

Case No. 12-6294

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HOBBY LOBBY STORES, INC., et al.,
Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, et al.,
Defendants-Appellees.

On Appeal from the Judgment of the United States District Court for the
Western District of Oklahoma, CIV-12-1000-HE

BRIEF OF THE STATE OF OKLAHOMA AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN FAVOR OF
REVERSAL OF THE JUDGMENT BELOW

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**STATEMENT OF THE IDENTITY, INTEREST, AND
AUTHORITY OF AMICI TO FILE**

The State of Oklahoma is interested in this case because the Plaintiffs-Appellees Hobby Lobby Stores, Inc., and Mardel, Inc. (“Hobby Lobby” and “Mardel”) are corporations organized under the laws of the State of Oklahoma, and are citizens of the State of Oklahoma, and Plaintiffs-Appellees David Green, Barbara Green, Mart Green, Steve Green and Darsee Lett (collectively, “the Green Family”) are citizens of the State of Oklahoma whose right to practice their religious faith has been violated. The actions of the Defendants-Appellees (“the Federal Government”) substantially burden the undisputed, sincere, and deeply held religious faith of these citizens of Oklahoma that are otherwise fully protected by the Constitution and laws of the State of Oklahoma, and forcibly require them to personally undertake actions that are contrary to the undisputed, sincere, and deeply held religious faith of these citizens. The State of Oklahoma is authorized by law to appear herein as *Amicus Curiae* by Fed. R. App. P. 29(a).

SUMMARY OF THE ARGUMENT

This brief will focus on two key, threshold errors made by the district court in denying a preliminary injunction, each predicated on a misunderstanding of Oklahoma law. First, the court relied on a “secular, for-profit corporation” v. “religious corporation” dichotomy that is found nowhere in the Oklahoma General Corporation Act under which Hobby Lobby and Mardel are organized. That Act

allows a corporation to organize for “any lawful purpose,” including religious purposes. The Act creates no distinction between those corporations who choose a lawful purpose that is religious in nature and those who choose a lawful purpose that is secular in nature. And even if there was such a distinction, the court erred in concluding that the closely-held Hobby Lobby and Mardel corporations were “secular” and thus categorically undeserving of Free Exercise Clause protection.

Second, and based on its initial error in concluding “general business corporations” are wholly unprotected by the Free Exercise Clause, the court erroneously concluded that Hobby Lobby and Mardel were not “persons” for purposes of the federal Religious Freedom Restoration Act (“RFRA”). To do so, the court ignored the statutorily-created presumption in favor of reading “person” as including corporations, concluding that the presumption “seem[ed] not to fit” the case. But based on the overwhelming and undisputed evidence of Hobby Lobby and Mardel’s sincere, religiously-influenced business conduct and structure, it is difficult to conceive of a situation where the presumption would find a better “fit.”

In sum, the district court took the view that when the Green Family took advantage of a corporate form offered by Oklahoma law they were stripped of significant Free Exercise Clause rights and RFRA protections. But that view is

inconsistent with the State of Oklahoma's understanding of its corporate laws, and is inconsistent with Oklahoma's longstanding tradition of using its laws to *protect* religious freedom rather than to *deprive* it.

These two errors led directly to the district court's erroneous denial of the preliminary injunction because the court considered only the Green Family's RFRA claim, concluding that the burden on the Green Family's exercise of their faith was not "substantial" because it was only an "indirect" burden, i.e., a burden on Hobby Lobby and Mardel rather than the Green Family. Had the court properly concluded that Hobby Lobby and Mardel had free exercise rights and were protected by RFRA, the result below would have undoubtedly been different because the court would have considered the direct, and quite substantial, burden that has been placed on Hobby Lobby and Mardel.

ARGUMENTS AND AUTHORITIES

I. Incorporation under Oklahoma law does not automatically result in a loss of religious freedom.

In rendering its decision below, the district court fixated upon what it considered to be a "fact": that the Hobby Lobby corporations were "secular" corporations and not "religious" corporations.

