CORPORATE FREE EXERCISE OF RELIGION AND THE INTERPRETATION OF CONGRESSIONAL INTENT: WHERE WILL IT END?

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> And now, We wish to speak to rulers of nations ... We beg of you, never allow the morals of your peoples to be undermined ... [D]o not tolerate any legislation which would introduce into the family those [artificial contraceptive practices] which are opposed to the natural law of God.
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> Humanae Vitae—Encyclical Letter of Pope Paul VI on the Regulation of Birth—1968

I. INTRODUCTION

In the waning days of the United States Supreme Court's term last summer, the longstanding clash between the United States Government and forces aligned with the natural law of God concerning the contraception mandate of the 2010 Patient Protection and Affordable Care Act (ACA)[1] culminated in a victory for religious liberty by for-profit closely held corporations;[2] gave rise to the issuance of an extraordinary reprieve excusing non-profit religious organizations from complying with an opt-out

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 15, 26, 29, 30, and 42 U.S.C.). The contraception mandate requires employer healthcare plans to provide coverage for specified services to women as part of a comprehensive and no-cost preventive care and screening program. 42 U.S.C § 300 gg–13(a)(4) (2010). Congress delegated the task of establishing these guidelines and specifications to the Health Resources and Services Administration (HRSA). *Id.* In consultation with the Institute of Medicine, HRSA recommended coverage for all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity. *Women's Preventative Services Guidelines*, U.S. DEP'T OF HEALTH AND HUMAN SERV. HEALTH RES. AND SERVS. ADMIN., http://www.hrsa.gov/womensguidelines/ (last visited May 1, 2015). The Department of Health and Human Services formally adopted these recommendations and also provided the HRSA the authority to exempt group health plans maintained by certain religious employers. *See* Group Health Plans and Health Insurance Issues Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,626 (proposed Aug. 1, 2011) (to be codified at 45 C.F.R. pt. 147.130).
2. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768, 2785 (2014).

notification provision of the mandate;[3] and sparked cries of bewilderment and betrayal by the dissenting justices in each of the two cases.[4] In the first decision, the Court divined an intent of Congress—dating back to the 1993 passage of the Religious Freedom Restoration Act (RFRA)[5] —to bestow upon for-profit corporations the right to exercise religion.[6] The legislative rulers of our nation, the Court declared in the consolidated cases of *Burwell v. Hobby Lobby Stores, Inc.*[7] and *Conestoga Wood Specialties Corp. v. Burwell*,[8] granted for-profit corporations relief from government-imposed substantial burdens on religiously motivated business practices if a less restrictive means of achieving the compelling governmental objective exists.[9] Applied to the contraception mandate, the Court held that if human shareholders of for-profits sincerely believe the natural law of God forbids the use of certain female contraceptive drugs and devices, then their companies are excused from adhering to the earthly obligation to subsidize insurance coverage for such services unless the government can show there is no other way to achieve the goals of the mandate.[10] The government could not make such a showing, the Court concluded, because it already had established an accommodative process for non-profit religious organizations.[11]

The religious empowerment of for-profits hinges on the change in definition of "exercise of religion" in the 2000 amendment to RFRA.[12] In 1993, Congress defined "exercise of religion" to mean "the exercise of religion under the First Amendment to the Constitution."[13] In 2000, Congress tweaked the terminology to "religious exercise" and changed the definition to "any exercise of religion, whether or not compelled by, or

3. *See* Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014) (order granting emergency application for injunction pending appellate review).
4. *See Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting); *Wheaton Coll.*, 134 S. Ct. at 2808 (Sotomayor, J., dissenting).
5. Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb–bb4 (2012)), *invalidated as to states and subdivisions by* City of Boerne v. Flores, 521 U.S. 507 (1997).
6. *Hobby Lobby*, 134 S. Ct. at 2768–69.
7. *Hobby Lobby*, 134 S. Ct. 2751.
8. *Id.*
9. *Id.* at 2759.
10. *Id.*
11. *Id.* at 2759–60.
12. *See id.* at 2761 (noting the most relevant part of RFRA for purpose of analyzing the scope of free exercise protection is contained in the 2000 amendment). This amendment was enacted as part of another statute. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L.No. 106-274, § 7(a)(3), 114 Stat. 803, 806.
13. RFRA, Pub. L. No. 103-141, § 5(4), 107 Stat. 1488, 1489 (1993).

central to, a system of belief."[14] A revolutionary change? Apparently.[15] A change in which Congress broke free from the gravitational and narrow orbit of First Amendment jurisprudence the Court itself had recently imposed?[16] Absolutely, according to the five-justice majority, which announced the 2000 definitional change amounted to nothing less than a "complete separation from First Amendment case law."[17] RFRA now rules the world of religious liberty in situations in which the federal government attempts to substantially burden the exercise thereof.[18] The Free Exercise Clause has been rendered moot on governing the validity of federal action, the result of a Congressional *coup d'état* brought on by the Court's own failed stewardship.[19] The Court suffered this reversal of power gracefully—at least in the area presented by the facts of these consolidated cases—sexual morality and contraceptive use.[20]

Justice Ginsburg dissented.[21] Joined by three of her colleagues, she saw RFRA as restorative of a prior line of Supreme Court cases, not as a bold initiative by Congress to expand protection for a class of commercial entities whose owners could impose their religious beliefs on others.[22] A minefield of litigation surrounding the scope of religious excuses would ensue, she feared.[23]

Three days later, on July 3, 2014, the Court enjoined the Secretary of Health and Human Services (HHS) from enforcing a regulation that a non-profit religious organization, otherwise exempt from providing contraceptive care under HHS rules, must certify its religious objections on a government-issued form and send a copy of the completed form to the third-party

14. *See* RLUIPA §§ 7(a)(3), 8(7)(A), 114 Stat at 806.(the definition is contained in section 8(7)(A) and is incorporated into section 7, the section containing the 2000 amendments to RFRA).
15. *See Hobby Lobby*, 134 S. Ct. at 2767 (recognizing that Congress, by enacting RFRA, went far beyond what the Court held is constitutionally required).
16. *See id.* at 2761 (recognizing Congress enacted RFRA in response to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), a decision in which the Court had repudiated its twenty-seven-year-old balancing test Congress was now restoring).
17. *Id.* at 2762.
18. *See id.* at 2785 (acknowledging there is no need to reach the constitutional free exercise claim, a claim which is judged by a more rigorous standard). In fact, the majority did not comment on the dissent's point that the First Amendment indisputably would not provide any relief to the claims of Hobby Lobby and Conestoga. *Id.* at 2787 (Ginsburg, J., dissenting).
19. *See* RFRA, Pub. Law. No. 103-141, § 2, 107 Stat. 1488, 1488 (1993) (amended 2000) (finding the unalienable and constitutional right of free exercise needed to be protected by restoring the compelling-interest balancing test the Supreme Court had virtually eliminated in *Smith*).
20. *See Hobby Lobby*, 134 S. Ct. at 2760, 2785 (recognizing that RFRA largely repudiated its prior method of analyzing free-exercise claims, and that the wisdom of RFRA is not the Court's concern, only its interpretation, as written).
21. *Id.* at 2787 (Ginsburg, J., dissenting).
22. *Id.* at 2791–92.
23. *Id.* at 2805–06.

administrator of its health insurance plan.[24] All Wheaton College had to do, pending appellate disposition of its contention that sending the form to its third-party administrator made it complicit in the evil of delivery of emergency contraceptives, was notify HHS in writing that it was a non-profit that had religious objections to providing contraceptive coverage.[25] Although HHS was aware of the identity of Wheaton College's third-party administrator, it is unclear how HHS is supposed to contact health care coverage representatives of exempt organizations in other cases given the limited notice required by the Court.[26] Justice Sotomayor dissented, believing along with the other two female justices, that the Court had retreated from its assurances made three days previous that the joinder of for-profits in the same accommodative status as religious non-profits, would have no impact on the ability of women from obtaining what Congress had mandated—no-cost preventive contraceptive care.[27] The Court is guilty of misleading the country, she exhorted.[28]

There we have it—two decisions in three days with one unmistakable message: Religiously based, anti-contraceptive beliefs held by either non-profit religious organizational employers or shareholders of for-profit closely held corporations are entitled to wide latitude in determining whether no-cost contraceptive insurance coverage furthers the public-health interests of the country. HHS responded quickly to these judicial developments, promulgating a set of interim final regulations on August 27, 2014.[29] In addition to recognizing the rights of for-profit, closely held corporations to lodge religious objections to the contraception mandate,[30] the department proposed an alternate method of notice for the self-certification requirement.[31] Now a conscientious religious objector has the option of notifying HHS of its objections, along with the name and contact information of its health plan representative, so that HHS can, in the words of the Court in *Wheaton College*, "facilitate the provisions of full contraceptive coverage"[32] to employees and dependents.[33]

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24. Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014) (order granting emergency application for injunction pending appellate review).
25. *Id.* at 2807.
26. *Id.* at 2815 (Sotomayor, J., dissenting).
27. *Id.* at 2808.
28. *See id.* (stating Americans could not take the Court at its word, and that the Court's action evinces disregard for even the newest of precedent and undermines confidence in the Court).
29. Coverage of Certain Preventative Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,101 (proposed Aug. 27, 2014) (to be codified at 45 C.F.R. 147.131(c)(1), (c)(2)(i)).
30. *Id.* at 51,094.
31. *Id.* at 51,101.
32. *Wheaton Coll.*, 134 S. Ct. at 2807.
33. *See* Coverage of Certain Preventative Services Under the Affordable Care Act, 79 Fed. Reg. at 51,101.

Not surprisingly, this alternate means of notification did not placate all litigants, some of whom successfully argued that submitting a notice of exemption makes them accomplices in the sinful act of contraception, and thus, substantially burdens their free-exercise rights under RFRA, justifying the entry of a preliminary injunction against HHS from enforcing the mandate.[34] The end game for these twenty-first century conscientious objectors, the authors submit, is the judicial establishment of a religious principle akin to the 1968 papal decree that any legislative sanctioning of the use of contraceptives cannot be tolerated.[35] This is outrageous. ACA proponents prevailed in the halls of Congress. Must the victors now conform their conduct to the religious necessities of human shareholders of corporations that are in the business of making money, not tending to souls? This Article examines why RFRA was enacted and amended; the questionable rationale employed by the Court to invent a for-profit free-exercise right; why the plain language of RFRA and constitutional tradition command a different result; and why the Establishment Clause of the First Amendment is the last refuge against religiously based, anti-contraceptive beliefs becoming the official position of the United States Government.

We begin with the story of the religious plight of two unemployed peyote smokers in Oregon in the mid-1980s. Their tale of woe is the first link in the causal chain of how the natural law of God, embodied in the anti-contraceptive beliefs of profit-seeking human shareholders, emerged as a papal-like beacon shining through the morass of immoral legislation.

II. SACRAMENTAL PEYOTE AND THE ENSUING LEGISLATIVE / JUDICIAL TUSSLE

Peyote usage was a felony in Oregon in the 1980's.[36] Alfred Smith and Galen Black, Oregon residents and members of a Native American Church, ingested peyote for sacramental purposes during a religious ceremony at their church.[37] When their employer found out, they were fired.[38] They applied for unemployment compensation benefits but initially were denied on the

34. Catholic Benefits Ass'n LCA v. Burwell, No. 5:14-cv-00685-R, 2014 WL 7399195, at *4, *7 (W.D. Ok. Dec. 29, 2014); Insight for Living Ministers v. Burwell, No. 4:14-cv-675, 2014 WL 6706921, at *2-3, *5 (E.D. Tex. Nov. 25, 2014); Ave Maria School of Law v. Burwell, No. 2:13-cv-795-JSM-CM, 2014 WL 5471054, at *1, *4 (M.D. Fla. Oct. 28, 2014). One court has rejected this argument. School of the Ozarks, Inc. v. U.S. Dep't of Health and Human Serv., No. 13-03157-cv-5-BP, slip op. at 6-9 (W.D. Mo. Jan. 13, 2015).

