No. ____

IN THE
Supreme Court of the United States

JEROME E. LISTECKI, Archbishop, as Trustee of the Archdiocese of Milwaukee Catholic Cemetery Perpetual Care Trust,
Petitioner,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

BRADY C. WILLIAMSON
GODFREY & KAHN, S.C.
One East Main Street,
Suite 500
Madison, WI 53703
(608) 257-3911
bwilliam@gklaw.com
Counsel of Record

NEAL KUMAR KATYAL
COLLEEN E. R. SINZDAK
EUGENE A. SOKOLOFF*
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

*Admitted only in New York; supervised by members of the firm.

Counsel for Petitioner

QUESTIONS PRESENTED

The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the federal government from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability, unless that rule represents the least restrictive means of achieving a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1.

The Second, Eighth, and District of Columbia Circuits have applied RFRA whenever a person's religious exercise is burdened by the application of federal law. The Sixth and Ninth Circuits, by contrast, maintain that RFRA applies only to suits in which the government is a party. The Seventh Circuit deepened that split in this case, concluding that RFRA's protections are limited to litigation with the government, and holding that a statutorily appointed officer fulfilling a federal-law duty to pursue claims on behalf of a bankruptcy estate is not acting "under color of law."

The Seventh Circuit in this case also acknowledged it had created a split on yet another question crucial to the scope of RFRA's protections when it held—contrary to the Eighth Circuit—that the Bankruptcy Code's protection of creditors represents a compelling governmental interest.

The questions presented are:

1. Whether RFRA shields religious exercise from burdensome applications of federal law only in litigation against the government, and—even if it does—whether statutorily appointed officers carrying out federal-law duties act "under color of law."

2. Whether the Bankruptcy Code's protection of creditors is a compelling governmental interest.

PARTIES TO THE PROCEEDING

This case arises from the Chapter 11 bankruptcy of the Archdiocese of Milwaukee.

Archbishop Jerome E. Listecki filed the adversary proceeding now before the Court in his capacity as the Trustee of an independent, non-debtor state-law trust, the Archdiocese of Milwaukee Catholic Cemetery Perpetual Care Trust (the "Trust" or the "Cemetery Trust").

The Official Committee of Unsecured Creditors (the "Committee"), appointed by the bankruptcy court pursuant to 11 U.S.C. § 1102, represents the interests of the bankruptcy estate for the purposes of this adversary proceeding by stipulation of the parties.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 780 F.3d 731. Pet. App. 1a-42a. The District Court's decision and order is reported at 496 B.R. 905. Pet. App. 43a-73a. The Bankruptcy Court's decision is reported at 485 B.R. 385. Pet. App. 74a-88a.

JURISDICTION

The Seventh Circuit entered judgment on March 9, 2015. On May 13, 2015, Justice Kagan granted Petitioner's application for an extension of time within which to file a petition for a writ of certiorari to and including July 7, 2015. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Religious Freedom Restoration Act ("RFRA") provides:

> **(a) In general**
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> **(b) Exception**
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> **(c) Judicial relief**
>
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a

> government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-1. Additional relevant provisions are included in the Petition Appendix at 89a.

INTRODUCTION

Congress enacted the Religious Freedom and Restoration Act to "provide very broad protection for religious liberty." *Burwell* v. *Hobby Lobby*, 134 S. Ct. 2751 (2014). The Seventh Circuit's opinion in this bankruptcy case sharply curtails that protection: It leaves religious freedoms vulnerable to encroachment by federal laws asserted in private litigation. And it makes free exercise rights the cost of admission for religious organizations entering Chapter 11. In the process, the decision deepens one circuit split and creates another. This Court's intervention is urgently needed.

First, The Seventh Circuit joined the Sixth and Ninth Circuits in holding that RFRA provides *no* protection to religious groups burdened by federal law, so long as the federal law claims are asserted by private litigants. That holding is squarely at odds with the decisions of the Second, Eighth, and District of Columbia Circuits, which all permit RFRA defenses in private litigation. Even worse than this now 3-3 circuit split, the Seventh Circuit's opinion is at odds with the statute's clear mandate that RFRA

applies to "all Federal law, and the implementation of that law." 42 U.S.C. § 2000bb-3(a). The Seventh Circuit's refusal to acknowledge that mandate means federal statutes will be used to curb religious freedoms Congress specifically intended to preserve.

The Seventh Circuit compounded its error in holding that RFRA applies only in litigation with the government by adopting an unduly constrained definition of who qualifies as the "government." Respondent, the Official Committee of Unsecured Creditors, is a statutorily appointed officer in this bankruptcy proceeding. In bringing its counterclaims, the Committee fulfilled a duty created by federal law, and even received qualified immunity rooted in federal statute. Nevertheless, the Seventh Circuit held that the Committee was not "acting under color of law." That finding cannot be squared with this Court's "color of law" precedent. It also makes it nearly impossible for RFRA to protect religious organizations' fundamental free exercise rights in bankruptcy proceedings, in which crucial roles are typically played by statutorily appointed officers like the Official Committee of Unsecured Creditors.

Second, the Seventh Circuit made doubly certain that religious organizations would be left unshielded in bankruptcy proceedings by holding that maximizing creditors' recovery in bankruptcy represents a compelling governmental interest sufficient to overcome a burden on the free exercise of religion. As the

Seventh Circuit expressly acknowledged, that holding creates a split with the Eighth Circuit, which reached precisely the opposite conclusion. And it forces the scores of religious organizations that file under Chapter 11 each year to choose between sacrificing their religious freedoms or facing financial ruin.

This Court's intervention is urgently needed to resolve these circuit splits and restore the crucial free exercise protections the Seventh Circuit's decision rolled back.

STATEMENT

A. Background

1. For nearly 160 years, the Archdiocese of Milwaukee has operated and maintained Catholic cemeteries and mausoleums in the Milwaukee area. Pet. App. 45a. The Archdiocese's cemeteries and mausoleums occupy approximately 1,000 acres and provide a final resting place for more than 500,000 Catholics, with about 3,000 individuals buried each year. *Id*. Petitioner is ultimately responsible for administering these facilities and providing for their care and maintenance. *Id.* at 47a.

The care and maintenance of Milwaukee's Catholic cemeteries is a fundamental exercise of Petitioner's Catholic faith. Among the core tenets of the Church is the belief in the ultimate resurrection of the human body and its reunion with the soul. *Id*. at 47a. That belief entails the obligation to treat the bodies

of the deceased faithful with dignity and respect. *Id*. Accordingly, Canon law provides that Catholic cemeteries are blessed and consecrated spaces set aside for Christian burial. *Id.* at 46a.

The canons governing cemeteries in the Church's 1917 Code of Canon Law and its 1983 revision emphasize the Catholic belief that cemeteries are sacred places, not mere property. *Id.* at 46a. As the Archdiocese's 1979 "Guidelines for Christian Burial" explains:

> Not only is the Catholic cemetery a sacred place, a place of prayer, and a place reflecting our beliefs and traditions, it is also for the community a sign of the link among all the faithful, living and dead.

Id. at 46a-47a.

2. Abiding by these religious mandates and traditions, the Archdiocese, for nearly a century, has set aside funds to provide for the perpetual care of its cemeteries. *Id.* at 45a. Canon law obligates the Archdiocese to apply these funds to their designated purpose, which, as the Archdiocese has promised to hundreds of thousands of Catholic faithful and their families, is the perpetual care and maintenance of cemetery property. *Id*. at 45a-46a.

In April 2007, acting to protect the remains and choices of those long deceased, the Archdiocese furthered its moral and canonical obligations by formalizing a trust under Wisconsin law. *Id*. at 45a. Petitioner's predecessor sought approval from the

Vatican to transfer the perpetual care funds into the formal Trust as a means of providing "improved protection of these funds from any legal claim and liability." *Id.* at 3a. With Vatican approval, the Archdiocese transferred approximately $55 million that had gradually accumulated for the cemeteries into the Cemetery Trust. *Id.* at 45a. Canon law prohibits Petitioner from alienating the Trust's funds without approval from the Church hierarchy. *Id.* at 48a.

B. The Adversary Proceeding

1. In 2011, facing litigation on behalf of the victims of clergy sexual assault, the Archdiocese of Milwaukee filed for bankruptcy under Chapter 11.

Shortly thereafter, Petitioner filed an adversary proceeding against the Committee. Among other things, Petitioner sought a declaration that neither the Cemetery Trust nor its funds were property of the estate. *Id.* at 75a. Petitioner argued that compelling the release of the cemetery funds transferred in 2007 to the Trust would impermissibly burden Petitioner's exercise of religion by interfering with his canonical obligation to provide for the perpetual care of the cemeteries, in violation of the Free Exercise Clause of the First Amendment and RFRA. *Id*.

Because the Archdiocese continued to operate the estate as debtor in possession, Petitioner would have been effectively both the plaintiff (as Trustee of the Cemetery Trust) and a defendant (as Archbishop in

charge of the Archdiocese's estate) in the adversary proceeding. Accordingly, Petitioner, the U.S. Trustee, and the Respondent Official Committee of Unsecured Creditors entered into a court-approved stipulation granting the Committee "derivative standing" to defend against Petitioner's claims and "to assert and litigate" counterclaims brought for the benefit of the bankruptcy estate under the Code's turnover and avoidance provisions. *Id.* at 59a.

Respondent moved for partial summary judgment on Petitioner's Free Exercise and RFRA claim. In response, Petitioner submitted a declaration attesting to the importance of cemeteries to the Catholic faith, explaining his ecclesiastical responsibilities to provide for the care of the Archdiocese's cemeteries, and describing the substantial burden that any diminution in the Trust's funds would impose on the Trustee, the Trust, and the Archdiocese. *Id.* at 5a, 90a-103a.

2. The bankruptcy court concluded that neither RFRA nor the First Amendment applied to the adversary proceeding, and granted Respondent's motion. *Id.* at 88a. The district court reversed. Holding that both RFRA and the First Amendment were implicated by Respondent's counterclaims, the district court found that the undisputed burden on Petitioner's exercise of religion was not justified by a compelling governmental interest, and granted

summary judgment for Petitioner under Fed. R. Civ. P. 56(f)(1). *Id.* at 69a, 73a.[1]

C. The Decision Below

The Seventh Circuit reversed.

1. The court began by considering whether RFRA applies to turnover and avoidance claims litigated on behalf of a bankruptcy estate by a creditors' committee appointed by the U.S. Trustee pursuant to 11 U.S.C. § 1102.

a. The panel focused on the Act's prohibitory language, which provides that "[g]overnment shall not substantially burden a person's exercise of religion" unless "it demonstrates" that the burden results from the "least restrictive means" of advancing a compelling state interest. Pet. App. 7a. In the Seventh Circuit's view, that language established a burden-shifting test that could only be satisfied by

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[1] Respondent moved to vacate the judgment and to recuse the court from any further litigation related to the Cemetery Trust when it came to light that a number of the judge's relatives were buried in the Archdiocese's cemeteries, and that the judge had paid for his parents' burial plot in 1975, some 17 years before he became a federal judge. *Id.* at 5a-6a. The district court denied Respondent's motions. Because the Seventh Circuit's vacatur of the summary judgment order automatically reassigned the case to a different judge by circuit rule, the court of appeals did not reach the merits of the recusal motion. *Id.* at 37a-38a. The bankruptcy proceeding remains pending.

the government itself as a party to litigation. *Id.* at 7a-8a. The opinion also cited legislative history suggesting that Congress was concerned with eliminating "Government interference" and "Government actions singling out religious activities for special burdens." *Id.* at 9a. Accordingly, the court concluded that "RFRA does not apply when the 'government,' as defined in RFRA, is not a party to the action." *Id.* at 10a.

In doing so, the court acknowledged that it was taking sides in a circuit split. Indeed, much of its discussion relied on the *dissent* in a Second Circuit case that applied RFRA to bar a private party suit. *See id.* at 8a (quoting *Hankins* v. *Lyght*, 441 F.3d 96, 114-115 (2d Cir. 2006) (Sotomayor, J., dissenting)). But the court did not engage with the reasoning of the Second Circuit's majority opinion or discuss decisions of the Eighth and D.C. Circuits applying RFRA without regard to the identity of the litigants.

b. The court of appeals next addressed whether Respondent, as a statutorily-designated creditors' committee, qualified as the "government" under RFRA. The Act defines "government" to include persons operating "under color of law." Pet. App. 10a. Drawing on case law interpreting analogous language in 42 U.S.C. § 1983, the court considered whether there was a sufficiently "close nexus" between Respondent and the government, or whether Respondent was carrying out a "public function" in

pursuing claims on behalf of the estate. *Id.* at 11a-17a.

The court rejected Petitioner's arguments that the role of the U.S. Trustee and the bankruptcy court in appointing and supervising a creditors' committee provided sufficient evidence of a nexus with the government. *Id.* at 11a-13a. It dismissed as "private ordering" Respondent's court-approved derivative standing to assert estate claims. *Id.* at 13a-14a. And it found that the grant of qualified immunity to creditors' committees for actions taken in furtherance of creditor interests, *see* 11 U.S.C. § 1103(c), was no different from common law immunities applied in tort and corporate law. *Id.* at 14a-15a.

The court went on to conclude that Respondent was not carrying out a "public function" when it brought counterclaims on behalf of the estate. The panel explained that the Bankruptcy Code gives the authority to litigate such claims to the bankruptcy trustee—"not to the United States Trustee or any other governmental entity." *Id.* at 15a-17a. Recovering transfers is therefore "not the exclusive prerogative of the government." *Id.* at 16a-17a. To the extent Respondent had some connection with the government, the court found that it was analogous to that of a public defender, who is employed by the government, but whose duty is "advancing the undivided interests of his client." *Id.* at 17a (quoting *Polk County* v. *Dodson*, 454 U.S. 312 (1981) (internal quotation marks omitted)). Relying on *Polk County*,

the panel held that a creditors' committee's "core function" of advancing creditor interests meant that it was not acting under color of law. *Id.*

2. Having concluded that RFRA did not apply to the adversary proceeding, the court considered whether the application of the turnover and avoidance provisions to the Trust would violate the First Amendment.

a. The court began by holding that the Bankruptcy Code provisions dealing with estate property were "neutral, generally applicable laws." Pet. App. 21a-22a (quoting *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014)). Under Seventh Circuit precedent, however, that conclusion was not dispositive. *Id.* at 27a (citing *Vision Church* v. *Village of Long Grove*, 468 F.3d 975, 996 (7th Cir. 2006)). The panel thus went on to "apply the pre-[*Employment Division* v. *Smith*, 494 U.S. 872 (1990)] balancing test" and consider whether the provisions represented a narrowly tailored means of advancing a compelling governmental interest. It "accept[ed] as true that the Code's application to the [Trust] would substantially burden [Petitioner's] religious beliefs without deciding the issue." *Id.* But it concluded that the "the protection of creditors * * * is a compelling governmental interest that can overcome a burden on the free exercise of religion." *Id.* at 28a.

Citing the "long history" of the Bankruptcy Code and the "broad scope and remedial nature" of the challenged provisions, the Seventh Circuit analo-

gized the Code to the social security system. *Id.* at 29a-30a (citing *United States* v. *Lee*, 455 U.S. 252, 258 (1982)). Like social security, the court explained, bankruptcy "provide[s] a support system to those who need it." *Id.* at 30a.

At the same time, the court squarely "disagree[d] with the Eighth Circuit's finding that the Code in general * * * do[es] not present a compelling governmental interest." *Id.* at 32a (citing *In re Young*, 82 F.3d 1407, 1416-17 (8th Cir. 1996) ("*Young I*"), *cert. granted, opinion vacated and remanded on other grounds sub nom. Christians* v. *Crystal Evangelical Church*, 521 U.S. 1114, *reinstated on remand sub nom. In re Young*, 141 F.3d 854 (8th Cir. 1998) ("*Young II*")). "Because our decision creates a circuit split," the panel explained, "this opinion has been circulated among all judges of this court in regular active service." *Id.* at 33a n.3.

The court of appeals concluded by holding that the turnover and avoidance provisions were "narrowly tailored" for First Amendment purposes, disposing of Petitioner's Free Exercise Clause claims.[2]

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[2] Because the Seventh Circuit had already held that RFRA did not apply, it did not reach the question of whether the turnover and avoidance provisions could pass RFRA's "least restrictive means" test.

REASONS FOR GRANTING THE PETITION

I. THIS COURT'S REVIEW IS NECESSARY TO RESOLVE A CIRCUIT SPLIT OVER RFRA'S SCOPE.

In holding that RFRA applies only to litigation in which the government is a party, the Seventh Circuit joined the wrong side of a longstanding split over the breadth of RFRA's protections. The court of appeals then added insult to injury by adopting a cramped understanding of who qualifies as the "government," misapplying this Court's "color of law" precedent and further diminishing the scope of RFRA's protective reach.

A. The Circuits Are Sharply Divided Over Whether RFRA Applies In Suits Among Private Parties.

1. The split here is obvious: The Second, Eighth, and District of Columbia Circuits apply RFRA whenever federal law burdens religious exercise—regardless of the identity of the parties involved. Accordingly, in a case very similar to this one, the Eighth Circuit held that RFRA was a defense to a bankruptcy trustee's suit to avoid pre-petition contributions to the debtor's church. *Young I*, 82 F.3d at 1417. And, in *Hankins* v. *Lyght*, 441 F.3d 96 (2d Cir. 2006), the Second Circuit held that RFRA allows parties who "claim that a federal statute * * * substantially burdens the exercise of their religion to assert the RFRA as a defense to *any action* asserting a claim based on [that statute]." *Id.*

at 104 (emphasis added). Likewise, in *E.E.O.C.* v. *Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996), the D.C. Circuit applied RFRA to bar both the EEOC's and a private plaintiff's gender discrimination claims against a religious employer. The D.C. Circuit explained that, through RFRA, Congress had "create[d] a compelling interest defense for the benefit of those whose free exercise rights would be burdened by a neutral federal law of general application." *Id.* at 470 (emphasis omitted).

By contrast, the Sixth and Ninth Circuits, like the Seventh Circuit here, read RFRA to apply only to claims or defenses against the government. *See* Pet. App. 9a (observing that the Sixth and Ninth circuits "have found RFRA does not apply in suits where the government is not a party"); *General Conf. Corp. of Seventh-Day Adventists* v. *McGill*, 617 F.3d 402, 411 (6th Cir. 2010) ("Congress did not intend [RFRA] to apply against private parties."); *Sutton* v. *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999) (holding that a plaintiff may not bring a religious discrimination suit against a private employer under RFRA, unless the employer acted "under color of law"); *see generally* Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 Va. L. Rev. 343 (2013).

The Seventh Circuit attempted to diminish the scope of that split by suggesting that the Second Circuit is the only circuit to hold that RFRA applies

to private parties after directly considering the question. But it is obvious that, under the Seventh Circuit's holding, the Eighth Circuit should not have allowed RFRA to apply in the bankruptcy suit in *Young*, and the D.C. Circuit should not have allowed RFRA to be used as a defense against the private plaintiff in *Catholic University*. The split with those circuits is square.

The Seventh Circuit also downplayed its disagreement with the Second Circuit by pointing out that *Hankins* involved a suit in which the government *could* have been a party. But again, that distinction is immaterial. The *Hankins* court explicitly stated that "RFRA's language surely seems broad enough to encompass" a suit "by a private party seeking relief under a federal statute against another private party who claims that the statute substantially burdens his or her exercise of religion." 441 F.3d at 103. That is why the Seventh Circuit opinion relies heavily on the *dissent* in *Hankins*.

To be sure, the *Hankins* court rested its holding on the narrower premise that RFRA applies at least where a statute is "enforceable by EEOC as well as private plaintiffs" because "the substance of the ADEA's prohibitions cannot change depending on whether it is enforced by the EEOC or an aggrieved private party." *Id.* But the same logic applies here: The substance of the Bankruptcy Code cannot change depending on whether a motion or adversary proceeding enforcing its provisions is filed by the

U.S. Trustee or a private party. As the Eighth Circuit explained, "RFRA * * * effectively amended the Bankruptcy Code, and has engrafted the additional clause * * * that a recovery that places a substantial burden on a debtor's exercise of religion will not be allowed unless it is the least restrictive means to satisfy a compelling governmental interest." *Young II*, 141 F.3d at 861.

Nor is the split with the Second Circuit diminished by dicta in a footnote in that court's subsequent decision in *Rweyemamu* v. *Cote*, as the Seventh Circuit suggested. Pet. App. 9a-10a (citing 520 F.3d 198, 203 & n.2 (2d Cir. 2008)). The *Rweyemamu* court expressly acknowledged that a RFRA "argument [wa]s not available * * * because defendants knowingly and expressly waived a RFRA defense." 520 F.3d at 198, 201; *see id.* at 204 (RFRA "is not at issue here"). And, of course, the three-judge panel in *Rweyemamu* was powerless to overrule *Hankins* even if it wanted to. That could only happen if the Second Circuit took the extremely rare step to hear the issue en banc, and in the seven years since *Rweyemamu*, it has not done so. If anything, the *Rweyemamu* footnote underscores the need for this Court's intervention to resolve a question that has produced both inter- and intra-circuit conflict.

2. The Second, Eighth, and D.C. Circuits have the better view of how that question should be decided. By its own terms, RFRA "applies to all Federal law, and the implementation of that law, whether statu-

tory or otherwise * * *." 42 U.S.C. § 2000bb-3(a). A suit by a private plaintiff to enforce a federal law is indisputably a suit involving the "implementation of that law." *See Young I,* 82 F.3d at 1417 (applying RFRA to bankruptcy case between private plaintiffs because the court's enforcement of the code "would involve the implementation of federal bankruptcy law."); *Hankins*, 441 F.3d at 103 (RFRA's reference to "all federal law, and the implementation of that law * * * easily covers" private suits to enforce federal law).