Indeed, central to the district court's analysis leading to denial of a preliminary injunction was that the Hobby Lobby and Mardel corporations were

“secular,” and therefore not legally entitled to the deference afforded to “religious” corporations in regard to the religious faith practiced by the corporation’s managers. While the Court recognized that Hobby Lobby and Mardel were operated by the Green Family according to their Christian faith, the court concluded that “as secular, for-profit companies,” the corporations were left wholly unprotected by the Free Exercise Clause.¹

Because of this fixation on a perceived categorical difference between “religious” corporations and “for-profit, secular corporation,” the district court did not fairly consider the Green Family’s operation of their corporations as a witness to their personal religious faith and erred in refusing to properly consider the same in relation to the Green Family’s prayer for a preliminary injunction under RFRA.²

¹ Order, JA, pp. 206a and 212a (“The court concludes plaintiffs Hobby Lobby and Mardel do not have constitutional free exercise rights as corporations and that they therefore cannot show a likelihood of success as to any constitutional claims they may assert. . . .”). The District Court’s Order is also published at 870 F.Supp.2d 1278. Citations herein to the Order will be to the copy of the Order found in the Joint Appendix.

² 42 U.S.C. § 2000bb *et seq.*

A. Under Oklahoma law, any organization may incorporate as a “general business corporation,” including churches and others with religious purposes.

Corporations in Oklahoma are most often organized under the Oklahoma General Corporation Act.³ In Oklahoma, corporations may be created for “any lawful purpose:”

B. A corporation may be incorporated or organized pursuant to the provisions of the Oklahoma General Corporation Act **to conduct or promote any lawful business or purposes**, except as may otherwise be provided by the Constitution or other law of this state.⁴

The “lawful purpose” need not be stated with any particularity in its certificate of incorporation:

A. The certificate of incorporation shall set forth:

* * *

3. The nature of the business or purposes to be conducted or promoted.

³ 18 O.S.2011, §§ 1001 - 1144. Corporations may also be organized in Oklahoma under special provisions: Savings and Loan corporations, Title 18 O.S.2011, §§ 381.1 - 381.86; Cooperative corporations, Title 18 O.S.2011, §§ 421 - 439.2; Educational corporations, Title 18 O.S.2011, §§ 571 - 575; Charitable, and Fraternal Corporations, Title 18 O.S.2011, §§ 581 - 594; Professional corporations, Title 18 O.S.2011, §§ 801 - 819; Business Development corporations, Title 18 O.S.2011, §§ 912; and Farming or Ranching Business corporations, Title 18 O.S.2011, §§ 951 - 956. An alternative procedure still exists for the creation of Religious Corporations, 18 O.S.2011, § 562, but the scope of the authorized powers of such a corporation created thereunder is far more limited than a corporation created under the Oklahoma General Corporation Act, *supra*.

⁴ 18 O.S.2011, § 1005(B)(emphasis added).

It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the general corporation law of Oklahoma, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any[.]⁵

Both of the Hobby Lobby corporations declare the above general corporate purpose of “any lawful act or activity” to be the purpose of the corporations.⁶

Similarly, Oklahoma corporations may describe their lawful purposes and activities in their bylaws:

B. The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its shareholders, directors, officers or employees.⁷

Every Oklahoma corporation organized under the Oklahoma General Corporation Act is specifically authorized to use its assets for charity:

Every corporation created pursuant to the provisions of the Oklahoma General Corporation Act shall have power to:

* * *

9. Make donations for the public welfare or for charitable, scientific or

⁵ 18 O.S.2011, § 1006(A)(3). (Emphasis added).

⁶ Joint Appendix, p. 162a (as to Hobby Lobby) and p.166a (as to Mardel). References to the Joint Appendix hereinafter will be abbreviated “JA” followed by the page thereof.