35. Pope Paul VI, *Humane Vitae: Encyclical Letter of His Holiness Paul VI on Regulation of Birth, Vatican* (July 25, 1968), *available at* http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html.

36. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).

37. *Id.*

38. *Id.*

basis of felonious misconduct.[39] The state administrative denial eventually reached the United States Supreme Court, and the Court faced the question whether the First Amendment free-exercise rights of Smith and Black had been violated.[40] In its 1990 decision, the Court answered no,[41] and in the process, fundamentally changed the constitutional prism of how claims of governmental interference with religious freedom are to be viewed. No more ascertaining whether the governmental action is a substantial burden on sincere religious exercise; no more fear of stepping into the abyss of evaluating the importance and centrality of religious doctrine; and no more scrutinizing whether a compelling governmental interest, if any, outweighs a claim of free exercise.[42] In its place, a new constitutional viewfinder took focus, one based on the legitimacy of the purpose and scope of the governmental action.[43] The Court held that as long as the law at issue is neutral and generally applicable, the right of free exercise does not excuse compliance.[44]

Congress was not happy, and indeed, its members were nearly united in their reaction. By a unanimous vote in the House of Representatives and with only three dissenters in the Senate, it enacted RFRA in 1993.[45] Returning to the days of yesteryear, at least those years between 1963 and 1990, Congress cast aside the neutral and general applicability standard, restored the compelling interest test, and added or ratified (depending on your perspective) a requirement that any substantial burden on a person's exercise of religion be accomplished by the least restrictive means available.[46] Congress did not define "person" or "person's," and its definition of "exercise of religion"—"the exercise of religion under the First Amendment to the Constitution"[47]—did not break new ground. In other words, Congress had no problem with the Court's past decisions on the scope of protected exercise; it just wanted to resurrect a test which had struck a sensible balance

39. *Id.*
40. *Id.* at 875–76.
41. *Id.* at 890.
42. *Id.* at 885–89.
43. *Id.* at 879.
44. *Id.*
45. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2791 (Ginsburg, J., dissenting).
46. RFRA, Pub. L. No. 103-141, §§ 2–3, 107 Stat. 1488-89 (1993) (amended 2000). In her dissenting opinion in *Hobby Lobby*, Justice Ginsburg acknowledged the confusion on whether the least restrictive alternative element was part of the judicial strict scrutiny analysis prior to *Smith*. *See Hobby Lobby*, 134 S. Ct. at 2793 (Ginsburg, J., dissenting). *Compare* City of Boerne v. Flores, 521 U.S. 507, 509 (1997) (RFRA's "least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify") (Syllabus of Court), *with* Sherbert v. Verner, 374 U.S. 398, 407 (1963) ("[I]t would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat [the problem] without infringing First Amendment rights.").
47. RFRA, § 5(4), 107 Stat. at 1489 (prior to 2000 amendment).

between the traditional exercise of religious liberty and competing governmental interests.[48]

As noted previously, however, Congress modified the definition of "exercise of religion" in 2000.[49] The path to this legislative adjustment is a bit serpentine. In 1997 the Supreme Court declared that Congress had exceeded its enforcement powers under the Fourteenth Amendment in imposing RFRA's requirements on the states.[50] The decision arose from a refusal by local zoning authorities to issue a building permit to the Archbishop of San Antonio to enlarge a church located in a historic district and the Archbishop's subsequent RFRA challenge.[51] Meanwhile, several federal appellate courts required RFRA plaintiffs (all prisoners) to show their religious exercise occupied a "central" role in their religion.[52] In response to both of these developments, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[53] State and local land use regulation and state and local correctional oversight became subject to the compelling interest/least restrictive alternative test if an affected person's religious exercise was substantially burdened.[54] And in a specific directive to the courts that it wanted to ensure maximum constitutional protection,[55] Congress defined religious exercise to include "any exercise of religion, whether or not compelled by, or central to, a system of belief."[56] Amending RFRA as part of the enactment of RLUIPA, Congress incorporated the new definition of "religious exercise"[57] and also removed the reference to state and local applicability.[58] "Religious exercise" as defined in the two statutes was now identical, and RFRA was expressly limited to actions of the federal government. This was the extent of the 2000 amendments to RFRA, a clarification or touching up, if you will, brought on by these separate developments.

Fast forward ten years to the regulatory rollout of the ACA.[59] Pursuant to a Congressional directive that certain employer-sponsored group health

48. *Id.* § 2, 107 Stat. at 1488.
49. *See supra* text accompanying notes 12–17.
50. *City of Boerne*, 521 U.S. at 536.
51. *Id.* at 511–12.
52. Weir v. Nix, 114 F.3d 817, 819–20 (8th Cir. 1997); Abdur-Rahman v. Mich. Dep't of Corr., 65 F.3d 489, 490-91 (6th Cir. 1995); Werner v. McCotter, 49 F.3d 1476, 1478, 1480 (10th Cir. 1995); Bryant v. Gomez, 46 F.3d 948, 948–49 (9th Cir. 1995).
53. RLUIPA, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc–cc5 (2000)).
54. *Id.* §§ 2-3, 114 Stat. at 803–04.
55. *Id.* § 5(g), 114 Stat. at 806.
56. *Id.* § 8(7)(A), 114 Stat. at 807.
57. *Id.* § 7, 114 Stat. at 806.
58. *Id.* § 7(b), 114 Stat. at 806.
59. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 15, 26, 29, 30, and 42 U.S.C.).

plans cover preventive care and screenings at no cost for women,[60] the Health Resources and Service Administration (HRSA), in consultation with the Institute of Medicine at the National Academy of Science, developed a set of comprehensive guidelines.[61] With respect to contraceptive services, HRSA recommended that group health plans cover "[a]ll Food and Drug Administration [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."[62] FDA-approved contraceptive methods include oral contraceptives, barrier methods, implants and injections, emergency oral contraceptives, and intrauterine devices.[63] HHS accepted the recommendations and also proposed a religious employer exemption.[64] Essentially covering only those in ministerial positions, the proposed exemption was limited to those religious employers whose purpose was the inculcation of religious values, who primarily employed and served people of their own faith, and who were non-profit organizations within the meaning of the Internal Revenue Code.[65]

Contentious does not begin to capture the ensuing public debate over the scope of this religious exemption. Academics, religious leaders, health care professionals, and John Q. Public weighed in loudly and sometimes not so clearly;[66] Catholic and other Christian employers expressed moral outrage, arguing the mandate forces them to violate religious doctrine;[67] and dozens of lawsuits were filed seeking injunctive relief.[68] HHS expanded the breadth

60. Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg-13(a)(4) (2010).
61. U.S. DEP'T OF HEALTH AND HUMAN SERVS. HEALTH RES. AND SERVS. ADMN., *supra* note 1.
62. *Id.* Other types of female preventive service for which health care coverage was recommended include: well-women visits, screening for gestational diabetes, human papillomavirus testing, counseling for sexually transmitted infections, counseling and screening for human-immune-deficiency virus, breastfeeding support, supplies, and counseling, and screening and counseling for interpersonal and domestic violence. *Id.*
63. *Birth Control: Medicine to Help You*, FDA, http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm (last updated Jan. 8, 2015).
64. Group Health Plans and Health Insurance Issues Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46626 (proposed Aug. 1, 2011).
65. *Id.*
66. *See, e.g.*, Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemption from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 348 n.17 (2014) (collecting examples of heated religious liberty rhetoric). The government reports receiving over 400,000 comments to its proposed regulations. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,094 (Aug. 27, 2014).
67. Gedicks & Van Tassell, *supra* note 66, at 344–45.
68. *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/ hhsinformationcentral/ (last visited Apr. 23, 2015).

of the religious exemption,[69] but the lawsuits kept coming.[70] The administrative parade of notice, comment, and revision came to an end on August 1, 2013, with the adoption of the final set of regulations delineating the scope of the religious employer exemption.[71] The HHS determined that churches and religious orders were exempt.[72] Other religious employers, denominated "eligible organizations," can claim an exemption if they are an organization 1) which holds itself out and operates as a non-profit entity and as a religious organization; 2) opposes providing coverage for some or all of the mandated contraceptive services on account of religious objections; and 3) is willing to certify that it is an organization which meets the preceding criteria.[73]

Secular, for-profit corporations obviously did not meet the criteria. Closely held, faith-based family corporations, in particular, objected, joining the cavalcade of litigation arguing that because their shareholders believe that human life begins at conception, because it is immoral to facilitate any act in contravention of that belief, and because they are dedicated to the operation of their corporations consistent with their faith, their free-exercise rights under RFRA and the First Amendment are being substantially burdened.[74] In the summer of 2013 the Third and Tenth Circuits reached conflicting results on the RFRA free-exercise claims of two of these for-profit corporations. Hobby Lobby Stores, Inc., a family owned multi-million dollar corporation with 13,000 employees prevailed in the Tenth Circuit;[75]

69. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8474–75 (proposed Feb. 6, 2013).

70. *See HHS Mandate Information Central*, *supra* note 68 (itemizing by date when relief was granted or denied in the injunctive suits challenging the mandate).

71. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,896-97 (to be codified at 45 C.F.R. § 147.131).

72. *See id.* at 39,896 (to be codified at 45 C.F.R. § 147.131(a)). The language of the regulation actually speaks of nonprofit entities organized and operated as such and referred to in sections 6033(a)(3)(A)(i) and (iii) of the Internal Revenue Code.

73. *See id.* at 39,896 (to be codified at 45 C.F.R. § 147.131(b)(1-4)).

74. Gilardi v. Sebelius, 926 F. Supp. 2d 273, 274–76 (D.D.C. 2013), *aff'd in part*, *rev'd in part sub nom.*, Gilardi v. U.S. Dep't of Health and Human Serv., 733 F.3d 1208 (D.C. Cir. 2013), *cert. granted, judgment vacated, and case remanded*, 134 S. Ct. 2902 (2014); Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 399, 402–03 (E.D. Pa. 2013), *aff'd sub nom.*, Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health and Human Serv., 724 F.3d 377 (3d Cir. 2013), *rev'd sub nom.*, Conestoga Wood Specialties Corp. v. Burwell, 134 S. Ct. 2751 (2014); Autocam Corp. v. Sebelius, No. 1:12-cv-1096, 2012 WL 6845677, at *1-3 (W.D. Mich. Dec. 24, 2012), *aff'd*, 730 F.3d 618 (6th Cir. 2013), *cert. granted, judgment vacated, and case remanded sub nom.*, Autocam Corp. v. Burwell, 134 S. Ct. 2901 (2014); Korte v. U.S. Dep't of Health and Human Serv., 912 F. Supp. 2d 735, 738–39 (S.D. Ill. 2012), *rev'd*, 735 F.3d 654 (7th Cir. 2013); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1284–85 (W.D. Okla. 2012), *rev'd en banc*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

75. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

Conestoga Wood Specialties, Corporation, a much smaller family operation out of Pennsylvania, was not successful.[76] By the time the Supreme Court granted certiorari,[77] three more circuits had issued decisions on corporate free exercise.[78] A bit of background on all five cases is in order.

III. HARVESTING CORPORATE PROFITS WITH A CONSCIENCE

The Mennonite Church, a Christian denomination, believes "[t]he fetus in its earliest stages . . . shares humanity with those who conceived it."[79] Norman and Elizabeth Hahn and their three sons are devout Mennonites.[80] They are the only shareholders of a family wood-working business, Conestoga Wood Specialties Corporation, which is organized under Pennsylvania law as a for-profit corporation.[81] It employs 950 persons.[82] The Hahns believe they are required to operate the company's business and endeavor to make a reasonable profit "in accordance with their religious beliefs and moral principles."[83] In addition, the Hahns, in their capacity as directors of the corporation, adopted a resolution titled "Statement on the Sanctity of Human Life" in which they profess their belief that human life begins at conception, and that it is sinful to be involved in the termination of human life after conception.[84] Of the twenty FDA-approved birth control methods,[85] the Hahns believe that four of them, two forms of "morning after" pills and two types of intrauterine devices, may operate after fertilization of

76. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Serv., 724 F.3d 377 (3d Cir. 2013), *rev'd sub. nom.*, Conestoga Wood Specialties Corp. v. Burwell, 134 S. Ct. 2751 (2014).

77. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013), *aff'd sub nom.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Serv., 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013), *rev'd sub. nom.*, Conestoga Wood Specialties Corp. v. Burwell, 134 S. Ct. 2751 (2014).

78. Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013); Gilardi v. U.S. Dep't of Health and Human Serv., 733 F.3d 1208 (D.C. Cir. 2013), *cert. granted, judgment vacated, and case remanded*, 134 S. Ct. 2902 (2014); Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013), *cert. granted, judgment vacated, and case remanded sub nom.*, Autocam Corp. v. Burwell, 134 S. Ct. 2901 (2014).

79. *Hobby Lobby*, 134 S. Ct. at 2764 (quoting *Statement on Abortion*, MENNONITE CHURCH USA (July 2003), http://resources.mennoniteusa.org/resource-center/resources/statements-and-resolutions/statement-on-abortion/).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* (quoting Conestoga Wood Specialties Corp v. Sebelius, 917 F. Supp. 2d 394, 402 (E.D. Pa. 2013), *aff'd sub nom.*, Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health and Human Serv., 724 F.3d 377 (3d Cir. 2013)).

84. *Id.* at 2764–65.

85. *Id.* at 2766. The approved methods are found at FDA, *supra* note 63.

an egg occurs.[86] Conestoga opposed the ACA requirement to provide coverage for these four so-called abortifacients because the payment or facilitation of the use of these drugs and devices would result in the Hahns engaging in immoral and sinful conduct.[87] Accordingly, Conestoga excluded from its group-health-insurance plan these four contraceptive methods and sought, along with the Hahns, an injunction against requiring their inclusion in the plan.[88] The district court denied a preliminary injunction, and a divided Third Circuit affirmed, holding that for-profit secular corporations cannot engage in religious exercise within the meaning of RFRA or the First Amendment.[89] The Third Circuit also rejected the claim brought by the Hahns themselves because the HHS mandate did not impose any requirement on them personally.[90]

The four alleged abortifacients were also the focus of injunctive actions brought by two Oklahoma for-profit corporations and their shareholders against HHS in federal court in Oklahoma.[91] Hobby Lobby Stores, Inc. and Mardel, Inc. are businesses collectively owned by David and Barbara Green and their children.[92] Hobby Lobby is an arts and crafts chain with over 500 stores and about 13,000 full-time employees.[93] Mardel operates thirty-five Christian bookstores and employs close to 400 people.[94] Like the Hahns, the Greens believe that life begins at conception, and it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point.[95] Each family member signed a pledge to run the businesses in accordance with the family's religious beliefs.[96] Based on those beliefs, both corporations and all five Greens challenged the legality of the contraceptive mandate.[97] The district court denied a preliminary injunction but the Tenth Circuit, sitting *en banc* reversed, finding the companies are "persons" within the meaning of RFRA, that they had demonstrated irreparable harm, and that they had established a likelihood of success on their RFRA claims.[98] The

86. *Hobby Lobby*, 134 S. Ct. at 2765.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 2766.
92. *Id.* at 2765. The Greens operate the businesses through a management trust, of which each family member is a trustee. *Id.* n.15.
93. *Id.*
94. *Id.*
95. *Id.* at 2766.
96. *Id.* The family also provided that the management trust would be governed according to the family members' religious principles. *Id.* at 2765 n.15.
97. *Id.* at 2766.
98. *Id.*

case was remanded for the district court to consider the remaining factors of the preliminary injunction test.[99]

Before the Court granted the petitions for writ of certiorari in *Conestoga* and *Hobby Lobby* on November 26, 2013,[100] the Sixth, Seventh, and District of Columbia Circuits similarly weighed in on the rights of for-profit corporations to challenge the legality of the contraceptive mandate under RFRA.[101] All of the cases involve closely held corporations which are owned and controlled by family members, all of whom are Roman Catholics and believe, consistent with the church's doctrines that all forms of artificial contraception, not just the four so-called abortifacients, are against the natural law of God.[102] And like the Hahns and Greens, these Catholic family members believe that offering contraceptive drugs and devices as part of an employer-sponsored health plan is sinful as it makes them complicit in the morally wrongful act of another.[103]

The Sixth Circuit sided with the Third Circuit's approach in *Conestoga*, rejecting the general claim that the family corporation is a person under RFRA as well as the more specific argument that the shareholders' free-exercise rights pass through to the corporate shell such that the corporation is the real party in interest to assert their individual rights.[104] In addition, and consistent with the result in *Conestoga*, the family members' claims were dismissed based on the shareholder standing rule, namely, that shareholders cannot bring claims intended to redress injuries incurred by the corporation.[105] The Seventh Circuit, in contrast, tracked the reasoning of the Tenth Circuit in *Hobby Lobby*, holding that a corporation is a "person" within the meaning of RFRA.[106] The District of Columbia Circuit took a different

99. *Id.*

100. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013), *aff'd sub nom.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Serv., 724 F.3d 377 (3d Cir.), *cert. granted, sub nom.*, Conestoga Wood Specialties Corp. v. Sebelius, 134 S. Ct. 678 (2013), *rev'd sub. nom.*, Conestoga Wood Specialties Corp. v. Burwell, 134 S. Ct. 2751 (2014).

101. Autocam Corp. v. Sebelius, 730 F.3d 618, 620 (6th Cir. 2013), *cert. granted, judgment vacated, and case remanded sub nom.*, Autocam Corp. v. Burwell, 134 S. Ct. 2901 (2014); Korte v. Sebelius, 735 F.3d 654, 658-59 (7th Cir. 2013); Gilardi v. U.S. Dep't of Health and Human Serv., 733 F.3d 1208, 1210 (D.C. Cir. 2013), *cert. granted, judgment reversed, and case remanded*, 134 S. Ct. 2902 (2014).

102. *Autocam Corp*, 730 F.3d at 620–21, *cert. granted, judgment vacated, and case remanded sub nom.*, Autocam Corp. v. Burwell, 134 S. Ct. 2901 (2014); *Korte*, 735 F.3d at 659, 662–64; *Gilardi*, 733 F.3d at 1210, *cert. granted, judgment reversed, and case remanded*, 134 S. Ct. 2902 (2014).

103. *Autocam Corp.*, 730 F.3d at 621; *Korte*, 735 F.3d at 659, 662–64; *Gilardi*, 733 F.3d at 1218.

104. *Autocam Corp.*, 730 F.3d at 624–28.

105. *Id.* at 623. Another panel of the Sixth Circuit followed the result in *Autocam* five weeks later. Eden Foods, Inc. v. Sebelius, 733 F.3d 626, 631–32 (6th Cir. 2013), *cert. granted, judgment vacated, and remanded sub nom.*, Eden Foods, Inc. v. Burwell, 134 S. Ct. 2902 (2014).

106. *Korte*, 735 F.3d at 682.

path, holding that while a corporation is not a person under RFRA, the shareholders have standing to assert claims on their own behalf as they have been injured in a way that is separate and distinct from the harm incurred by the corporation, an injury which gets around the shareholder standing rule.[107]

Five circuit court decisions, fourteen opinions among those five decisions,[108] and three different approaches form the prelude to the ultimate resolution of the conflict between all forms of artificial contraception,[109] as mandated by the ACA, and a person's religious objections thereto under RFRA. We turn now to the Court's decision in *Conestoga* and *Hobby Lobby* of June 30, 2014.

IV. THE CANONIZATION OF CORPORATE AND HUMAN SHAREHOLDER FREE EXERCISE

A. The Dogmatic View of Five

The question presented for writ of certiorari in both cases was identical: "Whether RFRA allows a for-profit corporation to deny its employees the heath coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners."[110] The Court recast the issue stating it was charged with deciding whether RFRA permits an agency of the United States Government to demand that closely held for-profit corporations pay for female contraceptive health care coverage for their employees and their dependents in violation of the shareholders' religious beliefs.[111] By a 5-4 vote, the Court held HHS could not lawfully make such a demand because its regulations impose a

107. *Gilardi*, 733 F.3d at 1215-16.

108. The Tenth Circuit led the charge with six opinions. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (en banc), *aff'd sub nom.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). Each panel member in *Gilardi* wrote an opinion, while the *Conestoga* and *Korte* cases each produced two opinions. *Gilardi*, 733 F.3d 1208; Contestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health and Human Serv., 724 F.3d 377 (3d Cir. 2013), *rev'd sub nom.*, Conestoga Woods Specialties Corp. v. Burwell, 134 S. Ct. 2751 (2014); *Korte*, 735 F.3d 654.. Finally, *Autocam* was unanimous. Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013), *cert. granted, judgment vacated, and case remanded sub nom.*, Autocam Corp. v. Burwell, 134 S. Ct. 2901 (2014).

109. Counsel for Hobby Lobby and Conestoga conceded at oral argument that his RFRA-based argument encompasses objections to all forms of artificial contraception. Transcript of Oral Argument at 38–39, *Hobby Lobby Stores*, 134 S. Ct. 2751 (No. 13-354, 13-356).

110. Brief for the Petitioner at (I), Sebelius v. Hobby Lobby Stores, Inc., *aff'd sub nom.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2951 (2014) (No. 13-354); Brief for Petitioner at (I), Conestoga Wood Specialties Corp. v. Sebelius, *rev'd sub nom.*, Conestoga Wood Specialties Corp. v. Burwell, 134 S. Ct. 2751 (2014) (No. 13-356).

111. *Hobby Lobby*, 134 S. Ct. at 2757.

substantial and impermissible burden on the free exercise of religion.[112] According to the majority, the protection provided in RFRA for a "person's exercise of religion" clearly encompasses free-exercise rights of for-profit corporations and the religious liberty of their human shareholders.[113] In fact, the majority declared, it is simply not possible to read the statute any other way.[114] Three major reasons were offered to support this unequivocal interpretation. The first two relate to the meaning of "person;" the third, to the scope of exercise of religion.

As RFRA does not define the term "person," it is necessary, the Court reasoned, to consult the Dictionary Act to determine its meaning.[115] Under the Dictionary Act, the word "person" includes corporations, companies, and the like as well as individuals, unless the context indicates otherwise.[116] The context of RFRA does not indicate otherwise, the Court held, because viable RFRA claims by non-profit corporations previously had been entertained, a fact the government conceded.[117] No conceivable definition of "person" could include individuals and non-profit corporations but exclude for-profit corporations, because giving the same word a different meaning for each corporate category would be to invent a statute rather than interpret one.[118]

Second, corporations are fictionalized conduits for which the rights of their human shareholders are formalized and protected.[119] In the Court's words: "[w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of [the people associated with the corporations]."[120] Once lodged within the corporate shell and passed through to human owners, the religious rights of these shareholders can then be asserted by the corporation.[121] In other words, a for-profit corporate employer, an entity which must abide by the contraceptive mandate, has standing to invoke the "passed-through" religious beliefs of its human

112. It is impermissible because the governmental action does not constitute the least restrictive means of serving a compelling government interest. The government could have accommodated the free exercise rights of these corporations and shareholders much like it did eligible religious organizations by excluding contraceptive care from the group plan but allowing such care to be separately paid for by the insurer. *Id.* at 2782.

113. *Id.* at 2768.

114. *See id.* at 2772 (dismissing the argument that the statute's protection of the exercise of religion was limited to those religious practices previously recognized by the Court before the 1990 *Smith* decision).

115. *Id.* at 2768.

116. 1 U.S.C. § 1 (2012).

117. *Hobby Lobby*, 134 S. Ct. at 2768–69.

118. *Id.* at 2769.

119. *See id.* at 2708 (stating Congress indirectly employs the familiar legal fiction of corporation in RFRA, the purpose of which is to protect human shareholders).

120. *Id.* at 2769.

