Commercial Religious Exercise: Translating the Commercial Speech Doctrine to the Free Exercise Clause

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INTRODUCTION

The Patient Protection and Affordable Care Act and implementing regulations require for-profit businesses with more than fifty employees to include contraceptive products in their health care coverage for employees.[1] Throughout the country, privately held corporations and their owners challenged this requirement on the grounds that it violates the Religious Freedom Restoration Act (RFRA), which states that the government shall not "substantially burden" a religious practice unless the regulation is "the least restrictive means" of serving a "compelling governmental interest."[2] The employers argued that requiring them to include contraceptives in employees' health coverage substantially burdened their religious opposition to using certain contraceptives.[3] In *Burwell v. Hobby Lobby Stores*, the Supreme Court held (5–4) that the contraceptive coverage mandate imposed a substantial burden on the employers' religious opposition to contraception,[4] and that the coverage mandate was not the "least restrictive means" of serving the government's interest "in guaranteeing cost-free access to the . . . contraceptive methods."[5] Justice Ginsburg, in dissent, argued that the mandate did not substantially burden the employers' personal practice of opposing contraception because it did not require employers to purchase or use contraceptives themselves; using contraceptives remained the independent decision of each employee.[6] The dissent further noted two troubling aspects of the majority's position. First, it denies employees benefits available to most other workers, and thereby imposes the employer's religious practice on its employees.[7] Second, it lays the ground for employers to challenge numerous regulations that protect workers, such as nondiscrimination and minimum wage laws, which may impose requirements in tension with an employer's personal religious practices.[8]

In this Essay, I argue that, in light of *Hobby Lobby*, RFRA should be amended to recognize the difference between religious practice that takes place in a personal setting and religious practice that takes place in a commercial setting, that is, during the course of a commercial

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[1] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762–64 (2014).

[2] *Id.* at 2761 (quoting 42 U.S.C. § 2000bb-1(a)–(b) (2012)); *see also* Korte v. Sebelius, 735 F.3d 654, 659 (7th Cir. 2013); Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1232 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014); Autocam Corp. v. Sebelius, 730 F.3d 618, 625 (6th Cir. 2013), *vacated*, 134 S. Ct. 2901 (2014).

[3] *See Hobby Lobby*, 134 S. Ct. at 2764–67.

[4] *Id.* at 2779. The Court reached this decision after holding that corporations have standing to assert free exercise claims under RFRA. *Id.* at 2775.

[5] *Id.* at 2780 (quoting 42 U.S.C. § 2000bb-1(b)(2) (2012)) (internal quotation mark omitted).

[6] *See id.* at 2799 (Ginsburg, J., dissenting).

[7] *See id.* at 2804.

[8] *See id.* at 2804–05.

employment relationship, "an area traditionally subject to government regulation."[9] This distinction between personal freedom and freedom when operating in the commercial sphere is far from novel. It is recognized elsewhere in constitutional law. The commercial speech doctrine, for example, applies a lesser degree of scrutiny to restrictions on "commercial speech" than to restrictions on noncommercial expression.[10] Tighter regulation is justified in a commercial setting because commercial relationships impact the interests of third parties. This reasoning translates to religious exercise. Commercial speech is entitled to less protection because it does not further public discourse and it has the potential to deceive or mislead consumers. Religious exercise in a commercial employment setting may be entitled to less constitutional protection because it goes beyond the employer's personal autonomy, and may burden the employees' rights. Although employers may argue that their personal religious practices are inseparable from their commercial employment practices, commercial speech doctrine cases show that it is possible to objectively distinguish primarily commercial from primarily noncommercial settings, based on the broader purpose of the employer's operation. Burdens on religious practice that occur during a commercial employment relationship should therefore be treated like commercial speech and subject to a lesser degree of scrutiny.

