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"To the Person": RFRA's Blueprint for a Sustainable Exemption Regime

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"To the Person": RFRA's Blueprint for a Sustainable Exemption Regime

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INTRODUCTION

The federal Religious Freedom Restoration Act (RFRA)[1] seems to be a source of perpetual controversy. Perhaps this is because it was enacted in reaction to a previous controversy: the U.S. Supreme Court's decision in *Employment Division v. Smith*, which changed the legal landscape of religious claims.[2] The Court's subsequent decision in *City of Boerne v. Flores* did nothing to quell controversy, declaring RFRA unconstitutional as applied to the states,[3] and ignited debates by religious adherents about the need for state RFRAs across the country.[4] Later, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, RFRA's weakened status got a boost from the Court, which gave greater life to the specificity

1. 42 U.S.C. § 2000bb-1 (2012), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

2. Emp't Div. v. Smith, 494 U.S. 872, 879–80 (1990) (dispelling the strict scrutiny test for religious burdens imposed by a "neutral law of general applicability"), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3, 107 Stat. 1488, 1488 (codified at 42 U.S.C. § 2000bb-1).

3. City of Boerne v. Flores, 521 U.S. 507 (1997).

4. After *City of Boerne*, twenty-one different states enacted state-level versions of RFRA. *State Religious Freedom Restoration Acts*, NAT'L CONF. ST. LEGISLATURES (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx. Other states continue to pursue state-level versions of RFRA. *2015 State Religious Freedom Restoration Legislation*, NAT'L CONF. ST. LEGISLATURES (Sept. 23, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx; *2016 State Religious Freedom Restoration Act Legislation*, NAT'L CONF. ST. LEGISLATURES (Dec. 31, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/2016-state-religious-freedom-restoration-act-legislation.aspx; *2017 State Religious Freedom Restoration Act Legislation*, NAT'L CONF. ST. LEGISLATURES (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/2017-religious-freedom-restoration-act-legislation.aspx. Professors Terri R. Day and Danielle Weatherby describe the nature of these "mini RFRAs":

> Many of the mini RFRA mimic the federal RFRAs by reinstating strict scrutiny review for challenges to government regulations that are alleged to substantially burden religious exercise. But other state RFRAs have key provisions that extend far beyond their federal parent. For example, some significantly dilute the *substantial burden* requirement (requiring only that the challenged law "burdens" or "restricts" religious exercise). Some envision the practice of religion to extend to any act or inaction that is tangentially related to a person's religious beliefs. And some even add a "clear and convincing" evidence requirement to satisfy strict scrutiny, making the government's burden of justifying the challenged law even more onerous.

Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate but Equal*, 65 DEPAUL L. REV. 907, 919–20 (2016) (footnotes omitted).

requirement of RFRA's "to the person" language.[5] More recently, controversy swirled around RFRA's application to the contraceptive mandate of the Affordable Care Act, especially as the Court decided *Burwell v. Hobby Lobby Stores, Inc*.[6] Scholars have criticized the *Hobby Lobby* decision as interpreting RFRA too broadly,[7] an interpretation which will inevitably allow religious adherents to "impose their religious view of morally correct behavior on others[,]"[8] "give license to discriminate[,]"[9] benefit from "an unfair special privilege to ignore the laws everyone else must obey[,]"[10] and turn the U.S. Code into "Swiss cheese" through exemptions.[11] On the other hand, scholars have argued that RFRA, in practice, is actually under-protecting religious adherents[12] and that a flood[13] of discriminatory RFRA claims simply has not

5. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006).

6. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

7. Andrew Koppelman & Frederick M. Gedicks, *Is Hobby Lobby Worse for Religious Liberty than Smith?*, 9 U. ST. THOMAS J.L. & PUB. POL'Y 223, 229 (2015) (asserting *Hobby Lobby* "converted RFRA from the statutory restoration of an even-handed balancing test into a doctrinal revolution that has vested in federal judges the authority to craft a wholly new and demanding religious exemption jurisprudence"); David B. Schwartz, *The NLRA's Religious Exemption in a Post*-Hobby Lobby *World: Current Status, Future Difficulties, and a Proposed Solution*, 30 A.B.A. J. LAB. & EMP. L. 227, 235 (2015) ("*Hobby Lobby* completes the transformation of the RFRA into a quasi-constitutional alternative to the Free Exercise Clause's traditional jurisprudence.").

8. Day & Weatherby, *supra* note 4, at 942.

9. *Id.*

10. Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1597 (2018).

11. Aram A. Schvey, *Much Ado About Nothing? Religious Freedom and the Contraceptive-Coverage Benefit*, 39 HUM. RTS. 11, 12 (2013).

12. Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353, 353 (2018). Professor Ira C. Lupu explains lower courts may have a reticence to apply RFRA in full force because "[b]ehind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe." Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989) [hereinafter *Where Rights Begin*]. As evidence of this reticence, Lupu argues that lower courts' interpretation of RFRA has not changed, even after the prodding in *O Centro*. Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 72 (2015) [hereinafter *Dubious Enterprise*].

13. The majority opinion in *Hobby Lobby* criticized the minority's predicted "flood of religious objections." Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 732–33 (2014); *see also* Barclay & Rienzi, *supra* note 10, at 1606–07; Mary Anne Case, *Why "Live-and-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual*

emerged.[14] Much of this controversy, past and present, stems from inconsistent application of RFRA's statutory language and the Supreme Court's precedent. It is as if lower courts lost RFRA's blueprint for success: the plain language of the statute.

The Supreme Court's decision in *O Centro* attempted to put some of RFRA's inconsistent application to rest, admonishing courts that RFRA's "to the person" language requires the government to focus its compelling interest to "the particular claimant."[15] Although some have argued that *O Centro* did little to advance the RFRA cause,[16] this Article suggests just the opposite. Indeed, this Article's analysis of post–*O Centro* cases that discuss RFRA's "to the person" language shows that courts are finally focusing on the particular claimant and, thus, returning to RFRA's plain language. This claimant-specific focus has manifested in courts' evaluations of compelling government interests, as in *O Centro*, and has also spurred "to the person" focus on RFRA's least restrictive means requirement. Ultimately, this Article argues that a strict application of the "to the person" language to both RFRA's compelling interest and least restrictive means requirements will achieve a long-awaited, sustainable religious exemption regime by awarding the most narrow exemptions to sincerely burdened religious adherents, thereby allowing the otherwise important purposes of generally applicable statutes to proceed while meaningfully vindicating the religious liberties of minority groups.