⁷ 18 O.S.2011, § 1013(B).

educational purposes, and in time of war or other national emergency in aid thereof[.]⁸

Every Oklahoma corporation organized under the Oklahoma General Corporation Act may lawfully restrict itself from undertaking particular types of otherwise lawful conduct:

17. Renounce in its certificate of incorporation or by action of its board of directors any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or shareholders.⁹

Plainly, Oklahoma’s laws allow a “for profit” corporation to advocate in favor of or being managed consistent with the religious faith of its creators, operators, and owners. Indeed, Oklahoma law favors corporations undertaking “any lawful act or activity,”¹⁰ which clearly includes religious expression and practice. Accordingly, a lawful purpose of *any* corporation organized under the Oklahoma General Corporation Act may be to express the views and even the religious beliefs and actions of its owners and the persons who operate it.

A church may choose to incorporate as a nonprofit corporation under these

⁸ 18 O.S.2011, § 1016(9).

⁹ *Id.* at ¶ 17.

¹⁰ 18 O.S.2011, § 1006(A)(3), quoted above.

same general corporation laws and enjoy all of the lawful rights and powers of any other corporation provided by those laws.¹¹ But under the district court’s rigid, categorical view of incorporation (“religious corporation” v. every other corporation), it is not clear that even a *church* that chose to organize under the Oklahoma General Corporation Act would be entitled to Free Exercise and RFRA protections. Instead of relying on that inflexible rule, the court instead should have looked beyond the mere choice of corporate form to determine whether Hobby Lobby and Mardel were religious organizations deserving of those protections.

B. Just as a church is in the eyes of the law nothing more than a collection of people acting to further a certain religious purpose, a corporation is nothing more than a collection of people acting to further certain purposes—purposes that can be religious.

In Oklahoma, corporations *are* what they *do*. When a church organizes itself as an Oklahoma nonprofit corporation, the corporation’s speech or acts express the faith and religious values of its congregants and undertakes its corporate acts through the congregants who operate and manage the corporation. In this sense, the corporation is a direct extension of the congregants.

“General” corporations are no different. A corporation cannot do or say or act except through the natural persons who control it. Corporations will conduct

¹¹ See 18 O.S.2011, § 1006(A)(7). Nonprofit corporations organize under the Oklahoma General Corporation Act.

themselves consistently with the purposes and goals of the natural persons who created them and who control them and who undertake actions on their behalf.

And if an Oklahoma corporation organized “for profit” chooses to express itself and undertake corporate speech and actions consistent with the religious faith and beliefs of its corporate directors and owners, those expressions and acts are no less lawful, no less valid, and no less the expressions of the faith and religious values of the corporate directors and owners whose faith should be no less protected when undertaken within the context of a “for profit” business.

And importantly, the “for profit”/”nonprofit” distinction is not one created by religion, but rather by secular laws. Indeed, the nonprofit status of corporations is not dependent upon the sincerity or active devotion of its members’ religious faith or their practice of religious faith, but instead depends upon government-made factors. As a result, whether actions undertaken for religious reasons are within the context of a closely held and operated corporation operating “for profit” or within the context of a corporation operating “not for profit” should not be determinative of the rights of the corporation to claim a religious liberty.

C. Oklahoma has a long tradition of protecting religious liberty through its laws.

Additional evidence that the Oklahoma General Corporation Act does not categorically deprive corporations of religious liberty comes from Oklahoma’s long

tradition of protecting and preserving religious liberty. In fact, the second provision placed in the Oklahoma Constitution by the State's founders declares:

Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights. Polygamous or plural marriages are forever prohibited.¹²

That constitutional guarantee of religious liberty is hardly a hollow promise. Indeed, those that infringe on the religious liberty of any "person" in Oklahoma are subject to criminal sanctions:

Any willful attempt, by means of threats or violence to compel any person to adopt, practice or profess any particular form of religious belief, is a misdemeanor.¹³

Every person who willfully prevents, by threats or violence, another person from performing any lawful act enjoined upon or recommended to such person by the religion which he professes, is guilty of a misdemeanor.¹⁴

And the word "person" as used within the State's Penal Code is specially defined to *include* corporations. As a result, Oklahoma's criminal laws both punish and protect corporations.¹⁵

¹² OKLA.CONST. art. I, § 2 (emphasis added).