Moreover, the position of the Sixth, Seventh, and Ninth Circuits flies in the face of the plain text of RFRA and Congress's expressed intent to "restore the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and to guarantee its application *in all cases* where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (emphasis added). As the Seventh Circuit recognized, that test can and does apply to suits among private parties. *See* Pet. App. 19a (discussing *McDaniel* v. *Paty*, 435 U.S. 618 (1978)). It naturally follows that RFRA should also apply to those suits.

The Seventh Circuit, like the Sixth and Ninth Circuits before it, reached a contrary conclusion only by ignoring the overwhelming textual evidence that RFRA applies against private parties. Instead, the Seventh Circuit focused on the language of the Act's "least restrictive means" test, which states that

"Government may substantially burden a person's exercise of religion only if it demonstrates that" doing so furthers a compelling interest through the "least restrictive means." 42 U.S.C. § 2000bb-1(b). The court concluded that "[a] private party cannot step into the shoes of the 'government' and demonstrate a compelling governmental interest and that it is the least restrictive means of furthering that compelling interest because the statute explicitly says that the 'government' must make this showing." Pet. App. 8a (citing *Hankins*, 441 F.3d at 114-115 (Sotomayor, J., dissenting); *Rweyemamu*, 520 F.3d at 203 n.2).

But that reasoning cannot be reconciled with the statute's specific mandate that RFRA's protections apply to "*all* Federal law and its implementation." Surely it makes more sense to believe that a private plaintiff may step into the shoes of the government than to conclude that Congress implicitly created a giant exception to RFRA's reach through the least restrictive means provision. Indeed, the Seventh Circuit's reasoning is all the more puzzling given that the least restrictive means provision establishes a test that tightly cabins those instances where the government may burden free exercise. And yet, for the Seventh Circuit, it simultaneously opens a massive loophole that permits the government to

restrict free exercise through federal statutes, so long as they are enforced by private plaintiffs.[3]

3. The Seventh Circuit's erroneous conclusion in this case demonstrates the need for this Court's intervention. The split between the circuits as to whether RFRA applies in claims and defenses against private parties is only deepening. And while it continues, federal law threatens to impinge on the religious freedoms of American citizens in ways Congress never intended. That untenable state of affairs cannot be permitted to continue.

B. In Any Event, RFRA Applies To Actions Brought By Statutorily Appointed Officers Carrying Out Federal-Law Duties.

Even if the Seventh Circuit had picked the winning side of the deepening split over RFRA's scope, its

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[3] Neither the judicial relief provision nor the legislative history rescues the Seventh Circuit's erroneous reasoning. The judicial relief provision speaks broadly of a person's right to assert a RFRA "violation as a claim *or defense* in a judicial proceeding." 42 U.S.C. § 2000bb-1(c) (emphasis added). It then states that a party may "obtain relief against a government," *id.*, but at most that limits the ability of a plaintiff to recover from a private defendant. It does *not* speak to a defendant's ability to assert RFRA as a defense against a private plaintiff. Nor can the legislative history override the express statement of purpose contained in the text of the statute itself. *See* 42 U.S.C. § 2000bb(b)(1). That language makes clear that RFRA does reach suits involving private parties. *See supra* at 18.

decision departed from this Court's established guidance for imputing nominally private action to the government.

A private party acts under color of law when "there is a sufficiently close nexus" between the government and the challenged conduct so that the conduct "may fairly be treated as that of the [government] itself." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). Put another way, the government is "responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement * * * that the choice must in law be deemed to be that of the" government. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982); *see Brentwood Acad.* v. *Tennessee Secondary Sch. Ath. Ass'n,* 531 U.S. 288, 296 (2001). Crucially, the question is not whether a particular private party is generally a "state actor[]," rather, "the question is whether *particular conduct*" is "'state action.'" *Jackson*, 419 U.S. at 349-350 (emphasis added).

1. Respondent's pursuit of turnover and avoidance claims against the Trust is quintessentially state action. Respondent owes its existence principally to the choices of federal officers acting pursuant to federal law. And its conduct in this case is compelled by congressional policy choices enshrined in the Bankruptcy Code.

a. A creditors' committee is appointed by the U.S. Trustee, an official of the Department of Justice. *See* 11 U.S.C. § 1102(a); 28 U.S.C. § 581. The committee

is one of just a few statutorily enumerated "officers" charged with administering the Chapter 11 process. *See* Title 11, ch. 11, subch. I ("Officers and Administration"). Although the committee "ordinarily" consists of the holders of the "seven largest claims against the debtor," the U.S. Trustee may appoint any creditors she deems fit and the bankruptcy court may order the U.S. Trustee to change the committee's composition at any time. *See id.*; *id.* § 1102(b)(1). Once the committee is appointed, the U.S. Trustee is charged with "monitoring" its activities, subject to the "general supervision" of the Attorney General. 28 U.S.C. §§ 586(a)(3)(E), (c).

The committee performs a specific role in the bankruptcy process, exercising powers enumerated in the Code. *See id.* at § 1103(c). That statutory authority—not any common law doctrine—is the source of the committee members' qualified immunity for actions within the scope of their duties. *See In re Pac. Lumber Co.*, 584 F.3d 229, 253 (5th Cir. 2009) ("11 U.S.C. § 1103(c) * * * implies [that] committee members have qualified immunity."); *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000); *In re Refco Inc.*, 336 B.R. 187, 190 (Bankr. S.D.N.Y. 2006). And, unlike any private litigant, the committee may employ attorneys and other professionals only with court approval. 11 U.S.C. § 1103(a). Those professionals are compensated from the debtor's estate, in keeping with the committee's status as an "officer" of the bankruptcy process. *Id.* at § 503(b)(3).

Respondent is, in short, a creature of federal law, composed and supervised by a federal officer, and charged with carrying out a congressionally charted role in the bankruptcy process.

b. Respondent's conduct in pursuing claims against the Trust can be imputed to the government for another reason: federal law imposes a duty on Respondent to bring those claims. By stipulation, Respondent stands in the shoes of a bankruptcy trustee for the purposes of this litigation. It is axiomatic that a bankruptcy trustee "has the duty to maximize the value of the estate." *Commodity Futures Trading Comm'n* v. *Weintraub*, 471 U.S. 343, 352 (1985). "The mechanism Congress designed to ensure this recovery was to vest in the trustee (or the debtor-in-possession) both the power to bring an avoidance action *and the duty to bring one if it would likely benefit the estate*." *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp.* v. *Chinery*, 330 F.3d 548, 568 (3d Cir. 2003) (en banc) (emphasis added); *In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1001 (8th Cir. 2007). Where a trustee refuses unjustifiably to bring a colorable avoidance action, the Code permits another party to pursue the claim instead. *See, e.g.*, *In re Adelphia Commc'ns Corp.*, 544 F.3d 420, 424 (2d Cir. 2008); *In re Gibson Grp., Inc.*, 66 F.3d 1436, 1438 (6th Cir. 1995); *Louisiana World Exposition* v. *Fed. Ins. Co.*, 858 F.2d 233, 247 (5th Cir. 1988). In other words, "the initiative" for Respondent's action against the

Trust comes from *Congress*, not from Respondent's private choice. *Jackson*, 419 U.S. at 357.

2. The Seventh Circuit failed to account for the totality of these circumstances. *See Brentwood Acad.*, 531 U.S. at 295 (noting that "the criteria" for state action "lack rigid simplicity" and that "no one fact" can be dispositive). And it failed to properly focus on whether Respondent's "particular conduct" was attributable to the government. *See Jackson*, 419 U.S. at 349. Instead, the court of appeals rested its decision on its view that Respondent's "core function is to act on behalf of, and advance the undivided interests of, its clients, namely the private creditors." Pet. App. 17a. That rationale misunderstands both the color-of-law test and the role of a government-appointed, court-supervised creditors' committee.

The question before the court was whether the government is responsible for burdening the Trust. The possibility that Respondent might in general further private interests could not answer that question. First, the court's conclusion departed from a faulty premise: the idea that creditors as a class have "undivided interests" presupposes *public* ordering. After all, a basic reason for the Bankruptcy Code is that individual creditors acting independently would *not* maximize the value of the debtor's estate and promote its equitable distribution. *See, e.g.*, Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law*, 7-19 (1986). Second, the court's

focus on Respondent's general role ignored the fact that Respondent's pursuit of claims against the Trust *in this case* is the product of a congressional policy choice enshrined in the Bankruptcy Code, not of the unfettered choices of a private actor.

The Seventh Circuit's failure to consider the particular conduct at issue drove its misplaced reliance on the analogy to public defenders and this Court's decision in *Polk County*. As this Court explained in *Brentwood Academy*, *Polk County* stands for the simple proposition that "the state-action doctrine does not convert opponents into virtual agents." 531 U.S. at 304. Respondent is hardly an "opponent" of the government when fulfilling a statutory duty to pursue claims against the Trust. Indeed, the courts of appeals have repeatedly held that bankruptcy trustees carrying out their statutory duties act as an arm of the court. *See, e.g.*, *McDaniel* v. *Blust*, 668 F.3d 153, 157 (4th Cir. 2012) (because a trustee "is an officer of the court that appoints him," the court "has a strong interest in protecting him from unjustified personal liability" (internal quotation marks omitted)); *In re McKenzie*, 716 F.3d 404, 420 (6th Cir. 2013); *Alexander* v. *Hedback*, 718 F.3d 762, 767 (8th Cir. 2013).

The decision below was thus contrary to this Court's established standards for determining when private parties act under color of law. And, by first holding that RFRA may only apply in suits with the government, and then adopting this inappropriately

limited understanding of who can qualify as the government, the court of appeals wrongly narrowed the scope of RFRA's broad protections. This Court should grant certiorari to correct that error.

II. THIS COURT SHOULD ALSO RESOLVE THE SPLIT AS TO WHETHER MAXIMIZING CREDITORS' RECOVERY REPRESENTS A COMPELLING GOVERNMENTAL INTEREST.

Certiorari is warranted for another reason: The Seventh Circuit, addressing petitioner's First Amendment claims, held that avoidance actions advance a compelling governmental interest. Pet. App. 27a-28a. In a previous decision, the Eighth Circuit, applying RFRA, held they do not. *See Young I*, 82 F.3d at 1420. Because the compelling interest question under RFRA and the First Amendment is one and the same, the decision below expressly "create[d] a circuit split." Pet. App. 33a & n.3; *see Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-432 (2006) (noting that RFRA "adopted the compelling interest test" developed in the First Amendment context). And, once again, the Seventh Circuit picked the wrong side.

1. The Seventh Circuit's first error was in misreading this Court's prior decisions recognizing a compelling interest in the collection of tax revenue and the preservation of the social security system. In *Young I*, the Eighth Circuit properly found that "protecting the interests of creditors is not comparable" to those

interests. 82 F.3d at 1420. The Seventh Circuit in this case reached exactly the opposite conclusion, finding that "[t]he broad scope and remedial nature of the Code are akin" to those interests. Pet. App. 29a. The Seventh Circuit focused particularly on the similarities between bankruptcy and the social security system, which this Court found presented a compelling interest in *United States* v. *Lee*, 455 U.S. 252 (1982). Pet. App. 29a-30a.

The Seventh Circuit's analogy is doubly flawed. Like the other cases in which this Court has found a compelling interest, *Lee* involved a massive *public* program. *See, e.g.*, *Hernandez* v. *Commissioner of Int. Rev.*, 490 U.S. 680 (1989) (government's ability to raise the revenue); *Gilette* v. *United States*, 401 U.S. 437 (1971) (maintenance of national security). The Bankruptcy Code's protection of creditors, by contrast, furthers quintessentially *private* interests. To be sure, the Code imposes public ordering to ensure that all creditors are treated fairly, but its ultimate purpose is to equitably maximize creditors' recovery on their *private*, state-law entitlements to the debtor's property. Along the same lines, the finding of a compelling interest in *Lee* turned on the Court's conclusion that "mandatory participation" was essential "to the fiscal vitality of the social security system"—not, as the Seventh Circuit suggested, on the fact that the system helps people in need. 490 U.S. at 258.

2. The Court's focus on the need for "mandatory participation" in the social security system points to another key defect in the Seventh Circuit's decision. In *Lee*, the Court held that a religious exception allowing the Amish to opt out of social security payments would undermine the entire statutory scheme. But the Bankruptcy Code is different; it includes a multitude of exceptions for individuals. Indeed, the very section of the Code authorizing trustees to recover pre-petition transfers expressly excludes religious or charitable contributions under a defined amount. 11 U.S.C. § 548(a)(2).

Those exceptions pose a powerful obstacle to a finding of a compelling interest in this case. In *O Centro*, this Court found that a statutory exception to the Controlled Substances Act "fatally undermine[d]" the argument that the system would collapse if a religious exception were granted. 546 U.S. at 434. The government argued that it had a compelling governmental interest in the uniform enforcement of drug laws and that the Act was a closed regulatory system, the effectiveness of which would be "undercut" if the judiciary crafted exceptions under RFRA. *Id*. at 434-435. But this Court noted that Congress had already crafted an exception for peyote to accommodate the religious practices of some Native Americans. With no evidence that the peyote exception had "undercut" the government's ability to enforce the Act, this Court rejected the uniformity argument. *Id.* at 436-437. The numerous exceptions to the

Bankruptcy Code provisions at issue in this case should likewise have informed the analysis below.

Instead, the Seventh Circuit mistakenly concluded that respecting Petitioner's free exercise rights *would* undermine the system, relying on precisely the kind of "slippery slope" arguments this Court has repeatedly rejected in both RFRA and First Amendment cases. *See O Centro*, 546 U.S. at 435-436 (citing *Sherbert*, 374 U.S. at 407 (applying the First Amendment), and *Cutter* v. *Wilkinson*, 544 U.S. 709, 722-723 (2005) (applying RLUIPA)). The court of appeals speculated that religious exceptions would "pose a logistical nightmare" for judges faced with piecemeal challenges to the Code's provisions. Pet. App. 34a. But it failed to explain why bankruptcy judges, who administer a wide array of statutory exceptions, would be unable to contend with free exercise protections. And it posited "scenarios in which individuals would join religious sects to circumvent the Code, all in the name of religion, and gain an 'economic advantage over' their secular competitors." *Id*. at 35a. But, as in *Sherbert*, "[e]ven if consideration of such" an argument were "not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, * * * it is highly doubtful whether [it] would be sufficient to warrant a substantial infringement of religious liberties." 374 U.S. at 407 (internal citation omitted).

In short, the Seventh Circuit ignored the clear import of this Court's holding in *O Centro*, relying instead on slippery slope reasoning this Court has soundly rejected. The Eighth Circuit, by contrast, correctly concluded that it could find no compelling interest in maximizing recovery under the Bankruptcy Code because "we cannot see how the recognition of what is in effect a free exercise exception to the avoidance of fraudulent transfers can undermine the integrity of the bankruptcy system." *See Young I*, 82 F.3d at 1420. There can be no doubt the Eighth Circuit has the better of the argument.

3. The Seventh Circuit's recognition of a compelling interest in the protection of creditors is yet another blow in an opinion that erroneously narrows religious freedoms at every turn, splitting with its sister circuits and breaking from this Court's precedent along the way. This Court's intervention is urgently needed to set the law back on the right path.

III. THE QUESTIONS PRESENTED ARE OF PARAMOUNT IMPORTANCE.

The questions presented in this petition are crucial to preserving the balance that Congress has struck between religious freedom and federal power. If the Seventh Circuit's decision stands, the growing number of religious organizations entering bankruptcy may have to check their free exercise rights at the door. And that's not all; the decision below sweeps far beyond the bankruptcy context, dramatically

narrowing the protections for religious freedoms in federal court.

A. Without This Court's Intervention, Religious Organizations Will Be Stripped Of RFRA's Protections In Bankruptcy Proceedings.

The economic recession and financial mismanagement have forced hundreds of religious organizations to file for bankruptcy under Chapter 11 over the last decade. Pamela Foohey, *Bankrupting the Faith*, 78 Mo. L. Rev. 719, 727 (2013). From 2006 to 2011 alone, nearly 500 religious entities sought bankruptcy protection, *id.* at 731, and research suggests they continue to file at a rate of approximately 90 per year, *see* Pamela Foohey, *When Churches Reorganize*, 88 Am. Bankr. L.J. 277 & n.2 (2014). Legal liability for sexual abuse has driven some of the largest such filings. *See Bankrupting the Faith*, supra, at 720-721. But bankruptcies occur in religious organizations of every stripe and often for the same reasons that drive other American corporations to seek reorganization. Indeed, a 2013 study found that the two leading causes of religious bankruptcy were the Great Recession and poor leadership. *Id.* at 727. And the main reason religious organizations file under Chapter 11 is to preserve church property encumbered by mortgages. *Id*. at 726.

The Seventh Circuit's decision strips religious organizations of RFRA's protections during these already painful bankruptcy proceedings. It dramati-

cally narrows the class of bankruptcy proceedings in which the statute applies, shutting out even those cases where nominally private parties, chosen for the purpose by federal officers, carry out federal-law duties. And it doubles down on that cramped interpretation with its unprecedented holding that maximizing recovery for private creditors represents a compelling governmental interest.

That puts financially troubled religious organizations to a Hobson's choice: Enter bankruptcy proceedings and accept the possibility that their free exercise rights will be substantially burdened in the process or face financial ruin and the loss of church property. Even setting aside the circuit splits the Seventh Circuit's opinion deepens and creates, this unacceptable situation warrants this Court's immediate intervention.

B. Review Is Needed To Restore The Broad Protections For Religious Freedoms That Congress Intended RFRA To Provide.

Congress made it exceptionally plain that RFRA is meant to provide broad protection from all legal burdens on the exercise of religion. In passing the statute, Congress was conscious that "*laws* [that are] neutral toward religion may burden religious exercise as surely as *laws* intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2) (emphasis added). That is why it expressly applied the Act's prohibitions to "all Federal law, and the implementation of that law." *Id.* § 2000bb-3(a). And, in 2000,

Congress amended RFRA's definition of the "exercise of religion" to ensure that it "be construed in favor of broad protection of religious exercise to the maximum extent permitted by the terms of this chapter and the Constitution." *Id.* at 2000cc-3(g).

The Seventh Circuit ignored that clearly expressed intent in this case. The decision below departs from RFRA's core purpose and gives private litigants free rein to burden religious exercise using federally created rights and procedures. It distorts this Court's "color of law" jurisprudence to dramatically limit the range of conduct attributable to the government for RFRA purposes. And it sets a low bar for what may constitute a compelling interest sufficient to justify a burden on religious freedoms. This Court should grant certiorari to restore the substantial protections Congress intended.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRADY C. WILLIAMSON
GODFREY & KAHN, S.C.
One East Main Street, Suite 500
Madison, WI 53703
(608) 257-3911
bwilliam@gklaw.com
Counsel of Record

NEAL KUMAR KATYAL
COLLEEN E. R. SINZDAK
EUGENE A. SOKOLOFF*
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

*Admitted only in New York; supervised by members of the firm.

Counsel for Petitioner

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APPENDIX

APPENDIX A

UNTED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Case Nos. 13–2881, 13–3353, 13–3495.

Jerome E. LISTECKI, as Trustee of the Archdiocese of Milwaukee Catholic Cemetery Perpetual Care Trust,

Plaintiff–Appellee,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Defendant–Appellant.

Argued June 2, 2014 | Decided March 9, 2015

Before FLAUM and WILLIAMS, Circuit Judges, and DOW, District Judge.[1]

WILLIAMS, Circuit Judge.

Facing financial problems and lawsuits from victims of sexual abuse, the Archdiocese of Milwaukee filed for Chapter 11 bankruptcy in 2011. A Creditors' Committee composed of abuse victims subsequently sought to void a one-time transfer of $55 million from the Archdiocese's general accounts to a trust earmarked for maintaining cemeteries as

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[1] Of the United States District Court for the Northern District of Illinois, sitting by designation.

fraudulent or preferential under the Bankruptcy Code (the "Code"). The Committee wanted the $55 million included in the Archdiocese's bankruptcy estate (the "Estate"), making it available to creditors. However, the district court found that the application of the Code to that transfer would violate the Archbishop's free exercise rights under the Religious Freedom Restoration Act ("RFRA") and the First Amendment. We only affirm the district court's conclusion that RFRA is not applicable when the government is not a to the suit based on the statute's plain language. However, we disagree with the district court's conclusion that RFRA is applicable in this action because the Committee does not act under "color of law" and is not the "government" for RFRA purposes. It is composed of non-governmental actors, owes a fiduciary duty to the creditors it represents and no one else, and has other nongovernmental traits. Although the Free Exercise Clause is implicated here, we disagree with the district court's conclusion that it bars the application of the Code to the $55 million. The Code and its relevant provisions are generally and neutrally applicable and represent a compelling governmental interest in protecting creditors that is narrowly tailored to achieve that end.

The Committee sought the district court judge's recusal after the summary judgment order, but the court denied that motion. Because of our holding in Parts A–C of this opinion, it is not necessary to definitively decide this issue.