In advancing this thesis, this Article takes the normative position that RFRA's standard is better suited to achieve American pluralism than the standard set forth in *Smith*. RFRA relieves governmental burdens upon the free exercise of sincere religious adherents, even where the burden is a completely incidental result of government action—*Smith* does not. RFRA reflects the American commitment to pluralism and inclusion by granting relief to the smallest quantity of sincere religious adherents—usually

Civil Rights, 88 S. CAL. L. REV. 463, 487 (2015) (arguing *Hobby Lobby* "open[ed] up the floodgates to a host of new potential claims for religious exemption by a host of different kinds of service providers"); Goodrich & Busick, *supra* note 12, at 353, 355–56, 383–84, 401.

14. Goodrich & Busick, *supra* note 12, at 355–56.

15. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006).

16. *Dubious Enterprise*, *supra* note 12.

possessing minority views that get little attention in Congress—while respecting majoritarian initiatives advanced by that body and the executive. However, it should be noted that RFRA is not a cure-all approach to every issue of religious freedom.[17] Rather, it functions as a backdrop, providing religious freedom coverage that other statutes fail to provide.

Part I of this Article discusses RFRA's historical background, touching on legislative history relevant to the "to the person" standard, and proceeds to view RFRA in eras of potency of judicial application. Part II analyzes RFRA's textual blueprint: how the "to the person" standard fits into the structure of RFRA's text, takes stock of judicial decisions discussing the "to the person" standard, and asserts that the post–*O Centro* "to the person" trend is the most principled path toward a sustainable and less controversial RFRA jurisprudence. Part III considers how religious claimants, government bodies, and judges should act in order to gain from strict application of the "to the person" standard.

I. HISTORICAL BACKGROUND

RFRA's history is a unique example of how Congress and the Supreme Court have interacted in the area of constitutional law. Both bodies interpreted the actions of the other as an overreach of authority. The current state of RFRA is the product of the reactions to that perceived overreach.

A. Judicial Decisions Prompting Enactment

Before RFRA, the U.S. Supreme Court's interpretation of the First Amendment's Free Exercise Clause set forth an exemption scheme deferential to bona fide religious adherents.[18] This scheme was characterized by the Court's decision in *Sherbert v. Verner*, a

17. *See, e.g.*, *infra* note 121 for discussion.

18. Additionally, as Dana Schwartzenfeld states, for "many years, the First Amendment's Free Exercise Clause was 'largely uncontroversial'" with major debates revolving "around government support for religion . . . rather than government interference with it." Dana Anne Schwartzenfeld, Note, *Let My People Grow: Putting a Number on Strict Scrutiny in the Wake of* Holt v. Hobbs, 51 GA. L. REV. 297, 301 (2016) (footnote omitted) (quoting Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1109 (1990)).

case from 1963 which set out the exemption standard.[19] David Schwartz, senior counsel to the National Labor Relations Board, summarized a court's process under that standard in two steps by considering first, "whether the plaintiff demonstrated that the law imposed a substantial burden on the exercise of religion"[20] and second, "whether there is a 'compelling state interest' that outweighs 'the degree of impairment of free exercise rights.'"[21] In that process, Schwartz stated, "the 'strict scrutiny' standard requires that any governmental restrictions on fundamental rights be the 'least restrictive alternative' and 'narrowly tailored' to achieve the compelling interest. In addition, while the government cannot question the validity of an objector's religious beliefs, it can question an objector's sincerity in seeking an exemption."[22] However, the Court became "increasingly resistant to accommodation claims"[23] under the *Sherbert* standard, leading up to its decision in *Employment Division v. Smith* in 1990.

Smith changed the legal landscape of the Free Exercise Clause by erecting a new standard for religious accommodation and exemption claims. Under the *Smith* standard, burdening a religious adherent's exercise of religion is justified as long as the burden results from a "neutral law of general applicability."[24] As such, the *Smith* standard substantially decreased the likelihood of obtaining a free exercise accommodation for religious adherents. Merely having a burden upon free exercise was not enough. "Religious groups, Congress, and even secular civil liberties groups strongly opposed"[25] the Court's decision in *Smith*.[26] The byproduct of this opposition was Congress's passage of RFRA,[27] a

19. Sherbert v. Verner, 374 U.S. 398 (1963).

20. Schwartz, *supra* note 7, at 230.

21. *Id.* (quoting *Sherbert*, 374 U.S. at 403, 406).

22. *Id.* (footnote omitted) (quoting Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 755 (1996).

23. Charlotte Garden, *Religious Employers and Labor Law: Bargaining in Good Faith?*, 96 B.U. L. REV. 109, 124 (2016).

24. Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

25. Alisa Lalana, Note, *RFRA and the Affordable Care Act: Does the Contraception Mandate Discriminate Against Religious Employers?*, 49 LOY. L.A. L. REV. 661, 666 (2016).

26. Barclay & Rienzi, *supra* note 10, at 1602–04.

27. Scott W. Gaylord, *RFRA Rights Revisited: Substantial Burdens, Judicial Competence, and the Religious Nonprofit Cases*, 81 MO. L. REV. 655, 658 (2016).

concerted legislative effort to "solidify *Sherbert*'s substantial-burden/compelling-interest standard as a statutory right."[28] But the text of RFRA went further than simply restoring the *Sherbert* test, instead providing even "greater protection for religious exercise than is available under the First Amendment."[29] However, this legislative advance "came up against some resistance as to its application to the states[,]"[30] as is discussed below in section I.C.

B. Legislative History

The earliest form of RFRA proposed to Congress, heard first in the House of Representatives in 1990, focused its *Sherbert*-like test to a particular religious adherent, as opposed to an entire religious group or society at large.[31] Indeed, it allowed the government to restrict free exercise only where "the governmental authority demonstrate[d] that application of the restriction *to the person*—(A) [was] essential to further a compelling governmental interest; and (B) [was] the least restrictive means of furthering that compelling governmental interest."[32] The bill heard months later in the Senate was phrased similarly, allowing free exercise restrictions only where "the government demonstrate[d] that application of the restriction *to the person*"; the bill tracked the rest of the provision introduced in the House.[33] The next year, a new House bill slightly modified the phrase to become, "Government may burden a person's exercise of religion only if it demonstrates that application of the burden *to the person*[,]"[34] a modification that was maintained in the Senate's bill a year later.[35] The House's final consideration of RFRA[36] resulted in the addition of a word into the relevant phrase, leaving it, "Government may *substantially* burden a person's

28. Schwartz, *supra* note 7, at 231.

29. Holt v. Hobbs, 135 S. Ct. 853, 859–60 (2015); *see also* Schwartzenfeld, *supra* note 18, at 303 ("Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA) in order to enhance the protections provided by the First Amendment." (footnote omitted)).

30. Schwartzenfeld, *supra* note 18, at 304.

31. H.R. 5377, 101st Cong. § 2(b)(2) (1990).

32. *Id.* (emphasis added).