I. THE DIFFERENCE BETWEEN COMMERCIAL AND NONCOMMERCIAL SETTINGS

RFRA requires the government to grant religious exemptions from neutral regulations, such as criminal laws, criteria for unemployment benefits, and school attendance requirements, that "substantially burden" a person's exercise of religion unless denying an exemption is the least restrictive means of serving a compelling interest.[11] RFRA overturned *Employment Division, Department of Human Resources v. Smith*, where the Supreme Court held that the government need not show a compelling interest to justify a general criminal prohibition on the drug peyote, which is used during tribal religious ceremonies.[12]

Hobby Lobby differs from both *Smith* and the pre-*Smith* cases that inspired RFRA in a critical respect. In those cases, the plaintiffs wished to engage in a religious practice within *their private domain*, away from the workplace—resting on the Sabbath,[13] home schooling children,[14] or using peyote during a religious ceremony.[15] In contrast, the contraceptive coverage mandate at issue in *Hobby Lobby* in no way restricts the employer's ability to privately oppose or abstain from contraception outside the workplace. It "carries no command that [the employers themselves] purchase or provide the contraceptives they find objectionable," it merely "calls on the companies . . . to direct money into undifferentiated funds that finance a wide variety of

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[9] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978)).
[10] *Id.*
[11] *See, e.g.*, Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).
[12] *Id.* Congress found that in *Smith*, "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4) (2012); *see Hobby Lobby*, 134 S. Ct. at 2760–61; *see also* Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006) (holding that RFRA requires the government to exempt the religious use of *hoasca* from laws criminalizing use of that drug).
[13] *See Hobby Lobby*, 134 S. Ct. at 2760 (citing Sherbert v. Verner, 374 U.S. 398, 408–09 (1963)).
[14] *See id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 210–11 (1972)).
[15] *See id.* at 2760–61 (citing *Emp't Div.*, 494 U.S. at 884).

benefits."[16] Employees decide independently whether to spend their cash earnings or their health benefits to purchase contraceptive products.[17] Employers remain free to personally oppose contraception and to express this view to their employees. Hence, there is a fundamental difference between *Hobby Lobby* and the cases that inspired RFRA: The difference between practicing one's religious beliefs in the personal sphere—an area traditionally protected from government regulation—and practicing one's beliefs during the course of a commercial relationship—an area traditionally subject to government regulation.

Importantly, the law recognizes that there is a constitutional difference between freedom in a personal setting and a commercial setting. Under the commercial speech doctrine, "the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or non-commercial speech."[18] Commercial speech "does no more than propose a commercial transaction,"[19] and "[i]n light of the greater potential for deception or confusion in the context of certain advertising messages," the law is more tolerant of regulation of commercial speech than other forms of speech.[20] Restrictions on noncommercial speech are subject to strict scrutiny, upheld "only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."[21] But restrictions on commercial speech are subject to intermediate scrutiny; they will stand if the government interest is substantial and there is a "reasonable fit" between the restriction and its objectives.[22] Rather than showing that the restriction on speech is the least restrictive means for achieving its interest, as would be required for a restriction on noncommercial speech, the government needs to show only that the restriction is "not broader than Congress reasonably could have determined to be necessary."[23] The Court has applied intermediate scrutiny to restrictions on the following forms of commercial speech: a condom manufacturer's advertising pamphlets,[24] presentations marketing Tupperware on college campuses,[25] advertising for casino gambling,[26] advertising for lawyers,[27] use of trademarked words,[28] and promotional advertising for utility companies.[29]

Likewise in the free exercise context, the Court has also acknowledged a difference between religious freedom in a personal setting and freedom to assert religious beliefs in a commercial setting. In *United States v. Lee*, which is part of the body of cases that supplies the legal standard

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[16] *Id.* at 2799 (Ginsburg, J., dissenting).
[17] *See id.* ("[N]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action." (second alteration in original) (quoting Grote v. Sebelius, 708 F.3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting)) (internal quotation marks omitted)).
[18] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983).
[19] *See id.* at 66 (internal quotation mark omitted).
[20] *Id.* at 65.
[21] Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 540 (1980).
[22] *See* Bd. of Trs. v. Fox, 492 U.S. 469, 479–80 (1989).
[23] *Id.* at 480 (quoting S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 539 (1987)) (internal quotation marks omitted).
[24] *See Bolger*, 463 U.S. at 67.
[25] *See Fox*, 492 U.S. at 474–75.
[26] *See* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 340 (1986).
[27] *See* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 472 (1988).
[28] *See* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 535 (1987).
[29] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980).