I. BACKGROUND

The Archdiocese has operated and maintained eight Catholic cemeteries and seven mausoleums in the Milwaukee area since 1857. It states in its complaint, which we accept as true, that it has set aside money for decades to provide perpetual care for those cemeteries in accordance with Canon Law. In April 2007, the Archdiocese created a trust fund (the "Trust") to maintain that money. Two months later, the Archbishop sent a letter seeking approval from the Vatican to transfer roughly $55 million (the "Funds") into the Trust, noting that "[b]y transferring these assets to the Trust, I foresee an improved protection of these funds from any legal claim and liability." The Vatican approved and the money was transferred in March 2008.

Before the creation of the Trust, the Archdiocese settled a case in which ten victims alleged they were abused by two priests in California. *See* Tom Heinen, *$17 Million Settles 10 Abuse Cases,* Milwaukee Journal Sentinel, Sept. 1, 2006, at A1. Ten months later, after the Trust was created, but before the Funds were transferred, the Wisconsin Supreme Court ruled certain statutes of limitations could be tolled, which allowed various sexual misconduct suits to go forward against the Archdiocese. *John Doe 1* v. *Archdiocese of Milwaukee,* 303 Wis.2d 34, 734 N.W.2d 827, 842–47 (2007). Some of the resulting cases have been stayed pending the outcome of the bankruptcy petition.

Due in part to those cases, the Archdiocese filed for Chapter 11 bankruptcy on January 4, 2011. The Archdiocese has run the Estate as a debtor-in-

possession since the filing. After the filing, the United States Trustee appointed a group of abuse victims to the Committee to represent the Archdiocese's unsecured creditors in the proceedings. The Archbishop then, in his role as trustee of the Trust, sought declaratory judgment from the bankruptcy court that the Funds would not "be used to satisfy any of the claims the Committee intends to pursue" against the Archdiocese because application of the Code to the Funds would violate the Archbishop's free exercise rights and RFRA. (We will call the plaintiff the "Archdiocese," even though it was technically the Trust and the Archbishop that brought the present action.) However, the complaint created a conflict because the plaintiff-Archbishop sought to limit the size of the Estate, and the Archdiocese as debtor-in-possession had little incentive to vigorously defend that complaint or assert affirmative defenses since it acts through its sole corporate member, the Archbishop. In other words, the declaratory complaint resulted in the Archbishop initiating an adversary action (as Trustee) against himself (as sole corporate member of the Archdiocese). Recognizing this problem, the parties entered into a stipulation, approved by the bankruptcy court, stating that the Committee was "granted derivative standing to assert and litigate the Avoidance and Turnover Claims against the Archbishop for the benefit of the Debtor's estate." The Committee asserted as a counterclaim that the transfer of money into the Trust was fraudulent and preferential and should be avoided pursuant to the Code.

The Committee moved for summary judgment on Count III, which sought a declaration that the First Amendment and/or RFRA bar the application of the avoidance and turnover provisions of the Code to the Funds. The Archdiocese responded and filed a cross-motion for summary judgment. The Archdiocese attached the Archbishop's affidavit, saying he had a Canonical duty to "properly maintain[ ] in perpetuity" the cemeteries and mausoleums, and "[i]f the Committee is successful in converting the [Funds] into property of the Debtor's estate, there will be no funds or, at best, insufficient funds, for the perpetual care of the Milwaukee Catholic Cemeteries." There was no discovery taken on whether this imposed a substantial burden on his religious beliefs, and attorneys for both sides later agreed to stay the cross-motion until the Committee's summary judgment motion was adjudicated.

The bankruptcy court granted the Committee's motion, but the district court reversed. It found the Committee was acting under color of law for RFRA purposes and that the Archbishop's exercise of religion would be substantially burdened if the Funds were required to become part of the Estate. It granted the Archdiocese's cross-motion for summary judgment on both RFRA and First Amendment grounds and dismissed the case. Two weeks later, the Committee filed motions to vacate and for recusal of the district court judge based on information it obtained after the ruling. The Committee argued that the judge was biased, or a reasonable person would question his impartiality, based on documents showing he has nine family members who

were buried between 1972 and 2013 in cemeteries owned by the Archdiocese: his father and mother (who passed away in 1975 and 1976, respectively), two sisters (1985 and 2001), an uncle (1972), an aunt (1985), his brother in-law (2013), and his wife's parents (1984 and 2010). The Committee also produced an Agreement that the judge signed with the Archdiocese on August 1, 1975, the day after his father passed away, for the purchase of his parents' burial plots. The judge denied the motion to recuse, stating he had no financial or other interest in the litigation and no reasonable person would perceive a substantial risk of bias in the case. The Committee filed a petition for a writ of mandamus with this court seeking the judge's recusal, and also appealed the summary judgment decision.

II. ANALYSIS

We begin by noting that the issue of whether the Archdiocese actually made a fraudulent, preferential or avoidable transfer is not before us. The issues before us relate only to Count III, which sought a declaration that the First Amendment and/or RFRA bar the application of the avoidance and turnover provisions of the Code to the Funds. We review the district court's decision that such a bar existed de novo. *Kvapil* v. *Chippewa Cnty.,* 752 F.3d 708, 712 (7th Cir.2014).

A. RFRA Does Not Apply in Suits in Which the "Government" Is Not Involved

The Committee contends it is not the "government" and therefore RFRA does not apply. We first determine whether RFRA applies when the "government" is not a party to action. We have previously said in

dicta that "RFRA is applicable only to suits to which the government is a party." *Tomic* v. *Catholic Diocese of Peoria,* 442 F.3d 1036, 1042 (7th Cir.2006), *abrogated on other grounds by Hosanna–Tabor Evangelical Lutheran Church & Sch.* v. *EEOC,* —— U.S. ——, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). Based on RFRA's plain language, its legislative history, and the compelling reasons offered by our sister circuits, we now hold RFRA is not applicable in cases where the government is not a party.

We begin by first examining RFRA's plain language. *See Barma* v. *Holder,* 640 F.3d 749, 751 (7th Cir.2011) (noting statutory interpretation begins with the plain language of the statute). It states, "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability * * *." 42 U.S.C. § 2000bb–1(a). Subsection (b) provides an exception, stating that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1(b). In other words, this is a burden shifting test in which the government must make a showing after the plaintiff demonstrates a substantial burden. *Rweyemamu* v. *Cote,* 520 F.3d 198, 203 n. 2 (2d Cir.2008) ("[W]e think the text of RFRA is plain * * * in that it requires *the government* to demonstrate that application of a burden to a person is justified by a compelling governmental interest" (emphasis in original) (internal citation omitted)). It

is self-evident that the government cannot meet its burden if it is not party to the suit. *See Hankins* v. *Lyght,* 441 F.3d 96, 114–15 (2d Cir.2006) (Sotomayor, J., dissenting) ("Where, as here, the government is not a party, it cannot 'go [ ] forward' with any evidence. In my view, this provision strongly suggests that Congress did not intend RFRA to apply in suits between private parties."). A private party cannot step into the shoes of the "government" and demonstrate a compelling governmental interest and that it is the least restrictive means of furthering that compelling governmental interest because the statute explicitly says that the "government" must make this showing.

If the intent were not yet clear, we find further support for this interpretation from the "[j]udicial relief" section of the statute. 42 U.S.C. § 2000bb–1(c). Congress stated that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain *appropriate relief against a government.*" *Id.* (emphasis added). The relief is clearly and unequivocally limited to that from the "government." If the government is not a party, no one can provide the appropriate relief. *See Gen. Conf. Corp.* v. *McGill,* 617 F.3d 402, 410 (6th Cir.2010) ("The text of the statute makes quite clear that Congress intended RFRA to apply only to suits in which the government is a party."). The plain language is clear that RFRA only applies when the government is a party.

Our interpretation is also supported by RFRA's legislative history. The Report from the Committee on

the Judiciary began by stating that the nation was founded by those with a conviction that they should be free to practice their religion "free from Government interference" and "Government actions singling out religious activities for special burdens." S.Rep. No. 103–111, at 4 (1993), 1993 U.S.C.C.A.N. 1892, 1894. In describing RFRA's purpose, the report refers to "government actions," "only governmental actions," and "every government action." *Id.* at 8–9. As then-Judge Sotomayor noted, "[a]ll of the examples cited in the Senate and House Reports on RFRA involve actual or hypothetical lawsuits in which the government is a party." *Hankins,* 441 F.3d at 115 n. 9 (Sotomayor, J., dissenting); *see also Gen. Conf. Corp.,* 617 F.3d at 411. The legislative history shows Congress did not mean for RFRA to be applicable when the government is absent, and we will not read into the statute what neither the plain language nor legislative history has included.

Finally, two of the three circuits to analyze this matter have found RFRA does not apply in suits where the government is not a party. *See Gen. Conf. Corp.,* 617 F.3d at 410–11; *Sutton* v. *Providence St. Joseph Med. Ctr.,* 192 F.3d 826, 834, 837–43 (9th Cir.1999). The only circuit to analyze the issue and hold to the contrary did so in the limited situation when the government *could* have been a party, over a strong dissent, and has retreated from its holding. *Compare Hankins,* 441 F.3d at 103 (finding RFRA applicable in private civil suit) *with id.* at 114–15 (Sotomayor, J., dissenting) *and Rweyemamu,* 520 F.3d at 203–04 & n. 2 (noting its "doubts" about *Hankins* because of RFRA's plain language and poli-

cy reasons, but not deciding the issue because it was waived). Therefore, we hold RFRA does not apply when the "government," as defined in RFRA, is not a party to the action.

B. The Committee Is Not the "Government"

The next question is whether the Committee is the "government" under RFRA, thereby triggering the statute. RFRA defines "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States * * *." 42 U.S.C. § 2000bb–2(1). The Archdiocese argues that generally a creditors committee, including this Committee, acts "under color of law" and therefore is "government" because: (1) it is an arm of the United States Trustee; (2) it owes its creation and existence to the combination of the Trustee, the court, and the Code; or (3) it is performing a traditional governmental function.[2] The Committee counters that its specific makeup and ability to appear in this action, as well as a committee's general fiduciary duties and responsibilities, all show that this Committee is not the "government." We agree with the Committee.

The phrase "color of law" in RFRA mirrors that found in 42 U.S.C. § 1983, which applies to those acting "under color of" law. We do not think this word choice is coincidental and agree with the Ninth Circuit in presuming that Congress intended for

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[2] The Archdiocese argues that the Committee is the governmental actor. It does not argue that the Bankruptcy Code or the Bankruptcy Court, is the "government" under RFRA.

RFRA "color of law" analysis to overlap with Section 1983 analysis. *Sutton,* 192 F.3d at 834–35 (interpreting RFRA "under color of law" in the same way as Section 1983 because "[w]hen a legislature borrows an already judicially interpreted phrase from an old statute to use it in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase but the judicial construction of the phrase" (internal citation omitted)); *see also Brownson* v. *Bogenschultz,* 966 F.Supp. 795, 797 (E.D.Wis.1997) (interpreting "color of law" under RFRA using Section 1983 analysis). So we turn to Section 1983 precedent to assist our analysis. We also note the overlap between a governmental actor and someone acting under the color of law and use these terms interchangeably. *See Lugar* v. *Edmondson Oil Co.,* 457 U.S. 922, 935, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

The Supreme Court has set forth various tests to use when deciding whether someone is a governmental actor, including the "symbiotic relationship test, the state command and encouragement test, the joint participation doctrine, and the public function test." *Rodriguez* v. *Plymouth Ambulance Serv.,* 577 F.3d 816, 823–24 (7th Cir.2009). But "[a]t its most basic level, the state action doctrine requires that a court find such a 'close nexus between the State and the challenged action' that the challenged action 'may be fairly treated as that of the State itself.' " *Id.* at 823 (quoting *Jackson* v. *Metro. Edison Co.,* 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974)).

First, the Archdiocese argues that the court and the Trustee collectively appoint and monitor a com-

mittee's makeup which shows a close nexus to governmental action. Yet, none of the individuals who make up the Committee are governmental actors. Each is a private, individual creditor who was sexually abused by the clergy. Neither is the process of appointing this Committee, nor committees in general, evidence of a close nexus. A committee is usually made up of the seven largest unsecured creditors. 11 U.S.C. § 1102(b)(1). They became creditors through their own private transactions with the debtor and choose to be appointed to the committee, and that makes them eligible for appointment. The U.S. Trustee, admittedly a governmental actor, appoints the committee in the first instance, as it did here. *See* 11 U.S.C. § 1102(a)(1). Appointing a committee is one of the ways that the Trustee is able to perform its duty and "supervise" the bankruptcy cases. *Id.;* 28 U.S.C. § 586(a)(3)(E). But upon the "request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee." 11 U.S.C. § 1102(a)(4). So, a committee is a combination of private decisions, Trustee appointment, and court supervision, with the private actions providing the qualifying criteria for appointment. This is not action that can be "fairly treated as that of the State itself." *Rodriguez,* 577 F.3d at 823. Just because the court appoints an entity and supervises some of its actions does not make it a governmental actor. *See Loyd* v. *Loyd,* 731 F.2d 393, 398 (7th Cir.1984) (finding court-appointed administer who sold a piece of property pursuant to the court's approval was not governmental actor).

Moreover, once a committee is created, it takes on a life of its own. The committee can, with the court's approval, employ one or more attorneys, accountants, or other agents to represent or perform services for the committee. 11 U.S.C. § 1103(a). Here, the Committee has retained counsel that represents them in this appeal. Those professionals report to the committee, not the Trustee or the court. The committee has an attorney-client relationship with the attorney. *In re Subpoenas Duces Tecum,* 978 F.2d 1159, 1162 (9th Cir.1992) (per curiam). Neither the Trustee nor the court is involved. All of a committee's expenses, and the fees and expenses of the professionals that the committee hires, are paid for by the Estate and not the government. 7 Collier on Bankruptcy ¶ 1103.03 (16th ed.2014). The Trustee can weigh in, and the court has input, but the money ultimately comes from the Estate, rather than the public coffers.

The Archdiocese next argues the Committee only gains standing to appear in the case from action taken by the bankruptcy court, rather than its own private actions, and so its presence in the suit is a result of governmental action. *See Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp.* v. *Chinery,* 330 F.3d 548, 568 (3d Cir.), *cert. dismissed,* 540 U.S. 1001, 1002, 124 S.Ct. 530, 157 L.Ed.2d 406, 407 (2003). Here, however, because there was conflict with the Archbishop representing the Trust on one hand and the Estate on the other, the two sides executed a "Stipulation Regarding the [Committee's] Standing" that allowed the Committee "derivative standing to assert and lit-

igate the Avoidance and Turnover Claims against the Archbishop." True, the court had to approve it, but the Committee's standing came about from the Archbishop's conflict and the Archdiocese's concession that the Committee could pursue the claims. This is private ordering.

Perhaps most problematic for the Archdiocese's argument is that a committee represents the larger interests of the unsecured private creditors, and it is to them, and not the Trustee, court, or any governmental actor, that the committee owes a fiduciary duty. *Smart World Techs., LLC* v. *Juno Online Services,* 423 F.3d 166, 175 n. 12 (2d Cir.2005) ("[C]reditors' committee owes a fiduciary duty to the class it represents, but not to the debtor, other classes of creditors, or the estate."); *In re SPM Mfg. Corp.,* 984 F.2d 1305, 1315–16 (1st Cir.1993) (same). The committee does not have to act in accordance with the Trustee's or court's wishes. In fact, the committee can, and should, oppose the Trustee if it is acting against the best interests of the unsecured creditors. *See In re Bayou Group, LLC,* 564 F.3d 541, 547 (2d Cir.2009) (noting both the creditors' committee and bankruptcy court disagreed with Trustee's motion to appoint trustee); *In re Columbia Gas Sys., Inc.,* 33 F.3d 294, 295 (3d Cir.1994) (noting difference between the committee's and Trustee's position on interpretation of statute). It is beholden to no governmental actor.

But, the Archdiocese argues, the Committee gets a "limited grant of immunity" and only governmental actors get immunity. *See In re PWS Holding Corp.,* 228 F.3d 224, 246 (3d Cir.2000) (noting immunity

pursuant to Section 1103(c) of Code for acts related to work for creditors). The problem with this argument is that immunity is routinely given to private individuals, for example, directors of corporations, *see Kamen* v. *Kemper Fin. Servs., Inc.,* 939 F.2d 458, 461 (7th Cir.1991), good Samaritans, *see Rodas* v. *Seidlin,* 656 F.3d 610, 626 (7th Cir.2011), and parents from tort suits for damages from their minor children, *see Barnes* v. *Barnes,* 603 N.E.2d 1337, 1339 (Ind.1992). Here, the Committee's immunity only applies when it is acting on behalf of the creditors, showing us the independence the Committee has from the court and Trustee since it is not subject to their whims or obligated to represent them.

Finally, the Archdiocese argues—and the district court found—that the Committee performs a "public function" making it a governmental actor. Under this test, a private entity is a governmental actor when it is performing an action that is "traditionally the exclusive prerogative of the State." *Jackson,* 419 U.S. at 353, 95 S.Ct. 449. This test is rarely met. *Rodriguez,* 577 F.3d at 824 n. 11. The Archdiocese argues that the Committee is basically stepping into the shoes of the Trustee. First, that theory is belied by the fact that the Committee can, and does, conflict with the Trustee. Were they performing the same function, they would presumably be on the same page. Second, the goal and purpose of the committee is to act on behalf of and for the creditors. Conversely, the goal of the Trustee is to "promote the integrity and efficiency of the bankruptcy system for the *benefit of all stakeholders—debtors, creditors, and the public.*" 1 U.S. Department of Justice, United States

Trustee Program Policy and Practices Manual § 1–4.2.1 (Feb.2015) (emphasis added), *available at* http://www.justice.gov/ust/eo/ust_org/ustp_manual/docs/Volume_1_Overview.pdf. There is some overlap between their functions—*e.g.,* both engage in restructuring discussions and converse with the court regarding the status of the case and the debtor's estate—but the traditional function of the governmental entity is to act as an impartial supervisor of the bankruptcy process for the benefit of all. The Committee, however, is far from impartial.

The Archdiocese also argues, and the district court found, that a debtor-in-possession performs a public function, and when the Committee obtained derivative standing to pursue avoidance claims, it stepped into the shoes of the debtor-in-possession, thereby becoming a governmental actor. *See In re Savino Oil & Heating Co., Inc.,* 99 B.R. 518, 524 (Bankr.E.D.N.Y.1989) (noting debtor-in-possession "becomes an officer of the court subject to the supervision and control of the Bankruptcy Court and the provisions of the Bankruptcy Code"). The problem for the Archdiocese is that the debtor-in-possession does not perform an action that is "*traditionally the exclusive prerogative* of the State." *Jackson,* 419 U.S. at 353, 95 S.Ct. 449 (emphasis added). As the Code makes clear, the "trustee" avoids transfers—not the United States Trustee or any other governmental entity. *See, e.g.,* 11 U.S.C. §§ 544, 547, 548. It is not the government or even a governmental actor that traditionally avoids transfers, but rather individual trustees and debtor-in-possessions. This is not the

exclusive prerogative of the government. *See State Bank of Toulon* v. *Covey* (*In re Duckworth*), 776 F.3d 453, 458 (7th Cir.2014) (noting individual trustee attempted to avoid transfer).

Although each determination of an entity's governmental actor status is fact- and case-specific, our conclusion that the Committee is not a governmental actor is supported by the Supreme Court's precedent. In *Polk County* v. *Dodson,* 454 U.S. 312, 318–19, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), the Court considered whether a public defender, performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding, was a state actor. The public defender is created by the government, selected and employed by governmental officials, subject to governmental supervision, exists only because of the state-created adversary system, and is given its power to appear in court (a uniquely state setting) by the government. Yet, the Court held that a public defender performing those duties is not a state actor because its job is not to act "on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client[;]' [t]his is essentially a private function." *Id.* Moreover, "a public defender is not amenable to administrative direction in the same sense as other employees of the State * * *. [A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior." *Id.* at 321, 102 S.Ct. 445. The same can be said of the Committee. Although some of its activities are subject to governmental and court supervision, its core function is to act on behalf of, and advance the undivided interest of, its clients, namely the private

creditors. *See also Filarsky* v. *Delia,* —— U.S. ——, 132 S.Ct. 1657, 1667, 182 L.Ed.2d 662 (2012) (focusing on whether the relevant actors were working "to achieve their own ends, [or] individuals working for the government in pursuit of government objectives"); *cf. West* v. *Atkins,* 487 U.S. 42, 51, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (noting jail doctor was a governmental actor, even though he had a duty to his patient first and foremost, because "his relationship with other prison authorities was cooperative"). There might be a "nexus," between the Committee and the government, but it is not a close one. *See Rodriguez,* 577 F.3d at 823.

For all these reasons, we find the Committee is not acting under the color of law and so RFRA does not apply. Therefore we need not address the Committee's argument that RFRA's application here would create federalism issues.

C. Free Exercise Clause Does Not Prevent Application of the Code to the Funds

The Archdiocese contends that even if the Committee is not the government and so RFRA does not apply, the Free Exercise Clause is implicated. While we agree that the First Amendment is applicable here, it does not prevent the application of the turnover and avoidance provisions because there is a compelling governmental interest in the application of the relevant portions of the Code that is narrowly tailored to achieving that interest.

