit under section 501(c)(3) and continued operations.[46] Judge Kleinfeld also rebutted Judge Berzon's test laid out in the dissenting opinion.[47] According to Judge Kleinfeld, Judge Berzon limited the section 702 application because "Congress used the terms 'religious corporation, association . . . or society' . . . to describe a church or other group organized for worship, religious study, or the dissemination of religious doctrine."[48] Therefore, under a Judge Berzon analysis, anything that is not considered a church or other group organized for worship, religious study, or the dissemination of religious doctrine does not receive the § 702 exemption.

While Judge Berzon argued that World Vision did not fit within this category, Judge Kleinfeld noted that, under Judge Berzon's test, even Mother Teresa's works would not fit under the exemption.[49] Judge Kleinfeld reformulated the test as follows:

> To determine whether an entity is a "religious corporation, association, or society," determine whether it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.[50]

Judge Kleinfeld argued that the exemption should apply only to nonprofits who hold services out to the general public without charge.[51] He compared the Salvation Army with a hypothetical hospital that is connected with a church.[52] The Salvation Army is most similar to a church because it does good works for its religion and holds those good works out for free.[53] Therefore, the Salvation Army is entitled to discriminate and the hypothetical hospital is not.[54] Judge Kleinfeld argued that a hospital connected with a church has

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[45] *Id.* at 742.

[46] *Id.* at 745.

[47] *Id.*

[48] *World Vision*, 633 F.3d at 742 (Kleinfeld, J., concurring) (alteration in original).

[49] *Id.* at 744.

[50] *Id.* at 748.

[51] *Id.* at 747.

[52] *Id*. at 746–47.

[53] *Id.*

[54] *See World Vision*, 633 F.3d at 746–47 (Kleinfeld, J., concurring).

no grounds to discriminate based on religion or for any reason. Because the hospital would be compensated for its services, it should not receive an exemption.[55]

Ultimately, the court had little trouble holding that World Vision met the section 702 exemption because it was a nonprofit and had a religious mission.[56] In the next case, *Townley*, the court analyzed the section 702 exemption for a for-profit company and did not apply the exemption to the manufacturing company.[57]

2. *EEOC v. Townley Eng'g & Mfg. Co.*

In *Townley*, the majority owners (holding 94% of the shares) of a closely-held manufacturing corporation (Townley) were devout Christians.[58] The business owners, Jake and Helen Townley, made a covenant with God that their "business 'would be a Christian, faith-operated business.'"[59] The Townleys were "'born again believers in the Lord Jesus Christ' who '[were] unable to separate God from any portion of their daily lives, including their activities at the Townley company.'"[60] As part of their covenant with God, the Townleys mandated that all employees attend a thirty-to-forty-five-minute weekly devotional service.[61] The service included prayer, Bible reading, and singing.[62] Not attending the service was the equivalent of being absent from work.[63] An employee policy handbook was created and passed out to all the employees, which mandated all employees attend the devotional services.[64]

An employee of Townley filed a religious discrimination complaint with the Equal Employment Opportunity Commission (EEOC).[65] The employee, an atheist, did not want to attend the devotional meetings.[66] After denying a transfer, the employee argued that he was constructively discharged from the company.[67] The EEOC then filed a complaint against Townley.[68]

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[55] *Id.* at 746–47.

[56] *Id.* at 741 (majority opinion).

[57] *See generally* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988).

[58] *Id.* at 611–12.

[59] *Id.*

[60] *Id.* at 612.

[61] *Id.*

[62] *Id.*

[63] *Townley*, 859 F.2d at 612.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

The EEOC claimed that Townley violated section 703(a) of the Civil Rights Act of 1964.[69] The district court ruled in favor of two of the employee's summary judgment motions, and Townley promptly appealed.[70] The Ninth Circuit held, *inter alia*, that section 702's exemption did not apply to a for-profit corporation.[71]

The first issue the court addressed was the definition of a "religious corporation."[72] The court looked to the legislative history of the bill; however, it found little help in defining the term.[73] After analyzing case law, the court stated that case law also did not help settle the definition of a religious corporation.[74] However, even without a definition of "religious corporation," the court acknowledged that "[i]n most cases, the defendant is clearly a 'religious corporation, association, educational institution, or society' within the meaning of section 702 of the statute."[75] The court concluded that the fact that most of the defendants were "clearly religious" "demonstrate[s] that the central function of section 702 has been to exempt churches, synagogues, and the like, and organizations closely affiliated with those entities."[76]

The court did not discuss the scope of the section 702 exemption in *Townley* but rather held that each case "turn[s] on its own facts" and "[a]ll significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious. Only when that is the case will the corporation be able to avail itself of the exemption."[77] To meet the section 702 exemption, the organization must meet a "primarily religious" standard.[78] The court then analyzed the different factors to determine whether an organization is "primarily religious" or secular.[79]

The court held the following factors lean in favor of an organization being secular: (1) the organization is for-profit, (2) the organization produces a secular product, (3) the organization is not affiliated with or supported by a church, and (4) the articles of incorporation of the organization do not

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[69] *Townley*, 859 F.2d at 612.

[70] *Id.*

[71] *Id.* at 613.

[72] *Id.* at 617.

[73] *Id.* at 617–18 (discussing the legislative history that did not clarify the definition of religious corporations).

[74] *Id.* at 618.

[75] *Townley*, 859 F.2d at 618.

[76] *Id.*

[77] *Id.*

[78] *Id.* at 618–19.

[79] *Id.* at 619.

mention any religious purpose.[80] The court held the following factors lean in favor of an organization being religious: (1) the organization's marketing includes a religious message, (2) the organization financially supports other religious entities, (3) the organization holds weekly devotional services, and (4) the organization's owners actively disciple others for the Lord Jesus Christ.[81] The court ultimately held that the company was secular, reasoning that the "beliefs of the owners and operators of a corporation are simply not enough in themselves to make the corporation 'religious' within the meaning of section 702."[82]

The second issue the *Townley* court considered was Townley's argument that Title VII violated its rights under the Free Exercise Clause of the First Amendment.[83] The court held that a company does not have Free Exercise rights under the First Amendment and that a company has "no rights of its own different from or greater than its owners' rights."[84] The court reasoned that the company is "merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs."[85]

The final issue the court considered was whether Townley's employee policy violated Title VII.[86] The employee policy required all employees to attend the devotional services.[87] Townley argued that it was entitled to invoke the Free Exercise Clause to uphold the employee policy.[88] The court applied a test similar to strict scrutiny in weighing three factors:

> (1) the magnitude of the statute's impact on the exercise of a religious belief; (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief; and (3) the extent to which recognition of an exemption from the statute would impede objectives sought to be advanced by the statute.[89]

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[80] *See id.*

[81] *See Townley*, 859 F.2d at 619.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 619–20. *Contra* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 708-13 (2014) (*Hobby Lobby* abrogated this portion of *Townley*, but the decision was based on a RFRA action and did not mention *Townley* in the opinion.).

[85] *Townley*, 859 F.2d at 619.

[86] *Id.* at 613.

[87] *Id.*

[88] *Id.* at 619.

[89] *Id.* at 620 (quoting EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1367 (9th Cir. 1986)).

The court ultimately held that the devotional services were not a violation of Title VII; however, Townley's mandate that employees who objected to the devotional services must attend the services was a violation.[90] The court held that Townley must accommodate the employees who objected to the employment practice.[91] The court reasoned that "Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."[92]

D. *Section 702 and the Hypothetical Businesses*

Under this current case law, the HB owners would not qualify for a section 702 exemption. Therefore, those business owners could not discriminate based on race, sex, nationality, or religion.[93] *Townley* and *World Vision* make it clear that a for-profit corporation does not qualify for the section 702 exemption because a for-profit corporation is not a "religious corporation or association."[94] Thus, because the HBs are for-profit companies, they would not qualify for the exemption.

The inability to discriminate based on religion poses a threat to the essence of the HBs' missions. The HBs' entire value proposition is based on a specific religion, and the owners believe it is best to only hire employees of their particular faith. These HB owners are not in isolation. As explained in the next section, the rise of Corporate Social Responsibility (CSR) has shifted the thinking of many business owners from profit maximization to social responsibility. When the CSR initiative of the business owner is a religious value proposition, the business owner's impact on society will be greatly limited.

IV. CORPORATE SOCIAL RESPONSIBILITY (CSR)

Social programs, including those implemented by governments and NGOs, cannot compete with the ability of the private sector to donate

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[90] *Id.* at 613.

[91] *Townley*, 859 F.2d at 621; *see also* Loren F. Selznick, *Running Mom and Pop Businesses by the Good Book: The Scope of Religious Rights of Business Owners*, 78 ALB. L. REV. 1353, 1381 (2014); Dallan F. Flake, *Image Is Everything: Corporate Branding and Religious Accommodation in the Workplace*, 163 UNIV. PA. L. REV. 699, 700 (2015) (discussing employer accommodation of employee religious rights).

[92] *Townley*, 859 F.2d at 620 (quoting EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1280 (9th Cir. 1982)).

[93] 42 U.S.C. § 2000e-2.

[94] *See generally Townley*, 859 F.2d 611; Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011) (per curiam).

resources towards a social good through a company's CSR initiatives.[95] The social good a company can do is not just about the products that a company produces, but also about the company's entire value proposition through CSR.