33. S. 3254, 101st Cong. § 2(b)(2) (1990) (emphasis added).

34. H.R. 2797, 102d Cong. § 3(b) (1991) (emphasis added).

35. S. 2969, 102d Cong. § 3(b) (1992).

36. H.R. 1308, 103d Cong. § 3(b) (1993). The Senate also made its final consideration of RFRA in 1993. S. 578, 103d Cong. § 3(b) (1993).

exercise of religion only if it demonstrates that application of the burden *to the person*."[37] This addition is reflected in the presently enacted statute.[38] Overall, the drafting history shows that RFRA's "to the person" language was contemplated from the beginning, put into RFRA's blueprint, and then deliberately maintained throughout the revision processes of the House and Senate.[39]

Curiously, in reports to the congressional bodies, neither proponents nor opponents of the legislation debated the "to the person" language. Rather, the reports show that when discussing the subsection containing the "to the person" language, legislators and citizens testifying to Congress mainly explained the compelling interest and least restrictive means analysis.[40] Otherwise, the "to the person" language was included when reciting the text of the proposed statute.[41] Only occasionally was the

37. H.R. 1308, 103d Cong. § 3(b) (1993) (as amended by Senate, Oct. 27, 1993) (emphasis added).

38. 42 U.S.C. § 2000bb-1(b) (2012).

39. For a compilation of RFRA's legislative history documents, see *Religious Freedom Restoration Act of 1993 (P.L. 103-141)*, U.S. DEP'T JUSTICE, https://www.justice.gov/jmd/religious-freedom-restoration-act-1993-pl-103-141 (last updated May 27, 2016).

40. *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 10 (1992) [hereinafter *H. Hearings*] (statement of Robert Dugan, Jr., Director, Office of Public Affairs, National Association of Evangelicals) ("Section 3(b) of the bill provides that government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is essential to further a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest. This provision is nothing more than a paraphrase of the Supreme Court's own compelling interest test since discarded. It faithfully reflects the purpose of the bill, which is to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is burdened."); 139 CONG. REC. 4923 (1993) ("This section codifies the compelling interest test as the Supreme Court had enunciated it and applied it prior to the *Smith* decision. The bill permits government to burden the exercise of religion only if it demonstrates a compelling state interest and that the burden in question the [sic] least restrictive means of furthering the interest. It permits persons whose religious exercise has been burdened in violation of the Act to assert that violation as a claim or defense in a judicial proceeding and to obtain appropriate relief against a government. Standing to assert such a claim or defense is to be governed by the general rules of standing under Article III of the Constitution."); 138 CONG. REC. 18,017–18 (1992) ("This section codifies the compelling interest test as the Supreme Court had enunciated it and applied it prior to the *Smith* decision. The bill permits government to burden the exercise of religion only if it demonstrates a compelling state interest and that the burden in question is the least restrictive means of furthering the interest.").

41. *H. Hearings*, *supra* note 40, at 19, 273 (1992) (statements of Robert P. Dugan, Jr., Director, Office of Public Affairs, National Association of Evangelicals and James Bopp, Jr.,

"to the person" language mentioned substantively outside these categories.[42] Perhaps this lack of discussion on the "to the person" language was a result of the debate's preoccupation with RFRA's potential clash with existing abortion law.[43]

Whatever the cause for little mention of the "to the person" language, RFRA successfully passed through Congress, with the Senate voting to pass the bill ninety-seven to three.[44] President Bill Clinton signed RFRA into law on November 16, 1993.[45]

C. Pre–City of Boerne[46]

RFRA remained in full force for about three and a half years until the Supreme Court's decision in *City of Boerne v. Flores*.[47]

General Counsel, National Right to Life Committee, Inc.); *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 160, 209 (1992) [hereinafter *S. Hearings*] (statements of Coalitions for America and James Bopp, Jr., General Counsel, National Right to Life Committee, Inc.); S. REP. NO. 103-111, at 3, 27 (1993).

42. During one of the debates, Henry Hyde, a Congressman from Illinois, discussed the issue of abortion while including the "to the person" language

> Government may burden a person's exercise of religion only, and the claim is made my religion requires me to exterminate my unborn child, or, to use the preferred phrase, terminate the pregnancy, only if it demonstrates that application of the burden to the person is essential to further a compelling governmental interest.

H. Hearings, *supra* note 40, at 50 (statement of Henry Hyde, Rep. from Illinois). Professor Lupu's address critiqued the entire framework of RFRA, mentioning the "to the person" language: "The requirements that the government's choice of means, as applied to the person claiming a religious burden, be both 'essential to' and the 'least restrictive means of furthering' a compelling interest will be extremely difficult for government to meet." *Id.* at 381 (statement of Professor Ira C. Lupu).

43. H.R. REP. NO. 103-88, at 8 (1993) ("There has been much debate about this bill's relevance to the issue of abortion."); S. REP. NO. 103-111, at 12 (1993) ("There has been much debate about this act's relevance to the issue of abortion."); *see generally H. Hearings*, *supra* note 40; *S. Hearings*, *supra* note 41.

44. *Roll Call Vote 103rd Congress - 1st Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=1&vote=00331 (last visited Apr. 8, 2019).

45. Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html.

46. This Article draws upon the same periods of RFRA potency Professor Lupu has previously defined. *See Dubious Enterprise*, *supra* note 12, at 57–67.

47. City of Boerne v. Flores, 521 U.S. 507 (1997).

During that time period, RFRA's potential power was at its zenith, applying to all law in the United States, state or federal.[48] This period generated a fairly significant amount of litigation: 168 decisions, predominantly rendered in federal courts.[49] However, even during RFRA's season of peak strength, religious adherents prevailed in only fifteen percent of cases heard on their merits, with thirty-six percent of those wins attributed to prisoners whose cases "typically involved the most basic infringements of religious liberty."[50]

During this period, local zoning authorities in the city of Boerne, Texas, denied a request from the Catholic Archbishop of San Antonio to enlarge St. Peter Catholic Church to accommodate its growing congregation.[51] After the Archbishop challenged the denial as a violation of RFRA,[52] the resulting case, *City of Boerne v. Flores*, found its way to the Supreme Court, where the Court held that Congress exceeded the bounds of its power under the Enforcement Clause of the Fourteenth Amendment by applying RFRA to the states.[53] The Court's decision stripped RFRA of much of its reach, limiting its application to the federal government.[54]

48. *Dubious Enterprise*, *supra* note 12, at 58.
49. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 591 (1998).
50. *Id.*
51. *City of Boerne*, 521 U.S. at 511.
52. *Id.*
53. *Id.* at 536.
54. *Id.*; 42 U.S.C. § 2000bb-2(1) (2012) ("[T]he 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."). On October 6, 2017, the United States Attorney General issued a memorandum with guidance for the executive branch's compliance with religious liberty duties. The memorandum clarifies that all federal actors must be compliant, not just high-level officials, noting that "[i]n particular, agencies should remember that RFRA applies to agency enforcement just as it applies to every other governmental action" and provides guidance specific to agencies as employers, as rule makers, as enforcers, as contractors, and as grant distributors. Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49670–71 (Oct. 26, 2017).