1. Free Exercise Clause Is Applicable in Private Civil Suits

The Free Exercise Clause states that "Congress shall make no law * * * prohibiting the free exercise"

of religion. U.S. Const. amend. 1, cl. 1. "[M]ost rights secured by the Constitution are protected only against infringement by governments," so that "the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." *Lugar,* 457 U.S. at 936–37, 102 S.Ct. 2744 (internal citation omitted). However, not all rights require the government be a party in the case. The Court's practice makes clear that free exercise is one of those rights. For example, in *McDaniel* v. *Paty,* Paty sought election to the state constitutional convention and filed a declaratory judgment action in state court that her opponent, McDaniel, was prohibited from running since he was an ordained minister and a Tennessee statute barred "minister[s] of the Gospel, or priest[s] of any denomination whatever" from serving. 435 U.S. 618, 621 & n. 1, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978). McDaniel countered that the statute violated his right to free exercise. *See id.* at 620–21, 98 S.Ct. 1322. Both parties were clearly private citizens, and yet the Court implicitly recognized that the Clause was applicable when it found a free exercise violation. *Id.* at 629, 98 S.Ct. 1322. The Court has also been clear that other clauses of the First Amendment are applicable in entirely private civil suits, and we see no reasonable distinction between those and the Free Exercise Clause. *See N.Y. Times Co.* v. *Sullivan,* 376 U.S. 254, 265, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) ("It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."); *see also Phi-*

la. Newspapers v. *Hepps,* 475 U.S. 767, 777, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986) (noting that the text of the First Amendment "by its terms applies only to governmental action" but is nonetheless applicable in civil suits between private parties). So, even though we find that the Committee is not a governmental actor, that does not end our First Amendment analysis.

We note that a certain line of Supreme Court cases, some of which the Archdiocese cites, have held that the Free Exercise Clause can be an affirmative defense that bars consideration of certain religious matters by secular courts. *See, e.g., Hosanna–Tabor,* 132 S.Ct. at 706 (holding that "ministerial exception," grounded in the Free Exercise Clause, bars courts from adjudicating employment discrimination case between religious institution and its ministers); *McCarthy* v. *Fuller,* 714 F.3d 971, 975 (7th Cir.2013) (collecting cases and noting that a "secular court may not take sides on issues of religious doctrine"). We understand the Archdiocese to be arguing, and it confirmed during oral argument, that it is citing these cases to show this court cannot "determine the centrality of the religious practice to an adherent's faith," meaning the sincerity of the Archbishop's religious beliefs, which we agree we cannot do. *See Korte* v. *Sebelius,* 735 F.3d 654, 683 (7th Cir.2013).

We do not understand the Archdiocese to be arguing the transfer of the Funds is a religious matter that this court cannot adjudicate, nor could it make that argument because those cases relate only to intrachurch disputes. Here, we have what was alleged to be a fraudulent or otherwise avoidable transfer,

and the court need not interpret any religious law or principles to make that determination, nor must it examine a decision of a religious organization or "tribunal" on whether or not the transfer was fraudulent. *Cf. Serbian E. Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696, 724–25, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976). So, there is no intrachurch dispute at issue.

Moreover, it is unclear whether the intrachurch doctrine is even applicable where fraud is alleged:

> [T]his Court never has suggested that those ["intrachurch"] constraints similarly apply outside the context of such intraorganization disputes * * *. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.

Gen. Council on Fin. & Admin. v. *Cal. Superior Ct.,* 439 U.S. 1369, 1372–73, 99 S.Ct. 35, 58 L.Ed.2d 63 (1978) (Rehnquist, J., Circuit Justice, in chambers); *see also Gonzalez* v. *Roman Catholic Archbishop of Manila,* 280 U.S. 1, 16, 50 S.Ct. 5, 74 L.Ed. 131 (1929) (examining the intrachurch doctrine and noting "the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights" might not be accepted in secular courts if "fraud" is found). The intrachurch doctrine is not applicable here.

2. Challenged Provisions Are of General and Neutral Applicability

Under the Free Exercise Clause, "neutral, generally applicable laws may be applied to religious prac-

tices even when not supported by a compelling governmental interest." *Burwell* v. *Hobby Lobby Stores, Inc.,* —— U.S. ——, 134 S.Ct. 2751, 2761, 189 L.Ed.2d 675 (2014) (quoting *City of Boerne* v. *Flores,* 521 U.S. 507, 514, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)); *see also Employment Div.* v. *Smith,* 494 U.S. 872, 879–80, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). A law is not neutral if it discriminates on its face by "refer[ring] to a religious practice without a secular meaning discernible from the language or context." *Church of Lukumi Babalu Aye* v. *City of Hialeah,* 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Moreover, facial neutrality is not determinative since "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534, 113 S.Ct. 2217. We also look at whether the object of the law is a neutral one, examining both direct and circumstantial evidence. *Id.* at 540, 113 S.Ct. 2217. In terms of general application, all laws are selective to some extent, but "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* at 542, 113 S.Ct. 2217. The Free Exercise Clause, at its heart, "protects religious observers against unequal treatment;" in other words, the government "cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 542–43, 113 S.Ct. 2217 (alterations and quotations omitted). If a law is not of general and neutral applicability, we ask whether the law is justified by a compelling governmental interest that is narrowly tailored to advance that interest. *Id.* at 531–32, 113 S.Ct. 2217.

There are four relevant sections of the Code at issue (the "Challenged Provisions"): (1) 11 U.S.C. § 541, which determines what the bankruptcy "estate is comprised of"; (2) 11 U.S.C. § 544, which sets forth voidable transfers, usually by looking at the state fraudulent transfer statutes, *In re Equip. Acquisition Res., Inc.,* 742 F.3d 743, 746 (7th Cir.2014); (3) 11 U.S.C. § 547, which allows the trustee to avoid and set aside certain preferential transactions; and (4) 11 U.S.C. § 548, which relates to "fraudulent transfers and obligations." The provisions work together to establish the scope of the estate subject to the bankruptcy proceedings, *id.* § 541; by ensuring that no assets involved in transactions that are "voidable under" the state fraudulent transfer statute, *id.* § 544, "voidable" as preferential, *id.* § 547, or "fraudulent," *id.* § 548, escape inclusion in the estate. The purpose of the Bankruptcy Code's avoidance and turnover provisions "is to maximize the bankruptcy estate and thereby maximize the recovery for creditors." *Tort Claimants Comm.* v. *Roman Catholic Archbishop* (*In re Roman Catholic Archbishop*), 335 B.R. 842, 864 (Bankr.D.Or.2005).

We find the Challenged Provisions are of general and neutral applicability. The Challenged Provisions and Code as a whole are generally applied to all entities with equal force—be it a church, synagogue, deli, bank, city or any other qualifying debtor. *See* 11 U.S.C. § 109 (defining "debtor" expansively). The Archdiocese does not challenge the general applicability, but instead contends the Challenged Provisions are not neutral because three sections specifically carve out religious and charitable contributions

from the reach of the estate. *See* 11 U.S.C. § 548(a)(2) ("A transfer of a charitable contribution to a qualified religious or charitable entity or organization" is subject to different avoidance considerations); 11 U.S.C. § 548(d)(4) (defining "qualified religious or charitable entity or organization" by cross-referencing the Internal Revenue Code); and 11 U.S.C. § 544(b)(2) (addressing same charitable contributions as § 548(a)(2)). The Archdiocese argues these provisions "refer[ ] to a religious practice without a secular meaning discernible from the language or context" and are therefore not neutral. *Lukumi,* 508 U.S. at 533–34, 113 S.Ct. 2217.

The first problem with the Archdiocese's argument is that these provisions do not "prohibit[ ]" the practice of religion. *See* U.S. Const. amend. 1, cl. 1 ("Congress shall make no law * * * *prohibiting* the free exercise" of religion. (emphasis added)). Instead, they do the exact opposite and encourage religious practice by providing exceptions to avoidance for certain religious and charitable donations. A benefit to religion does not disfavor religion in violation of the Free Exercise Clause. *See Hernandez* v. *Comm'r,* 490 U.S. 680, 696, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) ("encouraging gifts to charitable entities, including but not limited to religious organizations-is neither to advance nor inhibit religion"); *see also Walz* v. *Tax Comm'n of N.Y.,* 397 U.S. 664, 669, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (finding exemptions like the Challenged Provisions are a type of "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference").

The second problem with the Archdiocese's argument is that the Challenged Provisions do not single out only religious practice. Anyone, regardless of religion or beliefs, can donate money to a qualified religious or secular charitable organization under the Code and qualify for avoidance—no religion or religious practice required. *See Universal Church* v. *Geltzer,* 463 F.3d 218, 227–28 (2d Cir.2006) (noting that "fraudulent conveyance provision applies equally to religious and non-religious entities, while allowing a limited safe harbor for any charitable contributions, so it neither advances nor inhibits religion"). That the Challenged Provisions have both secular and religious components make them consistent with the laws upheld in *Smith:* "every single case cited by the *Smith* Court [as a] 'valid and neutral law of general applicability' * * * involved laws encompassing *both* secular and religious conduct." *Cent. Rabbinical Cong. of the U.S.* v. *N.Y.C. Dep't of Health,* 763 F.3d 183, 195 (2d Cir.2014) (collecting cases). The Challenged Provisions are generally and neutrally applicable.

3. Compelling Governmental Interest in Challenged Provisions Is Narrowly Tailored To Achieve That Interest

Were we writing from a clean slate, that would be the end of our Free Exercise Clause analysis. We understand the Supreme Court to have stated that the *Smith* general and neutral applicability tests apply regardless of the strength of the burden imposed. In other words, a law of general and neutral applicability will be upheld whether it imposes a substantial or minimal burden. *Smith,* 494 U.S. at 878, 110

S.Ct. 1595 ("It is a permissible reading of the [Free Exercise Clause] text * * * to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."). The very point of *Smith* is to avoid having courts "engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws." *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal,* 546 U.S. 418, 424, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006); *see also United States* v. *Ali,* 682 F.3d 705, 710 (8th Cir.2012) ("[T]he district court evaluated [under RFRA] whether the order substantially burdened Ali's religious practices, although this would not be required in a standard First Amendment analysis."); *United States* v. *Hardman,* 297 F.3d 1116, 1126 (10th Cir.2002) (en banc) (noting *Smith* held that a neutral and generally applicable law "need not be justified by a compelling interest even where religious practice is substantially burdened"). We read the Court's statement that a general and neutral law will be upheld even if it has the "incidental effect of burdening" religion to mean the law will be upheld as long as it only unintentionally burdens religion. *See, e.g., Lukumi,* 508 U.S. at 531, 113 S.Ct. 2217. We do not take the Court's precedent to mean a law must be supported by a compelling interest that is narrowly tailored if it unintentionally imposes a substantial burden on religion. *See id.* at 562, 113 S.Ct. 2217 (Souter, J., concurring) ("Distinguishing between laws whose 'object' is to prohibit religious exercise and those that prohibit religious exercise as an 'inci-

dental effect,' *Smith* placed only the former within the reaches of the Free Exercise Clause; the latter, laws that satisfy formal neutrality, *Smith* would subject to no free-exercise scrutiny at all, even when they prohibit religious exercise in application.").

However, our circuit precedent includes a subsequent step after the *Smith* test, namely to consider whether a law "unduly burdens" the religious practice. If so, we revert back to the pre-*Smith* balancing test and ask whether the government has a compelling interest that is narrowly tailored to advance that interest. *See Vision Church* v. *Vill. of Long Grove,* 468 F.3d 975, 996 (7th Cir.2006). The Committee has not asked us to overrule or reconsider *Vision Church,* so we proceed with the second step of its "two-fold" analysis.

Since no discovery was taken on the substantial burden issue, we accept as true that the Code's application to the Funds would substantially burden the Archbishop's religious beliefs without deciding the issue. So, we ask whether there is a compelling governmental interest in the Challenged Provisions that is narrowly tailored to advance that interest. Though there is no exact definition of a compelling interest, it is one "of the highest order" and is only found in "rare cases." *Lukumi,* 508 U.S. at 546, 113 S.Ct. 2217 (internal quotation omitted). For example, the Court has found compelling interests in the tax system, *Hernandez,* 490 U.S. at 699, 109 S.Ct. 2136, social security system, *United States* v. *Lee,* 455 U.S. 252, 258–59, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), and national security and public safety. *Gillette* v. *United States,* 401 U.S. 437, 462, 91 S.Ct.

828, 28 L.Ed.2d 168 (1971). But not all proffered justifications have met this high standard. *See, e.g., Ariz. Free Enter. Club's Freedom Club PAC* v. *Bennett,* —— U.S. ——, 131 S.Ct. 2806, 2825, 180 L.Ed.2d 664 (2011) (holding no compelling interest in "leveling the playing field" via election funding statute for Free Speech Clause purposes); *Sherbert* v. *Verner,* 374 U.S. 398, 407–09, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (determining no compelling interest in dilution of employment compensation fund or employers' scheduling and finding eligibility provisions in unemployment statute unconstitutional as applied); *Koger* v. *Bryan,* 523 F.3d 789, 800 (7th Cir.2008) (finding no compelling governmental interest in management of prison dietary department). Whether there is a compelling governmental interest depends on "a case-by-case determination of the question, sensitive to the facts of each particular claim." *Gonzales,* 546 U.S. at 431, 126 S.Ct. 1211 (quoting *Smith,* 494 U.S. at 899, 110 S.Ct. 1595 (O'Connor, J., concurring in judgment)).

The Committee's asserted compelling governmental interest is the protection of creditors. We agree that this is a compelling governmental interest that can overcome a burden on the free exercise of religion.

We start with the history of the Code since the "long history of the very provision under discussion" contributes to our understanding of its importance. *Gillette,* 401 U.S. at 460, 91 S.Ct. 828. The Court has extensively analyzed the history of the Bankruptcy Clause in the Constitution, U.S. Const. art. 1, § 8, cl. 4, and its place in our nation. In *Central Virginia Community College* v. *Katz,* for example,

the Court chronicled the history of the Bankruptcy Clause to 1649, noting that there was near unanimity to include the Bankruptcy Clause in the Constitution so that the federal government could address insolvency and discharging of debts with a uniform body of laws. 546 U.S. 356, 365–69, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006). Further, the protection of creditors has always been important. *See, e.g., In re River West Plaza–Chicago, LLC,* 664 F.3d 668, 671 (7th Cir.2011) ("A central purpose of bankruptcy is to maximize creditor recovery.") The Court has noted that avoidance of preferential transfers has been "a core aspect of the administration of bankrupt estates since at least the 18th century." *Katz,* 546 U.S. at 372, 126 S.Ct. 990; *see also Cohen* v. *De La Cruz,* 523 U.S. 213, 221, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998) ("The Bankruptcy Act of 1898 prohibited discharge of 'judgments in actions for frauds, or obtaining property by false pretenses or false representations' "); *BFP* v. *Resolution Trust Corp.,* 511 U.S. 531, 540–41, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (tracing history of fraudulent transfer laws to 1570); *Begier* v. *IRS,* 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990) (noting avoidance sections of the Code "further[ ]" the "central policy of the Bankruptcy Code" of "[e]quality of distribution among creditors"). The Code's importance in our nation's history is well-established.

The broad scope and remedial nature of the Code are akin to some of those interests the Court has held are compelling under this test, *e.g.,* the social security system. The social security system "serves the public interest by providing a comprehen-

sive * * * system with a variety of benefits available to all participants" nationwide. *Lee,* 455 U.S. at 258, 102 S.Ct. 1051. As with the social security system, the purpose of the Code is to provide a support system for those who need it. While the social security system aids those who have reached a certain age or are disabled, the Code aids those who have reached a certain financial condition and who need assistance repaying or recovering a debt. Both the Code and the social security system ensure the financial stability of the citizenry. *See also United States* v. *Whiting Pools,* 462 U.S. 198, 203, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983) ("By permitting reorganization [through bankruptcy], Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners.").

These purposes, the history and the Court's words, convince us that there is a compelling interest in the Code, including the Challenged Provisions. *Cf. United States* v. *Crystal Evangelical Free Church (In re Young),* 82 F.3d 1407, 1422–23 (8th Cir.1996) (Bogue, J., dissenting) ("I agree with the district court's view that the bankruptcy code and § 548(a)(2)(A) furthers the compelling governmental interest in * * * protecting the interests of creditors by maximizing the debtor's estate."), *overruled on other grounds by Christians* v. *Crystal Evangelical Free Church,* 521 U.S. 1114, 117 S.Ct. 2502, 138 L.Ed.2d 1007 (1997); *Morris* v. *Midway S. Baptist Church (In re Newman),* 183 B.R. 239, 251 (Bankr.D.Kan.1995) (finding compelling interest in

the Code); *In re Navarro,* 83 B.R. 348, 353 (Bankr.E.D.Pa.1988) (same).

Indeed, there is also no doubting the significance of the Bankruptcy Code to the individuals who invoke it. One need not look any further than the Archdiocese's own purposeful availment of the Code. If the Code's functioning were not a significant interest, it is questionable that the Archdiocese would have subjected itself to this bankruptcy proceeding and the adversary action since there is a very serious danger, from the Archdiocese's perspective, that it could be compelled to make the Funds part of the Estate. But it has taken that risk because of the benefits the Code provides: "A Chapter 11 reorganization * * * enables the archdiocese to use available funds to compensate all victims/survivors with unresolved claims in a single process overseen by a court, ensuring that all are treated equitably. In addition, by serving as a final call for legal claims against the archdiocese, the proceeding will allow the Church to move forward on stable financial ground, focused on its Gospel mission." Archdiocese of Milwaukee, *Chapter 11 Reorganization: Original Statement* (Jan. 4, 2011), http://www.archmil.org/reorg.htm. The Archdiocese is not alone. In 2013, there were 1,071,932 bankruptcy filings in the United States, including nearly 9,000 Chapter 11 filings. *See United States Bankruptcy Courts–Business & Nonbusiness Cases Commenced,* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/1213_f2. pdf (last visited Mar. 5, 2015). The very scope and number of entities that avail themselves of the Code is a telling indicator of

its importance. *See Lee,* 455 U.S. at 258, 102 S.Ct. 1051 (noting that "[b]ecause the social security system is nationwide, the governmental interest is apparent").

In this case, the importance of protecting the interests of the creditors is readily apparent. There were fifteen pages and hundreds of entries of accounts payables attached to the answer, each representing a vendor that requires the Code's functioning, as well as five additional pages of creditors holding unsecured nonpriority claims. *Cf. Andrews* v. *Riggs Nat'l Bank,* 80 F.3d 906, 909 (4th Cir.1996) ("Section 541, like the Bankruptcy Code generally, has two overarching purposes: (1) providing protection for the creditors of the insolvent debtor and (2) permitting the debtor to carry on and rebuild * * *.").

In finding a compelling interest, we disagree with the Eighth Circuit's finding that the Code in general, and specifically 11 U.S.C. § 548(a)(2)(A)—which is not at issue in this litigation—do not present a compelling governmental interest. *See In re Young,* 82 F.3d at 1419–20. In *Young,* the Eighth Circuit held that the Code could not be applied to avoid certain tithes and make them part of the bankruptcy estate. *Id.* at 1420. It found, without explanation, that "bankruptcy is not comparable to national security or public safety," meaning the social security system in *Lee* and the Selective Service Act in *Gillette,* and that "protecting the interests of creditors is not comparable to the collection of revenue through the tax system or the fiscal integrity of the social security system." *Id.* at 1419. As discussed above, we see parallels between *Lee* and the Code that the Eighth Cir-

cuit did not discuss. Additionally, we find the Eighth Circuit's cursory analysis did not take into account the importance of the Code in Supreme Court precedent, our nation's history, or the effect it has on debtors and creditors.[3] *See id.* at 1422–23 (Bogue, J., dissenting) ("It can be fairly said that our nation's economy depends extensively on the availability of credit to individuals and businesses. Bankruptcy is an extraordinary remedy for insolvent debtors and oftentimes harsh on creditors. One of the creditor's few protections are recovery statutes like section 548, which as of today includes a free exercise exception for religious giving in the year preceding filing for bankruptcy.").

We also find that the Challenged Provisions are narrowly tailored to achieve the interests of expanding the estate to pay creditors, thereby protecting their interests. We must look "beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales,* 546 U.S. at 431, 126 S.Ct. 1211. The Committee argues the Challenged Provisions are narrowly tailored because their existence and application to all creditors is the only means possible to serve the ends of federal bankruptcy law. The Archdiocese argues that there are

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[3] Because our decision creates a circuit split, this opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en Banc* on the question of the government's compelling interest in the Bankruptcy Code. Circuit Judge Sykes took no part in the consideration of this case.

various exceptions that already limit the definition of estate, and so there could be another exception to adequately address the Archbishop's substantial burden. Under the Archdiocese's proffered exception, it would comply with the other provisions of the Code but not those that affect its religious practices. The Archdiocese's proposed course of action would allow it to avoid including what were allegedly preferential, avoidable and fraudulent amounts in the Estate.

This proffered exception would undermine the narrowly tailored purpose of the Code. First, as the Committee notes, such an exception would not serve the purpose of aiding creditors. In this case, for example, the creditors would have $55 million less available in the Estate. Moreover, if the allegations are true, the rule would favor a dishonest debtor at the creditors' expense. This would undermine the compelling interest of the Code by allowing a debtor who has made preferential, fraudulent and avoidable transfers to intentionally harm its creditors. *See also Grogan* v. *Garner,* 498 U.S. 279, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) ("[W]e think it unlikely that Congress * * * would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud, [*e.g.* the creditors]."). (Again, we make no determination on the nature of the transfer here.)

