Imaginary Contradictions: A Reply to Professor Oleske

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I. INTRODUCTION

James Oleske has published in this space an attempted rebuttal[1] of an amicus brief that I filed in the Supreme Court's contraception cases.[2] His principal claim is that the Brief contradicts congressional testimony that I gave in 1998.[3] He quotes that testimony without regard to context, and he conflates different elements of the statutory claims at issue. The testimony was about civil rights cases and the defense of compelling government interest. The Brief addresses whether corporations and their owners are barred at the threshold simply because the business is incorporated. When one attends to those distinctions, which are hardly subtle, the alleged contradictions disappear.

His attempted rebuttal also fails to imagine that I might draw distinctions that he does not. It appears—I cannot be sure of this—that for him it is all one global question: do corporations win or lose? For me, the facts of cases matter. Corporations are covered, but they

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1. James M. Oleske, Jr., *Obamacare, RFRA, & The Perils of Legislative History*, 67 VAND. L. REV. EN BANC 77 (2014).

2. Brief of Christian Legal Society, *et al.*, in Sebelius v. Hobby Lobby Stores, Inc. (No. 13-354), and Conestoga Wood Specialties Corp. v. Sebelius (No. 13-356) (hereinafter *Brief*).

3. *Religious Liberty Protection Act of 1998, Hearings Before the Subcomm. on the Const. of the House Comm. on the Judiciary on H.R. 4019*, 105th Cong. 6-20, 67–90, 222–41 (June 16 and July 14, 1998) (hereinafter *1998 House Hearings*).

rarely make claims and often lose when they do. On occasion, they should win.

II. THE BRIEF

The Brief reviews congressional debates that reveal the public meaning of the Religious Freedom Restoration Act ("RFRA").[4] The original RFRA debates from 1990 to1993 did not specifically address whether the "persons" protected by the Act included for-profit corporations or their controlling shareholders. A definition of "person" that would have excluded for-profit corporations appeared in an early version of the bill and then was dropped from all later versions.[5] And the Act's supporters argued for a uniform standard applicable to all cases, with no exceptions. They adhered to that no-exceptions principle even when demands for an abortion exception appeared insurmountable. It is a reasonable inference that they would have refused an exception for corporations, but the issue did not arise.[6]

Congress did explicitly address whether for-profit corporations would be covered by the proposed Religious Liberty Protection Act ("RLPA"), debated from 1998 to 1999.[7] By that time, the issue of coverage for businesses had emerged in the form of cases of Christian landlords refusing to rent to unmarried couples.[8] The civil rights community demanded an exception for all civil rights claims, the bill's supporters adhered to their no-exceptions principle, and the bill eventually died in the Senate because of this impasse.[9] Important parts of the bill were then enacted as the Religious Land Use and Institutionalized Persons Act ("RLUIPA"),[10] including provisions that strengthened RFRA as it applies to the federal government.[11]

The fight over a civil rights exception culminated in a committee fight and floor debate in the House over the Nadler Amendment, which would have prevented all but the very smallest

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4. 42 U.S.C. § 2000bb–b-4 (2006).

5. *Brief*, *supra* note 2, at 8–10.

6. *Id.* at 6–8.

7. H.R. 4019 and S. 2148 in the 105th Congress, and H.R. 1691 and S. 2081 in the 106th Congress.

8. *See, e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (2000) (en banc); Smith v. Fair Emp't & Hous. Comm'n, 919 P.2d 909 (Cal. 1996); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994); Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994).

9. *Brief*, *supra* note 2, at 14–18, 31.

10. 42 U.S.C. § 2000cc–2000cc-5 (2006).