under RFRA,[30] the Court rejected an Amish employer's claim that paying social security taxes violated his religious opposition to state-sponsored welfare.[31] The Court found insofar as the tax imposed a burden on the employer's religious beliefs, the burden was justified by the government's interest in administering a universal tax scheme.[32] Although the *Hobby Lobby* majority suggested *Lee*'s reasoning is confined to the tax setting, *Lee* made two points that "cannot [be] confine[d] to tax cases."[33] The Court explained that "allowing a religion-based exemption to a commercial employer would 'operat[e] to impose the employer's religious faith on the employees.'"[34] And "'[w]hen followers of a particular sect enter into commercial activity as a matter of choice,' . . . 'the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on statutory schemes which are binding on others in that activity.'"[35] These statements in *Lee* allude to the difference I am describing, which is also captured by the commercial speech doctrine—that one's personal First Amendment freedom may be more curtailed in a commercial setting than in a personal one.

A commercial setting is fundamentally different from a private one. Because commercial speech falls "in an area traditionally subject to government regulation," the Court has explained that this is a "'commonsense' distinction."[36] Commercial transactions involve consumers or employees who may have less knowledge or bargaining power than retailers or employers. As *Lee* recognized, protecting the interests of these third parties justifies limiting the freedom of an employer who voluntarily enters the commercial marketplace in order to make a profit.[37] Regulation of commercial speech is justified by the "potential for deception or confusion in the context of certain advertising messages."[38] Similarly, in a for-profit employment relationship, employees' welfare, including access to medicine and other living conditions, is largely dependent on the employer's policies. For this reason, large employers are subject to minimum wage, antidiscrimination, and health and safety laws, such as the Affordable Care Act.[39] As the *Hobby Lobby* dissent observed, a whole host of employee-welfare regulations, such as those prohibiting race, sex, and religious discrimination, requiring minimum wages, or imposing other

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[30] *Lee* was decided during the period between *Sherbert* and *Smith*, and thus it is part of the jurisprudence reinstated by RFRA. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2803 (2014) (Ginsburg, J., dissenting) (noting that the RFRA "preserved" *Lee*).

[31] 455 U.S. 252, 255, 260 (1982).

[32] *See id.* at 260.

[33] *Hobby Lobby*, 134 S. Ct. at 2804 (Ginsburg, J., dissenting).

[34] *Id.* (alteration in original) (quoting *Lee*, 455 U.S. at 261).

[35] *Id.* (quoting *Lee*, 455 U.S. at 261).

[36] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978)).

[37] *See Lee*, 455 U.S. at 261.

[38] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983).

[39] *See, e.g.*, Liberty Univ., Inc. v. Lew, 733 F.3d 72, 94 (4th Cir. 2012) ("It has long been settled that Congress may impose conditions on terms of employment that substantially affect interstate commerce." (citing United States v. Darby, 312 U.S. 100 (1941) (upholding minimum wage and overtime provisions of the Fair Labor Standards Act))); *id.* at 92 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding National Labor Relations Act of 1935, which prohibited unfair labor practices)). As a basis for applying the Affordable Care Act to "large employers" (with more than fifty employees), Congress found that their practices have a substantial impact on the stability, wellbeing, and mobility of enough workers to have a significant impact on interstate commerce. *Id.* at 91–96 (quoting congressional findings that the provision of health coverage substantially affects commerce just as other forms of compensation and terms of employment do, and the businesses run by large employers likewise substantially affect commerce).

health and safety conditions, might conflict with employers' religious practices.[40] Just as laws prohibiting deceptive advertising restrict commercial speech in order to protect consumers, welfare laws restrict an employer's religious practices in order to protect employees who depend on their employer for security and well-being.