121. *See id.* (stating the exclusion of rights to corporations protects the free-exercise rights of the corporations and the religious liberty of the humans who own and control the corporations).

shareholders as a reason not to comply.[122] The irrefutable truth that business corporations cannot exercise religion separate and apart from their owners is irrelevant.[123] They act through their human shareholders, intended third-party beneficiaries of Congressionally bestowed rights, who are the ones who pray, worship, observe sacraments, seek meaning and spiritual fulfillment, suffer the pangs of conscience, obey the commands of a higher authority, or obtain moral sanctuary from the evils of the world.[124]

The moral sanctuary which the human shareholders of Hobby Lobby and Conestoga sought for their companies was relief from the evils of facilitating access of certain contraceptives to their employees.[125] These anti-contraceptive beliefs are religious in nature and part of a Christian and biblically-based value system which each set of owners perpetuated in the operation of their businesses, both in customer relations and in the delivery of employee benefits.[126] The perpetuation of this value system constitutes the exercise of religion within the meaning of RFRA according to the majority.[127] Invoking *Smith*'s noncontroversial observation that the exercise of religion includes belief, profession of belief, and performance of (or abstention from) acts,[128] the Court found that the refusal to provide employees legally mandated no-cost contraceptive coverage based on Christian-based ethical objections "fell comfortably" within *Smith*'s description of religious exercise.[129]

The Court's triple play on the interpretation of RFRA, much like its baseball metaphorical counterpart, leaves an observer stunned and wondering how the event unfolded so quickly. How can a restorative statute be transformed into one in which business corporations, never before thought to enjoy religious protection, now do? How can the Dictionary Act's definition of person include corporation but only in the sense of an osmotic membrane for the passage of the rights of shareholders, as long as those shareholders are human beings? If Congress really wanted for-profit corporations, closely held by human shareholders, to enjoy the protections of the exercise of religion, why did it not just say so in plain English? Or, if Congress wanted to limit the extension of religious rights to family-owned corporations, what prevented it from expressing that clearly and

122. *See id.* at 2769 (allowing corporations to assert RFRA claims furthers and protects the individual religious freedom of human shareholders).
123. *Id.* at 2768.
124. *See id.* (acknowledging individuals exercise religion through belief and action).
125. *Id.* at 2765–66.
126. *Id.* at 2771 n.73.
127. *Id.* at 2769–70.
128. *Id.* at 2770 (quoting Emp't Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 877 (1990)).
129. *Id.*

unambiguously? Did Congress know, let alone foresee, that its silent and undefined treatment of "person" (a word never used in RFRA without a possessive qualifier) would be interpreted as a "corporation" under the Dictionary Act only to be "reversely pierced" in the same judicial breath to mean human shareholders? The Court ignored the purpose of RFRA, misinterpreted the text, and displaced the tradition of free exercise. Simply stated, it invented or re-wrote the statute.[130]

B. Text and Tradition Displaced

The purpose of RFRA is expressly stated: To restore the compelling interest test of *Sherbert* and *Yoder* in situations where government substantially burdens a person's free exercise of religion under the First Amendment.[131] "Restore" is not defined in RFRA so we must look to a dictionary to ascertain the word's ordinary, contemporary and common meaning.[132] And to make sure we do not go too far astray in interpreting that ordinary meaning, we shall keep in mind the "acid test" proposed by Justice Scalia that whether a word can reasonably bear a particular meaning is best determined if you can use the word in the sense ascribed at a cocktail party without having people look at you funny.[133] Although people at cocktail parties may not usually converse by reference to a word's prefix, a group of rapt listeners would not look at you funny if you were to volunteer that the prefix "re" is a common one in the English language and denotes a return to a previous condition.[134] Nor would faces crinkle in consternation if you were to propose that viable synonyms for "restore" include reinstate, renew, revive, revitalize, reestablish, reimpose, reconstruct, rehabilitate, or even, bring back, fix, or mend.[135] So, if you happen to be attending a cocktail party on November 16, 1993, the date RFRA was enacted into law,[136] you could say in a company of straight faces that Congress just fixed the holding in

130. *See infra* text accompanying notes 140–45, 162–98, 217–33.

131. 42 U.S.C. § 2000bb (2012).

132. *See* Perrin v. United States, 444 U.S. 37, 42 (1979) (holding a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning). Over the past twenty-five years, the Court has substantially increased its use of dictionaries when construing text. James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 486 (2013). Scholars link this use to the rise of textualism and its focus on ordinary meaning. *Id.* Not surprisingly, controversy has ensued on whether this judicial invocation of dictionary definitions is objective and authoritative or a subjective and, at times, result-oriented approach to statutory interpretation. *Id.* at 486–87.

133. Johnson v. United States, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting).

134. *Re Definition*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/re? searchDictCode=all#RE (last visited Apr. 23, 2015).

135. ROGET'S 21ST CENTURY THESAURUS 712 (Barbara Ann Kipfer ed., 1992).

136. RFRA, Pub. L. No. 103-141, 107 Stat. 1488, 1490 (1993).

Smith by reviving the compelling interest test. That revitalization, you could accurately state, pertains to the test or standard itself; Congress did not address nor did it expand the class of persons who can engage in the protected exercise of religion, nor did it seek to extend the substantive boundaries of free exercise.[137] Whatever free-exercise rights persons possessed prior to the passage of RFRA remain the same because exercise of religion is defined by and limited to the First Amendment.[138] In other words, by defining "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution," Congress made clear that persons who do not have First Amendment rights are not protected by RFRA.[139] Simply stated, the ordinary meaning given to restoration of a balancing test cannot reasonably be interpreted to include an expansion of protected persons or an enlargement of underlying substantive rights.

Nor is the Dictionary Act's definition of "person" enlightening. Again, the operative principle is not "person."[140] The word "person" never stands alone or independent from "exercise of religion" in the text of RFRA. It is used either as a singular noun in the possessive case (person's exercise of religion)[141] or in conjunction with a personal pronoun in the possessive case (person whose exercise of religion).[142] Accordingly, "person" cannot be parsed alone; as it qualifies or modifies "exercise or religion" (which, in turn, is a defined term) the entire phrase, a person's exercise of religion under the First Amendment, must be construed.[143] That is a road sign Congress posted in the text of the statute. And there are rules of the road (discussed *infra*) the Supreme Court has in place to assist in giving meaning to that phrase.[144] But the Court ignored the clear and unambiguous language of the sign and selected a different path—the wrong path. Because the entire foundation of the Court's opinion rests on the unsupportable textual bifurcation of the operative phrase, the rationale of the opinion is likewise unsupportable. By equating person with corporation, the Court began its interpretive journey down a "one-word" street, marked: WRONG WAY: DO NOT ENTER. And during the course of this linguistic journey, the Court made some declarations on corporate formation and purpose which, although worthy of some

137. *See* S. REP. NO. 103-111, at 12 (1993) (stating the purpose of RFRA is only to overturn the Supreme Court's decision in *Smith*, discrediting the notion that the Act could have unintentional consequences or unsettle other areas of the law).
138. Rasul v. Myers, 563 F.3d 527, 533 (2009) (Brown, J., concurring).
139. *Id.*
140. *Id.* at 533–34.
141. RFRA§§ 3(a), (b), 107 Stat. at 1488 (codified as amended at 42 U.S.C. §§ 2000bb-1(a), (b) (2012)).
142. *Id.*; *see also* 42 U.S.C. §§ 2000bb(b)(2), 2000bb-1(c).
143. Gilardi v. Dep't of Health and Human Serv., 733 F.3d 1208, 1211–12 (D.C. Cir. 2013), *cert. granted, judgment vacated, and case remanded*, 134 S. Ct. 2902 (2014).
144. *See infra* text and accompanying notes 162–69.

comment, are "quite beside the point."[145] In support of the "person is a corporation" thesis, the Court implies that Congress was fully knowledgeable about certain corporate principles when it chose not to define person.[146] The Court set forth these principles in a semi-syllogistic format and without citation of authority:

- A corporation is a legal fiction;[147]
- It takes the form of an organization used by humans to achieve desired ends;[148]
- The desired end of a business corporation is to make a profit;[149]
- The purpose of the legal fiction is to provide protection for human beings;[150]
- If rights are extended by Congress to business corporations, the purpose is to protect the corporation's human shareholders;[151]
- In RFRA Congress extended the right of free exercise of religion to all corporations;[152]
- General business corporations cannot, separate and apart from the actions or belief systems of their human owners, exercise religion;[153]
- Thus, when free-exercise rights are extended to business corporations, the purpose is really to protect the religious liberties of their human shareholders.[154]

What is the Court really trying to say? Is there a distinction (or not) between corporation and individual when it comes to religious exercise? Where does the answer lie? It apparently does not lie with the concept of associational standing for that involves the redressing of members' rights and injuries without a showing of injury to the association itself.[155] Here, the

145. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014) (commenting that although true, it is quite beside the point that corporations cannot do anything at all, separate and apart from the human beings who own, run, and are employed by them).

146. *See id.* at 2768 (stating Congress provides protection for the Hahns and Greens of the world through the use of the familiar legal fiction of corporation).

147. *Id.* at 2768.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *See* United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 552 (1996) (defining the modern doctrine of associational standing as one in which an organization may sue to redress its members' injuries, even without a showing of injury to the association itself). An illustration of this concept apropos to RFRA is found in Gonzales v. O'Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006). There the Court affirmed the grant of a preliminary injunction under RFRA against the federal government in favor of a New Mexico

association or for-profit corporation is injured or directly affected by the contraception mandate.[156] By not relying on *Citizens United v. Federal Election Commission*[157] and the First Amendment right of corporations to express themselves for political purposes,[158] the Court backs away from extending any constitutional free-exercise rights to corporations per se.[159] What the Court appears to be saying with its refrain of human shareholder protection is that at least on the "closely held corporate" facts before it, a unity of interest exists between corporation and individual that is indivisible. Stated otherwise, RFRA grants closely held, for-profit corporations religious rights of their own, rights which are informed and brought to life by the belief system of their human shareholders.[160] Because the human shareholders oppose the use of contraception, the corporation's obligation under the ACA to include contraceptive coverage in its workplace health insurance plan is understood as a burden on the owners' religious liberty and, in turn, on the corporation itself.[161] What a neat and tidy circle of logic, or more cynically phrased, a closely held corporate Catch-22.

Enough of the corporate wrong-way detour; back to the phrase actually posted on the Congressional road sign—a person's exercise of religion under the First Amendment. "The query is simple: do corporations enjoy the shelter of the Free Exercise Clause? Or is the free-exercise right a 'purely personal' one, such that it is unavailable to corporations and other organizations because 'the historic function' of the particular guarantee has been limited to the protections of individuals?"[162] Several courts, judges, and even Hobby Lobby in its brief attempted to answer this query by looking to the "nature, history and purpose" of the Free Exercise Clause.[163] These three

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religious non-profit corporation which had sought equitable relief on behalf of its 130 members to permit them to engage in the sacramental practice of drinking hallucinogenic tea. *Id.* at 433.

156. Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg-13(a)(4) (2010).

157. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

158. *Id.* at 342.

159. In contrast, the Tenth Circuit in *Hobby Lobby* did not back away from this position stating it saw no reason why the Court would not recognize constitutionally-based, for-profit corporate religious expression as it had already acknowledged First Amendment protection for corporate political expression. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (10th Cir. 2013) (en banc), *aff'd sub nom.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

160. Korte v. Sebelius, 735 F.3d 654, 688 (7th Cir. 2013) (Rovner, J., dissenting).

161. *Id.*

162. Gilardi v. U.S. Dep't of Health and Human Serv., 733 F.3d 1208, 1212 (D.C. Cir. 2013), *cert. granted, judgment vacated, and case remanded*, 134 S. Ct. 2902 (2014).