Such an exception would also pose a logistical nightmare for the court, which would have to consider every provision in the Code, determine whether it affects the Archbishop's beliefs, and then act accordingly. Such an exception would also open up a reli-

gious affirmative defense beyond this case to all provisions of the Code, so long as that belief is sincerely held. The once-unified Code would become piecemeal in its application. But as with the tax code, the bankruptcy system " 'could not function if denominations were allowed to challenge the [ ] system' on the ground that it operated 'in a manner that violates their religious belief.' " *Hernandez,* 490 U.S. at 699–700, 109 S.Ct. 2136 (quoting *Lee,* 455 U.S. at 260, 102 S.Ct. 1051); *see also Comm. of Tort Litigants* v. *Catholic Diocese of Spokane,* 329 B.R. 304, 324 n. 5 (Bankr.E.D.Wash.2005) ("Bankruptcy debtors who voluntarily choose to participate in that statutory scheme, even those of a religious nature, should not be able to 'pick and choose' among Code sections."); *Tort Claimants Comm.,* 335 B.R. at 853 n. 9 (same). The mandatory and unified nature of the Code is just as important as the tax and social security systems once it has been initiated. Indeed, as Justice Stevens noted in his concurrence to *Lee,* "if tax exemptions were dispensed on religious grounds, every citizen would have an economic motivation to join the favored sects." 455 U.S. at 263 n. 3, 102 S.Ct. 1051 (Stevens, J., concurring). If an exemption to the Code was created in the name of religious beliefs, we can envision scenarios in which individuals would join religious sects to circumvent the Code, all in the name of religion, and gain an "economic advantage over" their secular competitors. *See Braunfeld* v. *Brown,* 366 U.S. 599, 608–09, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion) (noting competitive advantage over competitors was reason not to carve out exception to law at issue).

The Archdiocese counters that Congress has already created exceptions to increasing the size of the Estate elsewhere in the Code, and so the court could do the same here to respect the Archbishop's beliefs. However, "[t]he fact that Congress has already crafted some deductions and exemptions in the Code also is of no consequence" to the possibility of crafting a further exception. *Hernandez,* 490 U.S. at 700, 109 S.Ct. 2136 (quoting *Lee,* 455 U.S. at 261, 102 S.Ct. 1051). Congress has intended the estate to be expansive so that the creditors can obtain maximum relief. *See* 5 Collier on Bankruptcy ¶ 541.01 (16th ed.2014) (discussing "Congress's intent to define property of the estate in the broadest possible sense" since "[i]t would be hard to imagine language that would be more encompassing"). The Archdiocese's proposed narrowing would defeat Congress's very purpose in defining "estate" broadly by shrinking its size with an unwritten exception.

The case for a religious exception is even weaker here than in *Lee* and *Hernandez,* since what the Archdiocese asks us to do is write in an exception for purported fraud. The Court has rejected the idea that fraudulent or improper actions can be excused in the name of religion: "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public * * *. Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury." *Cantwell* v. *Conn.,* 310 U.S. 296, 306, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); *see also McDaniel,* 435 U.S. at 643 n. *, 98 S.Ct. 1322 (Stewart, J., concurring)

("[A]cts harmful to society should not be immune from proscription simply because the actor claims to be religiously inspired."); *Gonzalez,* 280 U.S. at 16, 50 S.Ct. 5 (noting fraud exception to intrachurch doctrine). We do not believe that there is, nor can there be, a religious exception that would allow a fraudulent conveyance in the name of free exercise. For these reasons, we find that the Challenged Provisions are of general and neutral applicability. Assuming the Archbishop's religious practice is substantially burdened, we find that there is a compelling interest in the application of the Challenged Provisions here that is narrowly tailored to achieve that interest.

Therefore, we reverse the grant of summary judgment in favor of the Archdiocese and the dismissal of the case, and grant the Committee's motion for summary judgment on Count III of the Archdiocese's complaint. Our decision does not resolve all the issues in the Archdiocese's complaint, nor do we make any finding as to whether the transfer of the Funds to the Trust was fraudulent, avoidable, or preferential. Our holding today is limited to a determination that RFRA and the First Amendment do not prevent the application of the Challenged Provisions to the Funds. In other words, if the case reaches that stage, the adjudicator can consider the issue of whether the transfer of the Funds ran afoul of any of the Challenged Provisions without violating the Free Exercise Clause or RFRA.

D. Recusal

Finally, the Committee appeals the denial of its motion for recusal, which it filed after the district

court entered its summary judgment order. Because we have vacated the summary judgment order and the case shall be assigned to a new judge on remand, we need not reach the merits of the Committee's motion. However, because the case will be remanded, we briefly note recusal considerations. The Committee alleges that the judge had financial and other interests in the case and so recusal was required under 28 U.S.C. § 455(b). The Committee also argues that a reasonable person would "be deeply concerned about the state of his parents' and other close relatives' bodies and gravesites" and would believe these facts create an appearance of impropriety requiring recusal under 28 U.S.C. § 455(a).

The Archdiocese argues "if the basis for recusal is a matter of public record, as in this case, then the failure to seek recusal in a timely manner is inexcusable." But there is no such requirement—a party does not have an obligation to discover any potentially disqualifying information that is in the public record. The onus is on the judge to ensure any potentially disqualifying information is brought to the attention of the litigants. 28 U.S.C. § 455(c) ("A judge should inform himself about his personal and fiduciary financial interests."); *see also Liljeberg* v. *Health Servs. Acquisition Corp.,* 486 U.S. 847, 873 n. 9, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) ("[N]otwithstanding the size and complexity of the litigation, judges remain under a duty to stay informed of any personal or fiduciary financial interest they may have in cases over which they preside."). It would be unreasonable, unrealistic and detrimental to our judicial system to expect litigants to investi-

gate every potentially disqualifying piece of information about every judge before whom they appear. "[L]itigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore through the judge's private affairs and financial matters * * *. 'Both litigants and counsel should be able to rely upon judges to comply with their own Canons of Ethics.' " *Am. Textile Mfrs. Inst., Inc.* v. *Limited, Inc.,* 190 F.3d 729, 742 (6th Cir.1999) (quoting *Porter* v. *Singletary,* 49 F.3d 1483, 1489 (11th Cir.1995)).

A judge should stay up to date on her financial and other interests so she can make informed decisions and avoid either the appearance of impropriety (28 U.S.C. § 455(a)) or actual bias (28 U.S.C. § 455(b)). The informed judge may then recuse herself on her own motion, if necessary. *See Hampton* v. *Chicago,* 643 F.2d 478, 480 n. 7 (7th Cir.1981) (per curiam) (noting district court "may disqualify himself on his own motion since, for example, he is probably best informed about his minor children's financial interests"). The informed judge can also disclose any concerns he might have so that the parties can proceed with full knowledge. 28 U.S.C. § 455(e) (noting "waiver may be accepted [under § 455(a)] provided it is preceded by a full disclosure on the record of the basis for disqualification"). Had that been done here, any purported timing issues or concerns that the Committee had questionable motives in filing the motion would have resolved themselves earlier in the proceedings.

Under 28 U.S.C. § 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality

might reasonably be questioned." Whether a judge's impartiality might be reasonably questioned is an objective determination. *In re Hatcher,* 150 F.3d 631, 637 (7th Cir.1998). The question is whether a reasonable person could perceive "a significant risk that the judge will resolve the case on a basis other than the merits." *Id.* (quoting *Hook* v. *McDade,* 89 F.3d 350, 354 (7th Cir.1996)).

The Committee argues that a reasonable person would question the judge's impartiality because he would be emotionally attached to the well-being of his family members' resting places. The Archdiocese argues that no reasonable person would "make [that] leap in logic." We think it surprising, given this litigation involves cemetery care and strongly held beliefs about the same, that the Archdiocese would give so little weight to the importance of where the deceased are buried.

Many people strongly ritualize the way they honor the departed, regardless of their faith, religion, or lack thereof. As the Archbishop points out, "the care and maintenance of Catholic cemeteries, cemetery property, and the remains of those interred therein is a fundamental exercise of the Catholic faith." No doubt we could go through and chronicle the importance that graves and cemeteries have on many of the world's major religions, or the importance they have on secular practices, as well.

That importance is compounded by who was buried in the cemeteries here. The Judicial Code of Conduct specifically notes the problems that arise when the "judge or the judge's spouse, or a person related to either within the third degree of relation-

ship" is "known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." *Code of Conduct for United States Judges* Canon 3(C)(1)(d)(iii) (Mar. 20, 2014), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/vol02a-ch02.pdf. Persons within the third degree are a "parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew." *Id.* Canon 3(C)(3)(a). When one of the family members within the third degree is involved in the litigation, that should heighten the judge's awareness, raising the question of whether there is actual bias and, if not, whether the judge should disclose any information so that the parties can decide whether to proceed with full knowledge. *See* 28 U.S.C. § 455(e). Here, these were not distant relatives of the judge's—they were his parents (whose plots he personally bought), two sisters, an uncle, an aunt, his mother-and father-in-law, and his brother in-law, so nine relatives within the third degree. This was problematic.

Though the municipality can come in after one year and take control of the cemeteries if the owner is unable to, Wis. Stat. § 157.115(1)(b)(1), there is no assurance that will happen. Also, the municipality does not have an obligation to take control until five years have passed. *Id.* at (b)(2). A reasonable person might wonder whether the impartiality of a judge, secular or religious, could be affected by the possibility of the graves of nine close relatives falling into a state of disrepair. A lot can happen in one year, let alone five. The image of the graves containing someone's father and mother crumbling is a pow-

erful one indeed, regardless of one's beliefs, and could reasonably call into question a judge's impartiality. These are graves of close relatives and loved ones, and the judge was clearly concerned enough about their care that, at least in his parent's case, he bought their graves. People have been known to act differently when the care of their loved ones is, or might be, affected. This is why the Canons draw the third degree distinction. *Cf. Nichols* v. *Alley,* 71 F.3d 347, 352 (10th Cir.1995) (finding reasonable person could question impartiality of judge whose chambers was affected by, and staff member and court personnel were injured by, bomb allegedly set off by defendant).

III. CONCLUSION

For the foregoing reasons, we AFFIRM IN PART and REVERSE IN PART the judgment of the district court and REMAND for proceedings consistent with this opinion. Circuit Rule 36 shall apply on remand.

APPENDIX B

UNTED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

Bankruptcy No. 11–20059–SVK;

Adversary No. 11–2459–SVK;

No. 13–C–179

In re ARCHDIOCESE OF MILWAUKEE, Debtor.

Archbishop Jerome E. LISTECKI, as Trustee of the Archdiocese of Milwaukee Catholic Cemetery Perpetual Care Trust,

Appellant,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Appellee.

Decided July 29, 2013

DECISION AND ORDER

RUDOLPH T. RANDA, District Judge.

The Archdiocese of Milwaukee is in bankruptcy. One of the issues in this bankruptcy is whether the Archdiocese's creditors, primarily clerical abuse victims who are represented by the Official Committee of Unsecured Creditors (the "Committee"), appointed by the United States Bankruptcy Trustee, can access funds contained in the Archdiocesan Cemetery Trust.

The Cemetery Trust, referred to as the Archdiocese of Milwaukee Catholic Cemetery Perpetual Care Trust, stands apart from the Archdiocese and holds more than $50 million in trust for the perpetual care of more than 500,000 deceased, interred under the tenets of the Catholic faith.

The Cemetery Trust filed an adversary complaint seeking declaratory relief, arguing that the Committee cannot access the funds therein without violating the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA") and the Free Exercise Clause of the First Amendment. The bankruptcy court granted the Committee's motion for partial summary judgment, finding that neither RFRA nor the First Amendment barred the Committee's claims or defenses in the adversary proceeding. *In re Archdiocese of Milwaukee,* 485 B.R. 385 (Bankr.E.D.Wis.2013). Archbishop Jerome E. Listecki, as Trustee for the Cemetery Trust, appealed.

The bankruptcy court's decision is reversed. The Committee, in pursuing the claims of the unsecured creditors under the authority granted to it by the bankruptcy court, acts "under color of law" and is subject to RFRA. § 2000bb–2(1). Therefore, RFRA and the First Amendment prevent the Committee from appropriating the funds in the Trust because doing so would substantially burden the Trustee's free exercise of religion.

I. BACKGROUND

The Archdiocese of Milwaukee was established on November 28, 1843 and created an archbishopric almost 32 years later. The Archdiocese is both a Wisconsin non-stock corporation and a public juridic per-

son under Codex Iuris Canonici or the Code of Canon Law of the Catholic Church. The Archdiocese's mission is to serve Catholic parishes, schools and institutions so that they, too, may effectively serve people in Southeastern Wisconsin and the broader community. The Archbishop is Jerome E. Listecki, successor to the former Archbishop, now Cardinal, Timothy M. Dolan.

The Archdiocese has operated and maintained Catholic cemeteries and mausoleums in Milwaukee since as early as 1857 (collectively, the "Milwaukee Catholic Cemeteries"). Those cemeteries consist of Catholic burial facilities within the geographical boundaries of the Archdiocese, including individual burial plots, crypts, niches, and property dedicated to future use as burial facilities. The Milwaukee Catholic Cemeteries encompass approximately 1,000 acres of land in which more than 500,000 individuals are interred. An estimated 3,000 burials take place each year.

In 2007, the Cemetery Trust was formed under Wisconsin law by then-Archbishop Dolan. The funds that comprise the Trust's principal took nearly a century to accumulate and include approximately $55 million that had been held, separately for that period, for the perpetual care of the Milwaukee Catholic Cemeteries even prior to being transferred to the Trust in or around March 2008 (collectively, with any later earned or received Trust funds, the "Perpetual Care Funds"). The Archdiocese receives quarterly distributions from the Trust to cover the costs for providing for the perpetual care of the Milwaukee Catholic Cemeteries.

Under Church law, Catholic cemeteries occupy land blessed and consecrated for the specific use of Christian burial. Church law includes canon law, issued or authorized by the Pope, recognized as the Church's supreme legislator. This Church law is universal and applicable to Catholics world-wide. Church law also includes particular law—that is, law that governs a specific territorial area for which it was promulgated.

When the Archdiocese established its first cemeteries in the mid–1800's, Church law in the United States forbade priests from providing funeral services for Catholics buried in non-Catholic cemeteries. Although this prohibition was eased in later years, allowing Catholic funerals for those buried in non-Catholic cemeteries, the Church continued to emphasize the sanctity of Catholic burial sites and the importance of Church-owned cemeteries. It also required, among other things, that Catholic cemeteries be maintained in a manner befitting their sacred purpose with money set aside to provide the necessary maintenance and care.

These expectations and requirements are reflected in the universal law of the Church, first codified in 1917 as the Code of Canon Law and in the particular law of the Archdiocese. The placement of the canons governing cemeteries in the original 1917 Code and the successor 1983 Code emphasizes the belief that Catholic cemeteries are sacred places, not mere property. As expressed in the Archdiocese's 1979 *Guidelines for Christian Burial:* "Not only is the Catholic cemetery a sacred place, a place of prayer, and a place reflecting our beliefs and traditions, it is

also for the community a sign of the link among all the faithful, living and dead."

For the Church and therefore Catholics, Catholic cemeteries reflect the Catholic belief in the resurrection of Jesus and the community's commitment to the corporal work of mercy of burying the dead. Resurrection of the dead, of course, has always been an essential element of the Christian faith, beginning with Jesus' own resurrection. For Catholics, moreover, the belief in resurrection is a belief in the ultimate resurrection of one's *own* body. According to this belief, the soul separates from the physical body at death to meet God, while awaiting reunion with its body, transformed and resurrected through the power of Jesus' resurrection, on the last day.

The sacred nature of Catholic cemeteries—and compliance with the Church's historical and religious traditions and mandates requiring their perpetual care—are understood as a fundamental exercise of this core belief. Theologically, the deceased must be treated with respect and charity in the Catholic faith with the hope of resurrection.

Although Archbishop Listecki is the administrator of both the Trust and the Archdiocese, the Trust is separate and distinct from the Archdiocese in civil and in canon law. Under the Code, the ownership of the Trust funds rests in the Trust, not the Archdiocese or the Archbishop. By administering and holding funds for the ongoing care of the Milwaukee Catholic Cemeteries, the Trust and Trustee assume canonical and moral responsibility for that perpetual care.

Similarly, the Code requires that the Trust's funds be used for the Trust's designated purposes. If funds are alienated from the Trust without the required canonical approval, the Archbishop as Trustee may well face discipline and a religious penalty from the Church. Depending on the value of the property at risk, canonical norms require consultation or consent from Church authorities. They may also require approval from the Vatican.

Archbishop Listecki, as Archbishop and Trustee, adheres to the belief in the resurrection of the body and that belief's exercise through, among other things, the perpetual care of the Milwaukee Catholic Cemeteries. If the Trust is legally compelled to cede all or part of the funds to the estate, there will be no funds or substantially less funds for that perpetual care. As a result, neither the Debtor nor the Trust and its Trustee will be able to fulfill their canonical and moral obligations to provide the appropriate care for these sacred sites—consistent with Catholic doctrine and canon law—or assure the requisite permanence, reverence and respect for those buried there.

II. JURISDICTION

An appeal to the district court from an interlocutory order issued by a bankruptcy court is appropriate when it involves a controlling question of law over which there is a substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the termination of the litigation. 28 U.S.C. § 1292(b); *In re Archdiocese of Milwaukee,* 482 B.R. 792, 797 (E.D.Wis.2012). Previously, the Court held that it was "satisfied that this standard is met, such that it will grant leave to ap-

peal. In the course of briefing, the parties are free to pursue further arguments on this point * * *" April 1, 2013 Decision and Order at 2, ECF No. 2. Taking up the Court's invitation, the Committee argues that leave was improvidently granted.

The Committee concedes that most of the issues presented are pure questions of law. However, the Committee argues that whether the Trustee's free exercise rights would be substantially burdened if some or all of the funds in the Trust were made part of the bankruptcy estate is an issue of fact that is not appropriate for an interlocutory appeal. The Committee is correct that interlocutory appeals on issues of fact are considered "pointless." "Disputed facts are resolved at trial—by the verdict if it's a jury trial and if it's a bench trial by the judge's findings of fact—and thus resolution comes at the end of the trial, which ordinarily is too late for an *interlocutory* appeal." *In re Text Messaging Antitrust Litig.,* 630 F.3d 622, 625 (7th Cir.2010) (emphasis in original). That said, the bankruptcy court did not reach the substantial burden issue, although it was raised by the Committee, because it ruled that RFRA did not apply to the Committee in the first instance. Accordingly, the Court is not in the position of reviewing the denial of summary judgment because of the existence of a genuine issue of material fact. *Ahrenholz* v. *Bd. Of Trustees of Univ. of Ill.,* 219 F.3d 674, 676 (7th Cir.2000) ("question of law" refers to "a question of the meaning of a statutory or constitutional regulation, or common law doctrine rather than to whether the party opposing summary judgment has raised a genuine issue of material fact").

The Committee further argues that there are no substantial grounds for difference of opinion on the issues presented by this appeal. Ironically, there may be substantial grounds for difference of opinion regarding the standard which governs whether an issue of law is "contestable." *Compare, Stong* v. *Bucyrus–Erie Co.,* 476 F.Supp. 224, 225 (E.D.Wis.1979) (standard is satisfied when "a reasonable appellate judge could vote for reversal of the challenged order"); *In re Bridgestone/Firestone, Inc.,* 212 F.Supp.2d 903, 909–10 (S.D.Ind.2002) (rejecting the standard in *Stong:* "Instead, we examine 'the strength of the arguments in opposition to the challenged ruling.' ") (internal citation omitted). The arguments in opposition to the bankruptcy court's ruling are strong enough to meet the latter, more rigorous standard.

Moreover, the Court easily concludes that resolution of the issues presented on appeal will materially advance the termination of this litigation. The bankruptcy court stayed the entire adversary proceeding pending the Court's decision on appeal. It cannot be denied that this Court's decision, or a further ruling on appeal from this Court's decision, will shape the course of future proceedings in bankruptcy. The Committee argues that protracted litigation will still occur because the substantial burden issue is not ripe for decision. As noted, the Committee raised this issue before the bankruptcy court. While the bankruptcy court did not reach this issue, it does not follow that the Court must also refrain from doing so.

On that point, a ruling from this Court is justified on a variety of procedural and jurisdictional grounds

aside from the review of an interlocutory order. After the Committee filed its motion for partial summary judgment, the bankruptcy court approved a stipulation in which the parties agreed that the Trustee's RFRA and First Amendment claims are non-core:

> The Parties and the Debtor ***do not consent*** to the Bankruptcy Court hearing and determining these claims and affirmative defenses. The Parties and the Debtor agree that the Bankruptcy Court may hear the RFRA and First Amendment Claims and the RFRA and First Amendment Affirmative Defenses and submit proposed findings of fact and conclusions of law to the district court in accordance with the provisions of 28 U.S.C. section 157(c)(1).

Adversary Docket No. 61, ¶ 2 (emphasis in original). Despite this explicit stipulation, and to the apparent surprise of the parties, the bankruptcy court entered an order granting the Committee's motion for partial summary judgment. As the Trustee argued in its motion for leave to appeal, there is cause to withdraw the reference because the Trustee's claims are concededly non-core. The distinction between core and non-core proceedings is the most important factor in determining whether there is cause for withdrawal since " 'efficiency, uniformity and judicial economy concerns are largely consumed within it.' This is mainly because a bankruptcy judge cannot enter a final judgment in a non-core proceeding. Instead, the bankruptcy judge makes recommendations that are subject to *de novo* review in the district court." *In re Archdiocese of Milwaukee,* Case No. 13–

C–58, 2013 WL 660018, at *1 (E.D.Wis. Feb. 22, 2013) (internal citations omitted). Also, since the bankruptcy court should have submitted "proposed findings of fact and conclusions of law," § 157(c)(1), the Court could simply treat the bankruptcy court's order as such and review it accordingly.