¹³ 21 O.S.2011, § 913.

¹⁴ 21 O.S.2011, § 914.

¹⁵ 21 O.S.2011, § 105 ("The word 'person' includes corporations, as well as

Oklahoma has also undertaken to restrain both itself and all of its branches, departments, agencies, officers and employees, together with its political subdivisions, from interfering with religious liberties through the Oklahoma Religious Freedom Act:¹⁶

A. Except as provided in subsection B of this section, no governmental entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability.

B. No governmental entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is:

1. Essential to further a compelling governmental interest; and
2. The least restrictive means of furthering that compelling governmental interest.¹⁷

These laws illustrate that Oklahoma law does not treat election of a corporate form offered under the Oklahoma General Corporation Act as a waiver of religious

natural persons.”).

¹⁶ See generally, the Oklahoma Religious Freedom Act, 51 O.S.2011, §§ 251 - 256.

¹⁷ 51 O.S.2011, § 253. This statute is substantially the same as the statute included within the federal *RFRA*, compare, 42 U.S.C. § 2000bb-1, specifically and generally, 42 U.S.C. § 2000bb *et seq.* Under the State law quoted above, “Government entity’ means any branch, department, agency, or instrumentality of state government, or any official or other person acting under color of state law, or any political subdivision of this state[.]” and “Substantially burden’ means to inhibit or curtail religiously motivated practice.” 51 O.S.2011, § 252.

liberty.

D. Hobby Lobby and Mardel are corporations deserving of the protections of the Free Exercise Clause and RFRA.

By promulgating and putting into effect the following exception to the contraception mandate, the Federal Government has admitted through its conduct that certain corporations, as “religious organizations,” should be completely exempt from the operation of the mandate:

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.

(B) For purposes of this subsection, a ‘religious employer’ is an organization that meets all of the following criteria:

- (1) The inculcation of religious values is the purpose of the organization.
- (2) The organization primarily employs persons who share the religious tenets of the organization.
- (3) The organization serves primarily persons who share the religious tenets of the organization.
- (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the

Internal Revenue Code of 1986, as amended.¹⁸

By creating this exemption for “religious employers,” the Federal Government has acknowledged that both individual and corporate religious rights are implicated by the mandate. Where the district court erred was in concluding that the religious views of persons operating a corporation that meets the above criteria are impacted somehow differently or in a manner that deserves more respect and protection than the religious views of the Green Family—views that the Green Family has expressed and will continue to express through the management and operation of Hobby Lobby and Mardel.

And remarkably, unlike the corporations that the Federal Government favored in the enactment of the exemption, Hobby Lobby and Mardel do not seek to avoid providing *all* contraceptives through their insurance plan; they only seek to be relieved from that limited portion of contraceptives they believe are analogues to abortion. Consequently, the relief they seek from the mandate is much narrower and of much less impact upon the public policy sought to be promoted by the Federal Government than the wholesale exemption granted to other corporations.

¹⁸ 45 C.F.R. § 147.130 (*Eff.* August 3, 2011). It should be noted that the Federal Government has proposed a new version of this rule that would omit the first three criteria for “religious employers.” *See* 78 Fed. Reg. 8456 (Feb. 6, 2013).

In seeking this narrow relief, the record shows that the Green Family made a strong showing in their Verified Complaint¹⁹ of their operation of their family's corporations in a manner consistent with their religious faith. The showing made by the Green Family in this regard does not appear to have been substantially, if at all, contested by the Federal Government²⁰ and the district court made no finding that the showing made by the Green Family was not true. Instead the court specifically found that:

No one questions that the Greens' beliefs are sincerely held or that the mandate burdens, at least indirectly, the Greens' own exercise of [their] sincerely held religious beliefs.²¹

David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett all declared under oath that their personal religious faith is "Christian" and that as corporate officers and management trustees they have sought to operate the family's corporations "in harmony with God's laws and in a manner which brings Glory to God."²² The corporations are operated by a management trust which owns all of the

¹⁹ The several jurats of the Green Family members are attached to the Verified Complaint, JA pp. 53a - 57s, inclusive.