Furthermore, the distinction between commercial and noncommercial activity is based on the values that animate these clauses of the First Amendment. The Court has recognized repeatedly that commercial speech is in a "subordinate position in the scale of First Amendment values,"[41] and this is because speech that proposes a commercial transaction does not have the public discourse value that the First Amendment is designed to protect.[42] That is, "[c]ommercial speech differs from public discourse because it is constitutionally valued merely for the information it disseminates, rather than for being itself a valuable way of participating in democratic self-determination."[43]

A similar point could be made about religious exercise in the commercial sphere. The free exercise clause is concerned with protecting individual freedom of religious belief. Courts have described free exercise rights as being of a "personal nature,"[44] preserving freedom of "the mind and spirit of man,"[45] and "the indefeasible right to worship God according to the dictates of conscience."[46] The right is primarily concerned with personal freedom to think and believe as one chooses, and it prevents the government from requiring or prohibiting religious beliefs or practices.[47] Just as commercial speech falls outside the public discourse at the core of the free speech clause, religious actions in a commercial setting reach beyond the personal autonomy of belief at the core of the free exercise clause. Freedom to think and believe whatever one chooses does not equate to absolute freedom to assert or act on those beliefs at any time, in any context or relationship.[48] Commercial regulations may prevent an employer from acting out certain beliefs in relationships with employees, but they do not prevent the employer from holding or practicing their beliefs in a private setting.[49]

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[40] *See Hobby Lobby*, 134 S. Ct. at 2804–05 (Ginsburg, J., dissenting).

[41] Bd. of Trs. v. Fox, 492 U.S. 469, 477 (1989) (quoting *Ohralik*, 436 U.S. at 456) (internal quotation mark omitted).

[42] *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 14 (2000).

[43] *Id.* at 4.

[44] Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1212 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014).

[45] *Id.* (internal quotation marks omitted).

[46] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 304 (1866).

[47] *See* Reynolds v. United States, 98 U.S. 145, 164 (1878) (explaining free exercise guarantees that "religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions").

[48] With the free exercise clause, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Id.*; *see also* Bowen v. Roy, 476 U.S. 693, 699 (1986) ("Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute.").

[49] Acceptable limits on religious activity in a commercial setting are illustrated by Title VII's religious accommodation and discrimination provisions, under which an employer need not accommodate a religious practice if it would impose "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (2012). An employer is not required to give employees days off on religious holidays, even if their religion prohibits work on those days. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70 (1986) (holding school board policy requiring a religious employee to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement was reasonable); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 80–81 (1977) (holding Title VII does not require an employer to deny the shift and job preference of some employees, and violate

In *Hobby Lobby*, the government and the dissent argued that corporations should not have standing to bring free exercise claims under RFRA because corporations do not hold religious beliefs.[50] This argument recognizes the distinction I am alluding to between personal and commercial activity. The commercial religious exercise standard I propose, however, is more accommodating of the free exercise claims of commercial employers than the dissent's view because even if a court determines that the religious practice occurs in a commercial setting, the regulation would nonetheless be subject to intermediate scrutiny. Furthermore, rather than draw an absolute dichotomy between private and business activity, the commercial religious exercise standard allows courts to recognize that businesses fall in different places along the commercial–personal spectrum, as discussed below, and to adjust the level of scrutiny accordingly.