CSR is defined as a private, profit-making enterprise that voluntarily engages in activities other than profit maximization to benefit the society in which it operates.[96] All companies are bound by certain legal thresholds, and CSR activities "exceed[] [those] obligatory, legally enforced thresholds."[97] CSR is a predominant force in the modern marketplace. Many companies view their CSR initiatives as a competitive advantage.[98]

The idea that private entities should engage in activities other than profit maximization has been a topic of great discussion in firms, academia, business schools, and judicial opinions. In *Dodge v. Ford Motor Company*, the Michigan Supreme Court analyzed Henry Ford's decision to give $60 million of the company's profits to charitable organizations rather than a dividend to the shareholders.[99] In the early 1900s, the *Dodge* court held that the purpose of a company is for profit-maximization, and therefore, a company could not distribute the profits to a social good.[100] Modern courts

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[95] Michael E. Porter & Mark R. Kramer, *Strategy & Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, 84 HARV. BUS. REV. 78, 83 (2006).

[96] Arvind K. Jain, *Corporate Social Responsibility*, *in* 2 INT'L ENCYC. OF THE SOC. SCI. 136, 136–38 (William A. Darity, Jr. ed., 2d ed. 2008).

[97] Markus Kitzmueller, *Economics and Corporate Social Responsibility*, *in* 21ST CENTURY ECON.: A REFERENCE HANDBOOK 785, 786 (Rhona C. Free ed., 2010).

[98] Porter & Kramer, *supra* note 95, at 91.

[99] Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

[100] *Id.* at 684.

have abandoned this Friedman approach to corporate economics[101] and would not overturn a decision to distribute profits to a social program.[102]

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[101] *See* Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice,* 12 INT'L J. OF MGMT. REV. 85 (2010). Milton Friedman was an economist who promoted free markets and capitalism and was concerned with the rise of corporate social responsibility. Friedman opposed CSR on five points: (1) Governments have the duty to solve social issues, free markets and firms working within those markets are not able to solve social issues; (2) managers are not trained in solving social issues, rather they are best at making money; (3) CSR would "dilute[] businesses' primary purpose" of profit maximization; (4) businesses already have enough power and that establishing power in the social sector would be harmful for society as a whole; (5) CSR would make firms less competitive globally. *Id.* at 88.

See also IAN MAITLAND, PROFIT MAXIMIZATION, CORPORATE SOCIAL RESPONSIBILITY, 4 ENCYC. OF BUS. ETHICS AND SOC'Y 1696 (Robert W. Kolb ed., 2008). Friedman's objections raised great discussion and debate not only regarding corporate social responsibility but also the very essence for the purpose of businesses. Friedman argued that managers "have accepted a fiduciary obligation to manage the corporation in accordance with the desires of its owners, and CSR would permit or require them to violate that obligation." *Id.* at 1697. From Friedman's perspective, public companies that gave to CSR initiatives would do so without the consent of the owners. *Id.* While Friedman argued against firms engaging in CSR, he made a delineation between a firm giving to CSR and people making personal-private donations. Friedman argued that the purpose of business is profit maximization and did not see a correlation between giving to CSR and maximizing profits. However, he stated that he saw nothing wrong with people giving their own money to social initiatives. That is a personal and private matter, unlike a public company giving to a CSR initiative. *Id.*

A break-through in CSR answered Friedman's contentions when it was realized that CSR may lead to profit maximization. *See* KITZMUELLER, *supra* note 97, at 785. Research indicates that there are "no necessary trade-offs between profitability in terms of financial performance and responsibility, even explicitly socially beneficial activities." SANDRA WADDOCK, STRATEGIC CORPORATE SOCIAL RESPONSIBILITY, 4 ENCYC. OF BUS. ETHICS AND SOC'Y 2007–08 (Robert W. Kolb ed., 2008). Firms realized that CSR initiatives were a demand shifter within the marketplace. Therefore, engaging in CSR activities and properly marketing those activities would increase company profits. *See* KITZMUELLER, *supra* note 97, at 791.

Friedman argued that firms should not engage in CSR if the firm's shareholders are unaware of the activity. *See* MAITLAND, *supra,* at 1696–97. Firms soon realized that CSR would not only attract customers but also shareholders. One step further is that firms could take an economic loss in the CSR initiative because it will lead to shareholder value maximization. *See* KITZMUELLER, *supra* note 97, at 787.

Four primary benefits of CSR are: (1) cost and risk reduction; firms reduce costs and risks by engaging in "environmentally responsible commitments [that] enhance long-term shareholder value." *See* Carroll & Shabana, *supra*, at 95, 97. Firms also find tax incentives. *Id.* at 97. (2) CSR can be a competitive advantage. Firms may target specific social causes that would bring the most profit maximization or shareholder maximization; (3) Reputation and legitimacy *Id*. at 95. Legitimacy is defined as a "generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions." Mark C. Suchman, *Managing Legitimacy:*

Distributing corporate profits to social programs benefits society.[103] Unfortunately, leaders from both spheres often see competing interests rather than harmony.[104] Healthy societies meet the basic needs of their citizens through higher education standards, health care, equal opportunity, and a just government. As the basic needs of life are fulfilled, the standard of living increases and businesses meet the demand of a higher standard of living.[105] Society needs businesses. Porter and Kramer expressed society's need for business when they argued that "[n]o social program can rival the business sector when it comes to creating the jobs, wealth, and innovation that improve standards of living and social conditions over time."[106] Corporate social responsibility is the catalyst to bridging the gap between the interests of society and the interests of a business.[107] By focusing on shared value through CSR initiatives, businesses and society will mutually flourish.[108]

Over half of state legislatures have adopted the Model Benefit Corporation Act, acknowledging the social benefits a business can make in the surrounding communities.[109] A benefit corporation is an entirely new type of business entity.[110] The advantage of a benefit corporation is that the fiduciary duties of a typical corporate fiduciary are adjusted to meet the purpose of the

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Strategic and Institutional Approaches, 20 ACAD. OF MGMT. J., 571, 574 (1995). As the legitimacy of the firm increases in the perception of the consumer, a "mutualistic" relationship is developed between the firm and the consumer. *See* Carroll & Shabana, *supra*, at 99. This is partly because the firm has become a valued member in society through its socially beneficial initiatives; (4) Synergistic value creation. *Id.* at 95, 100. "The win-win perspective to CSR practices is aimed at satisfying stakeholders' demands while, at the same time, allowing the firm to pursue its operations." *Id.* at 100. The company's operations can continue and earn profits while accomplishing the shareholder's demands for socially beneficial initiatives. *See also* Porter & Kramer, *supra* note 95, at 83 (discussing best practices to incorporate a CSR strategy within a firm.).

[102] Robert A. Katz & Antony Page, *Sustainable Business*, 62 EMORY L.J. 851, 868 (2013).

[103] Porter & Kramer, *supra* note 95, at 83.

[104] *See* VAN DUZER, *supra* note 5 (discussing the benefits of business to society and arguing that a correct theology of business can add value to all stakeholders of the business).

[105] Porter & Kramer, *supra* note 95, at 83.

[106] *Id.*

[107] *Id.* at 83–84.

[108] *Id.* at 84.

[109] *State by State Status of Legislation*, BENEFIT CORP., https://benefitcorp.net/policymakers/state-by-state-status (last visited Feb. 5, 2021); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 712–13 (2014).

[110] FREDERICK H. ALEXANDER, BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE 64 (2018).

benefit corporation.[111] Unlike corporations, where the fiduciaries are bound to maximizing shareholder wealth as the sole purpose of the corporation, benefit corporation fiduciaries are bound to achieving the purposes of the corporation as defined in the articles of incorporation.[112] The purpose must be beneficial to society.[113] Fiduciaries are charged with accomplishing that purpose, namely a benefit to society.[114]

The Model Benefit Corporation Legislation demonstrates a foundational shift in the way people think about corporations. This shift in corporate law is from a shareholder value maximization view to a stakeholder value maximization view. The benefit corporation is another indication of the rise of CSR and demand in the marketplace for companies that are seeking more than just a profit.

A. *Business, Corporate Social Responsibility, and Religion*

TOMS Shoes is an example of a company whose entire business model is based on a CSR value proposition.[115] When TOMS Shoes first started, it gave a pair of shoes away for every pair of shoes purchased.[116] This value proposition was an essential element of TOMS Shoes' business model.[117] Its

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[111] *Id.* at 70.

[112] *Id.* at 22, 70.

[113] *Id.* at 72.

[114] *Id.*

[115] *Impact*, TOMS SHOES, https://www.toms.com/us/impact.html (last visited Feb. 22, 2021).

[116] *TOMS and Save the Children*, SAVE THE CHILDREN, https://www.savethechildren.org/us/about-us/become-a-partner/corporations/toms (last visited Feb. 22, 2021). ("Known for their casual shoes and commitment to giving and innovation, TOMS operates a One for One™ model. For every pair of TOMS shoes purchased, a pair of new shoes is given to a child in need in partnership with humanitarian organizations.").

[117] Lucy Handley, *This Entrepreneur Set Out to Do Good over Making Money, but Still Earned Hundreds of Millions of Dollars*. CNBC, (Oct. 4, 2018, 11:09 AM), https://www.cnbc.com/2018/10/04/blake-mycoskie-of-toms-shoes-set-out-to-do-good--and-made-millions.html ("'I recognized in that question [who is going to give the next pair of shoes to impoverished children?] that [] the problem with this kind of nonprofit charitable giving model, at least . . . these women had to spend weeks getting enough shoes that would last these kids for a few months,' Mycoskie told 'The Brave Ones.'

Then he had an idea. 'What if I sold these really cool shoes that I had only seen in Argentina to my friends back in California, and every time I sold a pair, I would also make another pair to give to one of these kids? It just seemed like the simplest idea in the world,' he said. . . . 'We literally had created karma, if you will, by, you know, really setting out to do something to help people versus just trying to make money,' Mycoskie said.