²⁰ The District Court also specifically found that the Administration did not dispute the sincerity of the Green Family's beliefs. Order, JA, p. 605a.

²¹ Order, p. 20, JA, p. 221a (citation omitted).

²² Verified Complaint, ¶¶18, 19, 20, 21 and 22, JA, pp. 17a-18a.

voting stock of the corporations and regarding which the Greens all serve as trustees.²³ Mardel specializes in the sale of Christian materials such as Bibles, books, movies apparel, church and educational supplies²⁴ while Hobby Lobby is a craft store selling among other things art and craft supplies, home decor, and holiday decorations.²⁵ Hobby Lobby's publically proclaimed purpose is:

In order to effectively serve our owners, employees, and customers the Board of Directors is committed to:

Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles.

Offering our customers an exceptional selection and value.

Serving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals, and nurture families.

Providing a return on the owners' investment, sharing the Lord's blessings with our employees, and investing in our community.

We believe that it is by God's grace and provision that Hobby Lobby has endured. He has been faithful in the past, and we trust Him for our future.²⁶

²³ *Id.* See also, ¶ 38, JA, p. 21a.

²⁴ *Id.*, at ¶ 37, JA, p. 21a.

²⁵ *Id.* at ¶ 34, JA, p. 20a.

²⁶ *Id.* at ¶ 42, JA, p. 22a. See also http://www.hobbylobby.com/our_company/purpose.cfm.

Similarly, Mardel's publically proclaimed purpose is:

Mardel Christian & Education is a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support. To this end, we provide a large selection of Bibles, books, movies, gifts, music, kid products, apparel, church and educational supplies, and homeschool curriculum. We offer quality products at the best prices on Mardel.com and across our 35 stores located in the central region of the United States. Our products share truth, teach knowledge, offer encouragement, inspire worship, and bring joy by fulfilling the vision of Mardel to make a difference and give hope. Furthering our mission, we faithfully give 10% of our net profits to help print Bibles translated by Wycliffe Bible Translators. Wycliffe Bible Translators is a ministry dedicated to translating the Bible into the language of every people group around the World. We are a resource center equipping the whole person specializing in the provision of all your spiritual and intellectual needs.²⁷

The Green Family described in specific detail the numerous actions they have undertaken to operate their family businesses consistently with their professed faith.²⁸ The Green Family provides health insurance to their companies' employees through a self-insured plan that is consciously administered consistently with the Green Family's religious beliefs.²⁹ While the Green Family's religious beliefs do not prevent them from providing health insurance coverage for contraceptives

²⁷ See <http://www.mardel.com/about/>; see also, Verified Complaint, ¶ 49, JA, pp. 24a - 25a.

²⁸ Verified Complaint, ¶¶ 43 - 52 inclusive, JA, pp. 23a - 26a.

²⁹ *Id.* at ¶ 52, JA, p. 26a.

generally,³⁰ their religious beliefs prohibit them from deliberately providing insurance coverage for prescription drugs or devices that are inconsistent with their faith, particularly “abortion causing drugs and devices.”³¹ The Green Family believes that the prevention of the implantation of a human embryo into the wall of the uterus by the use of drugs or devices amounts to abortion and have a religious objection to providing coverage for such items in their companies’ health plans.³² The Federal Government’s regulations require all employers of fifty or more employees whose group health care plans were not “grandfathered” or made eligible for exemption under the regulations to provide coverage “without cost sharing, for [a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity’ as prescribed by a provider.”³³ These regulations require the Green Family to provide medication and devices that they believe cause the abortion and death of human embryos.³⁴

³⁰ *Id.* at ¶ 57, JA, p. 27a.