11. 42 U.S.C. § 2000cc-5(7)(A); 42 U.S.C. § 2000b-2(4) (specifying that RFRA and RLUIPA apply to "any" exercise of religion, "whether or not compelled by, or central to, a system of religious belief").

businesses from invoking RLPA in response to civil rights claims.[12] The operative language of RLPA was substantively identical to the operative language of RFRA: if government substantially burdens a person's exercise of religion, it must demonstrate that application of the burden to that person serves a compelling governmental interest by the least restrictive means.[13] Supporters of the Nadler Amendment argued that this language protected corporations—even very large corporations—and their officers and shareholders.[14] Opponents of the Amendment agreed that corporations were covered but argued that very few businesses could make a successful claim.[15] Every speaker agreed that corporations were covered by the language as it stood, and both sides agreed that this was largely a good thing. Mr. Nadler said that it was important to cover corporations with religious businesses, such as kosher butchers, and closely held corporations with religious owners, such as a "mom and pop store."[16] But supporters of the Nadler Amendment argued that businesses should not be protected with respect to civil rights claims.

III. THE TESTIMONY AND ITS RELATION TO THE BRIEF

Professor Oleske quotes my testimony that only the smallest businesses, and maybe not even them, would win on a RLPA defense to a civil rights claim.[17] He had no difficulty finding this testimony, because I cited this and much similar testimony in the Brief.[18] Supporters of the bill argued that a civil rights exception was unnecessary because civil rights claimants would win most cases, but that there were a few cases—in religiously sensitive contexts—where even civil rights claimants should lose. That testimony is in no way inconsistent with the Brief's claim that corporations and their owners are covered by the Act and not barred at the threshold. Rather, it assumes that they are covered so that courts can reach the merits and distinguish winning and losing cases.

Professor Oleske quotes portions of six paragraphs of my oral testimony, but he carefully avoids quoting the basis for that testimony. I said that businesses would lose civil rights cases because

12. The debate, at 145 CONG. REC. 16216–45 (July 15, 1999), is reviewed in *Brief*, *supra* note 2, at 18–31. The Nadler Amendment is set out in the Brief as well. *Id*. at 20–22.

13. The RFRA language and the corresponding RLPA language are also quoted in the Brief. *Id*. at 11 nn.9–10.

14. *Id.* at 22–26, 28–30.

15. *Id.* at 26–28.

16. *Id*. at 25.

17. Oleske, *supra* note 1, at 84 (quoting *1998 House Hearings*, *supra* note 3, at 236–38).

18. *Brief*, *supra* note 2, at 16–17 nn.16–17.

the courts would find a compelling government interest in enforcing the civil rights laws against any but the very smallest businesses. This reason is clear from the beginning of my answer:

> There is a California case that says a gay rights ordinance did not serve a compelling interest where it was being applied to force a church to hire a gay organist who would be participating directly in the liturgy of the church.
>
> There is a D.C. Court of Appeals case that says that gay rights laws are compelling interests in most of their applications to Georgetown University and higher education. I think that in the great bulk of contexts, the gay rights claim is going to prevail, but that in contexts, at the heart of the religious operation, they may not prevail and should not prevail.[19]

My written testimony at that hearing did not address the demand for a civil rights exception. But my written testimony at later hearings, which Professor Oleske also quotes,[20] did address the civil rights issue. And the more precisely formulated written testimony was unambiguous about the reasons businesses would not win civil rights cases: "A civil rights exception is unnecessary, because most civil rights claims satisfy the compelling interest test."[21]

The Brief argues that Congress understood for-profit corporations to be persons covered by the bill. My testimony predicted that no business of any size would win if it invoked the bill against a civil rights claim. There is nothing remotely inconsistent about those two propositions.

Professor Oleske tries to avoid that distinction by noting that the Brief concludes by saying that Hobby Lobby and Conestoga Wood should win their cases.[22] There is nothing inconsistent about that either; the testimony was about civil rights cases and *Hobby Lobby* and *Conestoga Wood* are not civil rights cases. The Brief does not address the compelling-interest issue. But there are multiple exceptions to the employer mandate, and the government has found other ways to deliver insurance coverage. Each of these facts weighs heavily against the claim of compelling interest. Moreover, the religious objection to paying for what one believes to be abortions is undoubtedly sincere and vastly stronger than religious objections to

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19. *1998 House Hearings*, *supra* note 3, at 236. The cases mentioned but not cited were *Walker v. First Orthodox Presbyterian Church*, 22 Fair Empl. Prac. Cas. 762 (Cal. Super. Ct. 1980), and *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987).