He has since launched a social entrepreneurship fund, investing in purpose-driven, for-profit companies.").

value proposition was the very essence of the business's existence.[118] From the owner's perspective, there is no reason for the business to exist in the absence of that value proposition.[119]

Two of the HBs used models that were entirely based on a CSR value proposition. The religious essence of Beau's manufacturing plant was to run the manufacturing plant in a way that honored God. The bottom line of Beau's business was not profit maximization, but rather running the manufacturing plant in accordance with the Bible. Therefore, some of Beau's decisions negatively affected the financial bottom line. Out of the company profits, Beau gave to his employees, church, and church camps. Instead of simply breaching a contract and paying the damages to engage with a different vendor, Beau seriously considered the promises he made with his vendors and others with whom he was in privity of contract. Similarly, Yosef's mission was to share his Jewish faith. He hired students from the local synagogue to be servers and share their faith. Additionally, he only purchased from kosher suppliers. The entire essence of these businesses was their CSR initiatives through the practice of the business owner's religion.

Jessica's business model was not a CSR value proposition. However, similar to all the HBs, Jessica had a religious value proposition. The money spent on the landscaping, décor, and interior design contributed to her brand and religious value proposition. Jessica spent extra money to create an environment that maximized the cosmic energy for her clients. However, Jessica had no activities that extended beyond the walls of her business into society. The religious component would not be profit-maximizing; nevertheless, CSR requires an element of societal contribution beyond the business's products or services provided.

The religious CSR initiatives and value propositions of the HBs are essential and important to those businesses, just as the CSR initiatives are essential and important to TOMS Shoes. The religious value proposition is the very essence of the HBs' existence. Additionally, those CSR initiatives would provide a societal value. However, current law impedes each of the HBs' value propositions because the law does not allow religious business owners to discriminate in their employment practices.

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[118] *Id.*

[119] *Id.* ("[We] really set[] out to do something to help people versus just trying to make money."); *see also, Impact*, TOMS SHOES, https://www.toms.com/us/impact.html (last visited Feb. 22, 2021) (TOMS Shoes is a Certified B Corporation indicating that the company must have a social purpose other than a sole purpose of making profits.).

V. *HOBBY LOBBY* AND THE EXERCISE OF RELIGION THROUGH A BUSINESS

A. *History of Religion in the Marketplace*

The following is an excerpt that discusses the historical context of *Hobby Lobby* regarding a "religious" free marketplace.

> Prior to the 2014 decision in *Burwell v. Hobby Lobby Stores, Inc*., a separation of church and commerce doctrine was developing unabated in federal and state courts. As United States Solicitor General Donald B. Verrilli, Jr. put it at the *Hobby Lobby* argument: "[O]nce you make a choice to go into the commercial sphere, . . . you are making a choice to live by the rules that govern you and your competitors in the commercial sphere."
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> In other words, business owners were free to practice religion on their own time, but when they entered the commercial world, faith had to bow to secular law. The *Hobby Lobby* case, construing the federal Religious Freedom Restoration Act, put an end to the notion of a nationally imposed, religion-free commercial zone. State and local zones, however, are a different matter.
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> . . . .
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> Religious freedom and tolerance are imbedded in the American psyche. Students begin learning about the history and tradition as early as nursery school and kindergarten when they are taught about the Thanksgiving holiday. While Americans have generally accepted the concept of separation of church and state, the government and some interest groups have pressed for a separation between church and private business as well.
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> The concept would have been inconceivable to the Pilgrims and Puritans who escaped England seeking the freedom to live by their religious principles. When they came to North America, the Puritans sought the freedom to practice their religious faith "by applying the doctrines and commandments of the Bible to every detail of life," including their commercial dealings. Puritanism was practiced primarily through day-to-day conduct and public action rather than "through sacred symbol" or "the glories or the pomps of art." The "emphasis" was "on serving the Lord in

one's vocation—as a tradesman, as a merchant, as an artisan, or as a magistrate or 'citizen.'" The Quakers, too, established themselves in business by conducting their commercial enterprises in accordance with religious principles.

The Founders of the United States over a century later recognized the role of religion in commercial pursuits. Thomas Jefferson said: "[Th]ose who labour in the earth are the chosen people of God . . . . It is the focus in which he keeps alive that sacred fire, which otherwise might escape from the face of the earth." Benjamin Franklin said, "God governs in the Affairs of Men."

Between the Revolution and the Civil War, the United States became home to a number of religious communal movements in which religious rule ordered every facet of life, including the economy and the family. Individuals spiritually rooted in the Great Awakening cleansed their own homes and their businesses of slavery. "As long as slavery survived, how could the awakened know a true millennium, and how could the enlightened truly speak of the pursuit of happiness."

In the nineteenth century, it was commonplace for American businesses to integrate religious or moral philosophy into business practices and this continued into the early 1900s. Concern about working conditions during the Industrial Revolution led preachers to remind proprietors to carry the faith to work. Minister Washington Gladden noted in the late nineteenth century that it was "the primary business of Christianity to define and regulate" the "relations of man to man," rejecting the argument that "his function [was] the saving of souls and not the regulation of business."

By the mid-twentieth century, however, a different approach emerged, that "religion should, for the most part, be zoned out of the marketplace and market relations," and this view took hold in the law itself. "The desirability of a religiously neutral workplace received legal manifestation with the passage of Title VII in 1964."

Today, many American businesses—particularly small mom-and-pop enterprises—have rejected this trend and

> attempted to operate their daily transactions in accordance with religious beliefs, viewing "religion not as one isolated aspect of human existence but rather as a comprehensive system more or less present in all domains of the individual's life." There has been "a religious awakening of sorts, which has spawned a new breed of religiously serious executives, investors, employees, and customers, all of whom are pulling many business corporations toward a more faith-infused model."[120]

B. *Introduction:* Burwell v. Hobby Lobby Stores, Inc.

The central question in *Hobby Lobby* was "Do business owners give up the right to free exercise at the door of the shop?"[121] "This idea—often posited by the government—has had some success in the courts, but *Hobby Lobby* expressly disposed of it at the federal level."[122] *Hobby Lobby* was brought to the Supreme Court of the United States by three companies, Conestoga Wood Specialties ("Conestoga"), Hobby Lobby, and Mardel.[123] Conestoga was started by Norman Hahn and was solely owned by Norman, his wife, and three sons (collectively, "the Hahns").[124] The Hahns were devout members of the Mennonite Church.[125] Additionally, as sole owners of Conestoga, they sought to "run their business 'in accordance with their religious beliefs and moral principles.'"[126] Embodied in their mission was a desire to "'operate in a professional environment founded upon the highest ethical, moral, and Christian principles.'"[127] Additionally, "[t]he company's 'Vision and Values Statements' affirm[] that Conestoga endeavors to 'ensur[e] a reasonable profit in [a] manner that reflects [the Hahns'] Christian heritage.'"[128] Conestoga was very successful and had 950 employees.[129]

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[120] Selznick, *supra* note 91, at 1353–57 (footnotes omitted).

[121] *Id.* at 1387 (footnotes omitted); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688 (2014).

[122] Selznick, *supra* note 91, at 1387 (footnotes omitted).

[123] *Hobby Lobby*, 573 U.S. at 701, 703–04.

[124] *Id.* at 700–01.

[125] *Id*. at 700.

[126] *Id.* at 701 (quoting Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 402 (E.D. Pa. 2013)).

[127] *Id.* (quoting *Conestoga*, 917 F. Supp. 2d at 402).

[128] *Id.* at 701.

[129] *Hobby Lobby*, 573 U.S. at 700.

Hobby Lobby was owned and operated by the Green family, David and Barbara Green and their three children.[130] Hobby Lobby was an arts and craft store.[131] One of the Greens' sons started Mardel, which was a Christian bookstore.[132] Each business was a success, with Hobby Lobby having 13,000 employees and 500 stores, and Mardel having 400 employees and 35 stores.[133] The Green family was a Christian family and sought to practice their faith through their business endeavors.[134]

> Hobby Lobby's statement of purpose commits the Greens to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so. The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior."[135]

All three companies brought a claim against the federal government, different federal agencies, and federal officers under the Religious Freedom Restoration Act of 1993 (RFRA).[136] The Hahns and Greens believed that life begins at conception.[137] The Hahns went so far as to add a board resolution for the company that stated that life began at conception.[138] The idea that life begins at conception was an integral tenant of the families' faith.[139] The federal government mandated that the companies provide medical insurance for their employees that provided for certain contraceptives that violated the

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130 *Id.* at 702.

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.* at 702–03.

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

136 *Id.* at 703–04.

137 *Id.* at 703.

138 *Id.* at 701.

139 *Id.*

companies' religious tenants; namely, that life begins at conception.[140] Therefore, the companies brought this lawsuit.[141] The companies argued that the insurance policies were a violation of their religious freedom.[142]

The Court first analyzed whether RFRA can apply to for-profit corporations.[143] The United States Department of Health and Human Services (HHS) made three arguments against applying RFRA: (1) the term "persons" does not include for-profit entities; (2) for-profit entities cannot exercise religion; and (3) RFRA was a codification of the Supreme Court's pre-*Smith* Free Exercise Clause precedent, and because "none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection."[144] "RFRA prohibits the '[g]overnment [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability' unless the Government 'demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'"[145]

First, regarding "persons," the Court held that "persons" encompassed a for-profit, closely-held corporation.[146] The Court noted that Congress did not define 'persons' in RFRA, and therefore, referenced the Dictionary Act where "persons" was defined to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[147] The Court made an analogy by referencing the Fourth Amendment.[148] The term "persons" under the Fourth Amendment was expanded to include corporations and therefore gave corporations certain rights against searches and seizures.[149] Additionally, the Court has entertained RFRA and free-exercise claims brought by nonprofits as the nonprofits fit within the term of "persons."[150] The Court stated that "no conceivable definition of the term [persons] includes natural persons and nonprofit corporations, but not for-profit corporations. . . . To give the same

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[140] *Id.* at 688.

[141] *Hobby Lobby*, 573 U.S. at 688.

[142] *Id.* at 703–04.