D. Post–City of Boerne *and Pre*–O Centro

City of Boerne spurred legislative action in both Congress[55] and state legislatures[56] that aimed to accomplish the same or similar task of RFRA in the state context. While some of those measures were successful, this period may be regarded as RFRA's darkest days, stretching from 1997 to 2006. Professor Ira C. Lupu calls RFRA during this period "persistently weak"; argues that it indicated a "gaping chasm between RFRA's promise, as reflected in its stringent statutory formula, and RFRA's performance"; and notes that in all RFRA cases in the federal courts of appeal, religious adherents never once prevailed.[57] These cases were characterized by court resolution on the substantial burden and compelling government interest portions of RFRA's test.[58] In many ways, during this period, RFRA appeared to be "all but dead"[59] language in the federal code, a forgotten failure of religious liberty protection. But new life was just around the corner.

E. Post–O Centro *to the Present*

Hoasca tea was the remedy for RFRA's comatose state. Indeed, Hoasca, a sacramental tea brewed from plants unique to the Brazilian Amazon[60] prohibited by the Controlled Substances Act, was the center of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[61] the case that gave RFRA new life. There, the Supreme Court gave special, even surprising, weight to RFRA's "to the

55. Two bills were considered in the House of Representatives, advocating for a "Religious Liberty Protection Act." H.R. 1691, 106th Cong. (as referred to S. Comm. on the Judiciary, July 16, 1999); H.R. 4019, 105th Cong. (1998). However, neither was successful. But a bill providing a much narrower set of protections was: the Religious Land Use and Institutionalized Persons Act (RLUIPA). 42 U.S.C. § 2000cc (2012). Many RLUIPA cases incorporate RFRA's "to the person" standard.

56. All but two of the states to enact a state RFRA, Kentucky and Pennsylvania, maintained the "to the person" language in their own statutes. KY. REV. STAT. ANN. § 446.350 (LexisNexis Supp. 2017); 71 PA. STAT. AND CONS. STAT. ANN. § 2404 (West 2012); *State Religious Freedom Restoration Acts*, *supra* note 4.

57. *Dubious Enterprise*, *supra* note 12, at 60–61.

58. *Id.* at 61 n.118.

59. Lupu, *supra* note 49, at 575.

60. *Hoasca Tea,* CENTRO ESPÍRITA BENEFICENTE UNIÃO DO VEGETAL U.S., http://udvusa.org/hoasca-tea/ (last visited Apr. 8, 2019).

61. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006).

person" language, requiring the government to focus its analysis on a small group of religious adherents belonging to the "Centro Espírita Beneficente União do Vegetal" (UDV) who drank hoasca tea as an essential part of their faith.[62] Specifically, the Court rejected what the government had asserted as a compelling governmental interest—uniform enforcement of the Controlled Substances Act—terming it a "categorical approach" with "broadly formulated interests" and "general characteristics."[63] The Court continued, explaining, "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[64] Thus, the Court examined the government's interest under "the more focused inquiry required by RFRA," which, through the "to the person" standard, required the government to "consider[] the harms posed by the particular use at issue [in *O Centro*]—the circumscribed, sacramental use of *hoasca* by the UDV"[65] and its 130 members.[66] Although the Court noted that RFRA does not foreclose the ability of the government to "demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program[,]"[67] it held that the government could not show the UDV's use of hoasca seriously compromised its ability to administer the Controlled Substances Act.[68] Notably, the Court did not apply the "to the person" language to the least restrictive means prong of RFRA, deciding the

62. *Id.* at 430–33.
63. *Id.* at 430–32.
64. *Id.* at 430–31.
65. *Id.* at 432.
66. *Id.* at 425. Since 2006, UDV's membership has grown to 270 individuals. *People of the União*, CENTRO ESPÍRITA BENEFICENTE UNIÃO DO VEGETAL U.S., http://udvusa.org/people-of-the-uniao/ (last visited Apr. 8, 2019).
67. *O Centro*, 546 U.S. at 435.
68. *Id.* at 432 ("Congress' determination that [hoasca] should be listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA."); *id.* at 439 ("[W]e conclude that the courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV's sacramental use of *hoasca*.").

case solely on the failure of the government to show a focused compelling interest.

O Centro has been termed a "surprisingly strong interpretation of RFRA,"[69] not because the Supreme Court was giving RFRA new strength from outside the statute, but because the interpretation in *O Centro* returned to the plain meaning of the "to the person" language already contained in RFRA's blueprint, suggesting "the possibility that RFRA's original promise might actually be realized."[70] The strength of *O Centro*'s interpretation is underscored by the fact that it was a unanimous opinion—not even the justices typically hostile to religion claims voiced dissent.[71]

After the Court's admonition to interpret the "to the person" language at a high level of specificity, many courts started enforcing other sections of RFRA's test with more force to cut down RFRA claims and dodge the "to the person" analysis altogether.[72] But the courts that have taken the "to the person" language head on seem to have taken *O Centro* seriously.

II. JUDICIAL USE OF THE "TO THE PERSON" STANDARD

In order to measure whether courts are more faithfully adhering to focused analysis of RFRA's "to the person" language after *O Centro*, this Article turns to empirical data. But, first, this Article looks to a plain language reading of RFRA's "to the person" text, outlining what should be courts' primary consideration when engaging in statutory interpretation.

A. Textual Interpretation of "To the Person"

The structure of RFRA's text and where the "to the person" language falls within it provides the best, and most obvious,

69. *Dubious Enterprise*, *supra* note 12, at 62.

70. *Id.*

71. *O Centro*, 546 U.S. at 422 ("*Roberts, C.J.*, delivered the opinion of the Court, in which all other Members joined, except *Alito, J.*, who took no part in the consideration or decision of the case.").

72. *Dubious Enterprise*, *supra* note 12, at 63. This sort of interpretive move, often made on RFRA's requirement that the religious adherent's religious exercise be substantially burdened, could have been employed by courts from the advent of RFRA. Indeed, the substantial burden requirement remains a threshold for RFRA claims that lower courts arguably continue to expand and contract.

structural clue about how the "to the person" language should be interpreted. RFRA's text appears as follows:

> (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.[73]

Under inspection in this Article is subsection (b). However, as discussed below, subsection (a), requiring a religious adherent to make a showing that a government action substantially burdens the religious adherent's exercise of religion, operates as an effective gatekeeper in the courts, screening out both insincere claimants and sincere claimants who are not truly burdened.[74]

73. 42 U.S.C. § 2000bb-1 (2012) (emphasis added).