163. *Id.*; Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health and Human Serv., 724 F.3d 377, 384-85, 388 (3d Cir. 2013), *rev'd sub nom.*, Conestoga Wood Specialties Corp. v. Burwell, 134 S. Ct. 2751 (2014); Autocam Corp. v. Sebelius, 730 F.3d 618, 626 (6th Cir. 2013), *cert. granted, judgment vacated, and case remanded sub nom.*, Autocam Corp. v. Burwell, 134 S. Ct. 2901 (2014); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1168 (10th Cir. 2013) (Briscoe, C.J., concurring in part and dissenting in part), *aff'd sub nom.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); *Korte*, 735 F.3d at 696-98 (7th Cir. 2013) (Rovner, J.,

factors or rules of the constitutional road, if you will, demonstrate that only individuals and communities of believers, not secular corporations, enjoy the shelter of the Free Exercise Clause. The heritage of religious liberty in this country centers around an individual's religious conscience and a community of believers.[164] The Supreme Court has accorded protection consistent with this original design. Individuals, clergy, religious entities and organizations, sects and congregations, and religiously affiliated educational associations all have been held to fall under the umbrella of potential First Amendment protection against government interference.[165] One need look no further than *Smith*, in which the Court provides a litany of case law and situations in which the government either had overstepped its bounds in attempting to regulate religious belief or surely would be prohibited from regulating certain religiously motivated actions or abstinence from physical acts.[166] Each prohibited government regulation or purported prohibition—compelling affirmation of religious belief; punishing the expression of religious doctrines it believes to be false; imposing special disabilities on the basis of religious views or status; lending its power to one or the other side in controversies over religious authority or dogma; "assembling with others for a worship service; participating in sacramental use of bread and wine; proselytizing; [and] abstaining from certain foods or certain modes of transportation"—involves individuals, religious clergy, or religious entities.[167] In fact the Court in *Smith* used the word "individual" several times in discussing the nature of First Amendment protection.[168] More recently, the Court echoed the community of believers' concept by noting the text of the First Amendment gives special solicitude to the rights of religious organizations.[169]

In contrast, nothing in the text of the First Amendment, Congress's debates, the historical context of the amendment's ratification, or any Supreme Court case suggests that artificial creatures of the law, incorporated to make money while limiting the liability of its shareholders, are deserving

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dissenting); Brief of Respondent at 24, Sebelius v. Hobby Lobby Stores, Inc., *aff'd sub nom.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354).

164. *Gilardi*, 733 F.3d at 1212-13. *See* Michael W. McConnell, *The Origins and Historical Understanding of the Exercise of Religion*, 103 HARV. L. REV. 1409, 1488–90 (1990) (noting the substitution of "free exercise of religion" for the "rights of conscience" in the constitutional formulation signifies a desire to protect a community of believers or religious bodies from governmental interference in addition to and even when the interference has no direct relation to a claim of conscience).

165. *Gilardi*, 733 F.3d at 1212–13.

166. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877–78 (1990).

167. *Id.*

168. *Id.*

169. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct.. 694, 706 (2012).

of constitutional religious protection.[170] Unlike religious organizations, which exist to foster the interests of persons subscribing to the same religious faith, workers who sustain the operations of for-profit corporations are not commonly drawn from one religious community.[171] In the pursuit of profit, shareholders are not acting in their capacity as members of a religious congregation or parishioners of a church. They do not comprise an association of individuals joined together for a common religious purpose.[172] They are investors, authorized by state law to issue stock and form a separate legal entity, in the hopes of generating a positive monetary return on their investment.[173]

Hobby Lobby attempts to seek shelter under the Free Exercise Clause by arguing that an individual's freedom to worship cannot be "vigorously protected from interference by the [government] unless a correlative freedom to engage in [a] group effort toward those ends [are] not also guaranteed."[174] While there may be some truth in this observation, Hobby Lobby and the Court steadfastly refuse to acknowledge that the nature, purpose and history of this correlative freedom relates to a community of believers who bring themselves together to believe, profess, worship, and engage in sacramental activities.[175] There is no religious tradition for secular corporations,

170. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2795 (2014) (Ginsburg, J., dissenting) (noting that the Court had never, until today, extended religious exemptions to any entity operating in the commercial, profit-making world); *Gilardi*, 733 F.3d at 1212–13 (summarizing the history of purpose of the Free Exercise Clause as encompassing only individuals and religious bodies, not for-profit corporations); Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health and Human Serv., 724 F.3d 377, 384–85, 388 (3d Cir. 2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (questioning how the Free Exercise Clause, designed to secure religious liberty for the individual, can be interpreted to include within its umbrella of protection a for-profit artificial being that is created to make money).

171. *Hobby Lobby*, 134 S. Ct. at 2795 (Ginsburg, J., dissenting).

172. Ron Fein, *Why Every Single Supreme Court Justice Got Hobby Lobby Wrong*, JURIST (Sept. 18, 2014, 12:00 PM), http://jurist.org/hotline/2014/09/ron-fein-hobby-lobby.php.

173. *Id.*

174. Brief for Respondents at 24, Sebelius v. Hobby Lobby Stores, Inc., *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984)).

175. *See Hobby Lobby*, 134 S. Ct. at 2796-97 (Ginsburg, J., dissenting) (commenting on majority's forgetfulness for not recognizing that religious organizations exist to serve and perpetuate religious values shared by a community of believers). From a Christian theological perspective, H. Richard Niebuhr has expressed the role of churches succinctly and eloquently: "The purpose of the Church is to increase among human beings the love of God and neighbor." H. RICHARD NIEBUHR, THE PURPOSE OF THE CHURCH AND ITS MINISTRY 31 (1977). Or, as voiced by the eminent theologian Paul Tillich, one to whom the Court had looked for guidance in explaining the concept of religion in the conscientious objector case of *United States. v. Seeger*, 380 U.S. 163, 180 (1965):

> [T]he Church gave an antidote against the threat of anxiety and despair, namely itself, its traditions, its sacraments, its education, and its authority. The anxiety of guilt was taken into the courage to be as a part of the sacramental community. The anxiety of doubt was taken into the courage to be as a part of the community in which revelation and reason are united.

consisting of shareholders, officers, employees, or others associated therewith.[176] They have diverse personal beliefs, diverse degrees of religious devotion, diverse moral compasses, and perhaps diverse notions as to whether and how corporations ought to reflect their "ultimate concerns" in business operations.[177]

More fundamentally, what distinguishes for-profits from religious non-profits is the utilization of labor for financial gain rather than the perpetuation of a religious value-based mission.[178] Employees provide that labor, and by accepting that labor, for-profit corporations submit to legislation designed to promote employee welfare.[179] This is the associational dynamic of for-profits—a far cry from joining your hands with fellow congregants in prayer at a Sunday morning worship service or partaking of the sacraments, whether it be taking Holy Communion at a Catholic service or ingesting peyote at a Native American sacred gathering. The First Amendment is a prism through which the validity of these claims are viewed, not the categorical imperative of statutory definitional consistency as myopically reflected by a small sliver of the corporate world which coincidentally happens to be closely held, familial and unanimous in their pro-life beliefs. Although admitting that Congress knows how to write a statute which links the meaning of a provision to a constitutional source,[180] the Court refuses to apply this rudimentary principle to its interpretation of RFRA.

The Court believes it is justified in doing so because it is "obvious [the 2000 amendment to RFRA effectuated] a complete separation from First Amendment case law."[181] It is true Congress deleted the reference to the First Amendment when defining religious exercise. It is also true the definition

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PAUL TILLICH, THE COURAGE TO BE 95 (1952).

176. *See Hobby Lobby*, 134 S. Ct. at 2796 (Ginsburg, J., dissenting) (noting the discrete and different characteristics of ecclesiastical and lay corporations dating back to the time of Blackstone in the mid-eighteenth century).

177. Korte v. Sebelius, 735 F.3d 654, 704 (7th Cir. 2013) (Rovner, J., dissenting).

178. Gilardi v. U.S. Dep't of Health and Human Serv., 733 F.3d 1208, 1242 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part), *cert. granted, judgment vacated, and case remanded*, 134 S. Ct. 2902 (2014). In emphasizing definitional consistency in its opinion, the Court noted no less than five times the government conceded that non-profit corporations are persons under RFRA. *Hobby Lobby*, 134 S. Ct. at 2769, 2769 n.20, 2771, 2774. True, but beside the point, the Solicitor General argued at oral argument, for the query is not who or what is a person within the meaning of RFRA, but rather what is the meaning of the phrase "person's exercise of religion." Transcript of Oral Argument at 48, 51, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354, 13-356). *See supra* text accompanying notes 162–63.

179. *Gilardi*, 733 F.3d at 1242–43 (Edwards, J., concurring in part and dissenting in part). *See* United States v. Lee, 455 U.S. 252, 261 (1982) (holding when 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 the statutory schemes which are binding on others in that activity).

180. *Hobby Lobby*, 134 S. Ct. at 2772.

181. *Id.* at 2761–62.

changed colors—from one importing a meaning ("'the exercise of religion' means the exercise of religion under the First Amendment to the Constitution")[182] to one conveying inclusiveness ("'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief").[183] The circumstances leading up to and surrounding the amendment, however, appear to support a conclusion far less sweeping and grandiose than that announced by the Court. As discussed previously, RLUIPA was enacted in response to the Court's decision in 1997 that Congress had exceeded its enforcement powers under section five of the Fourteenth Amendment in mandating state compliance with RFRA.[184] Three years later, Congress turned to its powers under the Commerce and Spending clauses to justify application of the compelling-interest test to two categories of state action—land use regulation and management of institutionalized persons.[185] And while Congress was correcting the error of its constitutional ways, it took the opportunity to fix the mistake lower federal courts had been making since 1993 in imposing proof of centrality on prisoners' claims of infringement under RFRA.[186] It effectively directed courts to return to the

182. RFRA, Pub. L. No. 103-141, § 5(4), 107 Stat. 1488, 1489 (1993).

183. RLUIPA, Pub. L. No. 106-274, § 8, 114 Stat. 803, 806 (2000) (amending section 5 of RFRA).

184. *See supra* text accompanying notes 50–51.

185. RLUIPA §§ 2, 3, 114 Stat. at 803–04. *See* Cutter v. Wilkinson, 544 U.S. 709, 715 (2005) (recognizing that Congress limited the reach of RLUIPA to two subjects, invoking its authority over each by reliance on the Spending and Commerce Clauses).

186. *See* Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995) (requiring proof by a prisoner that the government is preventing a religious experience that the faith mandates); Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995), *superseded by statute*, RLUIPA, Pub. L. No. 106-274, 114 Stat. 803 (noting that governmental regulation must substantially burden religious activity that manifests some central tenet of a prisoner's individual beliefs or denies a prisoner a reasonable opportunity to engage in activities that are fundamental to a person's religion); Abdur-Rahman v. Mich. Dep't of Corr., 65 F.3d 489, 491 (6th Cir. 1995), *superseded by statute*, RLUIPA, Pub. L. No. 106-274, 114 Stat. 803 (rejecting RFRA claim by prisoner that an essential tenet of his religious beliefs was substantially burdened); Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996), *superseded by statute*, RLUIPA, Pub. L. No. 106-274, 114 Stat. 803(recognizing that the substantial burden requirement of RFRA must inhibit or constrain conduct or expression that manifests a central tenet of religious belief or compels conduct or expression that is contrary to those beliefs); Weir v. Nix, 114 F.3d 817, 820 (8th Cir. 1997), *superseded by statute*, RLUIPA, Pub. L. No. 106-274, 114 Stat. 803 (adopting the language of the Tenth Circuit in *Werner*). In a case not involving a prisoner, the Fourth Circuit held that a parents' economic burden, incurred due to the failure of the school board to provide a cued speech transliterator to their hearing-impaired child at his religious school at no cost, was not substantial. The Fourth Circuit found the parents and child were neither compelled to engage in conduct prescribed by religious beliefs, nor forced to abstain from any action their religion mandates they take. Goodall by Goodall v. Stafford Cnty. Sch. Bd., 60 F.3d 168, 172 (4th Cir. 1995).