³¹ *Id.* at ¶ 53, JA, p. 27a.

³² *Id.* at ¶¶ 107 - 110, JA, p. 35.

³³ *See* Final Rules, 77 F.R. 8725-01, 2012 WL 458770.

³⁴ Verified Complaint, ¶¶ 106 - 108, JA, p. 35a.

As shown above, under the Oklahoma General Corporation Act, a general corporation may pursue any lawful purpose, including the religious purposes and practices the Green Family impose upon the operation of their companies. These are all lawful corporate purposes and practices for a general corporation organized in Oklahoma and are no less lawful or valid than similar purposes and practices that are reflected in the operation of non-profit “religious” corporations that also may be organized under Oklahoma laws, and who may be exempt from the Federal Government’s broad contraceptives mandate. As outlined above, the Green Family showed the district court that they regulate the operation and mission of their corporations as a witness to the existence of their faith. Certainly, no one from the Federal Government will undertake to personally include the contraception drugs, devices and services in the Green Family corporations’ self-insurance plans; the Federal Government will instead force the Green Family to do so. The mandate violates the Green Family’s faith by forcing them to undertake to provide in their self-insurance coverage what the Green Family believes to be and describe as “abortion causing drugs and devices.”³⁵

³⁵ Verified Complaint, ¶ 56, JA, p. 27a.

Religious faith is more than mere belief.³⁶ Even the district court recognized the sincere religious faith the Green Family professes as much more than a mere intellectual exercise. The Green Family plainly wants to avoid being complicit in what they believe is the destruction of unborn human life, and forcing them to personally undertake to include certain abortion-causing drugs, devices and educational services into their companies' self-insurance plans does direct violence to the Green Family's sincerely held religious faith. Operation of the Green Family's corporations in a manner consistent with the Green Family's religious faith is no less worthy of respect and protection than is the religious faith practiced by church members through a church also organized as a corporation under Oklahoma General Corporation Act.

In short, if *any* corporations organized under the Oklahoma General Corporation Act are deserving of religious liberty, these corporations are. The *only*

³⁶ In fact, the seminal text of the religion practiced by the Green Family states:

14 What good is it, my brothers, if a man claims to have faith but has no deeds? Can such faith save him? 15 Suppose a brother or sister is without clothes and daily food. 16 If one of you says to him, "Go, I wish you well; keep warm and well fed," but does nothing about his physical needs, what good is it? 17 In the same way, faith by itself, if it is not accompanied by action, is dead... 24 You see that a person is justified by what he does and not by faith alone... 26 As the body without the spirit is dead, so faith without deeds is dead.

James 2:14-17, 24, 26, The Holy Bible, New International Version.

way the district court was able to deny the corporations their religious liberty was by categorically denying all corporations organized under the same Oklahoma statute their religious liberty. That categorical denial was erroneous, and led to a result that is wholly inconsistent with Oklahoma's tradition of protecting religious liberty.

II. As corporations deserving of free exercise protections, Hobby Lobby and Mardel should have been considered “persons” for purposes of RFRA.

The district court should have granted a preliminary injunction on the Green Family's RFRA claim in order to preserve the *status quo* of the parties. Had it done so, the court would not have needed to reach any of the remaining claims.³⁷ The court's error in failing to grant the injunction was predicated on its failure to recognize Hobby Lobby and Mardel's free exercise rights.³⁸ Had the court properly concluded that Hobby Lobby and Mardel were “persons” for purposes of RFRA, the court would have addressed the RFRA claim quite differently, and would have reached a different conclusion.

³⁷ This was the approach taken by the District Court in *Newland, et al. v. Sebelius, et al.*, 881 F.Supp.2d 1287, 1295 (D. Colo. 2012) and is proper since the burden of proof regarding the statutory versus the Constitutional claims is much different. It is also appropriate since a *RFRA* claim focuses on the impact of the federal law as applied to the plaintiff instead of persons generally. Since this was an adequate legal ground for granting the preliminary injunction, we will only address the *RFRA* claim herein.