74. *See* Gaylord, *supra* note 27, at 691 (explaining "the substantiality of a burden is determined by the level of force the government applies to get a religious believer to contravene his religious beliefs, not a court's independent determination that a law's requirements are or are not *actually* consistent with his professed religious beliefs" and discussing substantial burden analysis in the context of religious nonprofit organizations); *see also* Lupu, *supra* note 49, at 594 (noting that "judges seeking to limit exemptions will be inclined to rely upon the 'burden' requirement as the primary obstacle to RFRA claimants" and that "[j]udges have used a variety of interpretive moves to disqualify RFRA claims on the grounds of insufficient burden on religion").

It is easy to see that the "to the person" language within subsection (b) is placed previous to, and separate from, subsections (b)(1) and (b)(2) below it. Thus, visually, it sits above the compelling interest and least restrictive means tests. This placement, together with the punctuation of the subsection's sentence, indicates that the "to the person" language is (1) a court's first concern under the subsection, and (2) that the language applies to both the compelling interest and least restrictive means tests. In other words, RFRA's subsection (b) really entails three steps: (1) recognition of the religious plaintiff as the "particular claimant"[75] at issue, (2) evidence that the government has a compelling interest specific to the plaintiff, and (3) evidence that the government's choice of furthering that specific compelling interest is the least restrictive means for that plaintiff. This conclusion, reinforced by *O Centro*, provides straightforward guidance for the application of RFRA. Below, this Article surveys the success of this conclusion in the courts.

B. Methodology

To track courts' use of the "to the person" standard after *O Centro*, this Article analyzes two data sets: (1) all federal court of appeals decisions citing RFRA, and (2) all federal decisions, including district courts, where the "to the person" language was a significant consideration.[76] Although not as robust as some

75. *O Centro*, 546 U.S. at 430–31; *see also* Equal Emp't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 590 (6th Cir. 2018) (terming this step "the 'to the person' test"). It should be noted that while this Article often refers to "particular claimants" as plaintiffs and discusses *plaintiff-level specificity*, RFRA may also be asserted by defendants as a defense to government action taken against them. Thus, plaintiff-level specificity is interchangeable with *defendant-level specificity*.

76. These data sets were chosen to provide different lenses through which to view judicial treatment of RFRA, and more specifically, the use of the "to the person" language in RFRA analysis. The first data set, analyzing federal courts of appeal decisions citing RFRA, was chosen to provide a picture of high-level appellate decisions more likely to engage in merits discussions of RFRA than their district court counterparts. This was done in an effort to gauge the frequency of substantial analyses of the "to the person" language as opposed to other RFRA-related analyses.

The second data set, analyzing all federal decisions, including district courts, where the "to the person" language was a significant consideration, was chosen as an issue-specific examination of *how* federal courts analyze the "to the person" language of RFRA, as opposed to *how frequently* they do so. In an effort to provide as much qualitative data to this issue-

empirical studies, this Article's resulting data set was achieved by modeling empirical analysis.[77]

The first data set was obtained by viewing Westlaw's citing references to RFRA, specifically Section 2000bb-1. The 1,353 results were narrowed to 815 reported federal decisions. By eliminating federal district court, bankruptcy court, and specialty court decisions, 306 cases remained, which, when duplicate results were removed and only cases occurring after February 21, 2006 (the date of the *O Centro* decision) were considered, reduced to 118 decisions.[78] These decisions were individually reviewed for their RFRA treatment.

The second data set was obtained by searching Westlaw's federal cases database for: "'RFRA' & 'to the person' & 'compelling'." The resulting case bank is composed of 696 cases. These results were further narrowed to 192 cases by excluding unreported decisions, decisions entered previous to *O Centro*, and bankruptcy and specialty court decisions. These 192 cases were reviewed for a discussion of RFRA's "to the person" standard that went beyond a simple recitation of the language from the statute.[79] In the end, fifty-nine decisions contained substantive discussions of the "to the person" language.[80]

C. Prevalence of "To the Person" Analysis in Federal Appellate Courts

The first data set shows the frequency with which federal appellate courts reach RFRA's "to the person" language after *O Centro*. Decisions were sorted into four categories: (1) those with a significant discussion of the "to the person" language, even if

specific examination, district court cases were also included. By including district court cases, this second data set was also useful as a tool to view the rates of different types of "to the person" engagement at the district and appellate levels of review.

Overall, federal courts, as opposed to state courts, were chosen for analysis because RFRA is a federal statute, and therefore a federal question frequently engaged in the federal court system. An empirical analysis of state courts' interpretation of RFRA's "to the person" standard would also be an interesting and useful data set.

77. *Cf.* Barclay & Rienzi, *supra* note 10, at 1633–39; Goodrich & Busick, *supra* note 12, at 357–62.

78. *See infra* Appendix A.

79. Where cases were resolved on RFRA's threshold substantial burden test, but a court proceeded in the alternative to analyze the "to the person" standard in some depth, those cases were deemed to include a substantive discussion of the "to the person" language.

80. *See infra* Appendix B.

discussed as an alternative holding (TTP); (2) those that referenced RFRA to lend interpretive power or historical context to a Religious Land Use and Institutionalized Persons Act claim (RLUIPA); (3) those that dispensed with a RFRA claim on non-to-the-person considerations, like standing, jurisdiction, or RFRA's relationship with sovereign immunity and money damages, or involved a state RFRA (Non-TTP); and (4) those that were resolved on the substantial burden prong of RFRA (Sub. Burden). Several cases included discussions falling into more than one category. Table 1 depicts this categorization.

Table 1: Federal Appellate Decisions Citing RFRA After *O Centro*[81]									
Jurisdiction	**Total Cases Citing RFRA**	**TTP**	**%**	**RLUIPA**	**%**	**Non-TTP**	**%**	**Sub. Burden**	**%**
All Fed. App.	118	28	24%	18	15%	52	44%	27	23%
SCOTUS	6	1	16%	3	50%	2	33%	0	0%
1st Circuit	2	0	0%	2	100%	0	0%	0	0%
2nd Circuit	7	1	14%	0	0%	4	57%	2	29%
3rd Circuit	9	0	0%	1	11%	4	44%	4	44%
4th Circuit	3	0	0%	1	33%	1	33%	1	50%
5th Circuit	9	2	22%	4	44%	2	22%	1	11%
6th Circuit	8	1	13%	1	13%	4	50%	3	38%
7th Circuit	12	1	8%	2	17%	6	50%	3	25%
8th Circuit	12	3	25%	2	17%	6	50%	3	25%
9th Circuit	19	5	26%	2	10%	7	37%	6	31%
10th Circuit	8	4	50%	0	0%	3	37%	2	25%
11th Circuit	6	3	50%	1	17%	2	33%	2	33%
D.C. Circuit	16	4	25%	0	0%	12	75%	1	6%

[81] *See infra* Appendix B

This data reveals some interesting findings. It suggests that RFRA cases, even at the appellate level, are being considered at all stages of the RFRA test in the post–*O Centro* era; they are not all being shut out on RFRA's substantial burden threshold.