Ironically, the Court contributed to the confusion surrounding the substantial burden element with some sloppy dicta in *Hernandez v. Comm'r*, 490 U.S. 680 (1989). In re-citing the elements of the compelling-interest test, the Court described the substantial burden as one which relates to a "central religious belief or practice." *Id.* at 699. This description, of course, was contrary to precedent. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990); Thomas v. Review

status quo ante.[187] The amendment was not a change so much as a "clarif[ication of] issues that had generated litigation under RFRA."[188] Congress made clear that neither compulsion nor centrality is an essential feature of a religious belief system.[189] This clarification was incorporated into RFRA to ensure uniformity in enforcement.[190] There is simply no indication that the "any exercise of religion" phrase in the 2000 amendment was intended to broaden the universe of persons protected by RFRA.[191]

Moreover, the absence of "First Amendment" in the 2000 definition clarification of religious exercise is not the unambiguous and revolutionary game-changer the Court makes it out to be.[192] The Court claims its responsibility is to interpret RFRA as written.[193] If true, the Court would see what an ambiguous mess Congress made out of the two statutes in providing guidance on how "religious exercise" is to be construed. RLUIPA, chapter 21C of Title 42 of the United States Code, contains a rule of construction; RFRA, chapter 21B of Title 42, does not. The rule of construction for RLUIPA provides: "This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution."[194] The absence of such a rule—or any rule of construction for that matter—in RFRA means that only persons affected by two limited categories of state governmental activity are entitled to have their form of religious exercise construed to the maximum extent permitted by the Constitution. This does not make a lick of sense.[195] Why

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Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981); Jones v. Wolf, 443 U.S. 595, 602-06 (1979); Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969); United States v. Ballard, 322 U.S. 78, 85–87 (1944).

187. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2792 (2014) (Ginsburg, J., dissenting).

188. H.R. REP. NO. 106-219, at 30 (1999).

189. *See id.* (noting religious exercise need not be compulsory or central to the claimant's religious belief system).

190. *Id.* Also incorporated into RFRA was the second part of RLUIPA's definition of "religious exercise," namely, that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." RLUIPA, Pub. L. No. 106-274, § 8, 114 Stat. 803, 806 (amending section 5 of RFRA).

191. *Hobby Lobby*, 134 S. Ct. at 2792 (Ginsburg, J., dissenting).

192. *See id.* at 2761–62 (stating the reference to the First Amendment in RLUIPA and in the 2000 amendment to RFRA constitutes an obvious effort by Congress to effectuate a complete separation from First Amendment case law).

193. *Id.* at 2785.

194. RLUIPA § 5(g), 114 Stat. at 806 (codified at 42 U.S.C. §2000cc-3(g) (2012)).

195. The Court attempts to avoid this nonsense by arguing that the mere incorporation of RLUIPA's definition of religious exercise into the text of RFRA carries with it RLUIPA's broad rule of construction. *Hobby Lobby*, 134 S. Ct. at 2762 n.5. Stated otherwise, the Court claims the rule of construction rides piggy-back on top of the definition when the latter is incorporated into the text of RFRA. This claim is belied by the fact that the language of the rule of construction is anchored to the RLUIPA chapter itself, and that RFRA, a separate chapter in the United States Code, contains

should state prisoners and religious institutions that are affected by local land use regulation be entitled to have their claims of religious exercise construed more broadly than claims by all other classes of persons victimized by federal governmental activity?

Congress did not intend such an absurd and inconsistent rule of construction. Nor did it intend the deletion of the reference to the First Amendment in the 2000 clarifying amendment to carry revolutionary weight. In the same paragraph of the House report in which the authors explain the need for clarification, they note that "religious exercise" under both RFRA and RLUIPA includes only conduct that is the exercise of religion under the First Amendment.[196] Rather than construing the absence of the First Amendment in the text of the 2000 amendment of RFRA as a Congressional takeover of the most cherished amendment, rendering moot more than 200 years of constitutional protection against actions of the federal government, the omission should be viewed as a legislative clarifying error, an inadvertent deletion of the textual hook which had always precluded persons who did not have First Amendment rights from asserting RFRA claims.[197] Did Congress really intend to hide an elephant of revolutionary religious change in a mouse hole of an incorporated statutory phrase?[198] Yes, the Court effectively answers, creating a schizophrenic world of religious exercise between a limited class of "state" RLUIPA persons protected by a broad rule of construction and an expansive class of RFRA "federal" persons with no such protection.

C. Don't Blame Us

Wrapping up its opinion in *Hobby Lobby*, the Court writes: "The wisdom of Congress's judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate . . . as applied to closely

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no omnibus rule of construction governing the statute in its entirety. *Id*. at 2792 n.10 (Ginsburg, J., dissenting).

196. H.R. REP. NO. 106-219, at 30 (1999).

197. Rasul v. Myers, 563 F.3d 527, 534 (D.C. Cir. 2009) (Brown, J., concurring).

198. *See Hobby Lobby*, 134 S. Ct. at 2796 (Ginsburg, J., dissenting) ("Congress does not 'hide elephants in mouseholes'") (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)). Moreover, why would Congress confuse its revolution by incorporating into the text of RFRA the entirety of RLUIPA's definition of "religious exercise" that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." Did Congress want to make sure the use of real property for religious purposes would be protected the same under RFRA as RLUIPA? Was such incorporation necessary in view of the all-encompassing scope of the "any exercise of religion" phrase? The Court did not address these questions.

held corporations, violates RFRA."[199] In their words, we [the Court] just read the plain language of the text of the statute; we are not dispensing constitutional justice. In fact we ruled twenty-four years ago that applying the compelling-interest test to constitutional free-exercise claims "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[200] Congress disagreed with our constitutional judgment, wrote a statute resurrecting the compelling-interest standard, amending it once along the way. With the guidance of The Dictionary Act, we have interpreted the statute, and our job is done. If you do not like the result, do not blame us; we told you so twenty-four years ago.

The Court's blame avoidance is not so simple. Congressional restoration of the compelling-interest test is not the same thing as a purported Congressional bestowment of free-exercise rights on closely held corporations, passed through to human shareholders in pursuit of for-profit business goals. Reliance on The Dictionary Act, premised on a bifurcation of the phrase, "person's exercise of religion," raises an issue of a result-oriented approach to statutory interpretation.[201] Bifurcation provides a foothold to for-profits to assert they are the proper "persons" under RFRA to challenge the contraceptive mandate. The Court ignores one of the basic principles of corporate law,

> The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. . . . After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.[202]

The Court brushes aside this traditional principle. Instead, it announces the only purpose behind a Congressional extension of corporate statutory rights is human shareholder protection,[203] rendering moot over two centuries of First Amendment protection against federal government interference.[204]

Why not go down the textually true path of a "person's exercise of religion" and debate, as the District of Columbia Circuit did, whether the

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199. *Hobby Lobby*, 134 S. Ct. at 2785. Characterizing the mandate as HHS's is consistent with the Court's framing of the issue as opposed to the verbiage expressed in the petitions for writ of certiorari. *See supra* text accompanying notes 110–11.

200. *Id.* (quoting Emp't. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 888–89 (1990)).

201. *See supra* note 132.

202. Cedric Kushner Promotions Ltd. v. King, 533 U.S. 158, 163 (2001).

203. *Hobby Lobby*, 134 S. Ct. at 2768.

204. *See id.* at 2761–62 (stating the 2000 amendment to RFRA was an obvious effort to effect a complete separation from First Amendment case law).

personal anti-contraceptive beliefs of the corporation's owners are substantially burdened by the mandate?[205] There is no mystery that owners are persons as distinguished from animals or things;[206] that they meet the three requirements of Article III standing (injury in fact, causation, and redress of injury);[207] that prudential considerations of standing, such as the shareholder standing rule,[208] do not apply;[209] and that unnecessary digressions into corporate form, public v. closely held applicability, the purpose of bestowment of statutory corporate rights, and the talk of discrimination against corporations as compared to sole proprietorships and partnerships, can be avoided.[210] All the "dramatic consequences"[211] that go with these digressions can likewise be avoided.

There is likewise little mystery that personal anti-contraceptive beliefs—tied as they are to how human shareholders conduct their businesses—are touched, affected, and indeed burdened by the mandate.[212] But is the burden substantial? That is the question that needed to be debated and decided. It certainly was brought to the table by the shareholders in *Gilardi*, arguing that the government was forcing, coaxing, penalizing, making, (fill in your participle of choice), them to participate and become compliant in the commission of a grave moral wrong.[213] In assessing the merits of this claim, courts are precluded, of course, from questioning its plausibility.[214] But courts can and should consider that religious beliefs of shareholders are inextricably bound to a pursuit of a morally acceptable business life, that owners are not required to use or purchase contraceptives nor prohibited from publically expressing their disapproval of contraceptive use, and that the mandate does not encourage employees to use contraceptives any more than the payment of wages require purchase of such drugs at the corner pharmacy.[215] This debate never occurred.

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205. Gilardi v. U.S. Dep't of Health and Human Serv., 733 F.3d 1208, 1212–15, 1217–19 (D.C. Cir. 2013); *id.* at 1227–31, 1237–39 (Edwards, J., concurring in part and dissenting in part), *cert. granted, judgment vacated, and case remanded*, 134 S. Ct. 2902 (2014).
206. *Id.* at 1215.
207. *Id.* at 1228 (Edwards, J., concurring in part and dissenting in part). Standing to assert a claim or defense under RFRA is specifically governed by Article III by the Constitution. RFRA, Pub. L. No. 103-141, § 3(c), 107 Stat. 1488, 1489 (codified as amended at 42 U.S.C. 2000bb-1(c) (2012)).
208. Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd., 493 U.S. 331, 336 (1990).
209. *Gilardi*, 733 F.3d at 1230-31 (Edwards, J., concurring in part and dissenting in part).
210. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2667-70 (2014).
211. *Id.* at 2767.
212. *Gilardi*, 733 F.3d at 1231 (Edwards, J., concurring in part and dissenting in part).
213. *Id.* at 1218.
214. *See supra* text and accompanying notes 186–89.
215. *Gilardi*, 733 F.3d at 1237–39 (Edwards, J., concurring in part and dissenting in part).

Instead, an "argle-bargle"[216] on closely held corporations is offered: persons are closely held corporations; closely held corporations, standing alone, cannot exercise religion; and human shareholders are the intended beneficiaries of religious liberties formally extended to and bestowed upon fictitious corporate shells.[217] Fewer than half the states have a statutorily created corporate form, a "close corporation," and even for the states that do, the definition of and requirements for such a business vary.[218] What the Court is really saying is that a "person" under RFRA is a corporation via The Dictionary Act only if it exhibits the following characteristics:

1. It is entirely family-owned;
2. It consists of a small number of shareholders;
3. The shareholders and the board of directors are co-extensive;
4. The family/shareholders/directors are unanimous in their religious connections;
5. The family/shareholders/directors are unanimous in wishing to seek an exemption from the contraception coverage requirement; and
6. The companies have long held themselves out to employees, customers and the public as companies operating under religious

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216. United States v. Windsor, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting) (commenting on the majority's opinion in *Windsor* holding unconstitutional the heterosexual definition of marriage in the Defense of Marriage Act).

217. *See supra* text and accompanying notes 115–24, 147–54.

218. Comment on the definition of "eligible organization" for purposes of Coverage of Certain Preventative Services Under the Affordable Care Act (Oct. 21, 2014), *available at* https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_comments_on_proposed_regs_corp_law_profs_for_submission.pdf. After an eleven-month comment period and the receipt of more than 75,000 comments, the government published a final set of regulations on the definition of "eligible organization" as it pertains to a "closely held for-profit entity." *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41318, 41324, 41346-47 (published July 14, 2015) (to be codified at 45 C. F. R. 147.131 (b) (2) (ii), (b) (4). In addition to the obvious features of not being a nonprofit entity and not being publicly traded, a closely held for-profit entity must have more than 50 per cent of the value of its ownership interest owned directly or indirectly by five or fewer individuals or have an ownership structure that is substantially similar thereto. *Id.* at 41346. Various rules exist with respect to performing the calculation. First, ownership interests owned by a corporation, partnership, estate or trust are considered owned proportionately by such entity's shareholders, partners, or beneficiaries while ownership interests owned by a nonprofit entity are considered owned by a single owner. *Id.* Second, an individual is considered to own the ownership interests owned, directly or indirectly, by or for his or her family. *Id.* at 41347. Family includes only brothers and sisters (including half-brothers and half-sisters), a spouse, ancestors, and lineal descendants. *Id.* Finally, if a person holds an option to purchase ownership interests, he or she is considered to be the owner of those ownership interests. *Id.* With respect to claiming an exemption and accommodation, the organization's highest governing body (such as its board of directors, board of trustees, or owners, if managed directly by its owners) must adopt a resolution or similar action, under the organization's applicable rules of governance and consistent with state law, establishing its objections based on the owners' sincerely held religious beliefs. *Id.* at 41346.