Whether the Court treats this as an interlocutory appeal, a § 157(c)(1) proceeding, or as a withdrawal of the reference from the bankruptcy court, the legal issues are subject to *de novo* review. Interlocutory appeals are not appropriate vehicles to resolve issues of fact, but the bankruptcy court did not make any findings of fact. To the extent that the interlocutory nature of the bankruptcy court's order calls into question the Court's plenary authority to resolve the Trustee's RFRA and First Amendment claims, the reference is withdrawn from the bankruptcy court for this limited purpose. *See, e.g., In re Enron Corp.,* No. 03 Civ.1727 LTS, 2003 WL 22481030, at *4 (S.D.N.Y. Nov. 4, 2003) (explaining that if a proceeding is "non-core, [the district court] will ultimately adjudicate the parties' rights, whether in the context of a trial or dispositive motion practice. Legal determinations by the bankruptcy judge will be subject to *de novo* review on appeal in any event, and the Court retains the power to withdraw the reference for cause at any time. The essential attributes of the judicial power remain with this Court to the extent the matter is non-core").

III. RFRA

RFRA was passed in response to *Emp't Div., Dep't of Human Res. of Or.* v. *Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which held that

"neutral and generally applicable laws are not susceptible to attack under the Free Exercise Clause of the Constitution even if they incidentally burden the exercise of religion." *Lighthouse Inst. of Evangelism, Inc.* v. *City of Long Branch,* 510 F.3d 253, 261 (3d Cir.2007). RFRA was Congress's attempt to overrule *Smith* by "mandating that neutral laws that substantially burden religious exercise must be justified under the compelling government interest test." *In re Emp't Disc. Litig. Against State of Ala.,* 198 F.3d 1305, 1320 (11th Cir.1999). Prior to *Smith,* the Court had traditionally held that any law that substantially burdened the free exercise of religion was constitutionally permissible only if the government could show a compelling interest. "Thus, the purpose of RFRA was to return to what Congress believed was the pre-*Smith* status quo of requiring the Government to show a compelling interest for any law that substantially burdened the free exercise of religion." *Harrell* v. *Donahue,* 638 F.3d 975, 983–84 (8th Cir.2011) (internal citations omitted).

In *City of Boerne* v. *Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), the Court invalidated RFRA as applied to States and their subdivisions because the Act exceeded Congress's remedial powers under the Fourteenth Amendment. *Cutter* v. *Wilkinson,* 544 U.S. 709, 715, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (citing *Boerne,* 521 U.S. at 532–36, 117 S.Ct. 2157). In the wake of *Boerne,* "[e]very appellate court that has squarely addressed the question has held that the RFRA governs the activities of federal officers and agencies." *O'Bryan* v. *Bureau of Prisons,* 349 F.3d 399, 401 (7th Cir.2003) (cit-

ing *Guam* v. *Guerrero,* 290 F.3d 1210, 1221 (9th Cir.2002); *Henderson* v. *Kennedy,* 265 F.3d 1072, 1073 (D.C.Cir.2001); *Kikumura* v. *Hurley,* 242 F.3d 950, 958 (10th Cir.2001); *In re Young,* 141 F.3d 854, 856 (8th Cir.1998)). Nonetheless, the bankruptcy court found that *Boerne* precludes the Trustee's RFRA claims because "Wisconsin trust law governs the validity of the Trust, and Wisconsin fraudulent transfer law governs whether transfers of the Debtor's property to the Trust are avoidable and recoverable by the Committee * * *. [T]hese state laws cannot be invalidated by RFRA." 485 B.R. at 392.

It is true, as the bankruptcy court explained, that the property interests of the Archdiocese in relation to the Trust are generally determined by state law. But the ultimate issue of whether or not that property can be brought into the bankruptcy estate is governed solely by the Bankruptcy Code. 11 U.S.C. § 541(a) (defining the property *of the estate*); § 542(a) (turnover of property *to the estate*); § 550(a) ("to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, *for the benefit of the estate,* the property transferred * * *") (emphasis added). As the Eighth Circuit held in light of *Boerne:*

> We conclude that RFRA is an appropriate means by Congress to modify the United States bankruptcy laws * * *. The Trustee has not contended, and we can conceive of no argument to support the contention, that Congress is incapable of amending the legislation that it has passed. Neither can we accept any argument that allowing the discharge of a debt in bankruptcy and pre-

> venting the recovery of a transfer made by insolvent debtors is beyond the authority of Congress. We therefore conclude that Congress had the authority to enact RFRA and make it applicable to the law of bankruptcy.

Young, 141 F.3d at 861 (internal citations omitted). Simply put, *Boerne* is no obstacle to the application of RFRA in this case. Applying RFRA to the Committee's claims would not invalidate state law.

A. Government

Under RFRA, "government" may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it can demonstrate that the burden is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(a), (b). As an initial matter, the Trustee argues that RFRA applies not just to claims against "government," as that term is defined by RFRA, but also to actions between private parties. The Seventh Circuit has indicated, albeit in dicta, that RFRA "is applicable only to suits to which the government is a party." *Tomic* v. *Catholic Diocese of Peoria,* 442 F.3d 1036, 1042 (7th Cir.2006). This is in accordance with the general weight of authority among other appellate courts. *See Gen. Conf. Corp. of Seventh–Day Adventists* v. *McGill,* 617 F.3d 402, 411–12 (6th Cir.2010) (citing then-Judge Sotomayor's dissent in *Hankins* v. *Lyght,* 441 F.3d 96 (2d Cir.2006)); *Worldwide Church of God* v. *Phila. Church of God, Inc.,* 227 F.3d 1110, 1120–21 (9th Cir.2000); *Sutton*

v. *Providence St. Joseph Med. Ctr.,* 192 F.3d 826, 834–35 (9th Cir.1999).

Therefore, the Court will proceed under the assumption that the Seventh Circuit would find RFRA inapplicable to suits between private parties. Nonetheless, the Court finds that the Committee falls within the definition of "government" because it acts under color of law pursuant to the authority granted to it by the bankruptcy court.

B. Color of Law

Under RFRA, "the term 'government' includes a branch, department, agency, instrumentality, and official (*or other person acting under color of law*) of the United States * * *" § 2000bb–2(1) (emphasis added). The "judicial interpretation of the phrase 'acting under color of law,' as used in 42 U.S.C. § 1983, applies equally in [a] RFRA action." *Sutton,* 192 F.3d at 835 (citing *Brownson* v. *Bogenschutz,* 966 F.Supp. 795, 797 (E.D.Wis.1997)). Accordingly, the "ultimate issue" is whether "the alleged infringement of federal rights [is] fairly attributable to the [government]." *Rendell–Baker* v. *Kohn,* 457 U.S. 830, 838, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). For the reasons that follow, the Committee's pursuit of claims against the Cemetery Trust is fairly attributable to the government.

The Supreme Court has described a two-part test on the issue of "fair attribution." First, the deprivation "must be caused by the exercise of some right or privilege created by the [government] or by a rule of conduct imposed by the [government] * * *" *Lugar* v. *Edmondson Oil Co.,* 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). The Committee does

not dispute that this element is satisfied. *Id.* (describing cases where "a state statute provided the right to garnish or to obtain prejudgment attachment, as well as the procedure by which the rights could be exercised"). As explained above, the Committee is attempting to claim the assets in the Trust for the benefit of the bankruptcy estate pursuant to various provisions of the Bankruptcy Code. *See, e.g.,* 11 U.S.C. §§ 541, 542, 544, and 548.

Second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar,* 457 U.S. at 937, 102 S.Ct. 2744. "Action by a private party pursuant to [a] statute, without something more, [is] not sufficient to justify characterization of that party as a 'state actor.' " *Id.* at 939, 102 S.Ct. 2744. The Supreme Court has identified numerous situations when private conduct is fairly attributed to the government. For example, private action can become state action when private actors "conspire or are jointly engaged with state actors to deprive a person of constitutional rights;" when the state "compels the discriminatory action;" when the state "controls a nominally private entity;" when the state is "entwined" with a private entity's "management or control;" when the state "delegates a public function to a private entity;" or when there is "such a close nexus between the state and the challenged action that seemingly private behavior may be treated as that of the state itself." *Hallinan* v. *Fraternal Order of Police of Chi. Lodge No. 7,* 570 F.3d 811, 815–16 (7th Cir.2009) (internal citations omitted).

Confusion reigns in this area of the law, and the Supreme Court has questioned whether these different tests are "actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation * * *" *Lugar* at 939, 102 S.Ct. 2744. For example, in *Hallinan,* the Seventh Circuit described the "close nexus" situation as a separate test; just under two months later, the Seventh Circuit wrote that at its "most basic level, the state action doctrine *requires* that a court find such a 'close nexus between the State and the challenged action' that the challenged action 'may be fairly treated as that of the State itself.' " *Rodriguez* v. *Plymouth Ambulance Service,* 577 F.3d 816, 823 (7th Cir.2009) (quoting *Jackson* v. *Metro. Edison Co.,* 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (emphasis added)). The *Rodriguez* court then recognized that the various formulations are susceptible to "semantic variations, conflations and significant overlap in practical application; we further recognize that they 'lack rigid simplicity.' Nevertheless, we believe that it is useful to describe these tests as the symbiotic relationship test, the state command and encouragement test, the joint participation doctrine and the public function test." *Id.* at 823–24 (internal citations and quotations omitted). At the risk of placing this case in a category that may or may not be analytically distinct, the Court finds that it falls under the "delegation of a public function" rubric. In turn, the Committee's performance of this public function, discussed below, demonstrates that the requirement of a "close nexus" has also been satisfied.

In the underlying Chapter 11 proceedings, the Archdiocese is acting as a debtor-in-possession with respect to the bankruptcy estate. "In recognition of the fact that, in a reorganization, the appointment of a trustee is generally the exception, rather than the rule, the Bankruptcy Code vests a debtor-in-possession with the powers of a trustee in the event no trustee is appointed." *In re iPCS, Inc.,* 297 B.R. 283, 287 (Bankr.N.D.Ga.2003). As a result, the Archdiocese has "the power to bring causes of action on behalf of the estate, such as avoidance actions." *Id.* More than that, the Archdiocese, as debtor-in-possession, is "duty-bound[ ] to assert cognizable claims in an effort to recover damages for the benefit of the estate." *Id.*

Archbishop Listecki is the spiritual leader of the Archdiocese, and he is also the Trustee of the Cemetery Trust. Because of this conflict of interest, the Archdiocese cannot bring avoidance actions against the Trust. Accordingly, the Committee, consisting of five unsecured creditors previously appointed by the United States Trustee, 11 U.S.C. §§ 1102(a)(1), (b)(1), was granted derivative standing by the bankruptcy court to "assert and litigate the Avoidance and Turnover Claims against the Archbishop for the benefit of the Debtor's estate, including, but not limited to, any Avoidance and Turnover Claims that, if not for the Court's order approving this Stipulation, the Committee would not have had standing to bring because those Avoidance and Turnover Claims belong to the Debtor's estate." Adversary Docket No. 39, ¶ 3. The "ability to confer derivative standing upon creditors' committees is a straightforward ap-

plication of bankruptcy courts' equitable powers." *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp.* v. *Chinery,* 330 F.3d 548, 568 (3d Cir.2003).

In the Court's view, the pursuit of claims on behalf of a bankruptcy estate is a traditional public function. As one court explained, the filing of a Chapter 11 petition causes a "fundamental *legal change* in the entity." *In re* v. *Savino Oil & Heating Co., Inc.,* 99 B.R. 518, 524 (Bankr.E.D.N.Y.1989) (emphasis in original).

> The filing entity is legally different from what it was the moment before filing, as it now assumes the mantle of a new juridical entity, a debtor-in-possession. *As such it becomes an officer of the court subject to the supervision and control of the Bankruptcy Court and the provisions of the Bankruptcy Code. A debtor-in-possession in a Chapter 11 case has the same fiduciary duties as a trustee appointed by a court.* Indeed, the debtor-in-possession occupies the shoes of a trustee in every major way. As a *de jure* trustee, the debtor-in-possession holds its powers in trust for the benefit of creditors.

Id. (emphasis added). In other words, the debtor-in-possession is an officer of the court charged with the duty to act for the benefit of the bankruptcy estate. By giving the Committee derivative standing to bring claims on behalf of the estate, the bankruptcy court effectively transferred the responsibility for performing this public function from the Archdiocese, as debtor-in-possession, to the Committee. Stated another way, because of its inability to pursue legal

action against the Trust, the Archdiocese, in conjunction with the bankruptcy court, delegated this function to the Committee, a function that is "traditionally the exclusive prerogative" of the government. *Jackson,* 419 U.S. at 353, 95 S.Ct. 449.

Indeed, by analogy to the immunity of a bankruptcy trustee, courts have held that a creditors committee is entitled to qualified immunity. "Because of its central statutory role in the Chapter 11 process, and to assure the effective representation of its constituency, an official committee such as the Creditors Committee enjoys a qualified immunity that corresponds to, and is intended to further, the Committee's statutory duties and powers." *Pan Am Corp.* v. *Delta Air Lines, Inc.,* 175 B.R. 438, 514 (S.D.N.Y.1994); *see also In re Drexel Burnham Lambert Group, Inc.,* 138 B.R. 717, 722 (Bankr.S.D.N.Y.1992). This immunity "extends to conduct within the scope of the committee's statutory or court-ordered authority." *Id.* The Committee concedes that it is entitled to qualified immunity, but then disclaims what necessarily follows: only parties acting under color of law are entitled to qualified immunity. *Wyatt* v. *Cole,* 504 U.S. 158, 167–68, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) ("Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions * * *. These rationales are not transferable to private parties"). The Committee cannot claim the benefits of qualified immunity while ignoring its downside in the matter at hand. *See, e.g., In re Walnut Equipment Leasing Co.,* No. 97–19699

DWS, 2000 WL 1456951, at *4 (Bankr.E.D.Pa. Sept. 22, 2000) ("the Committee was authorized to commence avoiding actions. It did so, and is entitled to immunity for its actions. A contrary holding would chill the ability of the committee to properly exercise its obligation to maximize assets for the estate since it could easily find itself * * * the subject of suit * * *").

The conclusion that the Committee is acting under color of law is supported by the Supreme Court's delegation-of-a-public-function cases. For example, in *Edmonson* v. *Leesville Concrete Co., Inc.,* 500 U.S. 614, 628, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), the Court held that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of their race because "the injury to excluded jurors would be the direct result of governmental delegation and participation." The Court framed its analysis around three guiding principles. First, the "extent to which the actor relies on governmental assistance and benefits;" second, "whether the actor is performing a traditional governmental function;" and third, "whether the injury caused is aggravated in a unique way by the incidents of governmental authority." *Id.* at 621–22, 111 S.Ct. 2077 (internal citations omitted); *see also Georgia* v. *McCollum,* 505 U.S. 42, 51, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (extending *Edmonson* to a criminal defendant's use of race-based peremptory challenges).

First, the Court explained that although "private use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state ac-

tion, our cases have found state action when private parties make extensive use of state procedures with 'the overt, significant assistance of state officials.' " *Edmonson,* 500 U.S. at 622, 111 S.Ct. 2077 (internal citations omitted). The Court continued: "It cannot be disputed that, without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist." *Id.* at 622, 111 S.Ct. 2077. Similarly, the Committee exists only because it was appointed by the bankruptcy trustee, and it is subject to oversight and control by the trustee and the bankruptcy court. 28 U.S.C. § 586(a)(3)(E) (trustee is responsible for "monitoring creditors' committees appointed under title 11"); 11 U.S.C. § 1103(a) (court must approve the hiring of any "attorneys, accountants, or other agents"); §§ 503(b)(2), (b)(3)(F), (b)(4) (allowance of administrative expenses);[4] § 1102(a)(4) (bankruptcy court may order the trustee to change the membership of a committee if it "determines that the change is necessary to ensure adequate representation of creditors").

Most important, the Committee is allowed to pursue claims on behalf of the bankruptcy estate only because the bankruptcy court gave the Committee standing to do so. This standing can be unilaterally withdrawn. *In re Adelphia Commc'ns Corp.,* 544 F.3d 420, 423 (2d Cir.2008) ("a court may withdraw a committee's derivative standing and transfer the

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[4] The bankruptcy court already suspended payment of the Committee's legal fees and expenses because of concern over the Archdiocese's ability to cover its operating expenses. Bankruptcy Docket Nos. 1464, 1784.

management of its claims, even in the absence of that committee's consent, if the court concludes that such a transfer is in the best interests of the bankruptcy estate"). Accordingly, without the "direct and indispensable participation of the judge, who beyond all question is a state actor," *Edmonson* at 624, 111 S.Ct. 2077 the Committee would not be able to serve its intended purpose. The bankruptcy court " 'has not only made itself a party to the [violation], but has elected to place its power, property and prestige behind the [violation].' " *Id.* (internal citations omitted). "In so doing, the government has 'create[d] the legal framework governing the [challenged] conduct,' and in a significant way has involved itself with" violating the Trustee's right to free exercise of religion. *Id.* (internal citations omitted).

Second, as the Court already explained, the pursuit of claims on behalf of a bankruptcy estate is a traditional public function. *Jackson* at 352, 95 S.Ct. 449 ("We have * * * found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the [government]"). As in *Edmonson,* this public function is not altered because the Committee is motivated by private interests. "Though the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body * * *. The fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised." *Edmonson* at 626, 111 S.Ct. 2077; *see also McCollum,* 505 U.S. at 54, 112 S.Ct. 2348 ("that a defendant exercises a per-

emptory challenge to further his interest in acquittal does not conflict with a finding of state action. Whenever a private actor's conduct is deemed 'fairly attributable' to the government, it is likely that private motives will have animated the actor's decision").

Third, the injury in *Edmonson* was "made more severe" because the government "permit[ted] it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds." *Edmonson* at 628, 111 S.Ct. 2077. So it is here. Free exercise of religion, just like equal protection, is inherent in our constitutional system.

For the foregoing reasons, the Committee's actions are fairly attributable to the government. Therefore, the Committee is acting under color of law for purposes of RFRA.

C. Substantial Burden

Under RFRA, a "substantial burden on the free exercise of religion * * * is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." *Mack* v. *O'Leary,* 80 F.3d 1175, 1179 (7th Cir.1996). This "generous definition" is "sensitive to religious feeling. Many religious practices that clearly are not mandatory * * * are important to their practitioners, who would consider the denial of them a grave curtailment of their religious liberty." *Id.* It also reflects the "undesirability of making judges arbiters of religious law." *Id.*

In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), [5] which defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7)(A). The RLUIPA definition, now incorporated by RFRA, § 2000bb–2(4), "prompted a renewed consideration of what constitutes a substantial burden." *Koger* v. *Bryan,* 523 F.3d 789, 799 (7th Cir.2008). In the "context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction—effectively impracticable." *Civil Liberties for Urban Believers* v. *City of Chi.,* 342 F.3d 752, 761 (7th Cir.2003). The Court is unsure as to whether this formulation is useful outside of a land use regulation. However, RLUIPA also applies to prisons that receive federal funding, *Ortiz* v. *Downey,* 561 F.3d 664, 670 (7th Cir.2009), and *Koger* applied the *Civil Liberties* test to such a claim. In any event, the *Mack* standard apparently still applies to RFRA

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[5] RLUIPA was enacted in response to *Boerne,* discussed above. "So Congress went back to the drawing board, narrowed its focus, and began compiling a legislative record of free-exercise violations in two discrete areas: laws affecting land use by religious organizations and laws affecting the religious exercise of institutionalized person. RLUIPA was the result of this effort and was adopted in 2000, three years after" *Boerne. River of Life Kingdom Ministries v. Vill. Of Hazel Crest, Ill.,* 611 F.3d 367, 380 (7th Cir.2010) (Sykes, J., dissenting).

claims, and even if the *Civil Liberties* standard should apply, the difference is not outcome-determinative. *Koger,* 523 F.3d at 799 ("In determining when an exercise has become 'effectively impracticable,' it is helpful to remember that in the context of the Free Exercise Clause, the Supreme Court held that a government imposes a substantial burden on a person's beliefs when it 'put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs' ") (quoting *Thomas* v. *Review Bd.,* 450 U.S. 707, 718, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981)); *Mack* at 1178 ("the more generous definition is more faithful both to the statutory language and to the approach that the courts took before *Smith,* in cases like * * * [*Thomas*]—which is the approach that Congress wanted them to take under [RFRA]"); *Guerrero,* 290 F.3d at 1222 (applying *Thomas*'s "substantial pressure" test to an RFRA claim).

As explained by Archbishop Listecki, "the care and maintenance of Catholic cemeteries, cemetery property, and the remains of those interred is a fundamental exercise of the Catholic faith." Adv. Docket No. 69–2, Declaration of Archbishop Listecki, ¶ 3. Thus, if the Trust's funds are converted into the bankruptcy estate, there will be no funds or, at best, insufficient funds for the perpetual care of the Milwaukee Catholic Cemeteries. *Id.* at ¶ 30. Moreover, Archbishop Listecki would be forced to choose between obedience to church doctrine and obedience to a civil judicial authority:

> In my lay and ecclesiastical capacities, responsible for the religious, moral, and fiscal health of the Archdiocese—as well as the Trust—I have

> never been placed in a position of having to choose between a doctrinal directive or mandate from church authorities and a lawful order from a civil judicial authority. No religious leader in American society should be compelled to make that choice, which is no choice at all in light of the overriding deference owed one's highest religious authority.