[143] *Id.* at 705.

[144] *Id.* at 707–13.

[145] *Id.* at 682 (quoting 42 U.S.C. §§ 2000bb-1(a), (b)).

[146] *Id.* at 706–08.

[147] *Hobby Lobby*, 573 U.S. at 707–08.

[148] *Id.* at 707.

[149] *Id.*

[150] *Id.* at 708.

words a different meaning for each category would be to invent a statute rather than interpret one."[151] The Court emphasized the point that for-profit corporations are included in the term 'persons'.[152]

The Court then addressed the argument that for-profit companies cannot exercise a religion.[153] The Court held that a for-profit entity could exercise religion.[154] The Court reasoned that non-profit organizations have a corporate form and have the right to exercise religion.[155] Therefore, a for-profit corporation's corporate form alone is not sufficient to conclude that the for-profit corporation does not have the right to exercise religion.[156] The Court analogized this to the sole proprietorship recognized in *Braunfeld*.[157] In *Braunfeld*, the Court recognized that the compulsory nature of a regulation on a sole proprietor can be a burden on the exercise of religion.[158]

The profit-making nature of an entity also does not prohibit the right to exercise the religion of that entity.[159] The Court stated: "If, as *Braunfeld* recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can't Hobby Lobby, Conestoga, and Mardel do the same?"[160] The Court also pointed to the fact that most state corporate statutes say that a corporation may be organized for "any lawful purpose," and in many cases today, that lawful purpose is something more than just profit.[161] A corporation is such an example where "over half of the States, for instance, now recognize the 'benefit corporation,' a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners."[162]

Regarding the ability of a corporation to exercise religion, the Court concluded:

> [T]he "exercise of religion" involves "not only belief and profession but the performance of (or abstention from) physical acts" that are "engaged in for religious reasons." Business practices that are compelled or limited by the tenets

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151 *Id.* at 708–09 (footnotes omitted) (citations omitted).

152 *Id.*

153 *Hobby Lobby*, 573 U.S. at 709.

154 *Id.* at 709–10.

155 *Id.*

156 *Id.*

157 *Id.*; *see also* Braunfeld v. Brown, 366 U.S. 599 (1961).

158 *Hobby Lobby*, 573 U.S. at 710; *see also Braunfeld,* 366 U.S. at 605.

159 *Hobby Lobby*, 573 U.S. at 709–10.

160 *Id.* at 710.

161 *Id.* at 713.

162 *Id.* at 712–13; *see* discussion *supra* Section IV.

> of a religious doctrine fall comfortably within that definition. Thus, a law that "operates so as to make the practice of . . . religious beliefs more expensive" in the context of business activities imposes a burden on the exercise of religion.[163]

Finally, the Court addressed HHS's argument that RFRA should not apply to this case because RFRA was the codification of pre-*Smith* cases, and none of those cases squarely held that corporations have free exercise rights.[164] The Court reasoned that nothing in the statute suggested that RFRA was the codification of pre-*Smith* cases.[165] Second, Congress amended RFRA in a way that indicated it did not intend to stay closely tied with the pre-*Smith* cases.[166] Third, when Congress wanted to exclude for-profit companies, it explicitly did so.[167] The Court finally concluded that RFRA did apply to federal regulation restrictions of closely-held, for-profit corporations.[168]

After the Court determined that RFRA applied, it then determined whether the HHS contraceptive mandate substantially burdened the companies' exercise of religion.[169] The Court held that it had "little trouble in concluding that it [did]."[170] First, the mandate would force the Greens and their companies to violate their religious beliefs.[171] Second, the mandate would force the companies to pay enormous sums of money for not abiding by the regulation.[172] Hobby Lobby, for instance, would have to pay an extra $475 million per year if it wanted to provide insurance in accordance with its religious beliefs.[173]

The Court then considered whether "HHS ha[d] shown that the mandate both '(1) [was] in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that compelling interest.'"[174] First, regarding a compelling governmental interest, HHS contended that the

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[163] *Hobby Lobby*, 573 U.S. at 710 (citations omitted).

[164] *Id.* at 713.

[165] *Id.* at 714.

[166] *Id.*

[167] *Id.*

[168] *Id.* at 719.

[169] *Hobby Lobby*, 573 U.S. at 719.

[170] *Id.*

[171] *Id.* at 720.

[172] *Id.*

[173] *Id.*

[174] *Id.* at 726 (quoting 42 U.S.C. § 2000bb-1(b)).

contraceptive mandates served an important governmental interest.[175] The Court conceded this point; however, it noted that the interests were couched in the interests of public health and gender equality.[176]

The Court next considered whether the mandate was the least restrictive means of furthering the government's compelling interest.[177] The Court ultimately held that the burden had not been met.[178] The Court reasoned that there were two means to accomplish the government's interest: (1) the government could pay for the contraceptives, or (2) the same accommodation given to non-profits could be given to these companies.[179] The Court ultimately held that the contraceptive measures were a violation of the families' and companies' free exercise of religion right and could not be upheld.[180]

C. Hobby Lobby *Opened the Door for Religious Businesses*

Before *Hobby Lobby,* the consensus was that a business owner should keep his religion outside of the marketplace.[181] *Hobby Lobby* radically changed that paradigm. *Hobby Lobby* opened the door for religious businesses through two important holdings. First, individuals have the right to exercise their religion through a corporation.[182] Second, the term "person," as used in RFRA, includes corporations, and therefore, a corporation could bring a claim when a corporation and its owner's free exercise of religion are violated.[183]

Justice Alito described the relationship between the corporation and its owners, stating:

> [I]t is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights,

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[175] *Hobby Lobby*, 573 U.S. at 726–27.

[176] *Id.* at 727.

[177] *Id.* at 728.

[178] *Id.*

[179] *Id.* at 728–30.

[180] *Id.* at 736.

[181] Selznick, *supra* note 91, at 1353–57.

[182] *Hobby Lobby*, 573 U.S. at 706.

[183] *Id.* at 706.

> whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.[184]

In establishing that a corporation has the right to exercise religion, the Court analyzed whether the profit-seeking function of a corporation would bar the corporation from the right to free exercise of religion.[185] The Court held that a for-profit corporation can exercise religion abandoning the precedent that the profit aspect of a corporation bars it from any religious exercise right.[186] The Court acknowledged that many corporations have more than a profit-maximizing purpose and seek to impact society.[187] Additionally, since non-profit corporations have a corporate form and have the right to exercise religion, the Court saw no difference between a non-profit corporation and a for-profit corporation in their right to exercise religion. [188]

The Court also held that a for-profit corporation is a "person" under RFRA and therefore qualifies to bring a RFRA action.[189] Qualifying to bring a RFRA action is important because "RFRA offer[s] broader protection than the Free Exercise Clause to the religious employer":[190]

> By its name it purports to "restore" an era of a general, free-ranging right of accommodation for conduct or inaction associated with a religious belief. The Act expressly repudiates Justice Scalia's opinion in *Smith*. In essence, it treats any "religious practice" as the equivalent of a fundamental liberty protected from government limitation

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184 *Id.* at 706–07.

185 *Id.* at 705.

186 *Id.* at 706–07.

187 *Id.* at 711–12.

188 *Hobby Lobby*, 573 U.S. at 712.

189 *Id.* at 706–07.

190 Selznick, *supra* note 91, at 1378.

> by a balancing test borrowed from substantive due process. Thus, the Act states that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government does so "in furtherance of a compelling governmental interest;" and by "the least restrictive means." The "exercise of religion" is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." For example, a person might belong to a religion that permits but does not compel polygamy. As long as a practitioner can associate his or her polygamy with a religious purpose (perhaps the fruitful reproduction of the religious membership) or a religious belief (perhaps that four people are a single marital union before God), the practice is an exercise of religion. Moreover, a person might be a member of an organized religion or system of religious belief but hold a personal and eccentric view or interpretation of the sect's doctrine. A Lutheran might firmly believe that Saturday work is sinful. It makes no difference whether Lutheran doctrine corroborates this view.[191]

Hobby Lobby was a monumental case for the religious business owner. It acknowledged that an owner has religious exercise rights through his or her corporation. The corporation also has the same religious exercise rights. Now, based on those rights, the owner and the corporation can sue when those rights are infringed upon by the government. Finally, the Court in *Hobby Lobby* abandoned the idea that corporations cannot be designated as religious because of their purpose of maximizing profit.

VI. THE INEVITABLE CLASH OF A RELIGIOUS EMPLOYER AND TITLE VII POST-*HOBBY LOBBY*

The clash between a religious employer's exercise of religion rights and the bar against discrimination was inevitable. Currently, there is a four-way circuit split regarding the section 702 exemption and the proper test to be applied.[192] Because the section 702 exemption prevents the federal

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[191] Richard Carlson, *The Sincerely Religious Corporation*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 165, 178–79 (2018) (footnotes omitted).

[192] Emily S. Fields, *VII Divided by Four: The Four-Way Circuit Split over the Title VII "Religious Organization" Exemption*, 63 WAYNE L. REV. 55, 75–76, 82 (2017); *see* Fike v. United Methodist Child's Home of Va., Inc., 547 F. Supp. 286, 289–90 (E.D. Va. 1982) (The

government from infringing on a person's First Amendment rights, the different section 702 exemption tests create unequal protections for an individual's First Amendment rights: "The consequence of this permissible discrimination is an intrusion upon an individual's Fifth and Fourteenth Amendment rights to equal protection of the laws, including a guarantee of civil rights."[193] The gravity of correctly defining a religious corporation is great because either the employee's rights or the corporation's and owner's rights will be infringed upon.