II. IDENTIFYING A COMMERCIAL SETTING

If RFRA were amended to subject restrictions on commercial religious exercise to intermediate scrutiny, the first question in a free exercise claim would be whether the religious practice occurs in a primarily commercial setting or in a personal setting. I would expect employers to argue that their practice of discouraging employees from using contraception is indistinguishable from their personal practice of opposing contraception, and the coverage mandate therefore burdens a practice that occurs in their personal domain. Although there is no bright line, the commercial speech cases demonstrate how it is possible to objectively distinguish commercial activity from noncommercial activity. The Court has evaluated the primary purpose of expression to determine whether it is commercial speech. Speech that occurs for the primary purpose of a commercial transaction does not become religious, political, or educational just because one of these elements is injected, and expression primarily motivated by religion does not become commercial merely because a commercial transaction is involved. Similarly, where the business exists primarily to further the employer's religious beliefs, the business is a means of personal religious exercise, and the stricter, noncommercial standard should apply. Where the business exists for a primary purpose distinct from furthering the employer's personal religious beliefs, the business is a commercial entity distinct from the employer's personal religious exercise, and therefore the less-strict commercial standard should apply.

Commercial speech cases illustrate how this standard could be applied in practice. In *Bolger*, the Court found that a condom manufacturer's advertising pamphlets were commercial speech, even though the manufacturers argued the pamphlets were educational because they included information about venereal disease.[51] The Court considered several characteristics to reach this conclusion: the pamphlets were concededly advertising; they referred to a specific product; and the manufacturers had an economic motivation for mailing the product.[52] Similarly, in *Board of Trustees v. Fox* the Court held that presentations for marketing Tupperware in college

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their collective bargaining agreement's procedures for selecting days off, in order to give religious workers Saturdays or Sundays off). This shows that personal religious freedom is not generally understood as freedom to act out one's belief in any commercial setting.

[50] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2794 (2014) (Ginsburg, J., dissenting) ("[N]o decision of this Court [has] recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law . . . . [T]he exercise of religion is characteristic of natural persons, not artificial legal entities." (footnote omitted)).

[51] *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983).

[52] *Id.*

dormitories were commercial speech, and a policy prohibiting them was subject to intermediate scrutiny.[53] The Tupperware-marketers claimed that the presentations were educational, rather than commercial, because they informed students about home economics. The Court found the primary purpose of the presentations commercial, explaining how "there is nothing whatever 'inextricable' about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares."[54] The Court further remarked that "[i]ncluding these home economics elements no more converted [the marketer's] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech."[55]

The Court has applied the same analysis in the opposite direction to conclude primarily religious activity is not commercial speech, even though it contains a commercial component. In *Murdock v. Pennsylvania*, the Court held that selling religious literature door-to-door was religious expression warranting strict scrutiny.[56] The Court concluded that evangelist book sellers were primarily motivated by spreading their beliefs, as opposed to being commercial retailers of books.[57] "[T]he mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise."[58] As in *Fox*, the *Murdock* Court looked to the primary purpose of the activity to determine that selling religious literature was not commercial speech despite a commercial element. In *Murdock*, the Court evaluated the social practice in which the commercial component was imbedded—the sale took place within the religiously motivated activities of a religious group, and the commercial component was therefore incidental to the primary religious purpose.[59] The Court has often referred to the distinction between commercial and noncommercial as one of common sense, stating that such judgments "ultimately revolve around questions of social meaning; they turn on whether the utterance of a particular speaker should be understood as an effort to engage public opinion or instead simply to sell products."[60]

Translating this to the free exercise context, whether a "commercial" standard applies would depend on whether a religious practice takes place in a personal or commercial environment, and a court would inquire as to the primary purpose of the employer's operation. If the operation mainly exists in order to serve a religious mission, the organization's employment practices are likely inseparable from the employer's personal religious exercise. But if the employer's operation exists for the primary purpose of profit-making, then religious practice in the employer's personal domain may be distinguished from their practice in the commercial setting. At the commercial end of the spectrum is an employer with hundreds of diverse employees, engaged in a secular business, whose corporate charter or governing documents do not mention religious values or objectives. At the other end of the spectrum is a religious non-profit that exists for the purpose of perpetuating a religious belief or activity, rather than to make a secular,

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[53] 492 U.S. 469, 480 (1989).
[54] *Id.* at 474.
[55] *Id.* at 474–75.
[56] 319 U.S. 105, 110 (1943).
[57] *See id.* at 111.
[58] *Id.*
[59] *See id.* at 112.
[60] Post, *supra* note 42, at 18.