> principles that constrain their business behavior in accordance with the religious beliefs of the shareholders.[219]

This brings to mind Humpty Dumpty scornfully lecturing Alice on the nature of semantics: "When I use a word, it means just what I choose it to mean—neither more nor less."[220] A new reality for the fictional world of corporations now exists. "Puzzling," Alice may have responded, or because it fails his cocktail party "acid test,"[221] Justice Scalia's own soft epithet of "jaw-dropping" may be most apropos.[222]

Having judicially canonized corporate free exercise, the Court then proceeded to determine that shareholders' religious liberties were substantially burdened by financial penalties imposed for non-compliance with the mandate,[223] and that although no-cost contraceptive care may serve a compelling governmental interest,[224] it could be effected by a means less restrictive than requiring these shareholders to fund contraceptive methods in a manner that violates their religious beliefs.[225] And there just happened to be a less restrictive alternative in place, a self-certification exemption offered by HHS to religious employers that still ensured employees and their dependents no-cost care.[226] This is what the Court was talking about in its opening remarks about an expansion of the exemption having "precisely

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219. *Id.* at 2. An interesting example of the fallout of including for-profits within the definition of person in a religious freedom statute recently occurred in Indiana. The Indiana Legislature had specifically defined person in the Religious Freedom Restoration statute to include an individual; an organization organized and operated primarily for religious purposes; and a corporation, partnership, limited liability company, or any other entity that may sue or be sued and that exercises practices that are compelled or limited by a system of religious belief held by individual(s) who have control and substantial ownership of the entity. *See* Ind. Code §34-13-9-7 (Effective July 1, 2015). Faced with an avalanche of negative publicity surrounding the potential use of the statute as a tool to discriminate, primarily on the basis of sexual orientation, the legislature quickly amended the statute to add a definition of "provider" which essentially included for-profits and excluded religious organizations and their clergy and then further amended the statute to prohibit a provider from refusing to offer or provide services, facilities, the use of public accommodations, and goods on the basis, *inter alia*, of race, sex, sexual orientation, and gender identity. *See* Ind. Code §34-13-9-0.7 and §34-13-9-7.5. (Effective July 1. 2015).

220. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS 186 (New American Library 1960). Judicial references to Alice's wonderings number well over 1,000, her encounter with Mr. Dumpty being one of the most frequently cited. Parker B. Potter, Jr., *Wondering About Alice: Judicial References to Alice in Wonderland and Through the Looking-Glass*, 28 WHITTIER L. REV. 175, 176–77 (2006).

221. *See supra* text accompanying note 133.

222. United States v. Windsor, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting).

223. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775–76, 2779 (2014) (noting that if the group health plans do not cover the contraceptives at issue, the corporate plaintiffs will be taxed $100 per day for each affected individual, which in Hobby Lobby's case would amount to $475 million per year).

224. *Id.* at 2780.

225. *Id.* at 2872.

226. *Id.*

zero" impact on female employees of Hobby Lobby and other corporate plaintiffs.[227] That may be true, but in dicta leading up to this finding of a less restrictive approach, the Court chartered a path for corporate employers and religious non-profits to claim an exemption from the exemption-notification process, an impact that is anything but precisely zero.[228] In fact, its impact, if fully implemented, constitutes a violation of the Establishment Clause.[229] The Court wasted no time taking its first step down this path when, three days after deciding *Hobby Lobby*, it issued a temporary injunction prohibiting HHS from requiring a religious employer to certify its religious objections to the mandate on a government-issued form and to send a copy of the completed form to the third-party administrator of its health-insurance plan.[230] But we are getting ahead of ourselves. First, we must discuss the *Hobby Lobby* dicta.

V. THE PROCESS OF EXEMPTION, RELIGIOUS LIBERTY, AND THE ESTABLISHMENT CLAUSE

Before identifying the HHS accommodative approach as the basis for its lesser-restrictive-means holding, the Court in *Hobby Lobby* had a few choice words to say about the viability of no-cost healthcare legislation within the context of a strict scrutiny analysis. And the Court was not positive:

> The most straightforward way [of the Government achieving its desired goal of cost-free contraceptive care] would be for [it] to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown . . . that this is not a viable alternative.[231]

Subsidizing, in whole or in part, the cost of contraceptive drugs and devices, the Court added, may even warrant the creation of entirely new legislative programs in order to satisfy the least restrictive command of the RFRA strict scrutiny test.[232]

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227. *See id.* at 2760 ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and other companies involved in these cases would be precisely zero.").
228. *See infra* notes 232–33, 253, 268–70 and accompanying text.
229. *See infra* notes 271–77 and accompanying text.
230. *Hobby Lobby*, 134 S. Ct. at 2807.
231. *Id.* at 2780.
232. *Id.* at 2781. Justice Ginsburg took objection to what she characterized as this "let the government pay" alternative, arguing it would impede women's receipt of benefits "by requiring them to take

Minimizing the potential fallout of this stark dictum, Justice Kennedy added a concurring comment.[233] He emphasized that the Court, although discussing Hobby Lobby's argument that the Government should pay for the objectionable drugs and devices, withheld judgment on whether this is a "proper response to a legitimate claim for freedom in the health care arena."[234] And echoing Establishment Clause concerns of a unanimous court in *Cutter v. Wilkinson*,[235] he observed that a person's free exercise of religion may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."[236]

So the question remains: will the self-certification process, if challenged directly, satisfy the least-restrictive means test while still providing precisely zero impact to female employees covered under an employer's group health plan? The first hint came three days later with the issuance of an emergency injunction by the Court in *Wheaton College v. Burwell*.[237] Wheaton College, a religious non-profit entity clearly exempt from the mandate, asserted the exemption itself impermissibly burdened its free-exercise rights under RFRA on the theory that sending the government-issued form to the third-party administrator of its health plan made it compliant in providing contraceptive services by triggering the obligation of the administrator to provide the services to which it objects.[238] The language of the government form, EBSA Form 700, requires an authorized representative of the organization to certify that the health coverage it establishes, maintains, or arranges, qualifies for a religious accommodation from providing contraceptives sources without cost sharing.[239] The form then directs the organization to provide a copy of the certification to its health insurance issuer or third-party administrator, as the case may be, "in order for the plan to be accommodated with respect to the contraceptive coverage

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steps to learn about, and to sign up for, a new [government funded and administered] heath benefit," a step Congress did not contemplate. *Id.* at 2802 (Ginsburg, J., dissenting) (quoting Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,888 (July 2, 2013)).

233. *Id.* at 2785–87 (Kennedy, J., concurring).

234. *Hobby Lobby*, 134 S. Ct. at 2786.

235. Cutter v. Wilkinson, 544 U.S. 709 (2005). In *Cutter*, the Court upheld the constitutionality of RLUIPA from a facial attack by prison officials that the accommodation of prisoners' religious rights violated the Establishment Clause. *Id.* at 720. The Court noted, however, that in properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries. *Id.*

236. *Hobby Lobby*, 134 S. Ct. at 2787 (Kennedy, J., concurring). Justice Kennedy believes HHS carried its burden to show the mandate serves a compelling governmental interest in providing insurance coverage that is necessary to protect the health of female employees. *Id.* at 2785–86. Although the four dissenters agree, five votes exist to support an actual finding of fact that the first prong of the RFRA strict scrutiny test is satisfied. *Id.* at 2799 (Ginsburg, J., dissenting).

237. Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014).

238. *Id.* at 2808 (Sotomayor, J., dissenting).

239. *Id.* at 2816 (Appendix).

requirement."[240] With all three female justices dissenting, the Court issued a conditional injunction: if Wheaton College informed HHS in writing of its eligibility for a religious exemption, it need not use Form 700 nor need it send a copy of the form to its third-party administrator, and HHS would be enjoined from enforcing the pertinent provisions of the mandate pending final disposition of appellate review.[241] The interlocutory injunction was issued pursuant to the All Writs Act.[242] Interestingly, the last two Chief Justices of the Court had previously declared that injunctions issued under this statue, to block the operation of a duly enacted law and regulation, in cases where the courts below had not yet adjudicated the merits and where the courts had declined request for similar injunctive relief, were proper only if the legal writs at issue were indisputably clear.[243]

Justice Sotomayor authored a blistering dissent, which was joined by Justice Ginsburg and Justice Kagan.[244]

> Those who are bound by our decisions usually believe they can take us at our word. Not so today. After expressly relying on the availability of the religious-nonprofit accommodation to hold that the contraceptive coverage requirement violates RFRA as applied to closely held for-profit corporations, the Court now, as the dissent in *Hobby Lobby* feared it might, retreats from that position. That action evinces disregard for even the newest of this Court's precedents and undermines confidence in this institution.[245]

After all, as Justice Sotomayor notes, RFRA requires Wheaton to show accommodation "substantially burden[s] [its] exercise of religion." Can it be that availing itself of the very accommodation designed to prevent its participation in administering contraceptive services is a substantial burden? In a word, no. That is because the law requires some entity provide contraceptive coverage. The operation of law imposes the guarantee of contraceptive coverage—not a religious non-profit's election not to be the entity that provides coverage. And, even if the minimally burdensome paperwork necessary for the Government to administer the accommodation could be deemed substantial, then it is the least restrictive means.[246] As Justice Sotomayor points out, the Court has no business rewriting

240. *Id.*
241. *Id.* at 2807.
242. 28 U.S.C. § 1651(a) (2012).
243. Lux v. Rodrigues, 131 S. Ct. 5, 7 (2010) (Roberts, C.J., in chambers); Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers).
244. *Wheaton Coll.*, 134 S. Ct. at 2807 (Sotomayor, J., dissenting).
246. *Id.* at 2808.
246. *Id.* at 2814.

administrative schemes,[247] and even if it did, the Court's scheme of using two stamps (where the non-profit who wishes to be exempt notifies DHS, who then has to notify the unnamed third-party administrator) as opposed to one (the nonprofit notifies its third-party administrator directly on the simple form provided) does anything but make the accommodation process easier.[248] Justice Sotomayor concluded the Court failed to appreciate "a simple truth: The Government must be allowed to handle the basic tasks of public administration in a manner that comports with common sense."[249]

The grant of an interlocutory injunction in *Wheaton College* was by no means the final word and may well have raised more questions than it answered:

- What are the rights of Wheaton College that are "indisputably clear?"
- What part of RFRA puts on hold the "written equivalent of raising a hand in response to the government's query as to which religious organizations want to opt out[?]"[250]
- Does the *Wheaton College* injunction strengthen the *Hobby Lobby* dicta and foreshadow how the Court will deal with objections to the exemption notification process and thus, to the future viability of the mandate?
- If the objections are upheld on the merits, does that amount to an "unlawful fostering of religion?"
- Will the recent HHS regulation of an alternative notice process make a difference?
- How will Justice Kennedy untie the Gordian knot of the "let the government pay"[251] polemic, as voiced by the other four members of the *Hobby Lobby* majority and the four dissenters?[252]

Some religious employers appear to think the *Hobby Lobby* dicta is their legal ticket to salvation from complicity in the grave moral evil of facilitating contraception through participation in the exemption notification process. It was the cornerstone of their less-restrictive alternative pitch to the District of Columbia Court of Appeals in the first federal appellate case to reach the merits of the validity of the HHS regulation promulgated after the *Wheaton College* injunction.[253]

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247. *Id.*
248. *Id.* at 2815.
249. *Id.*
250. Priests for Life v. U.S. Dep't of Health and Human Servs., 772 F.3d 229, 250 (D.C. Cir. 2014).
251. *Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting).
252. *See supra* notes 232–37 and accompanying text.
253. Joint Supplemental Brief of Appellants at 19, Priests for Life v. U.S. Dep't of Health and Human Servs., 772 F.3d 229 (D.C. Cir. 2014) (No. 13-5368).