First, just under half of all RFRA claims are resolved without touching on either of RFRA's prongs—by definitional, justiciability, or applicability analysis. In other words, these claims fail before reaching RFRA's substantial burden threshold. Second, fifteen percent of decisions citing RFRA do not apply it at all—RLUIPA decisions—which usually reference RFRA in a passing description of RLUIPA's genesis or analogize to RFRA's constitutionally derived burdens.

Third, roughly a quarter of RFRA decisions are made on the substantial burden prong of RFRA. Yet, those decisions occur just as often as decisions made on RFRA's "to the person" prong, in conjunction with the compelling interest and least restrictive means considerations. In the end, the data shows that, at most, only twenty-eight claims survived in the appellate sphere to be evaluated in RFRA's final, "to the person" consideration. And many of those evaluations denied religious exemptions at the last step.

D. Judicial Analysis of "To the Person" in All Federal Courts

The second data set provides more qualitative context to federal judicial treatment of RFRA. Here, decisions, including federal district court decisions, were sorted into categories according to their method of employing the "to the person" analysis: (1) description and/or application of the "to the person" language to compelling interest analysis (TTP w/ CI Only), and (2) description and/or application of the "to the person" language to both the compelling interest and least restrictive means analyses (TTP w/ CI & LRM). Table 2 depicts this categorization on the right side of the black line. On the left side of the black line, Table 2 compares the frequency of "to the person" analysis in federal district courts (D. Ct. TTP) with federal appellate courts (App. TTP) in the same jurisdiction.

Table 2: "To the Person" Analysis in Federal Courts								
Jurisdiction	**Total TTP**	**App. TTP**	**D. Ct. TTP**	**%**	**TTP w/ CI Only**	**%**	**TTP w/ CI & LRM**	**%**
All Federal	59	19	40	68%	19	32%	40	68%
SCOTUS	1	—	—	—	0	0%	1	100%
1st Circuit	1	0	1	100%	0	0%	1	100%
2nd Circuit	5	1	4	80%	2	40%	3	60%
3rd Circuit	8	2	6	75%	5	62%	3	37%
4th Circuit	0	—	—	—	—	—	—	—
5th Circuit	6	2	4	67%	2	33%	4	67%
6th Circuit	7	0	7	100%	3	43%	4	57%
7th Circuit	2	1	1	50%	1	50%	1	50%
8th Circuit	5	2	3	60%	0	0%	5	100%
9th Circuit	5	4	1	20%	0	0%	5	100%
10th Circuit	9	3	6	67%	3	33%	6	67%
11th Circuit	3	2	1	33%	1	33%	2	67%
D.C. Circuit	7	1	6	86%	2	28%	5	71%

As Table 2 shows, federal appellate courts do not reach the "to the person" language with the same frequency as the federal district courts below them, although the Ninth and Eleventh Circuits buck that trend. This is not too surprising—many RFRA cases are resolved at the district court level. But what is most interesting is that Table 2 shows most federal courts considering the "to the person" language apply it to both the compelling interest *and* least restrictive means portions of RFRA's second prong. While the Third, Sixth, and Seventh Circuits have lower frequencies of fully engaging the "to the person" language, the First, Eighth, and Ninth Circuits, as well as the U.S. Supreme Court, have fully engaged the "to the person" language every time those courts reach that step of RFRA's test. Overall, the "to the person" analysis has been applied to both the compelling interest and least restrictive means considerations at a rate of sixty-eight percent.

This last finding is of particular interest because *O Centro* itself only explicitly reinforced the "to the person" language's plaintiff-level specificity as to the compelling interest consideration.[81] In other words, if *O Centro* were the sole driving force behind plaintiff-level specificity, one would expect the TTP w/ CI Only percentage to be much higher. However, some courts have drawn from Free Exercise Clause interpretation to particularize RFRA's least restrictive means requirement in a similar, plaintiff-specific way. As an example, in *Legatus v. Sebelius*,[82] a federal district court in Michigan used a plaintiff-specific definition of least restrictive means from *South Ridge Baptist Church v. Industrial Commission of Ohio*,[83] a free exercise and establishment case. The quoted definition from *South Ridge Baptist Church* explained the least restrictive means to be "the extent to which accommodation of the [plaintiff] would impede the state's objectives."[84] After using this definition, the district court proceeded to evaluate the least restrictive means as "to the person" of Legatus—not just the least restrictive means

81. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006) (declining to address the State's least restrictive means argument for failure to show particularized compelling interest).

82. Legatus v. Sebelius, 988 F. Supp. 2d 794, 810–13 (E.D. Mich. 2013).

83. S. Ridge Baptist Church v. Indus. Comm'n, 911 F.2d 1203 (6th Cir. 1990).

84. *Legatus*, 988 F. Supp. 2d at 810 (quoting *S. Ridge Baptist Church*, 911 F.2d at 1206).

of accomplishing the government's compelling interest as to Roman Catholics or the general body of Americans.[85]

Other courts have created plaintiff-level specificity by collapsing subsection (b)'s two requirements to consider whether "application of the burden to the person . . . is the least restrictive means of furthering [a] compelling government interest."[86] Perhaps this is because, for some courts, the "distinction between the two [considerations] is not always clear."[87]

However, a much simpler, *O Centro*–type move to create plaintiff-level specificity is found in the Supreme Court's decision in *Hobby Lobby*. There, the Court, in its explanation of least restrictive means, emphasized RFRA's "to the person" language: "See §§ 2000bb–1(a), (b) (requiring the Government to 'demonstrat[e] that application of [a substantial] burden to *the person* . . . is the least restrictive means of furthering [a] compelling governmental interest' (emphasis added))."[88] By doing this, the Court emphasized what should have been obvious from RFRA's text: the "to the person" language applies in equal and separate measure to the least restrictive means analysis.[89] The surrounding text makes the Court's plaintiff-level emphasis for the least restrictive means requirement the most clear. The Court stated, "HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases."[90] This passage has had the largest effect in creating plaintiff-level specificity on the least restrictive means consideration. Indeed, various cases cite *Hobby Lobby* for this proposition.[91] In many ways, *Hobby Lobby*

85. *Id.* at 810–13.

86. Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 691 (N.D. Tex. 2016) (quoting 42 U.S.C. § 2000bb-1(b) (2012)); *see also* La. Coll. v. Sebelius, 38 F. Supp. 3d 766, 786 (W.D. La. 2014); Colo. Christian Univ. v. Sebelius, 51 F. Supp. 3d 1052, 1063 (D. Colo. 2014).

87. N. Arapaho Tribe v. Ashe, 92 F. Supp. 3d 1160, 1188–89 (D. Wyo. 2015).

88. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).

89. Other courts have followed a similar approach, simply emphasizing the obvious language of RFRA. *See* United States v. Anderson, 854 F.3d 1033, 1036–37 (8th Cir. 2017); United States v. Christie, 825 F.3d 1048, 1063 (9th Cir. 2016); Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 841 (E.D. Mich. 2016).

90. *Hobby Lobby*, 573 U.S. at 728.

91. *See, e.g.*, Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs., 818 F.3d 1122, 1158 (11th Cir. 2016); Singh v. McHugh, 185 F. Supp. 3d 201,

has done for least restrictive means what *O Centro* did for compelling interest.

Whatever the method for adopting this plaintiff-specific approach, what *O Centro* left unfinished—the reemphasis of the "to the person" language's application to the least restrictive means test—is now being completed.

E. O Centro*'s Success: Diminishing the "Swiss Cheese" Problem*

Even though RFRA's textual blueprint plainly shows that the "to the person" specificity requirement applies to both the compelling interest and least restrictive means portions of RFRA, full judicial application of the "to the person" standard is a recent event. It looks like RFRA's original promise might finally be realized.[92] Some, however, feel this original promise is a threat to the ordered administration of justice, undermining generally applicable laws,[93] allowing religious adherents to become a law unto themselves,[94] and creating a metaphorical "Swiss cheese" legal system with gaping holes created by exemptions.[95] This fear is overstated. While RFRA does in fact grant religious adherents exemptions, its statutory burdens ensure these exemptions do not thwart the purpose behind generally applicable laws. Indeed, the strengthening of RFRA's "to the person" language—through *O Centro*, *Hobby Lobby*, and other cases—only makes RFRA's exemption framework more sustainable.

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230 (D.D.C. 2016); Armstrong v. Jewell, 151 F. Supp. 3d 242, 249 (D.R.I. 2015); March for Life v. Burwell, 128 F. Supp. 3d 116, 131 (D.D.C. 2015) (quoting Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 264 (D.C. Cir. 2014)); United States v. Epstein, 91 F. Supp. 3d 573, 586 (D.N.J. 2015).

92. *Dubious Enterprise*, *supra* note 12, at 62.

93. *See, e.g.*, *Hobby Lobby*, 573 U.S. at 739–72 (Ginsburg, J., dissenting).

94. Emp't Div. v. Smith, 494 U.S. 872, 890 (1990) ("[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.").

95. Schvey, *supra* note 11, at 12.

But how can this be? Does not the strengthening of the "to the person" language only work to the benefit of religious adherents? The answer to these questions, of course, is in the cases.

First, recent studies have shown that exemptions resulting from RFRA are not punching holes in legislative frameworks at an alarming rate. In Professor Goodrich and Ms. Busick's analysis of Tenth Circuit religious freedom cases, they observed that the number of RFRA claims was quite small—only thirty-one in ten years.[96] And these cases appear to be mostly confined to narrow scenarios: challenges of the Affordable Care Act's contraceptive mandate, Native American religious practices, and drug schemes.[97] Only forty-eight percent of those cases resulted in an exemption, all a product of the Affordable Care Act's contraceptive mandate,[98] which Goodrich and Busick argue is an anomalous source of RFRA cases anyway.[99] Without the anomalous contraceptive mandate cases, RFRA, in the Tenth Circuit, left legislative schemes untouched.[100] Thus, while RFRA's framework allows, in theory, for the granting of various religious exemptions from generally applicable laws, in practice, very few are granted.

Second, the exemptions that are granted by RFRA are carefully narrowed by RFRA's statutory burdens: the substantial burden test and, of particular interest here, the "to the person" standard's application to both the compelling interest and least restrictive means requirements. In other words, RFRA makes sure that any holes that are created in the "Swiss cheese" are small[101] and do not

96. Goodrich & Busick, *supra* note 12, at 363–66.

97. *Id.*

98. *Id.* at 382.

99. *Id.* at 366.

100. *Id.* at 382. Goodrich and Busick argue that although the Tenth Circuit is not perfectly representative of all federal courts across the nation, it is uniquely situated to be predictive of the future of religious liberty litigation because (1) it was the pipeline for some of the most influential religious liberty decisions in recent years, such as *Hobby Lobby* and *Little Sisters of the Poor*, (2) the balance of its Republican- and Democrat-appointed judges hovers near fifty-fifty, (3) its reversal rate falls near the federal circuit average, and (4) the religious demographic of the Tenth Circuit is almost exactly the same as the nation as a whole. Zubik v. Burwell, 136 S. Ct. 1557 (2016); Goodrich & Busick, *supra* note 12, at 356.

101. Interestingly, the United States Department of Agriculture has actually regulated the size of holes in Swiss cheese, taking the "eyes" in the cheese from the size of a nickel to the size of a dime. Bob Faw & John Seigenthaler, *The Hole Story: USDA Regulates Size of Holes in Swiss Cheese*, NBC NIGHTLY NEWS (Aug. 8, 2000), https://archives.nbclearn.com

impair its flavor—what the law was intended to accomplish.[102] The substantial burden test ensures that disingenuous and insubstantial RFRA claims never result in an exemption. The "to the person" language shrinks the possible exemption to an identifiable individual or group of individuals. Applied to the compelling interest test, the "to the person" standard requires the government to explore the diameter of such a narrow exemption. The government must show it has a compelling interest in closing the pinpoint sized hole created by an individual or group's noncompliance. And if the government has a plaintiff-specific compelling interest, the "to the person" language, working in tandem with the least restrictive means requirement, requires the government to show that closing the hole is the only way to maintain the flavor of the legislative cheese. RFRA assures religious exemptions do not consume generally applicable laws; it keeps our cheese flavorful.

After the U.S. Supreme Court's decision in *Hobby Lobby*, many have argued that the Court's interpretation of the word "person" as used in RFRA to cover closely-held, for-profit corporations[103] will expand holes in the Swiss cheese, creating large exemptions for vast numbers of people.[104] Hobby Lobby, Inc., for example, employs roughly 37,500 employees.[105] Hobby Lobby's RFRA exemption thus created a hole in the Affordable Care Act cheese.