³⁸ Order, JA, p. 219a (“The same reasons behind the court's conclusion that secular, for-profit corporations do not have First Amendment rights under the Free Exercise Clause support a determination that they are not ‘persons’ for purposes of the RFRA”).

As this Court has previously described it, the necessary elements for a plaintiff asserting a *prima facie* RFRA claim are as follows:

RFRA provides that '[g]overnment shall not substantially burden a person's exercise of religion.' 42 U.S.C. § 2000bb1(a). Thus, a plaintiff establishes a *prima facie* claim under RFRA by proving the following three elements: (1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion. *See id.*; *Werner v. McCotter*, 49 F.3d 1476, 1479 n. 1 (10th Cir.1995)³⁹

In addressing the Green Family's RFRA claim, the district court found that the second and third elements were easily met, the only question was whether the contraception mandate imposed a "substantial burden" on the Green Family.⁴⁰ In concluding it did not, the court characterized the impact on the Green Family as only "indirect":

Evaluating the "directness" factor here, the court concludes the Greens are unlikely to be able to establish a 'substantial burden' on them within the meaning of RFRA. The mandate in question applies only to Hobby Lobby and Mardel, not to its officers or owners.⁴¹

As the district court implicitly acknowledged, the impact of the mandate on Hobby Lobby and Mardel is quite "direct." As a result, the court likely would have found

³⁹ *Kikumura v. Hurley, et al.*, 342 F.3d 950, (10th Cir. 2001).

⁴⁰ Order, JA, p. 221a.

⁴¹ Order, JA, p. 224a.

the requisite “substantial burden” and entered an injunction on the RFRA claim—particularly if the court had applied the proper standard to the claim.

As to that standard, the district court properly found that the questions presented were serious, substantial, difficult and doubtful,⁴² but erroneously found that it should not apply the proper “relaxed standard” when the injunction “seeks to stay governmental action taken in the public interest.”⁴³ In rejecting the “relaxed standard” for all of the Green Family’s claims, the district court relied primarily upon this Circuit’s *Nova*⁴⁴ decision, together with its *Heideman*⁴⁵ and *Foulston*⁴⁶ decisions. But none of those cases involved a claim under RFRA, and the Court erred in relying on those decisions in declining to apply the “relaxed standard” in reference to its determination of probability of success on the merits on the Green Family’s RFRA claim.

As observed by the Court of Appeals in *Korte v. Sebelius*:⁴⁷

⁴² *Id.* at 208a.

⁴³ *Id.*

⁴⁴ *Nova Health Systems v. Edmondson*, 460 F.3d 1295 (10th Cir. 2006).

⁴⁵ *Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003).

⁴⁶ *Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir. 2006).

⁴⁷ *Korte, et al. v. Sebelius, et al.*, ___ F.3d ___, 2012 WL 6757353 (7th Cir., December 28, 2012).

RFRA protects the same religious liberty protected by the First Amendment, and it does so under a more rigorous standard of judicial scrutiny[.]

A plaintiff demonstrating a claim under RFRA consequently has a much greater chance of success than upon a constitution-based claim since under RFRA, after it has been established by the claimant that a substantial burden to the claimant's exercise of religion exists, the burden shifts to the government to show that application of the regulation to the plaintiff is in the furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest notwithstanding "that the burden results from a rule of general applicability."⁴⁸ RFRA claims, therefore, should be under the relaxed standard since they are far more likely to succeed. The district court never considered the Green Family's RFRA claim under the relaxed standard and never even recognized in its analysis the government's burden of showing a compelling governmental interest of fully applying the mandate upon the Green Family by the least restrictive means of furthering that compelling governmental interest.

CONCLUSION

Based upon the record made by the Green Family this court should reverse the decision of the district court refusing to grant the motion for preliminary injunction

⁴⁸ 42 U.S.C. § 2000bb.

and direct that a preliminary injunction be granted pending the outcome of the litigation.

Respectfully submitted,

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