20. Oleske, *supra* note 1, at 85 n.36.

21. *Religious Liberty Protection Act of 1999, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary on H.R. 1691*, 106th Cong. 119 (May 12, 1999) (hereinafter *1999 House Hearing*); *Religious Liberty, Hearing Before the Senate Comm. on the Judiciary on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure*, 106th Cong. 99 (June 23 and Sept. 9, 1999) (hereinafter *1999 Senate Hearings*).

22. Oleske, *supra* note 1, at 85 (citing Brief, *supra* note 2, at 43).

serving gay customers, and I have always understood the compelling-interest test to be a balancing test in which the strength of the religious claim matters.[23] And in the 1998 hearings, the question was about gay customers. No one was thinking about same-sex weddings, which have far greater religious significance for many people.

Professor Oleske claims a similar inconsistency with respect to substantial burden, with the same disregard of context. In 1999, in response to a question about religiously motivated employment discrimination, I said that some "small, personally involved employers in enterprises infused with religious mission" might be able to show a substantial burden on religious exercise if forced to hire an employee who undermined the religious principles of the business.[24] But, I said, "[a]s the employer becomes larger, or the nature of the work becomes less integrated with the religious mission, this balance of interests changes. Soon it becomes impossible for the employer to show a substantial burden on religious exercise. . . ."[25] Professor Oleske of course quotes this last statement, stripped of context, and says it is inconsistent with the Brief's statement that the owners of Hobby Lobby can show a substantial burden on their religious exercise.[26]

The testimony was about disruption of an intimate, religiously infused work environment—an environment that is almost inevitably lost as the number of employees grows and the employment relationship becomes less personal. Hobby Lobby's claim is nothing like that. The Greens, who own Hobby Lobby, say that they are required to pay for what they believe to be abortions, and that the decision to do so must be made and implemented at corporate headquarters. How many employees they have in their far-flung stores may be relevant to the government's claim of compelling interest, but it is not relevant to the substantial burden on the Green's exercise of religion.

Professor Oleske also claims to find inconsistency in one other point in the Brief. The Brief says that requiring business people to forfeit their religious-liberty rights as soon as they incorporate, or as soon as they hire their fiftieth employee, is akin to the historic wrong of excluding English and Irish Catholics from many occupations, and in the Irish case, limiting most of their businesses to two apprentices.[27] That too is entirely consistent with my earlier

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23. *See, e.g.*, Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 151–52 (2009).

24. *1999 Senate Hearings*, *supra* note 21, at 153.

25. *Id.* at 154.

26. Oleske, *supra* note 1, at 85 n.36 (citing *Brief*, *supra* note 2, at 34).

27. *Brief*, *supra* note 2, at 41–42.

testimony. The size of a business may affect the government's claim of compelling interest, it will often affect whether the business has religiously united owners who run it on religious principles, and it will affect the extent to which owners are personally involved in every aspect of the business. So, business size may affect outcomes under RFRA's standard of substantial burden and compelling interest. But incorporation or business size should not impose an absolute bar at the threshold. The Brief is about coverage at the threshold.

The Brief says that "[s]upporters of the Nadler Amendment knew they needed an amendment to exclude corporate claims, and they knew that they had not gotten such an amendment to RFRA."[28] Professor Oleske says that if my testimony were true, than an amendment was not needed. But that is to confuse my view of the matter with Mr. Nadler's. As the Brief explains, supporters of the Nadler Amendment were not content with the likelihood that civil rights claimants would win most of the cases. They wanted no risk of ever losing and no burden of litigating a religious-liberty defense.[29] They wanted to exclude claims at the threshold, and for that they needed an amendment.