Id. at ¶ 44.

Archbishop Listecki's declaration unquestionably represents the authoritative church position regarding the central and sacred nature of cemeteries to the Catholic faith. A secular court "may not take sides on issues of religious doctrine." *McCarthy* v. *Fuller,* 714 F.3d 971, 975 (7th Cir.2013). The Court's only province is to decide "whether a party is correct in arguing that there is an authoritative church ruling on an issue, a ruling that removes the issue from the jurisdiction of that court. But once the court has satisfied itself that the authorized religious body has resolved the religious issue, the court may not question the resolution." *Id.* at 976 (internal citations omitted). In *Fuller,* a civil lawsuit "charging RICO, trademark, and copyright violations along with Indiana torts," *Id.* at 972, the defendant claimed that she was a member of a Roman Catholic religious order. The district court held that this was a proper jury question, but on appeal, the Seventh Circuit elicited an *amicus* brief from the Holy See which concluded that Fuller "is not a nun * * *, not a member of the Catholic Sisterhood or of any Catholic religious order, and not entitled under Catholic law to call herself Sister Therese." *Id.* at 976. Judge Posner

considered the brief to be the "unquestionably authentic statement of the Holy See. In it the Holy See has spoken, laying to rest any previous doubts: Fuller has not been a member of any Catholic religious order for more than 30 years. Period. The district judge has no authority to question that ruling. A jury has no authority to question it. We have no authority to question it." *Id.* at 978. In other words, "federal courts are not empowered to decide (or to allow juries to decide) religious questions." *Id.* at 980.

The Committee argues, as discussed above, that further proceedings are required because substantial burden is an issue of fact that needs further development through discovery. Procedurally, the Committee moved for partial summary judgment, and in response, the Trustee asked the bankruptcy court to not only deny the Committee's motion, but also to enter summary judgment in his favor. Fed. R. Bankr.P. 7056; Fed.R.Civ.P. 56(f)(1) (Judgment Independent of the Motion). At a hearing which occurred before the Committee filed its reply brief, the parties agreed that the bankruptcy court would defer ruling on the substantial burden issue, at least with respect to how it was raised by the Trustee's request for summary judgment. October 18, 2012 Hearing Transcript, ECF No. 13–14. Accordingly, the bankruptcy court did not reach this issue because it concluded that RFRA did not apply to the Committee's actions in the first instance. That being said, Archbishop Listecki's declaration stands unopposed, and on the issue of religious doctrine, it is unassailable. Moreover, the issue of substantial burden is essentially coterminous with religious doctrine. Canon

law dictates that the funds in the Trust must be used for the perpetual care of those interred under the tenets of the Catholic faith. Removing some or all of these funds from the Trust and placing them in the bankruptcy estate would undoubtedly put "substantial pressure" on Archbishop Listecki and the Trust to "modify [their] behavior" and "violate [their] beliefs." *Koger* at 799. No amount of discovery can change canon law. In this context, any transfer of funds from the Trust to the estate would meet the substantial burden test.

D. Compelling Governmental Interest; Least Restrictive Means

Because the Committee is "government," and because invading the Trust would substantially burden the Trustee's free exercise of religion, the Committee must establish that this burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. § 2000bb–1(b)(1), (2). Compelling governmental interests are "interests of the highest order." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Examples include maintaining the tax system, *Hernandez* v. *C.I.R.,* 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989), enforcing participation in the social security system, *United States* v. *Lee,* 455 U.S. 252, 258–59, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), maintaining national security and public safety, *Gillette* v. *United States,* 401 U.S. 437, 462, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), and providing public education, *Wisconsin* v. *Yoder,* 406 U.S. 205, 213, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

With respect to the Bankruptcy Code, the Court agrees with the Eighth Circuit that the "interests advanced by the bankruptcy system are not compelling under the RFRA." *In re Young,* 82 F.3d 1407, 1420 (8th Cir.1996), *vacated on other grounds,* 521 U.S. 1114, 117 S.Ct. 2502, 138 L.Ed.2d 1007 (1997), *reaff'd,* 141 F.3d 854 (8th Cir.1998). "[B]ankruptcy is not comparable to interests of national security or public safety * * *. [A]llowing debtors to get a fresh start or protecting the interests of creditors is [also] not comparable to the collection of revenue through the tax system or the fiscal integrity of the social security system, which have been recognized as compelling governmental interests in the face of a religious exercise claim." *Id.; see also In re Roman Catholic Archbishop of Portland, Ore.,* 335 B.R. 842, 864 (Bankr.D.Or.2005) ("the Bankruptcy Code itself contains various provisions that limit the breadth of the estate, * * * Thus, the Bankruptcy Code itself provides for exceptions that do not further the policies of the Code. In light of those exceptions, I conclude that there is no compelling governmental interest in applying § 544(a)(3) if doing so would impose a substantial burden on the exercise of religion").

Furthermore, even if enforcement of the Bankruptcy Code could be considered a compelling governmental interest, enforcing the code in this particular case is not the least restrictive means of furthering that interest. "If the compelling state goal can be accomplished despite the exemption of the particular individual, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest." *Callahan* v. *Woods,* 736 F.2d

1269, 1272–73 (9th Cir.1984). Once again, as the Eighth Circuit explained: "we cannot see how the recognition of what is in effect a free exercise exception to the avoidance of fraudulent transfers can undermine the integrity of the bankruptcy system as a whole; its effect will necessarily be limited to the debtor's creditors, who will as a result have fewer assets available to apply to the outstanding liabilities, and not all creditors or even all debtors." *Young,* 82 F.3d at 1420.

IV. FIRST AMENDMENT

The First Amendment provides that Congress shall make no law prohibiting the free exercise of religion. The Free Exercise Clause "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *Jimmy Swaggart Ministries* v. *Bd. Of Equalization of Cal.,* 493 U.S. 378, 384, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990). When faced with a free exercise challenge, the first inquiry is whether the law being challenged is neutral and of general applicability. Such a law "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi,* 508 U.S. at 531, 113 S.Ct. 2217 (citing *Smith*). In this respect, the bankruptcy court held that the "purpose and effect of the Bankruptcy Code provisions at issue in this case are generally applicable and religion-neutral." 485 B.R. at 393.

This conclusion, even if correct, does not end the inquiry. *Vision Church* v. *Vill. of Long Grove,* 468 F.3d 975, 996 (7th Cir.2006). "A regulation neutral on its face may, in its *application,* nonetheless offend the constitutional requirement for neutrality if it unduly burdens the free exercise of religion," in which case there must be a "compelling governmental interest justif[ying] the burden." *Id.* (quoting *Jimmy Swaggart Ministries,* 493 U.S. at 384–85, 110 S.Ct. 688) (emphasis added). As the Court already explained, the burden on the Trustee's free exercise of religion is substantial, and there is no compelling governmental interest which can justify the burden. *St. John's United Church of Christ* v. *City of Chi.,* 502 F.3d 616, 644 (7th Cir.2007) ("a facially-neutral law that 'imposes a substantial burden on religion' offends the Free Exercise Clause and likewise is subject to strict scrutiny") (quoting *Vision Church* at 996).

V. CONCLUSION

RFRA and the First Amendment prevent the Committee from appropriating the funds in the Trust because doing so would substantially burden the Trustee's free exercise of religion.

Therefore, **IT IS HEREBY ORDERED THAT** the decision of the bankruptcy court is **REVERSED,** and this matter is **REMANDED** for further proceedings consistent with this opinion.

APPENDIX C

UNTED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

Bankruptcy No. 11–20059–SVK;
Adversary No. 11–2459–SVK

In re ARCHDIOCESE OF MILWAUKEE, Debtor.

Archbishop Jerome E. LISTECKI, as Trustee of the Archdiocese of Milwaukee Catholic Cemetery Perpetual Care Trust,

Plaintiff,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Defendant.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

Counterclaimant,

v.

Archbishop Jerome E. LISTECKI, as Trustee of the Archdiocese of Milwaukee Catholic Cemetery Perpetual Care Trust,

Counterdefendant.

Decided Jan. 17, 2013

DECISION ON MOTION FOR SUMMARY JUDGMENT

SUSAN V. KELLEY, Bankruptcy Judge.

On April 2, 2007, the Archdiocese of Milwaukee (the "Debtor") created the Milwaukee Catholic Cemetery Perpetual Care Trust (the "Trust" or the "Cemetery Trust") to provide for the perpetual care of the Debtor's cemetery property and grounds. In March 2008, the Debtor funded the Trust by transferring over $55 million to a Trust bank account at U.S. Bank. The Debtor filed a chapter 11 petition on January 4, 2011, and shortly thereafter, the United States Trustee appointed the Official Committee of Unsecured Creditors (the "Committee"). On January 13, 2012, the plaintiff, Archbishop Jerome E. Listecki (the "Archbishop"), as Trustee of the Trust, filed a five-count Amended Complaint against the Committee, which had been granted standing to defend, negotiate and settle the claims made concerning the Trust.

In the Amended Complaint, the Archbishop seeks a declaration that (1) the Trust is not property of the Debtor's bankruptcy estate, and (2) the funds held in the Trust are not property of the Debtor's bankruptcy estate. Count III of the Amended Complaint alleges that the Committee cannot use the Bankruptcy Code to make the Trust property of the estate because doing so would violate the Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb et seq.) ("RFRA") and the First Amendment to the United States Constitution. The Committee filed a Motion for Summary Judgment, seeking summary adjudication of Count III and the Committee's related Seven-

teenth, Twentieth and Twenty–Second affirmative defenses.

Does including the Trust assets in the bankruptcy estate substantially burden the Debtor's free exercise of religion in violation of RFRA, the First Amendment or both? To answer in the affirmative would compel the Court to reach the unprecedented finding that a Chapter 11 creditors' committee is the government. That is a leap of faith the Court will not make. The Court also easily concludes that the Bankruptcy Code is a neutral and generally applicable statute that does not target religion or religious conduct. Therefore, the Court will grant the Committee's Motion. This disposition does not necessarily mean that the Cemetery Trust assets will be available to pay the Debtor's creditors; the other Counts of the Complaint[6] and the Committee's Counterclaim remain to be decided.

Procedural Background

The parties filed briefs and supporting materials, and the Court held a hearing on January 11, 2013. The Archbishop stridently protested the Committee's failure to file a statement of proposed undisputed

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[6] Count I is a claim that the Trust assets are not property of the bankruptcy estate based on various theories of trust law. Count II is a claim that since the Trust *res* was never commingled, the *res* was not property of the estate; Count IV alleges that since the funds were not commingled at the time of the bankruptcy petition, the trust funds are not property of the estate; and Count V alleges that since the Archbishop can trace the funds in the Trust, the funds are not property of the estate.

material facts.[7] But there can be no serious dispute about the facts necessary for the Court to decide this Motion. Whether RFRA applies to including Cemetery Trust assets in the Debtor's bankruptcy estate, and whether Bankruptcy Code provisions are neutral and generally applicable, are legal questions, not factual ones. Both parties confirmed at the hearing that the issues are purely ones of law. Under these circumstances, the Committee's failure to file a statement of proposed undisputed facts is harmless.[8]

The Committee advances three arguments: (1) RFRA is applicable only to suits to which the government is a party; (2) RFRA may not be applied to invalidate state law, such as Wisconsin fraudulent transfer law; and (3) application of neutral, generally applicable provisions of the Bankruptcy Code does not violate First Amendment free exercise claims.

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[7] This Court's Local Rules regarding summary judgment do not require the statement of undisputed facts, except possibly by reference to the District Court's Local Rules. Arguably, the District Court's summary judgment procedural rules are inconsistent with the Bankruptcy Court's rules, and do not apply. No pretrial order obligated the Committee to file the statement in this adversary proceeding, and the Court does not customarily require such statements, except as expressly stated in a pretrial order. As the Committee noted, the Debtor has filed several Motions for Summary Judgment in this case, and none has been accompanied by a statement of undisputed facts.

[8] The Committee supported its Motion for Summary Judgment with an affidavit.

1. RFRA is Applicable Only to Suits Involving the Government

RFRA forbids "government" from substantially burdening religious exercise unless the burden is narrowly tailored to serve a compelling governmental interest. 42 U.S.C. § 2000bb–1. RFRA defines the term "government" to include a "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." 42 U.S.C. § 2000bb–2. The Committee hangs its hat on *Tomic* v. *Catholic Diocese of Peoria,* 442 F.3d 1036 (7th Cir.2006), in which the court rejected the Second Circuit's decision in *Hankins* v. *Lyght,* 441 F.3d 96 (2d Cir.2006), and declared: "RFRA is applicable only to suits to which the government is a party." *Tomic,* 442 F.3d at 1042. The Archbishop counters that *Tomic's* pronouncement was mere dictum, but other courts of appeals have held that RFRA applies only to suits involving the government.

For example, in *General Conf. Corp.* v. *McGill,* 617 F.3d 402, 410 (6th Cir.2010), the court defined the issue as "whether RFRA applies only in suits against the government or also in suits by private parties seeking to enforce federal law against other private parties." Adopting the dissent in *Hankins* by then-Judge Sotomayor, the Sixth Circuit concluded that RFRA does not apply to suits between private parties for three reasons:

> First, as discussed above, RFRA's text does not support the *Hankins* majority's interpretation. Second, the *Hankins* majority limited its holding to the application of RFRA vis-a-vis federal laws

> that can be enforced by private parties and the government. That case concerned an action under the ADEA by a clergyman who had been forced into retirement. The ADEA claim could have been brought by the EEOC, and the majority sought to avoid disparate application of the statute based on who brings discrimination charges. *Id.* There is no EEOC-like agency that can bring trademark-enforcement actions. Third, a different panel of the Second Circuit already has expressed "doubts about *Hankins's* determination that RFRA applies to actions between private parties." *Rweyemamu* v. *Cote,* 520 F.3d 198, 203 (2d Cir.2008). That panel stated that "we think the text of RFRA is plain," credited Judge Sotomayor's dissent, and concluded that RFRA should not apply to purely private disputes "regardless of whether the government is capable of enforcing the statute at issue." *Id.* at 203 n. 2.

Id. at 411.

The Ninth Circuit, too, has concluded that RFRA does not apply to suits between private parties. *See Worldwide Church of God* v. *Phila. Church of God, Inc.,* 227 F.3d 1110, 1121 (9th Cir.2000) ("It seems unlikely that the government action Congress envisioned in adopting RFRA included the protection of intellectual property rights against unauthorized appropriation."); *Sutton* v. *Providence St. Joseph Med. Ctr.,* 192 F.3d 826, 834, 837–43 (9th Cir.1999) (observing that Congress did not specify that RFRA applies to nongovernmental actors, as it typically does when intending to regulate private parties, and holding that private parties could not be considered state

actors under RFRA unless they acted jointly with government officials to violate free-exercise rights).

In *Sutton,* the defendant (a private hospital) would not hire the plaintiff who for religious reasons refused to provide a social security number as federal law required. The *Sutton* court thoroughly explored when a private party acts "under color of law" and therefore qualifies as a governmental actor for RFRA purposes. The court noted that Congress has used the phrase "under color of law" in other statutes, including 42 U.S.C. § 1983. *Id.* at 835–36; *see also Brownson* v. *Bogenschultz,* 966 F.Supp. 795, 797 (E.D.Wis.1997) (stating that the required degree of government action under RFRA is analyzed under same standard as § 1983). The court concluded that in determining whether a person is liable under § 1983, the ultimate issue is whether the alleged infringement of federal rights is fairly attributable to the government. *Sutton,* 192 F.3d at 835 (citing *Rendell–Baker* v. *Kohn,* 457 U.S. 830, 838, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982)).

According to *Sutton,* the analysis starts with a presumption that private conduct does not constitute government action. Calling the circumstances under which a private party can act under color of law "rare," and noting that "something more" than simply enforcing a federal statute is required, the court identified four tests for identifying when a party acts under color of law: "(1) public function, (2) joint action, (3) governmental compulsion or coercion, and (4) governmental nexus." *Id.* at 835–36. The plaintiff seized on governmental compulsion, arguing that the government compelled the result by mandating

that the hospital require the social security number. After a thorough review of the case law, the *Sutton* court rejected the argument, finding that mere application of a statute is insufficient: the government must provide a "nexus" for a private entity to be clothed with the garb of a governmental actor. Examples include government participation in the action via conspiracy, official cooperation with the action, or government enforcement and ratification of the private entity's action. *Id.* at 841. The Ninth Circuit's own decisions supplied similar illustrations:

> In summary, Ninth Circuit precedent does not suggest that governmental compulsion, without more, is sufficient to deem a truly private entity a governmental actor in the circumstances of this case. Instead, the plaintiff must establish some other nexus sufficient to make it fair to attribute liability to the private entity as a governmental actor. Typically, the nexus consists of some willful participation in a joint activity by the private entity and the government. Plaintiff here fails to allege any such nexus.

Id. at 843. The Archbishop argues that the court in *Sutton* "made clear it was not holding that, in all instances, a party could not bring a RFRA claim against a private entity." (Archbishop's Response Brief at 11). True, *Sutton* recognized the exceptions under which a private party can act "under color of law." But the court found no exception applicable, because the plaintiff failed to show that there was any "nexus to make it fair to attribute liability to the private entity as a government actor." *Id.*

No nexus was shown in *Sutton,* and no nexus has been shown here. The Archbishop has not alleged that the Committee is engaged with the government in a conspiracy, has not alleged any joint action and has not alleged that the government is officially cooperating with the Committee. Comprised of five individual creditors, the Committee merely seeks to apply provisions of the Bankruptcy Code and Wisconsin law so as to include property in the Debtor's bankruptcy estate. The Archbishop says that this property is needed to maintain Catholic cemeteries. The "government" is not involved here any more than it was involved in *Sutton.*

The Archbishop argues that the Committee is acting under color of law because the Committee was appointed by the U.S. Trustee, is subject to court approval, and has shades of judicial immunity. The Archbishop concedes that no court has ever held that a creditors' committee is the "government" based on these factors. He cites *Brownson* v. *Bogenschultz,* 966 F.Supp. 795, 798 (E.D.Wis.1997), but in *Brownson,* Judge Reynolds said: "Under the joint action theory, private defendants act under color of state law when they collaborate with a state official to deny the plaintiffs' rights. To transform a private defendant into a state actor under the joint action theory, the public and private actors must share a common and unconstitutional goal." (internal citations omitted). The Archbishop fails to explain how the Committee's performance of its functions in this bankruptcy case, or its immunity in performing them, translates to the Committee acting jointly with

the federal government to accomplish a common goal, let alone an unconstitutional one.

The Archbishop also relies on *Taunt* v. *Barman (In re Barman),* 252 B.R. 403(Bankr.E.D.Mich.2000), but *Barman* is easily distinguishable. In *Barman,* the Chapter 7 trustee obtained an *ex parte* order and went with the U.S. Marshal to the debtor's residence to search for concealed assets. The debtor sought to suppress the resulting evidence because his Fourth Amendment rights had been violated. Noting that the Fourth Amendment only applies to abuses by the government, the court concluded that the trustee was acting under color of law. The court reached this conclusion not only because the U.S. Marshal had accompanied the trustee on the search, but also because of the trustee's status as a trustee, someone appointed and supervised by the U.S. Trustee, an official of the U.S. Department of Justice.

Initially, this Court rejects the *Barman* court's determination that the trustee's connection to the U.S. Trustee elevates the Chapter 7 trustee to government status. Other courts have declined to deem the trustee a governmental actor in various contexts. *See Cromelin* v. *United States,* 177 F.2d 275, 277 (5th Cir.1949) (trustee "is in no sense an agent or employee or officer of the United States."); *Wells* v. *United States,* 98 B.R. 806 (N.D.Ill.1989) ("For one thing, a trustee in bankruptcy has long been held not to be an agent of the United States."); *Spacone* v. *Burke (In re Truck–A–Way),* 300 B.R. 31 (E.D.Cal.2003) (disagreeing with *Barman* and suggesting that no order should have been issued to the

trustee precisely because the trustee is not a government attorney or law enforcement official).

Even if the *Barman* trustee did act under color of law in searching the debtor's residence with the U.S. Marshal, the facts in this case are different. The Committee, acting derivatively through the Debtor as debtor in possession, is defending a lawsuit concerning property of the bankruptcy estate. The U.S. Trustee does not supervise debtors in possession or creditors' committees in the same manner as Chapter 7 trustees. Section 586(a)(1) of Title 28 U.S.C. provides: "Each United States Trustee * * * shall (1) establish, maintain, and *supervise* a panel of private trustees that are eligible and available to serve as trustees in cases under chapter 7 of title 11." 28 U.S.C. § 586(a)(1) (emphasis supplied). Conversely, section 586(a)(3)(E) states that the U.S. Trustee's role is simply to "monitor" the creditors' committee. 28 U.S.C. § 586(a)(3)(E). "Supervising" implies some level of control over Chapter 7 trustees' actions, while "monitoring" suggests little more than observation of committee participation in Chapter 11 cases.

Finally, although the U.S. Trustee appointed the Committee, the Committee is not acting in concert with the U.S. Trustee or any government official in this adversary proceeding. The U.S. Trustee is not a party to this adversary proceeding, and no representative of the U.S. Trustee appeared at the hearing on the Motion for Summary Judgment. The Court also rejects the Archbishop's suggestion that this Court's enforcement of the Bankruptcy Code and supervision of this bankruptcy case makes the Committee a governmental actor for purposes of RFRA.

Such a nexus would render virtually every participant in a bankruptcy case the government.