If the Supreme Court of the United States were to address the issue of whether a for-profit, religious business can qualify for the section 702 exemption to Title VII, the Court would have two methods of analysis. The first method of analysis would be to include a religious, for-profit corporation in the definition of the section 702 exemption that applies to religious corporations or associations. The second method of analysis would be to determine whether a religious corporation would win in a RFRA claim. The following sections apply these two methods of analysis. But first, since *Hobby Lobby* referenced Title VII, those references must be addressed.

A. *Title VII Discussed in the* Hobby Lobby *Opinion*

The *Hobby Lobby* Court briefly mentioned Title VII twice in its opinion.[194] However, both instances were not clear and invite commentators to argue over that portion of the opinion.[195] Some commentators may argue that the Title VII portions of the opinion were dicta, suggesting that RFRA should not be used in a Title VII case.[196] However, the Court's comments were not merely dicta, but rather an analysis of Title VII in its rationale for the application of RFRA.[197]

1. Excerpt One: Congress Speaks with Specificity

Commentators indirectly point to the following excerpt to argue that the Court in *Hobby Lobby* held that a for-profit corporation cannot be a religious

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Secularization Test), *aff'd*, 709 F.2d 284 (4th Cir. 1983); EEOC v. Miss. Coll., 626 F.2d 477, 484–85 (5th Cir. 1980) (The Sufficiently Religious Test); McClure v. Salvation Army, 323 F. Supp. 1100, 1101–02, 1104–06 (N.D. Ga. 1971) (same), *aff'd*, 460 F.2d 553, 561 (5th Cir. 1972); Spencer v. World Vision, Inc., 633 F.3d 723, 724 (9th Cir. 2011) (per curiam) (The Primarily Religious Test); LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226–27, 229–30 (3d Cir. 2007) (The LeBoon Test).

[193] Fields, *supra* note 192, at 76.

[194] *Hobby Lobby*, 573 U.S. at 716–17, 733.

[195] *Id.*

[196] *See* Amanda Brennan, *Playing Outside the Joints: Where the Religious Freedom Restoration Act Meets Title VII*, 68 AM. U. L. REV. 569, 587, 593 (2018).

[197] *Hobby Lobby*, 573 U.S. at 716–17.

"corporation or association" within Title VII's section 702 exemption.[198] However, this is a misinterpretation of the opinion. The entire portion of the case regarding Title VII states as follows:

> Presumably in recognition of the weakness of this argument,[199] both HHS and the principal dissent fall back on the broader contention that the Nation lacks a tradition of exempting for-profit corporations from generally applicable laws. By contrast, HHS contends, statutes like Title VII, 42 U.S.C. § 2000e–19(A),[200] expressly exempt churches and other nonprofit religious institutions but not for-profit corporations. See Brief for HHS in No. 13–356, p. 26. In making this argument, however, HHS did not call to our attention the fact that some federal statutes *do* exempt categories of entities that include for-profit corporations from laws that would otherwise require these entities to engage in activities to which they object on grounds of conscience. If Title VII and similar laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations.[201]

In an attempt to strengthen HHS's argument that a for-profit corporation cannot be a religious corporation, HHS argued that there was a presumption that religious accommodations do not apply to for-profit companies.[202] HHS analogized to Title VII, 42 U.S.C. § 2000e–1(a), arguing that § 2000e–1(a)

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[198] *See* Carmella, *supra* note 15, at 425 ("The Court has been careful not to align businesses with churches in the autonomy discourse and has been careful not to suggest that a business is central to creating or reinforcing norms for a community of believers."); Carlson, *supra* note 191, at 194 ("A for-profit corporation that is not a "religious" organization (and cannot be, because it is for profit) might be subject to heightened scrutiny with respect to the sincerity of an asserted religious belief of its owners.").

[199] *See Hobby Lobby*, 573 U.S. at 713 ("HHS argues that RFRA did no more than codify this Court's pre-*Smith* Free Exercise Clause precedents, and because none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection. This argument has many flaws.").

[200] Note, the *Hobby Lobby* opinion referenced "Title VII, 42 U.S.C. § 2000e–19(A)" as the law that HHS was arguing, but this was a typographical error, as the Court cited to Respondent's (HHS) brief where the Respondent argued regarding "2000e–1(a)." *Id.* at 716; Brief for the Respondents at 26, Conestoga Wood Specialties Corp. v. Sebelius, 572 U.S. 1011 (2014) (No. 13-356), 2014 LEXIS 538, at *47 [hereinafter Brief for HHS]).

[201] *Hobby Lobby*, 573 U.S. at 716–17 (citation & footnote omitted).

[202] *Id.* at 716; *see* Brief for HHS, *supra* note 200, at *47.

does not apply to for-profit companies.[203] HHS said that Congress excluded for-profit corporations from the exemption because a for-profit company cannot be religious.[204] The Court said that HHS was incorrect.[205] The presumption is that there is an accommodation, even when the courts or Congress are silent on the matter.[206] That presumption stands unless Congress specifically says otherwise.[207] Congress did not specifically say whether a for-profit corporation was excluded from the definition of "religious organization or association" because Congress never defined that term.[208] Thus, in *Hobby Lobby*, the Court did not rule on whether § 2000e–1(a) excludes for-profit companies.[209] The Court only addressed HHS's incorrect use of the analogy.

2. Excerpt Two: The Government's Compelling Interest in Title VII

In the last few paragraphs of the opinion, Justice Alito addressed several of the dissent's concerns. One objection was "that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs," but Justice Alito noted that "HHS has made no effort to substantiate this prediction."[210] Closely related to that idea was the dissent's second concern, that RFRA should not be used in a Title VII case, which is the main point that commentators argue was just dicta. [211] The following is the full statement in Justice Alito's opinion:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard

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[203] Brief for HHS, *supra* note 200.

[204] *Id.*

[205] *Hobby Lobby*, 573 U.S. at 716–17.

[206] *See id.*

[207] *Id.*

[208] *See id.*

[209] *See id.*

[210] *Id.* at 732.

[211] *Hobby Lobby*, 573 U.S. at 733.

> to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.[212]

Coupling Justice Alito's comments with the following excerpt from the dissent's footnote to the opinion, provides a compelling argument that *Hobby Lobby* settled the issue:

> Typically, Congress has accorded to organizations religious in character religion-based exemptions from statutes of general application. *E.g.*, 42 U.S.C. § 2000e–1(a) (Title VII exemption from prohibition against employment discrimination based on religion for "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 . . . of its activities"); 42 U.S.C. § 12113(d)(1) (parallel exemption in Americans With Disabilities Act of 1990). It can scarcely be maintained that RFRA enlarges these exemptions to allow Hobby Lobby and Conestoga to hire only persons who share the religious beliefs of the Greens or Hahns. Nor does the Court suggest otherwise. . . .
>
> The Court does identify two statutory exemptions it reads to cover for-profit corporations, 42 U.S.C. §§ 300a–7(b)(2) and 238n(a), and infers from them that "Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations," . . . The Court's inference is unwarranted. The exemptions the Court cites cover certain medical personnel who object to performing or assisting with abortions. . . . Notably, the Court does not assert that these exemptions have in fact been afforded to for-profit corporations. These provisions are revealing in a way that detracts from one of the Court's main arguments. They show that Congress is not content to rest on the Dictionary Act when it wishes to ensure that particular entities are among those eligible for a religious accommodation.
>
> Moreover, the exemption codified in § 238n(a) was not enacted until three years after RFRA's passage. If, as the Court believes, RFRA opened all statutory schemes to

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[212] *Id.* (citation omitted).

> religion-based challenges by for-profit corporations, there would be no need for a statute-specific, post-RFRA exemption of this sort.[213]

The dissent argued that RFRA should not be applied to all statutory schemes and specifically not to Title VII.[214]

In analyzing whether *Hobby Lobby* precluded a RFRA analysis for a Title VII claim, one commentator suggested that "[t]he court [in *Harris Funeral Home*[215]] did not read the *Hobby Lobby* dicta on Title VII—declaring that Title VII serves a compelling interest and is narrowly tailored—as exempting Title VII from the focused analysis RFRA demands."[216] The commentator continues:

> In an attempt to quell the dissent's fears that its decision will permit every corporation to become a law unto itself, the majority rejected the possibility "that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction." It reasoned that the government has a compelling interest in providing equal opportunity in the workforce, and Title VII's prohibition on racial discrimination is the least restrictive means to achieve that goal.[217]

This commentator argued that the *Hobby Lobby* opinion contained dicta not allowing RFRA to be applied to Title VII.

However, the *Harris Funeral Home* district court rejected the views of the commentators. Rather, *Harris Funeral Home* interpreted *Hobby Lobby* as follows:

> This Court does not read that paragraph as indicating that a RFRA defense can never prevail as a defense to Title VII or that Title VII is exempt from the focused analysis set forth by the majority. If that were the case, the majority would presumably have said so. It did not.

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[213] *Id.* at 753 n.15 (Ginsburg, J., dissenting) (some citations omitted).

[214] *Id.*

[215] *See infra* Section VI.D; EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 581 (6th Cir. 2018) (determining whether requiring employer to comply with Title VII satisfied EEOC's compelling interest in eliminating workplace discrimination and the compliance did not substantially burden his religious practice of operating funeral homes), *aff'd sub nom.* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

[216] Brennan, *supra* note 196, at 593.

[217] *Id.* at 587 (footnote omitted).

. . . .

> Without any authority to indicate that Title VII is exempted from the analysis set forth in *Hobby Lobby*, this Court concludes that it must be applied here.[218]

Similar to Excerpt One, commentators argued that *Hobby Lobby* contained dicta which suggested that RFRA could never be applied to a Title VII issue.[219] That is not a proper interpretation. Similar to *Harris Funeral Home*, *Hobby Lobby* did not exempt a RFRA defense to Title VII.[220] Title VII was not even the issue in *Hobby Lobby*. Each time Title VII was mentioned by the majority in *Hobby Lobby*, it was simply in passing and was not thoroughly analyzed.[221] Therefore, *Hobby Lobby* does not bar a RFRA defense for a Title VII claim.