commercial profit.[61] Thus, both employers and employees at religious non-profits have long been treated differently from those at other non-profits and granted exemptions from federal employee-welfare regulations.[62] Closer to the religious non-profit end of the spectrum is a small, closely held for-profit business founded with explicit religious objectives and values, such as a for-profit publisher of Christian books whose charter specifies a religious mission.[63] This business may be much more like the evangelists in *Murdock* selling religious literature door-to-door, which was not commercial speech. The primary purpose of the business is perpetuating a religious mission, while the for-profit aspect is incidental or secondary to this end. Whether religious activity is imbedded in a primarily commercial relationship would be a factual question for courts to evaluate on a case-by-case basis.[64]

CONCLUSION

Intermediate scrutiny would not allow every burden on religious exercise that takes place in a commercial setting. Regulations on commercial speech have often been struck down under intermediate scrutiny.[65] The same could be true of regulations limiting religious exercise in the commercial domain. The difference is that the government would need to show its interest is "substantial" rather than compelling, and that the regulation is a reasonable means of directly

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[61] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2796–97 (2014) (Ginsburg, J., dissenting) ("[F]or-profit corporations are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers]." (quoting Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1242 (D.C. Cir. 2013), *vacated*, 134 S. Ct. 2902 (2014) (Edwards, J., concurring in part and dissenting in part)) (internal quotation marks omitted)).

[62] *See, e.g.*, Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012) (holding Free Exercise Clause shields a minister of a religious non-profit from being sued for violating the Americans with Disabilities Act); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339–40 (1987) (holding Title VII's exemption of non-profit churches from provisions prohibiting religious discrimination does not violate Establishment Clause); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 507 (1979) (interpreting the National Labor Relations Act as exempting Church-operated educational institutions from National Labor Review Board's jurisdiction). In exempting religious non-profits from the Affordable Care Act, the Department of Health and Human Services reasoned that "[r]eligious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964, are available to nonprofit religious organizations but not to for-profit secular organizations." Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8,456, 8,462 (Feb. 6, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pts. 147, 148, and 156). The Americans with Disabilities Act also exempts religious non-profits, but not for-profit, secular corporations. *See* 42 U.S.C. § 12113(d)(1)–(2) (2012); *see also Gilardi*, 733 F.3d at 1242 (Edwards, J., concurring in part and dissenting in part).

[63] *See* Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 116 (D.D.C. 2012) (holding that a for-profit publisher of Christian literature exercises religion because the company's charter stated its purpose is "to minister to the spiritual needs of people," and the company holds weekly chapel services for its employees (internal quotation mark omitted)).

[64] I express no view on where the *Hobby Lobby* plaintiffs fall on this spectrum between primarily for-profit companies, that is, with no agreement in their charter to further a religious purpose, and companies that exist primarily for a religious purpose. This would be a factual question for the district court to determine in the first instance, based on evidence such as the corporate charter, mission statements, governing policies, and past religious practices.

[65] *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 69 (1983) (regulation prohibiting condom manufacturer's advertising pamphlets did not withstand intermediate scrutiny); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (regulation limiting the publication of prescription drug price information did not withstand intermediate scrutiny).

serving that interest, as opposed to the least restrictive way of doing so.[66] This less-demanding inquiry recognizes that regulation is presumptively more permissible in the commercial sphere, but it does not mean that employers are entirely without freedom to advance their religious beliefs in the commercial setting.

The commercial speech doctrine illustrates that there is a recognized difference between commercial activity motivated primarily by profit-making, and actions motivated by other personal values. Primarily commercial conduct may fall outside the core freedom of belief and expression that the Constitution is most concerned about. Because commercial activity implicates interests of consumers and employees, it extends beyond the domain of the employer or retailer's personal freedom, and the employer's personal religious and expressive freedoms should, at times, succumb to laws that protect the interests of other people involved in their profit-making activity.

[66] *See* Bd. of Trs. v. Fox, 492 U.S. 469, 479–80 (1989).