Priests for Life v. U.S. Department of Health and Human Services[254] forms the jumping-off point as to why religious objections to providing contact information to an insurance representative or a third-party administrator do not constitute a substantial burden on religious exercise and why any argument that they do, runs afoul of the Establishment Clause.

There, eleven Catholic organizations (who employ both Catholics and non-Catholics) in the D.C. area claimed the regulatory accommodation that permitted them to opt out of the contraceptive coverage requirement under the ACA itself, imposed an unjustified substantial burden on plaintiffs' religious exercise in violation of RFRA.[255] Plaintiffs asserted that the notice they submit in requesting accommodation is a "trigger" that activates substitute coverage, and that the government will "hijack" their health plans and use them as "conduits" for providing contraceptive coverage to their employees and students.[256] Plaintiffs claimed the government has no compelling interest in requiring notice of their desire to opt out and has not shown the notice requirement is the least restrictive means."[257] The D.C. Circuit disagreed.

The court stated that notice was not a substantial burden on the objector.[258] Rather, completing the one-page form was the equivalent to raising a hand in response to a government query.[259] And the suggestion by plaintiffs that submitting the one-page form implicated them in the process of providing contraceptive coverage was also meritless.[260] Burdens that fall to third parties are not substantial burdens.[261] And here, the opt-out (accommodation) shifts to the government, a third party, the obligation to insure for female contraceptive services (the requirement the objector opposes). At bottom, the free exercise of religion does not allow a religious objector to dictate Government conduct simply because it offends sincerely

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254. After the HHS regulation of August 27, 2014, the process of exemption, as stated by the Court in *Priests for Life*, "works simply:"

> A religious organization that objects on religious grounds to including coverage for contraception in its health plan may so inform either the entity that issues or administers its group health plan or the Department of Health and Human Services. Delivery of the requisite notice extinguishes the religious organization's obligation to contract, arrange, pay, or refer for any coverage that includes contraception. The regulations then require group health plan insurers or administrators to offer separate coverage for contraceptive services directly to insured women who want them, and to inform beneficiaries that the objecting employer has no role in facilitating that coverage.

772 F.3d at 236.

255. *Id.* at 239.
256. *Id.* at 237.
257. *Id.*
258. *Id.* at 247.
259. *Id.* at 250.
260. *Id.* at 252.
261. *Id.* at 248.

held religious sensibilities, as incidental effects of government programs that do not coerce individuals to *act* in a manner contrary to their religious beliefs are permissible.[262] The "act" here is filling out a form, which is not against Catholic beliefs, and the beneficiaries receive coverage—not due to the opt-out form but rather because the ACA imposes that obligation.[263] In fact, the court characterized the alleged burden of the opt-out Form "a single sheet of paper" as "*de minimis*."[264]

In short, the substantial burden argument is groundless:

> Religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out. They have no RFRA right to be free from the unease, or even anguish, of knowing that third parties are legally privileged or obligated to act in ways their religion abhors. . . . "Government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[265]

Thus, RFRA was no aid to the *Priests for Life* objectors because RFRA only grants objectors a right to be free of any unjustified substantial governmental burden on their religious exercise.[266]

The court went on to find that even if the accommodation was a substantial burden, it furthered a compelling governmental interest by promoting public health (reducing unwanted pregnancies and medical risks that flow from the same to mother and child) and gender equality (unwanted pregnancies bear greater economic burdens on women).[267] Finally, the D.C. Circuit rejected the plaintiffs' reliance on the *Hobby Lobby* dicta previous discussed. Plaintiffs argued that the Government could offer such lesser restrictive alternatives as "tax deductions or credits for the purchase of contraceptive services, expand eligibility for existing federal programs that provide free contraception, allow women to submit receipts to the federal government for reimbursement, or provide incentives for pharmaceutical

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262. *Id.*
263. *Id.* at 253.
264. *Id.* at 249.
265. *Id.* at 246 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988)).
266. Other circuits agree on the lack of a substantial burden. Little Sisters of the Poor Home for the Aged, Denver v. Burwell. No. 13-1540, 2015 WL 4232096, at *29-30 (10th Cir. 2015); Wheaton Coll. v. Burwell, No.14-2396, 2015 WL 3988356, at *3-5 (7th Cir. 2015); East Texas Baptist Univ. v. Burwell, No. 14-20112, 2015 WL 3852811, at *5 (5th Cir. 2015); Geneva Coll. v. Sec'y of the U.S. Dep't of Health and Human, Serv., 778 F. 3d 422, 428 n. 3, 442 (3d Cir. 2015), *stay denied sub nom.*, Zurik v. Burwell, Nos. 14A1065, 14-1418, 2015 WL 3947586 (2015).
267. *Priests for Life*, 772 F.3d at 264.

companies to provide contraceptives free of charge to women."[268] All of these alternatives would substantially impair the government's interest and pose financial, logistical, informational, and administrative burdens on women.[269] Quoting Justice Kennedy's concurrence in *Hobby Lobby*, the court noted that RFRA does not permit religious exercise to "unduly restrict other persons, such as employers, in protecting their own interests, interests the law deems compelling."[270]

This in turn raises an Establishment Clause issue. In *Estate of Thornton v. Caldor*,[271] the Supreme Court held that a statute that favors one religion over all other interests violates the Establishment Clause because "[t]he First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct . . ."[272] Accordingly, the Court struck down a Connecticut statute providing Sabbath observers with an absolute and unqualified right not to work on their Sabbath as a violation of the Establishment Clause, since the primary effect of the statute was to impermissibly advance religion.[273]

Citing *Caldor*, the Court in 2005 rejected an Ohio prisoners' RLUIPA challenge that prison officials failed to accommodate their exercise of a "nonmainstream" religion by

> denying them access to religious literature, denying them the same opportunities for group worship that are granted to adherents of mainstream religions, forbidding them to adhere to the dress and appearance mandates of their religions, withholding religious ceremonial items that are substantially identical to those that the adherents of mainstream religions are permitted, and failing to provide a chaplain trained in their faith.[274]

The Court stated:

> courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries, and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths.[275]

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268. *Id.* at 265.
269. *Id.*
270. *Id.* at 266 (quoting Hobby Lobby Stores, Inc. v. Burwell, 134 S. Ct. 2786-87 (Kennedy, J., concurring)).
271. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).
272. *Id.* at 710 (quoting Otten v. Baltimore & O.R. Co., 205 F.2d 58, 61 (2d Cir. 1953)).
273. *Id.*
274. Cutter v. Wilkinson, 544 U.S. 709, 713 (2005).
275. *Id.* at 709.

In other words, a permissive accommodation of religion's exercise must not "devolve into an unlawful fostering of religion."[276] As the Establishment Clause is a constitutional preexisting external limit on any rights confined by statute, it supersedes any application of RFRA that violates it. Thus, the argument that a particular government rule or measure is not the least restrictive approach to accommodate a person's religious liberties is trumped if the consequence of that argument violates the Establishment Clause.[277]

VI. CONCLUSION

Repudiating the assertion of Justice Ginsburg, that the accommodation granted to Hobby Lobby and Conestoga may impact the rights of thousands of their female employees or dependents of their employees,[278] the Court proclaimed the impact precisely zero.[279] These folks, the Court states, have access to insurance without cost-sharing for all FDA-approved contraceptives, access that furthers an assumed compelling public health interest.[280] So when Jane Doe, a thirty-five-year-old mother of four, making close to minimum wage as a retail clerk at a pro-life and exempt Christian-based family corporation, gets seen by her family physician for artificial contraception needs, there should be precisely zero problems with the no-cost delivery of that care and any follow-up, such as a prescription or an intrauterine device. No doubt about it, according to the Court.[281] Although Ms. Doe's insurance card will show a subscription to a plan which does not provide contraceptive services, her employer's health insurer or a third-party administrator will have received all the necessary information from the employer to administer her insurance claim. Or will it have all the information? Can her corporate employer effectively deny Ms. Doe's care by claiming its human shareholders are religiously prohibited from providing a notice of exemption? Surely not. Surely, the injunction in *Wheaton College* will not obtain permanent status. Surely, the Court will not back off its assurance of meaningful access by equating the exemption-notification process with a substantial burden on religious exercise. We know the three

276. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334–35 (1987).

277. Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemption from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 375 (2014).

278. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting).

279. *Id.* at 2760 (majority opinion).

280. *Id.* at 2760, 2780.

281. *See id.* at 2760 ("Under [an HHS accommodation for corporate religious objections, female employees] would still be entitled to all FDA-approved contraceptives without cost sharing.").

female justices are not totally convinced.[282] It defies belief the Court would backtrack. The Court did not contest the argument by HHS that the system of religious exemption and simultaneous full contraceptive access imposes no net burden on the insurance companies that are required to provide the coverage.[283] Five justices believe the contraceptive mandate serves a compelling public health interest.[284] The accommodative system in place is an "alternative that achieves all of the Government's aims while providing greater respect for religious liberty."[285] Alternate notice to the HHS is now on the table, such that HHS can directly rely on this notification "to facilitate the provision of full contraceptive coverage under the [ACA]."[286] How else is full contraceptive coverage effectuated other than by HHS receiving the relevant contact information about the insurance payors from the employers, the ones who obviously possess this information?

For-profits now have an exemption. Can they, with a straight face at a cocktail party or before the highest court in the land, contend this right of exemption is self-executing, and their simply saying so is the end of the matter. No notification to anyone is required; just leave us alone. It can be said, but it cannot constitutionally be done. The Court has already endorsed employer notice to HHS;[287] it has assured all of us "who are bound by [their] decisions"[288] that full and meaningful access continues in the face of an expanded exemption;[289] and it has effectively held that the will of the people, expressed in the passage of the ACA, will not be impinged.[290] The executive branch of government has read *Hobby Lobby* and *Wheaton*, accepted a role as the recipient of the exemption notice, and promulgated proposed regulations to coordinate the delivery of no-cost insured care.[291] Cries of being complicit with, facilitating, initiating or triggering a moral and evil act, discussed in the preceding section, cannot carry the day.[292] These may very well be the sincere beliefs of conscientious objectors, but those beliefs, under the law, are not substantially burdened by sending what amounts to a postcard to HHS with the name, e-mail address, and phone number of their insurance

282. Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (Sotomayor, J., dissenting, joined by Justices Ginsburg and Kagan).
283. *Hobby Lobby*, 134 S. Ct. at 2759.
284. *See supra* note 237.
285. *Hobby Lobby*, 134 S. Ct. at 2759.
286. *Wheaton Coll.*, 134 S. Ct. at 2807.
287. *See id.* at 2807 (conditioning the issuance of an injunction against enforcement of employer notification to healthcare representatives on EBSA form 700 upon the employer notifying HHS, in writing, of its religious objection to providing coverage for contraceptive services).
288. *Id.* at 2808 (Sotomayor, J., dissenting).
289. *Hobby Lobby*, 134 S. Ct. at 2759–60.
290. *See id.* at 2759–60 (finding that all of the Government's aims of no-cost contraceptive coverage under the ACA are not impeded by expanding the HHS accommodation to owners of for-profit corporations who have religious objections to providing group health contraceptive coverage).
291. *See supra* notes 29–33 and accompanying text.
292. *See supra* notes 253–57 and accompanying text.

contact. Such a holding would result in the judicial blessing of the following principle of law:

> Consistent with the Encyclical Letter of Pope Paul VI on the Regulation of Birth, objections to the contraception mandate of the ACA that are compelled by a sincere religious belief, including but not limited to the mere notification of opting out of the mandate, are hereby ESTABLISHED as immutable and unconditional principles of the United States of America.

This principle may bear a papal imprimatur, but it violates the first clause of the First Amendment to the U.S. Constitution because the "First Amendment . . . gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities."[293] So said Learned Hand in 1953,[294] and so said the Court in 1985, quoting Judge Hand.[295] So should the Court re-state and re-affirm this principle today.

293. Otten v. Baltimore & O.R. Co., 205 F.2d 58, 61 (2d Cir. 1953).
294. *Id.*
295. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (quoting *Otten*, 205 F.2d at 61).