B. *Redefining "religious corporation or association" using the* Townley *Test*

Townley is one of the first cases that addressed whether a for-profit corporation could qualify for the section 702 exemption. The main factor referred to by the *Townley* court, and other courts after *Townley*, was the for-profit distinction. While the court in *Townley* analyzed whether the corporation is for-profit as simply a factor, the for-profit status has developed into a functional categorical rule that bars for-profit corporations from qualifying for the section 702 exemption.[222] When analyzing whether an organization qualifies for the exemption, the first question is whether it is for-profit.[223] If it is, then the case is dismissed;[224] if not, then the court will continue its analysis. Courts reason that the faith of a business owner does not have a place in the marketplace by leaning on the separation of church and commerce doctrine.[225]

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[218] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 857–58 (E.D. Mich. 2016), *rev'd*, 884 F.3d 560, 567 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

[219] *See supra* Section VI.A.1.

[220] *See Harris Funeral Homes*, 201 F. Supp. 3d at 857–58; *Hobby Lobby*, 573 U.S. at 733.

[221] *See Hobby Lobby*, 573 U.S. at 716–17, 733.

[222] *See id.* at 716; EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618–19 (9th Cir. 1988); Spencer v. World Vision, Inc., 633 F.3d 723, 734–35 (9th Cir. 2011) (O'Scannlain, C.J., concurring).

[223] *World Vision*, 633 F.3d at 734 (O'Scannlain, C.J., concurring).

[224] *See id.* at 734–35.

[225] *See* Selznick, *supra* note 91, at 1391.

Following its mention of the separation of church and commerce doctrine, the court in *Townley* held that each case "turn[s] on its own facts" and "[a]ll significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious. Only when that is the case will the corporation be able to avail itself of the exemption."[226] As noted above, while the *Townley* court held the determination for the exemption is case-by-case and certain factors must be weighed, the for-profit status is a categorical bar.[227] This means that, instead of being a factor, the for-profit status is a bar from the section 702 exemption. The *Townley* court then laid out the test for whether a corporation is "primarily religious."[228] The court bifurcated the different factors into those that lean in favor of an organization being secular, and those that lean in favor of an organization being religious. The factors were listed and bifurcated as follows:

> **Secular**
> 1) the organization is for-profit;
> 2) the organization produces a secular product;
> 3) the organization is not affiliated with or supported by a church; and
> 4) the organization's articles of incorporation mention a religious purpose.
>
> **Religious**
> 1) the organization's marketing includes a religious message;
> 2) the organization financially supports a religious organization;
> 3) the organization conducts weekly devotional services; and
> 4) the organization's owner is a person of faith.[229]

After *Hobby Lobby*, the *Townley* factors leaned in favor of a for-profit corporation being included in the definition of a "religious corporation or association." Regarding secular factor three—"not affiliated with or supported by a church"[230]—as business owners, the Hahn and Green families both gave from their profits to church-related activities.[231] As active members of their respective churches, they attempted to run their businesses in a way that honored the Lord in accordance with the faith of their church, and this

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[226] *Townley*, 859 F.2d at 618.

[227] *Id.*

[228] *Id.* at 619.

[229] *See id.*

[230] *Id.*

[231] *Hobby Lobby*, 573 U.S. at 703.

was sufficient to satisfy the affiliation with a church factor.[232] Using the Hypothetical Businesses, Yosef hired students from the synagogue. Yosef also donated his profits to a Jewish community center that was connected with his synagogue. These facts show how a business owner can also satisfy the third factor.

In *Hobby Lobby,* Justice Samuel Alito, spoke directly to *Townley's* fourth factor, the founding documents stating a religious purpose,[233] in mentioning the benefit corporation.[234] Benefit corporations have a specific purpose other than profit-maximization, which can include a religious purpose.[235] Limited Liability Companies can also be formed for any specific purpose in their articles of organization.[236] Religious elements, such as a member holding to certain doctrines of faith, can be added to the operating agreement of the LLC.[237] Thus, a religious purpose can easily be incorporated in the founding documents of a for-profit organization. As illustrated, a for-profit corporation can meet the fourth factor of the *Townley* test in various ways.

The second factor, whether the organization produces a secular product,[238] is a little more difficult to handle. The second factor derives from the separation of church and commerce doctrine.[239] However, both the Greens and the Hahns sold secular products.[240] The Court did not even mention this distinction in *Hobby Lobby*.[241] The Court was more concerned with the religious liberties of the business owner than whether the business sold a religious product.[242] Therefore, whether the corporation sells a secular product may not have as much weight in the analysis as some of the other factors.[243]

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[232] *Id.*

[233] *Townley*, 859 F.2d at 619.

[234] *Hobby Lobby*, 573 U.S. at 712.

[235] *Id.* at 712–13.

[236] VA. CODE ANN. § 13.1–1008 ("Every limited liability company formed under this chapter has the purpose of engaging in any lawful business, purpose, or activity, whether or not such business, purpose, or activity is carried on for profit, except as otherwise provided by the law of this Commonwealth, unless a more limited purpose is set forth in the articles of organization.").

[237] *Id.* at § 13.1–1023.

[238] *Townley*, 859 F.2d at 619.

[239] Selznick, *supra* note 91, at 1353–57.

[240] *Hobby Lobby*, 573 U.S. at 700, 702 (The Greens sold arts and crafts through Hobby Lobby; the Hahns sold woodworking products).

[241] *See id.* at 682.

[242] *Id.* at 706.

[243] *See id.*

The final, and arguably the most important factor, is that the corporation is for-profit. As previously discussed, courts have construed this factor to be a categorical rule, indicating that a for-profit corporation can never be religious.[244] The question at hand is whether *Hobby Lobby* has changed that rule and indicated that a corporation can be religious. *Hobby Lobby* held that a corporation has the right to free exercise of religion.[245] Does that mean that the corporation is religious? A better question may be: do the religious rights of the corporation's owner flow through the corporation to make that corporation inherently religious? If the corporation is not inherently religious, should the corporation still be defined as religious because of the flow of the owner's rights? This article argues that the for-profit corporation can be defined as religious pursuant to the section 702 exemption to Title VII.

In *The Sincerely Religious Corporation*, Richard Carlson attempted to address whether, after *Hobby Lobby*, a for-profit corporation can exercise religion and be religious.[246] One of the examples Carlson used was the section 702 exemption.[247] Carlson concluded that a for-profit corporation cannot be religious.[248]

Carlson conceded that *Hobby Lobby* changed the precedent by allowing a for-profit corporation to bring a RFRA claim.[249] However, it seems Carlson would argue that the RFRA claim is only based on the religious exercise rights of the owner and not the corporation.[250] Carlson supported these arguments by quoting Justice Alito's opinion, where Justice Alito explained that a corporation is a legal fiction that protects the rights of the individual.[251] Carlson stated the following from Justice Alito's opinion in *Hobby Lobby*:

> Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of "persons." But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends . . . . When rights, whether

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[244] *See id.* at 716; Spencer v. World Vision, Inc., 633 F.3d 723, 733–35 (9th Cir. 2011); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615–16 (9th Cir. 1988).

[245] *Hobby Lobby*, 573 U.S. at 709.

[246] Carlson, *supra* note 191.

[247] *Id.* at 185.

[248] *Id.* at 185–86.

[249] *Id.* at 167.

[250] *Id.* at 191–94.

[251] *Id.* at 193.

> constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.[252]

Carlson is correct in addressing the quote where Justice Alito points to the purpose of protecting the rights of the owners. However, Justice Alito also indicated that the free exercise right belongs to the company as well.[253] In determining whether the HHS mandate "substantially burden[ed]" the exercise of religion, Justice Alito stated, "[b]y requiring the Hahns and Greens *and their companies* to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs."[254] Here, Justice Alito referred to both the families and their companies, indicating that both the families' and companies' freedom of religious exercise was violated.

The distinction that the religious exercise right applies to a company, *as well as* to its owner's family, is important because it indicates that a for-profit corporation has religious freedom rights. The question at hand is whether the Court's holding in *Hobby Lobby* also means that a for-profit corporation can be religious.

Carlson would argue that *Hobby Lobby* did not change the meaning of "religious corporation, organization, or association."[255] However, Carlson does not give any reason for why the Court's holding does not change the analysis. He simply states that a for-profit corporation can never be religious.[256] One of Carlson's statements does not have a footnote, nor a cite to any reference.[257] Another statement cites to 42 U.S.C. 2000e-1(a).[258] Carlson presumes that, based on the statute, a for-profit corporation can never be religious. However, as noted above, the statute does not define a "religious organization."[259] It is case law, and in particular *Townley*, that barred a for-profit corporation from being defined as religious.[260] However, *Hobby Lobby* removed the for-profit bar for a RFRA action, which seriously

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[252] Carlson, *supra* note 191, at 193 (citing Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706–07 (2014)).

[253] *Hobby Lobby*, 573 U.S. at 720, 723.

[254] *Id.* at 720 (emphasis added).

[255] Carlson, *supra* note 191, at 194.

[256] *Id.*

[257] *Id.* at 192.

[258] *Id.*

[259] Fields, *supra* note 192, at 61.