In summary, the Court concludes that the Committee is not the government and is not acting under color of law as that phrase is used in RFRA. This conclusion is grounded on (1) the Seventh Circuit's statement in *Tomic,* and the other circuit court decisions concluding that RFRA does not apply in suits between private parties; (2) the "rare" circumstances under which a private party acts under color of law; (3) the failure of the Committee to satisfy any of the tests in *Sutton,* such as joint action or government compulsion; and (4) the lack of any precedent under which a creditors' committee has been found to be acting "under color of law" in defending or prosecuting an avoidance action suit in bankruptcy court. Therefore, RFRA does not apply to bar the Committee's claims or defenses in this adversary proceeding.

2. RFRA May Not be Applied to Invalidate State Law

Assuming it is necessary to reach the argument, the Court also agrees with the Committee that RFRA does not bar the claims here because the ultimate law to be applied is state law. The Supreme Court stated in *Cutter* v. *Wilkinson,* 544 U.S. 709, 715, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005): "In *City of Boerne,* this Court invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment."[9] After *Boerne,* even assuming

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[9] In a footnote, the Court added: "RFRA, Courts of Appeals have held, remains operative as to the Federal Government and

that RFRA applies to actions involving the federal government, RFRA clearly cannot be used to invalidate a state law.

Although a federal statute, 11 U.S.C. § 541, defines what is property of the bankruptcy estate, the ultimate determination whether the Trust assets are included in the Debtor's estate is a question of state law. In *Butner* v. *United States,* 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979), the Supreme Court stated: "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." Citing *Butner,* the court in *Tort Claimants Comm.* v. *Roman Catholic Archbishop (In re Roman Catholic Archbishop),* 335 B.R. 842, 860 (Bankr.D.Or.2005), questioned whether RFRA applied at all to an estate property determination in a diocesan bankruptcy.

In this adversary proceeding, Wisconsin trust law governs the validity of the Trust, and Wisconsin fraudulent transfer law governs whether transfers of the Debtor's property to the Trust are avoidable and recoverable by the Committee. The Court agrees with the Committee that these state laws cannot be invalidated by RFRA.

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federal territories and possessions. *See O'Bryan v. Bureau of Prisons,* 349 F.3d 399, 400–401 (7th Cir.2003); *Guam v. Guerrero,* 290 F.3d 1210, 1220–1222 (9th Cir.2002); *Kikumura v. Hurley,* 242 F.3d 950, 958–960 (10th Cir.2001); *In re Young,* 141 F.3d 854, 858–863 (8th Cir.1998). This Court, however, has not had occasion to rule on the matter." *Id.*

3. Application of Neutral, Generally Applicable Provisions of the Bankruptcy Code do not Violate First Amendment Free Exercise Claims

In *Employment Division* v. *Smith,* 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court held that the Free Exercise Clause of the First Amendment ordinarily does not relieve a religious adherent from compliance with a neutral, generally applicable law. As applied to this case, the Court cannot relieve the Archbishop from the estate-defining provisions of the Bankruptcy Code if the Code is a neutral, generally applicable law. A law is neutral if its object is something other than the infringement or restriction of religious practices. *See Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). A law is not generally applicable if it imposes burdens only on conduct motivated by religious belief in a selective manner. *St. John's United Church of Christ* v. *City of Chicago,* 502 F.3d 616, 631 (7th Cir.2007) (quoting *Lukumi,* 508 U.S. at 543, 113 S.Ct. 2217).

The Archbishop argues that the Bankruptcy Code is not a neutral, generally applicable law because the Code contains various exceptions and exemptions. But none of the examples the Archbishop cites is "targeted" at religion, nor is the object of the Bankruptcy Code directed at religion or religious practices. Rather, the provision at issue here—the provision that creates and defines the bankruptcy estate—advances one of the "overarching purposes" of the Bankruptcy Code: the protection of creditors. *Andrews* v. *Riggs Nat'l Bank (In re Andrews),* 80

F.3d 906, 909–910 (4th Cir.1996). This objective is "effectuated through statutory provisions that marshal and consolidate the debtor's assets into a broadly defined estate from which, in an equitable and orderly process, the debtor's unsatisfied obligations to creditors are paid to the extent possible." *Id.* The Code provisions and their underlying purpose have no connection whatsoever to religion and do not target religious activity.

Although there are exceptions to the statutory list of property includable in the bankruptcy estate, the exceptions are not directed at religion or conduct motivated by religious belief. For example, the estate does not include certain funds placed in education individual retirement accounts. 11 U.S.C. § 541(b)(5). Various conditions are attached to the college savings account exception, but none of them deals with religion. The statutory exception does not differentiate in any way between a savings account for a religious education or a secular education. The Archbishop fails to explain how this exception targets religion. The Court concludes that the purpose and effect of the Bankruptcy Code provisions at issue in this case are generally applicable and religion-neutral. Therefore, application of these provisions to the Archbishop and his Trust is not unconstitutional.

Conclusion

The Committee's Motion for Summary Judgment with respect to Count III of the Amended Complaint and the related affirmative defenses is granted. The Court will issue a separate order.

APPENDIX D
ADDITIONAL STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000bb. Congressional findings and declaration of purposes

[* * *]

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb–2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity; [* * *]

42 U.S.C. § 2000bb–3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993. [* * *]

APPENDIX E
DECLARATION OF ARCHBISHOP JEROME E. LISTECKI[10]

Archbishop Jerome E. Listecki HEREBY DECLARES AS FOLLOWS:

1. I am the Archbishop of the Archdiocese of Milwaukee and Trustee of the Archdiocese of Milwaukee Catholic Cemetery Perpetual Care Trust (the "Trust"). I have personal knowledge of the matters in this Declaration and, if called upon as a witness, I could and would competently testify as to those facts. I make this Declaration in support of Archbishop Jerome E. Listecki 's, as Trustee of the Archdiocese of Milwaukee Catholic Cemetery Perpetual Care Trust, Opposition to Defendant's Motion for Partial Summary Judgment.

CORE BELIEFS OF THE CATHOLIC FAITH

2. The following are basic and immutable tenets of the Roman Catholic religion:

(a) "Belief in the resurrection of the dead has been an essential element of the Christian faith from its beginnings." Catechism of the Catholic Church, Libreria Editrice Vaticana, 1994 ("CCC") § 991.

(b) "If there is no resurrection of the dead, then Christ has not been raised; if Christ has not been raised then our preaching is in vain and your faith is in vain." 1 Cor. 15:12-14; CCC § 651.

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[10] *In re Archdiocese of Milwaukee*, Adv. Proc. No. 11-02459-SVK (Bankr. E.D. Wis. filed Jul. 9, 2012), Doc. No. 69-2.

(c) Resurrection theology does not refer to some other body. "We believe in the true resurrection of this flesh that we now possess." Church Council of Lyons II (1274); CCC § 1017.

(d) The Credo—the very profession of a Roman Catholic's faith—"culminates in the proclamation of the resurrection of the dead on the last day and in life everlasting." CCC § 988.

(e) "In death, the separation of the soul from the body, the human body decays and the soul goes to meet God, while awaiting its reunion with its glorified body. God, in his almighty power, will definitively grant incorruptible life to our bodies by reuniting them with our souls, through the power of Jesus' Resurrection." CCC § 997.

(f) "In expectation of [the last] day, the believer's body and soul already participate in the dignity of belonging to Christ. This dignity entails the demand that he should treat with respect his own body, but also the body of every other person." CCC § 1004.

(g) The soul "will be reunited with the body on the day of the resurrection of the dead." CCC § 1005; see also CCC § 650.

3. Canon law, particular laws, universal laws, and Catholic practice all serve and support these fundamental tenets of our faith. In short, the care and maintenance of Catholic cemeteries, cemetery property, and the remains of those interred is a fundamental exercise of the Catholic faith.

CANON LAW

4. Canon law is the body of internal laws that govern the Catholic Church (the "Church"). The Greek word "canon" (icavthv) means "rule, standard or measure." The 1917 Code of Canon Law (the "1917 Code") was the first codification promulgated or issued as one legal text. It was composed of five "books" or major sections. Given the theological and practical developments that emerged from the Second Vatican Council in 1962-65, the Code was revised in 1983 in a seven-book (section) format (the "1983 Code").

5. While the Code of Canon Law (the "Code") serves as the universal law of the Church, the Church also has provisions for particular law, or law governing a specific territorial area, such as a diocese.[11] Universal law generally applies to Catholics throughout the world; particular law governs the territory for which it is promulgated. (cc 12, 13)

6. The Pope is the supreme legislator in the Church, and all universal laws are issued or authorized by him. Those who supervise particular churches, such as dioceses, may issue particular laws. Once laws are issued, they remain in effect until abrogated (changed in whole) or derogated (changed in part). A universal law, however, may not be derogated by a particular law, unless the universal law expressly provides otherwise. (c. 20)

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[11] In citing to the Code, "canon" or "c." are proper citations or "cc" if citing to multiple provisions.

7. Christian burial and cemeteries are governed by both universal and particular law. The canonical history of Catholic cemeteries in the Archdiocese of Milwaukee (the "Archdiocese") encompasses canonical provisions in effect prior to the 1917 Code, such as the norms of the Councils of Baltimore; the 1917 Code; and the 1983 Code.

CATHOLIC CEMETERIES

8. Catholic cemeteries are protected and governed by the Church's law, which guarantees reverence and respect for the remains of the dead. (Code, Book IV, Part III, Title I, Chapter 5)

9. The Church affirms the sacredness of Catholic cemeteries, land that is blessed and consecrated by the Church for the specific use of Christian burial. (Id.) This sacred nature is directly related to the Church's belief in the resurrection of the body and the final consummation of the world. (See 7 2-3 above)

10. The Archdiocese was established on November 28, 1843 and created an archbishopric on February 12, 1875. Its mission is to serve Catholic parishes, schools and institutions so that they may effectively carry out their mission, to serve the people of God in Southeastern Wisconsin and the broader community.

11. Since 1857, and in furtherance of its religious mission, the Archdiocese has operated and maintained various Catholic cemeteries and mausoleums (collectively, the "Milwaukee Catholic Cemeteries").

12. The Milwaukee Catholic Cemeteries consist of Catholic burial facilities within the geographic boundaries of the Archdiocese, including individual

burial plots, crypts, niches, and property dedicated for future use as Catholic burial facilities. They currently encompass approximately 1,000 acres of land, in which more than 500,000 individuals are interred. An estimated 3,000 new burials take place each year.

13. When the Archdiocese established its first Catholic cemetery in 1857, the importance of burying Catholics in Catholic cemeteries was enforced by the provisions of the First Plenary Council of Baltimore, which issued norms for the Church in the United States. So clear was the connection between Catholic identity and Catholic burial that if a Catholic cemetery was available, priests were forbidden to provide funeral services for a Catholic being buried in a cemetery owned by a non-Catholic church or a secular corporation. (First Plenary Council of Baltimore ("Conc. Balt. I"), n.3)

14. This mandate was modified in the Second and Third Plenary Councils, allowing Catholic funeral services for Catholics being buried in a non-Catholic cemetery provided that the individual grave sites were blessed. Nonetheless, the importance of the Church's own cemeteries remained, as did the declaration regarding the sanctity of burial sites for Catholics. (Second Plenary Council of Baltimore ("Conc. Balt. II"), nn.391-392; Third Plenary Council of Baltimore ("Conc. Balt. III"), nn.317-319)

15. Indeed, the Second and Third Plenary Councils of Baltimore further decreed that cemeteries must be maintained in a manner befitting their sacred purpose and that money must be set aside to provide ongoing upkeep of the property. (Conc. Balt. II, n.393; Conc. Balt. III, n.319)

16. The 1917 Code continued the canonical expectation that the Church would own and maintain its own cemeteries, under specific rules, either at each parish or at a common site or sites in the diocese. (17CIC c. 1239) The inherent nature of Catholic cemeteries as sacred is reflected in the placement of the canons on cemeteries in the 1917 Code section entitled "Sacred Places." Cemeteries are not mere "property" in the Catholic faith.

17. In 1975, the National Catholic Cemetery Conference issued "Christian Burial Guidelines," which became the basis for particular law in many dioceses throughout the United States. The Archdiocese issued a modified version of the guidelines in 1979. As expressed in those guidelines:

> Not only is the Catholic cemetery a sacred place, a place of prayer,and a place reflecting our beliefs and traditions, it is also for the community a sign of the link among all the faithful, living and dead. It is recognition of that Faith which is shared by the dead buried there and the living who commit their deceased to this holy ground.

Guidelines for Christian Burial, Archdiocese of Milwaukee, 1979.

18. The Archdiocese's guidelines further set the expectation that Catholics, because of their identity with the Church, will be buried in Catholic cemeteries. According to the Archdiocese's guidelines, Catholic cemeteries are "symbolic of that community which shared the same faith, hope, and love with the deceased in life" and "reflect the doctrine of our belief in the Resurrection of Jesus from the dead and our commitment to the Corporal Work of Mercy of bury-

ing the dead." Pursuant to the guidelines, Catholic cemeteries are "protected by the Church's law providing the assurance of permanence, reverence, and respect for the remains of the deceased." (Emphasis added.)

19. The Archdiocese's guidelines also establish the expectation that service and maintenance fees will be charged, subject to the age-old practice of reduced fees or a free burial for those in need.

20. The 1983 Code continues to express the Church's belief in the sacred nature of its cemeteries. The 1983 Code's canons on Cemeteries are found in Book IV (The Sanctifying Functions of the Church), Chapter Five, Part III, entitled "Sacred Places and Times." The final canon in this chapter defines the role of the local church in ensuring the sacred character of cemeteries:

> Particular law is to establish appropriate norms about the discipline to be observed in cemeteries, especially with regard to protecting and fostering their sacred character.

(c. 1243) The Archdiocese's regulations on Catholic cemeteries constitute the relevant particular law and provide norms governing these issues.

21. The expectation that Catholic cemeteries will be properly maintained in perpetuity is grounded in the sacred character of the cemetery. The designation and use of funds for the perpetual care of Catholic cemeteries is necessary to and inseparable from the Church's (including the Trustee's, Trust's and the Archdiocese's) exercise of its belief in the sacredness of Catholic cemeteries and reverence for the dead.

THE TRUST

22. Then Archbishop, now Cardinal Timothy M. Dolan, formed the Trust under the civil laws of the State of Wisconsin in 2007. In addition to its civil law status, the Trust is a public juridic person under the Code.

23. I, as Archbishop and Trustee, and the Trust act in conjunction and in conformance with the vision of the Roman Catholic Church. The Trust nevertheless functions as an autonomous body with independent decision-making authority. Under canon law, the property of public juridic persons is ecclesiastical property subject to the canons governing church property. (cc 1254-1258)

24. The Trust constitutes a separate and distinct legal entity from the Archdiocese, rather than a division or asset of the Archdiocese. This separate status is reflected in all accounting related to the Trust, its independent creation and management, and its unique tax identification.

25. The property of one juridic person in the Church, including the Perpetual Care Funds which comprise the Trust, cannot be transferred to another juridic person without observing the canonical norms on alienation of property. For the administrator of a juridic person, such as the trustee of the Trust, to transfer funds to another is a matter of great import. Depending on the value involved, consultation or consent from certain Church bodies is required. Such consultation or consent may also require obtaining approval from the Vatican. The failure of an administrator to observe these norms could result in a canonical penalty: "A person who alienates ecclesi-

astical goods without the prescribed permission is to be punished with a just penalty." (c. 1377)

26. The fact that one person may serve as the administrator of more than one juridic person, such as I do, does not mean that ownership of the property of the juridic persons is the same. Rather, under canon law, "ownership of goods belongs to that juridic person which has legitimately acquired them." (c. 1256)

27. The administrator of a juridic person, such as the trustee of the Trust, may change with time, but the set purposes of the juridic body do not change. Juridic persons are presumed in canon law to be perpetual. (c. 120, §1) They can, under certain circumstances, go out of existence but only by prescribed processes.

28. If a juridic person such as the Trust is suppressed (c. 120, §1), it may cease to exist, but the obligations do not cease; those obligations must be assumed by another physical or juridic person because the obligations are perpetual. If one juridic person merges with another, forming a third juridic person, all of the assets, but also all of the obligations, transfer to the new entity. (c. 121)

29. The funds that comprise the Trust have taken nearly a century to accumulate, and the Archdiocese currently receives quarterly distributions from the Trust for costs incurred in providing for the perpetual care of the Milwaukee Catholic Cemeteries.

30. If the Committee is successful in converting the Trust corpus into property of the Debtor's estate, there will be no funds or, at best, insufficient funds, for the perpetual care of the Milwaukee Catholic Cemeteries.

CATHOLIC CEMETERY NORMS

31. Pursuant to the Catechism of the Catholic Church, "the sacred character of Catholic cemeteries is noted not only in the Church's legal texts but also in its teaching documents. The bodies of the dead must be treated with respect and charity, in faith and hope of the Resurrection. The burial of the dead is a corporal work of mercy." CCC 2300.

32. The Church affirms the sacredness of the Catholic cemetery as land that has been blessed and consecrated by the Church for the specific use of Christian burial. (c. 1240, §1)

33. Decrees from Church authority mandate that cemeteries be maintained in a manner befitting their sacred purpose and that money be set aside to provide ongoing upkeep of the property.

34. By accepting funds designated for the ongoing care of cemetery property, the Archdiocese, and subsequently the Trust and its Trustee, assume canonical and moral responsibility for that perpetual care. Regardless of the accounting mechanism used or the civil law construct established for fulfilling this responsibility, the Code is clear that funds entrusted for a designated purpose may only be used for that purpose:

> Offerings given by the faithful for a certain purpose can be applied only for that same purpose.

(c. 1267, §3)

35. The canon similarly requires that the property of an autonomous pious foundation be used for its designated purposes, governed by all the canonical norms on ecclesiastical property. (c. 1257, §1)

36. In addition, funds that have a restricted purpose must be maintained as an "autonomous pious foundation." That term is defined as "aggregates of things destined for the purposes described in canon 114 §2, and established as juridic persons by the competent ecclesiastical authority." Those purposes are limited to: "works of piety, of the apostolate or of charity, whether spiritual or temporal." (c. 114, §2)

37. Canon law requires that those who administer property "exercise vigilance so that

the goods entrusted to their care are in no way lost or damaged." (c. 1284, §2, 1°) They similarly are required to "take care that the ownership of ecclesiastical goods is protected by civilly valid methods." (c. 1284, §2, 2°). These means may, but do not necessarily, include reporting on designated funds in accord with generally accepted accounting principles or formalizing the restricted nature of funds through canonical or civil law.

38. Under canon law, all persons who lawfully take part in the administration of ecclesiastical goods are bound to fulfill their duties in the name of the Church.

> §1 All administrators are to perform their duties with the diligence of a good householder.
>
> §2 Therefore they must: . . .
>
> > 2° ensure that the ownership of ecclesiastical goods is safeguarded in ways which are valid in civil law;
> >
> > 3° observe the provisions of canon and civil law, and the stipulations of the founder or donor or lawful authority; they are to take

> special care that damage will not be suffered by the Church through the non-observance of the civil law;
>
> 4° seek accurately and at the proper time the income and produce of the goods, guard them securely and expend them in accordance with the wishes of the founder or lawful norms;

(c. 1284)

39. Under canon law, "[w]henever ecclesiastical goods have been alienated without the required canonical formalities but the alienation is valid civilly, it is for the competent authority, after having considered everything thoroughly, to decide whether and what type of action, namely, personal or real, is to be instituted by whom and against whom in order to vindicate the rights of the Church." (c. 1296)

40. Among other burdens, if the funds which comprise the Trust are deemed property of the Debtor's estate, the Archdiocese, the Trust and I, as Archbishop and Trustee, will be unable exercise our respective obligations to provide for the care required for the sacred grave sites under canon law, as well as the Catholic Church's historical and religious traditions and mandates, among other sources.

41. I, the Trust and the Archdiocese have and have had a sincere intent to perform our obligations to provide perpetual care for the bodies of the dead. According to canon law and the Catholic tradition, graves must be cared for in a certain fashion to maintain their character as sacred places as defined by canon law and the Catholic tradition.

42. Observing canon law, I and my predecessor utilized means allowed under civil law to safeguard the Trust's funds, including approximately $55 million previously held in trust for the perpetual care of the Milwaukee Catholic Cemeteries and transferred to the Trust in or around March 2008 (collectively with any later earned or otherwise received Trust funds, the "Perpetual Care Funds"), and to advance the sacred and religious purpose of the cemeteries. I and my predecessor, furthermore, established civil and canonical constructs to ensure faithful fulfillment of the responsibility to observe the will of contributors to the fund. Likewise, the Perpetual Care Funds have been used to serve the religious purpose of maintaining the sacred character of Catholic cemeteries for which it was established.

43. The legally compelled taking of the Perpetual Care Funds from the Trust would substantially burden, if not render entirely impossible, the adherence to core Catholic beliefs, pursuant to which "we believe in the true resurrection of this flesh that we now possess." Church Council of Lyons II (1274); CCC § 1017.

44. In my lay and ecclesiastical capacities, responsible for the religious, moral, and fiscal health of the Archdiocese—as well as the Trust—I have never been placed in a position of having to choose between a doctrinal directive or mandate from church authorities and a lawful order from a civil judicial authority. No religious leader in American society should be compelled to make that choice, which is no choice at all in light of the overriding deference owed one's highest religious authority.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct and that this Declaration is executed on July 7 , 2012, in Tinley Park, Illinois

/s/ Archbishop Jerome E. Listecki