IV. PROFESSOR OLESKE'S OTHER OBJECTIONS

Professor Oleske's remaining points can be dealt with more quickly. He says that the operative language of RLPA was not substantively identical to the operative language of RFRA, because the 1999 version of RLPA contained a provision stating that "[t]his Act should be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by its terms and the Constitution." RFRA contained no such provision.[30]

This is true. And it had absolutely no effect on the fight over a civil rights exception. The demand for a civil rights exception arose in 1998, before this language was added. And in the debate on the Nadler Amendment, no one on either side mentioned this provision. No supporter of the Amendment said that this broad-construction provision was a source of protection for corporations, or that it aggravated the risk that corporations would be protected, or that it had any relevance whatever.

When the bill's lead sponsor said that "[a]ll the arguments related to civil rights that have been advanced today were equally applicable to the Religious Freedom Restoration Act," no one

28. *Id.* at 30.

29. *Id.* at 17.

30. Oleske, *supra* note 1, at 86.

disagreed.[31] No one said that he was wrong because RLPA had a broad-construction provision and RFRA did not. The debate continued well past that point; multiple supporters of the Nadler Amendment rose to speak. No one made anything like the point that Professor Oleske makes now.

The broad-construction provision is not why supporters of the Nadler Amendment thought that RLPA would protect corporations. Probably they thought that RLPA would protect corporations because that is how the United States Code defines "person,"[32] although no one said that either. Certainly they thought that the bill protected corporations because the bill's supporters agreed that it protected corporations and persistently opposed amendments to reduce that coverage. And they thought the bill protected corporations because both sides agreed that it *should* protect corporations, except with respect to civil rights claims.[33]

Professor Oleske says that the debate in 1999 was fueled by a Ninth Circuit decision protecting a religious landlord.[34] That is also what the Brief says.[35] That is why the issue got much attention in 1998 and 1999 after getting no attention in the hearings and debates from 1990 to 1993. But that is not an argument about the language of the statute. The Ninth Circuit decision focused attention on the question, and with their attention focused, members of Congress concluded that the language copied from RFRA protected for-profit corporations. The Brief does not say that members of Congress had any subjective intent about this question in 1993. The Brief says that coverage of corporations was the objective public meaning of the language as Congress understood it when it focused on the question in the 1998–99 hearings and debates.

Finally, Professor Oleske says that it is not true that "everyone agreed" with this interpretation. He quotes testimony from Christopher Anders of the ACLU, who said: "The question of whether a corporate employer or corporate landlord may raise a religious liberty defense is less clear than whether an individual serving as an employer or landlord may raise that defense."[36] But the supporters of the Nadler Amendment were no more reassured by his diffident attempt to preserve his litigating position than by my prediction that civil rights would generally be a compelling interest. No *member of*

31. *Id.* at 28.
32. 1 U.S.C. § 1 (2006).
33. *See supra* note 16 and accompanying text.
34. Oleske, *supra* note 1, at 86.
35. *Brief*, *supra* note 2, at 17–18.
36. *1999 House Hearings*, *supra* note 21, at 86.

Congress said that corporations might not be covered, and in context, that is all I said: "When Congress discussed the meaning of Section 2 of RLPA, it was necessarily also discussing the meaning of Section 2 of RFRA. Everyone agreed on what this section of RLPA meant—and therefore on what RFRA meant."[37]

V. CONCLUSION

Professor Oleske purports to trumpet discoveries that cause the argument in the Brief to "completely fall apart."[38] He purports to reveal egregious contradictions between my testimony then and my argument now. There is nothing to the alleged contradictions, and very little to the rest. The leaders of the two sides in this debate, who had grappled with this issue for seventeen months, repeatedly and unambiguously stated their view that for-profit corporations were covered. They did not mention the broad-construction provision or Mr. Anders's testimony, and they gave no apparent weight to either.

Neither did the supporters of the Nadler Amendment mention my testimony or give any apparent weight to what I said. But if they had fully credited every word, it would not have affected their view that corporations were covered. It would only have reassured them that civil rights claimants would rarely lose to a RLPA defense asserted by a corporation.

37. *Brief*, *supra* note 2, at 11–12.

38. Oleske, *supra* note 1, at 83.