[260] EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 615–16 (9th Cir. 1988).

calls into question the bar against defining a for-profit corporation as religious.[261]

With a categorical bar to a for-profit corporation, the test Carlson would propose for a religious organization is:

> Whether an organization is religious depends on whether it is religious by its organization and function. The sincerity of the individuals who form the organization does not need much evaluation for this purpose. None of these approaches require that the membership or employees must be homogenous in their religious beliefs. An organization might serve, accept work, and open its facilities to persons of other religions or no religion at all. What matters most are the non-profit form, religious function and organization, and religious expression to the outside world. Individual sincerity is not a likely issue unless the organization might be a complete sham. In this way, the objective legitimacy of a non-profit organization's claim of religiousness is completely different from the subjective sincerity of an individual's claim of a religious reason for a practice. Evaluating a religious organization's legitimacy does involve some of the same dangers of entanglement found in the adjudication of individual sincerity, but the dangers are much less severe.[262]

By eliminating the for-profit bar, a for-profit organization could be a religious organization as defined by Carlson. The organization would be recognized as religious by forming with a religious purpose, implementing policies that have a religious presupposition, and holding the company out to the world as religious.

Carlson also makes the assertion that a corporation cannot be religious because religious beliefs or faiths entail mental processes.[263] Organizations do not have mental processes; therefore, organizations cannot be religious. Carlson also argued that organizations cannot be religious because, as Justice Alito pointed out, corporations are the alter ego of the business owner.[264] The business owner's religious freedom rights flow through the corporation.

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[261] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706 (2014).

[262] Carlson, *supra* note 191, at 189–90.

[263] *Id.* at 167.

[264] *Id.* at 194.

Therefore, Carlson would argue, this indicates that the rights are that of the owner and not the corporation.[265]

Carlson is correct in that organizations do not believe in anything on their own. However, how then can a non-profit be a religious corporation? The non-profit also does not have mental processes. Rather, the religious definition is derived from the organization of the entity and its function. As mentioned above, a for-profit can be organized as and function as a religious entity.[266] Second, as addressed above, Justice Alito explained that the religious exercise is not only that of the corporation's owners, but it is also that of the corporation itself.[267]

Why do religious freedom rights flow through the organization? Because the owners have religious beliefs. Why would the beliefs of the owner also not flow through the organization? Amazon just recently released a statement regarding its policies and views on political and social issues.[268] Are these statements the actual beliefs of Amazon? Did Amazon conjure up these beliefs on its own? No. It was the fiduciaries of the corporation that came together and established the beliefs as a corporate body for Amazon. [269] The beliefs of the individuals flow through the organization. Does that mean that Amazon's statements will not affect the organization? Arguably, no. These statements drive Amazon to make certain choices regarding business strategy, communication, marketing, CSR initiatives, and where to funnel profits regarding corporate donations.

Very similar to the Amazon statements are the statements made by Hobby Lobby, Conestoga, and Townley. These companies had statements of faith. The statements reflected the position of the companies and the policies in place to reflect those beliefs. Hobby Lobby, Conestoga, and Townley were organized and functioned as religious entities.

The last argument in support of allowing a for-profit corporation to be defined as religious is the demand shift in the marketplace. The bar to religious for-profits seems to stem from the separation of church and

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[265] *Id.*

[266] *See* discussion *supra* Section VI.B. (VA. CODE ANN. § 13.1–1008 ("Every limited liability company formed under this chapter has the purpose of engaging in any lawful business, purpose, or activity, whether or not such business, purpose, or activity is carried on for profit, except as otherwise provided by the law of this Commonwealth, unless a more limited purpose is set forth in the articles of organization.")).

[267] *Hobby Lobby*, 573 U.S. at 720.

[268] Brian Fung, *Amazon Lays Out Its Policies on Political and Social Issues*, CNN BUSINESS (Oct. 10, 2019, 8:56 PM), https://www.cnn.com/2019/10/10/tech/amazon-policy-positions-jay-carney/index.html.

[269] *Id.*

commerce doctrine.[270] But it also seems to stem from the doctrine that the sole purpose for a corporation is profit-maximization. Much of corporate law is based on that doctrine.[271] For instance, a corporation's fiduciary duties are based on profit-maximization.[272] The overall premise of a corporate fiduciary is to maximize the profit for a shareholder.[273] Therefore, a decision that is opposed to maximizing shareholder value may be a breach of the fiduciary duty.

However, there is a shift in the marketplace that demands maximizing stakeholder value over shareholder value; this demand shift is manifested in the thirty-three states that have adopted a benefit corporation model act.[274] Under the act, a corporation may be formed for other purposes besides solely maximizing shareholder wealth.[275] The demand for benefit corporations and CSR initiatives indicates that the market demands corporations to add value to all internal and external stakeholders.[276] The market demands something more. In the religious context, the market demands business owners that live their faith through their business and give to similar religious activities.

A for-profit corporation should not be barred from qualifying as a religious organization under the section 702 exemption. *Hobby Lobby* held that for-profit corporations have the right to exercise the company's religion.[277] A corporation that exercises religion is proved religious by its founding documents, policies, and practices, as well as by the corporation's marketing of its professed religion to the outside world. Therefore, the for-profit bar should no longer be a categorical bar; rather, it should be a factor to consider.

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[270] *See* discussion *supra* Section VI.B.

[271] ALEXANDER, *supra* note 110, at 92 ("Although the directors of conventional corporations are provided some leeway as to social responsibility under the business judgment rule (discussed in chapter 3), they are required to view all decisions through the lens of value maximization for shareholders.").

[272] *Id.* at 28 ("[D]irectors must perform their duties with the primary focus of increasing shareholder wealth.").

[273] *Id.*

[274] *Id.* at 67 ("Largely through the efforts of Clark and B Lab, benefit corporation legislation has now been adopted in thirty-three jurisdictions within the United States.").

[275] *Id.* at 72 (citations omitted) ("'[A] benefit corporation shall have a purpose of creating general public benefit.' In addition, a benefit corporation may, in its articles, add a specific benefit purpose. Section 201 suggests that there is possibly a goal-oriented element to corporate purpose under the MBCL, which is quite different from conventional corporate law.").

[276] *Id.* at 67; *see also* Porter & Kramer, *supra* note 95.

[277] *See Hobby Lobby*, 573 U.S. at 719.

In conclusion, *Hobby Lobby* changed the *Townley* analysis for a for-profit corporation. The four secular factors—1) the organization is for-profit, (2) produces a secular product, (3) affiliation with or supported by a church, and (4) founding documents mention a religious purpose—can still be used to determine whether a for-profit corporation can be religious pursuant to the section 702 exemption. However, the for-profit status is not a categorical exemption; rather, it is just a factor. Therefore, some for-profit corporations should be considered religious pursuant to the section 702 exemption.

C. *Title VII and RFRA*

There is a second method a court could use to determine whether a for-profit, religious business would qualify for the section 702 exemption. The court could analyze whether the corporation's right to the free exercise of religion was violated by not qualifying for the section 702 exemption. Regarding RFRA, it is important to note that *Hobby Lobby* was decided in 2014; therefore, it is a recent avenue for religious corporations to protect their rights as *Hobby Lobby* extended that claim to for-profit corporations.[278]

In *Bostock* v. *Clayton County*, the Supreme Court seemed to encourage a religious employer facing a Title VII lawsuit to assert a claim regarding the corporation's religious exercise rights.[279] In *Bostock*, the Supreme Court consolidated three cases to define the term "sex" in Title VII.[280] The Court held that sex discrimination under Title VII includes discrimination based on the individual's sexual orientation or gender identity.[281] At the end of the majority opinion, the Court noted that, because the employers did not raise any religious exercise issues, those issues were for another case and a later Court to decide.[282] If an employer were to bring the issue before the Court, the Court reasoned that a RFRA claim would be the proper action.[283] Title VII's bar from discriminating against this new protected class will impact religious employers' religious exercise rights.

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[278] *Id.* at 707–08.

[279] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753–54 (2020).

[280] *Id.* at 1737–39.

[281] *Id.* at 1754.

[282] *Id.*

[283] A RFRA action would be proper. Additionally, in support of redefining a for-profit corporation as "religious," a court could find that the ordinary public meaning of "religious corporation" as stated in Title VII, includes for-profit religious corporations. One question the Court asked was what the ordinary public meaning of the word "sex" in Title VII was. Similarly, the Court could ask what the ordinary public meaning of a "religious corporation" in Title VII is. *See Bostock*, 140 S. Ct. at 1738–39, 1753–54.

Similar to *Hobby Lobby*, if a religious corporation were to bring a RFRA action regarding qualifying for the section 702 exemption, the Court would have to determine whether the government substantially burdened the corporation's exercise of religion, even if the burden resulted from a rule of general applicability.[284] To overcome the burden, the Government would have to demonstrate that the application of the burden to the person: (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest.[285] The conclusion to this analysis will be contingent on the posture of the case and who brought the RFRA defense.

D. EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.

One of the cases consolidated into *Bostock* was *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc*.[286] While the issues in the case and most of the scholarship on the case revolve around the definition of "sex," the balancing of LGBT rights, and the issue of whether LGBT individuals are a protected class, the case provides an excellent example for the two methods of analysis presented in this article.[287]

Aimee Stephens was born biologically as a male; however, she decided to transition from male to female.[288] Aimee was fired from Harris Funeral Homes because of her decision to transition to a female.[289] Thomas Rost was the majority owner of Harris Funeral Homes and was the owner that fired Aimee.[290] Rost testified that he fired Aimee because of her transition from male to female.[291]

Rost is a devout Christian and seeks to honor the Lord through his closely-held, for-profit corporation.[292] Rost proclaims "that God has called him to serve grieving people" and "that his purpose in life is to minister to the grieving," which is reflected in the company's mission statement and on its website.[293] The company also places Bibles, "Daily Bread" devotionals, and

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[284] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 682 (2014); *see also Bostock*, 140 S. Ct. at 1754.

[285] 42 U.S.C. § 2000bb-1(a)–(b).

[286] *Bostock*, 140 S. Ct. at 1731.

[287] *Id.*

[288] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566 (6th Cir. 2018).

[289] *Id.*

[290] *Id.*

[291] *Id.* at 569.

[292] *Id.* at 568.

[293] *Id.*

"Jesus Cards" in public places throughout the funeral home.[294] However, the funeral home is not connected to a church, it does not display religious figures so as to not offend any guests of different faiths, and Rost does not discriminate when hiring based on religious beliefs.[295]

The EEOC filed a complaint against the Funeral Home claiming discrimination against a protected class.[296] The District Court of Michigan ruled in favor of Rost and the funeral home.[297] Despite direct evidence of discrimination, the court found that "the Religious Freedom Restoration Act ("RFRA") precludes the EEOC from enforcing Title VII against the Funeral Home, as doing so would substantially burden Rost and the Funeral Home's religious exercise."[298] In addition, "the EEOC had failed to demonstrate that enforcing Title VII was the least restrictive way to achieve its presumably compelling interest 'in ensuring that Stephens is not subject to gender stereotypes in the workplace in terms of required clothing at the Funeral home'"; and thus, the court held that "the EEOC could have achieved its goal by proposing that the Funeral Home impose a gender-neutral dress code."[299]

The Court of Appeals overruled the district court.[300] Regarding the RFRA analysis, the court held: (1) requiring the employer to comply with Title VII did not substantially burden his religious practice of operating funeral homes, precluding a RFRA defense to Title VII claims; (2) requiring the employer to comply with Title VII satisfied EEOC's compelling interest in eliminating workplace discrimination, precluding a RFRA defense to Title VII claims; and (3) requiring the employer to comply with Title VII was the least restrictive way to further the EEOC's interests, precluding a RFRA defense to Title VII claims.[301]

A religious employer will have a hard time overcoming the government's compelling interest in eliminating workplace discrimination. This analysis will ultimately boil down to each court's decision. As seen in *Harris Funeral Homes*, the district court held that the religious employers overcame the government's compelling interest.[302] The Court of Appeals held it did not.[303]

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294 *Harris Funeral Homes*, 884 F.3d at 568.

295 *Id.*

296 *Id.* at 566.

297 *Id.* at 567.

298 *Id.* at 570.

299 *Id.*

300 *Harris Funeral Homes*, 884 F.3d at 600.

301 *Id.*

302 *Id.* at 570.

303 *Id.* at 567.

As noted above, when *Harris Funeral Homes* was consolidated in *Bostock*, the RFRA claim was not brought before the Supreme Court.[304]

The *Harris Funeral Homes* case also presented an interesting issue regarding redefining a religious corporation. Per an amicus brief, the Court of Appeals analyzed whether *Harris Funeral Homes* would qualify for the ministerial exception.[305] As previously noted in Section III(B), a for-profit corporation should not qualify for the ministerial exception. Instead of attempting to qualify for the ministerial exception, Rost should have raised an argument for redefining "religious corporation [or] association" pursuant to the section 702 exemption.[306]

Harris Funeral Homes would fall squarely within the section 702 exemption. Harris Funeral Homes was a closely-held corporation with only a few owners.[307] The majority owner, owning 95.4% of the corporation, was a Christian who sought to honor the Lord through his business.[308] His purpose was to minister to grieving people.[309] Harris presented the corporation as a Christian corporation by displaying scripture on printed materials and verses on the website.[310] Harris also had "Jesus Cards" in public places around the funeral home.[311] Harris did not have a religious purpose in the business's articles of incorporation; however, similar to the for-profit factor, this is just one factor the court should consider.[312] Asking the court to redefine "religious corporation or association" may have won the day for Rost and his closely-held, religious business.

In conclusion, the Court would have two methods to analyze whether a for-profit, religious business would qualify for the section 702 exemption. The first method of analysis would be including a religious, for-profit corporation in the definition of the section 702 exemption that applies to religious corporations or associations. The second method of analysis would be arguing that a religious corporation would win in a RFRA claim.

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304 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

305 *Harris Funeral Homes*, 884 F.3d at 581.

306 42 U.S.C. § 2000e-1(a).

307 *Harris Funeral Homes*, 884 F.3d at 566.

308 *Id.* at 568.

309 *Id.*

310 *Id.*

311 *Id.*

312 *Id.*

VII. PLANNING FOR THE RELIGIOUS BUSINESS OWNER

Moving from the litigation mindset to a planning mindset, there are several points a religious business owner might consider. First, as the law stands, courts have not included for-profit corporations in the definition of a "religious corporation or association" pursuant to the section 702 exemption, and therefore, for-profit corporations do not qualify for the section 702 exemption.[313] Because a for-profit corporation cannot qualify for the exemption, the business owner may consider keeping the business under fifteen employees.[314] The Civil Rights Act of 1964 does not apply until the fifteenth employee is hired.[315] Therefore, a business owner may discriminate if there are fewer than fifteen employees.[316]

A religious business owner may take some additional steps in hopes that the law changes. The goal of the religious business owner is to show that the essence of the business cannot be separated from the religious purpose of the business. The courts look to the organization and function of the business.[317] In the organization of the business, the business owner should consider, similar to the Greens and Hahns, a closely-held corporation or an LLC as the chosen business entity.[318] Both business entities are typically used when there is a small number of owners. In the founding documents of the business, the owner should state that the business is created for a specific religious purpose. The founding document might also reference a document that contains the statement of faith of the business and the business owners. In the bylaws of the corporation or the operating agreement of the LLC, the business owner should consider making ownership of the business conditioned on holding the beliefs stated in the statement of faith. The documents could also state that disaffirming the statement of faith could lead to the expulsion of ownership rights in the company or a forced buy-out agreement.

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[313] *See* discussion *supra* Section III.D.

[314] 42 U.S.C. § 2000e(b) (defining employers as those with fifteen or more employees).

[315] *Id.*; *see also*, Selznick, *supra* note 91, at 1362, 1382 (discussing state religious freedom statutes that may prohibit discrimination by some for-profit entities with less than fifteen employees).

[316] 42 U.S.C. § 2000e(b).

[317] EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988).

[318] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 700, 702 (2014). The businesses in *Hobby Lobby* were formed as corporations; however, the court emphasizes that the businesses were closely held. *Id.* at 701. The Green family owned Hobby Lobby, and the Hahn family owned Conestoga. *Id.* at 700. These businesses were not public companies but instead owned by a small number of family members. *Id.* While the Court did not explicitly state that an LLC would work, an LLC could meet the closely-held factor. An LLC cannot be a public company, and an LLC's founding documents could limit the owners to family members, furthering the argument that an LLC would work.

The business owner may also consider a benefit corporation. As previously mentioned, the benefit corporation is designed for a specific purpose other than shareholder value maximization.[319] The other purpose, besides the benefit of society, should be for a specific religious purpose. The business owner may find this profitable because the fiduciary duties of the benefit corporation will incorporate that specific religious purpose. Unlike a closely-held corporation, where the courts may not be as persuaded that the fiduciaries of the closely-held corporation may incorporate religious purposes in their fiduciary duties. Similar to a benefit corporation, members of an LLC may incorporate the religious purpose as part of their fiduciary duties per the operating agreement.

The business owner should also carefully craft human resource policies and procedures. These human resource policies and procedures should reflect the business owner's faith and how it manifests throughout the business. Because the religious business will not currently qualify for the section 702 exemption, the business owner may consider a position that will qualify for a "bona fide occupation qualification" ("BFOQ").[320] Using the Hypothetical Businesses, for instance, Yosef may consider making his server position a BFOQ because the religious qualifications of the position include talking with customers about the Jewish faith.[321]

Other human resource issues may arise that are similar to Townley's mandatory policy of paid devotion and worship services for all employees. In these instances, the business owner must provide adequate accommodations for employees who do not wish to participate in certain activities. The business owner will have to further research the EEOC religious accommodation compliance rules and case law.

Most of the courts noted the distribution of profits to religious activities as a factor in determining whether the organization was religious.[322] The religious business owner should consider giving to religious organizations of similar faith.[323] Most courts also considered whether the business marketed itself as a religious business.[324] The business owner should attempt to incorporate religious marketing elements through its marketing plan.[325]

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[319] ALEXANDER, *supra* note 110, at xvi.

[320] 42 U.S.C. § 2000e-2(e).

[321] *See* discussion *supra* Section III.A.

[322] *See, e.g.*, Spencer v. World Vision, Inc., 619 F.3d 1109, 1119–20 (9th Cir. 2010).

[323] *Id.*

[324] *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 612 (9th Cir. 1988).

[325] *Id.*

Finally, the business owner should stay true to the mission embodied in the business's founding documents. The business should not deviate from its religious purpose, policies, or procedures. The courts will look for instances where the business did not act in a way that is in accordance with the founding documents.

VIII. CONCLUSION

The "for-profit" aspect of a business should not be a categorical bar from the section 702 exemption. The original test from *Townley* considered factors in the evaluation of a business. However, the "for-profit" factor has turned into a bar from the exemption. This bar is an infringement on a business's First Amendment right to exercise religion. *Hobby Lobby* was a landmark case that established that businesses do have a right to exercise religion. The religious exercise right should be applied to Title VII and the section 702 exemption to allow a for-profit business to discriminate in employment practices. Allowing for-profit businesses to use the exemption will meet the cultural demand for religious CSR initiatives and return to the idea that religion and the marketplace can operate seamlessly together.

From a business planning mindset, there are several points a religious business owner might consider. First, as the law stands, courts have not included for-profit corporations in the definition of a "religious corporation or association" pursuant to the section 702 exemption, and therefore, such corporations do not qualify for the section 702 exemption. Because a for-profit corporation cannot qualify for the exemption, the business owner may consider keeping the business under fifteen employees. The Civil Rights Act of 1964 does not apply until the fifteenth employee is hired.[326] Therefore, a business owner may discriminate if there are fewer than fifteen employees.[327]

[326] 42 U.S.C. § 2000e(b).

[327] *Id.*