/portal/site/k-12/flatview?cuecard=51917; *see also* Kitchen Daily, *Why Does Swiss Cheese Have Holes?*, HUFFPOST (Apr. 17, 2012, 6:04 AM), https://www.huffingtonpost.com /2012/04/17/holes-in-swiss-cheese_n_1428707.html.

102. Professor Garden has addressed RFRA's narrow exceptions regime in the employment context. *See* Garden, *supra* note 23, at 157 ("[T]he interests of all concerned are served when accommodations are as narrow as possible, particularly if they burden third parties. Of course, narrow accommodations minimize encroachments on employees' interests. But, perhaps counterintuitively, religious employers are also better off when RFRA accommodations are narrow.").

103. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 708 (2014). "Person" has been deemed to include non-profit corporations as well. *Id.*

104. *See* Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49669 (Oct. 26, 2017) (interpreting "person" to apply to individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies); Rachel Alexander, *The Constitutional Theory of* Burwell v. Hobby Lobby, 175 L. & JUST. 209, 212 (2015); *Dubious Enterprise*, *supra* note 12, at 78–80; Garden, *supra* note 23, at 139–40; Koppelman & Gedicks, *supra* note 7, at 224.

105. *Our Story*, HOBBY LOBBY, https://www.hobbylobby.com/about-us/our-story (last visited Apr. 19, 2019).

But even that hole is tiny, amounting to only 0.002% of the American workforce.[106] To say that expansion of "person" to cover corporate entities with religious identity will allow RFRA to hollow out legislation is an overstatement.[107]

This conclusion is emphasized by the far more typical type of prevailing RFRA litigant: individuals or small religious organizations. Take, for example, Robert Soto, a Native American pastor, and his congregation;[108] Kawal Tagore, a Sikh employee of the IRS ousted from her job;[109] or the Irshad Learning Center, a Muslim community group.[110]

Often enough, however, RFRA is applied to preclude *any* exemption, however miniscule, in cases where the government meets its burdens under the "to the person" standard. The government's ability to administrate an absolute ban on controlled substances serves as a good example. In *O Centro*, as stated above, the Supreme Court granted an exemption to the Controlled Substances Act, allowing a small sect to drink hallucinogenic tea.[111] In doing so, the Court articulated that its decision should not be interpreted to mean it would be impossible for the government to enforce an absolute ban on some controlled substances.[112] The Court stated it was possible that "the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious

106. Chuck Vollmer, *2016 State of the U.S. Labor Force*, JOBENOMICS (Jan. 12, 2016), https://jobenomicsblog.com/2016-state-of-the-u-s-labor-force/ (explaining Bureau of Labor Statistics from 2016 which estimate 157,833,000, or forty-nine percent, of Americans belong to the "Civilian Labor Force").

107. *See generally* Goodrich & Busick, *supra* note 12.

108. McAllen Grace Brethren Church v. Salazar, 764 F.3d 465 (5th Cir. 2014); Settlement Agreement, McAllen Grace Brethren Church v. Jewell, No. 7:07-cv-060 (S.D. Tex. June 13, 2016), https://s3.amazonaws.com/becketpdf/Exhibit-1-Settlement-Agreement-file-stamped.pdf.

109. Tagore v. United States, 735 F.3d 324 (5th Cir. 2013); Order Granting Motion for Authorization to Enter, Tagore v. United States, No. H-09-0027 (S.D. Tex. Oct. 15, 2014), https://s3.amazonaws.com/becketpdf/Court-Order_Tagore.pdf.

110. Irshad Learning Ctr. v. County of DuPage, 804 F. Supp. 2d 697 (N.D. Ill. 2011).

111. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006).

112. *Id.* at 435.

accommodations would seriously compromise its ability to administer the program."[113]

The government has managed to make such a demonstration in several cases. In *United States v. Christie*,[114] the government successfully showed that plaintiffs' "unbending compliance" with the Controlled Substances Act was the least restrictive means of advancing a compelling government interest: preventing distribution of cannabis to recreational users.[115] There, the Ninth Circuit explained,

> [t]he record in this case succeeds where the record in *O Centro* fell short because . . . in this case there is specific evidence that the [plaintiffs'] distribution methods created a realistic possibility that cannabis intended for members of the [plaintiffs' church] would be distributed instead to outsiders who were merely feigning membership in the [church] and adherence to its religious tenets.[116]

A religious exemption for marijuana use and distribution was similarly foreclosed by the government's showing of a particularized compelling interest and least restrictive means in *Armstrong v. Jewell*,[117] where the Rhode Island Federal District Court "acknowledge[d] the overwhelming difference between marijuana . . . and other substances, which are used by religious organizations in tightly circumscribed ceremonies."[118] The government has successfully availed itself of this reasoning in cases outside of the Controlled Substances Act—for example, complete bans on the crime of kidnapping,[119] the application of uniform terms of supervision for probationers,[120] Title VII's non-discrimination requirements,[121] and the restriction of inmates'

113. *Id.*
114. United States v. Christie, 825 F.3d 1048, 1052 (9th Cir. 2016).
115. *Id.* at 1056–57.
116. *Id.* at 1057.
117. Armstrong v. Jewell, 151 F. Supp. 3d 242, 251 (D.R.I. 2015).
118. *Id.* at 252.
119. United States v. Epstein, 91 F. Supp. 3d 573, 583–87 (D.N.J. 2015).
120. United States v. Lafley, 656 F.3d 936, 940–42 (9th Cir. 2011).
121. Equal Emp't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 595 (6th Cir. 2018). Although this Article is focused on the application of Federal RFRA, it is important to note that for state RFRAs, one area similar to Title VII that has resulted in almost no exemptions is where religious adherents invoke a state RFRA in order

access to alcohol.[122] Although these cases involved small groups, or even individuals, whose resulting religious exemption would have been a microscopic hole in the relevant legislation, the government was still able to prevail.

These considerations show that RFRA's statutory burdens, when appropriately considered through the lens of the plaintiff-specific "to the person" standard, produce the smallest religious exemptions possible. RFRA, properly applied, will not gut legislative frameworks. Rather, it is a statutory method of balancing important rights in a pluralistic society. It protects religious claimants from substantial burdens on the free exercise of their religion through tiny exemptions while permitting the overall advancement of the government's stated goals in the enforcement of otherwise beneficial legislation.

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to obtain an exemption from a state non-discrimination law which includes sexual orientation and/or gender identity as a protected class. Courts have uniformly, with only one exception, held that non-discrimination is a compelling interest and that there is no less restrictive means, other than uniform enforcement, to achieve that interest. *See, e.g.*, Dep't of Fair Emp't & Hous. v. Cathy's Creations, Inc., BCV-17-102855 (Cal. App. Dep't Super. Ct. Feb. 5, 2018) (exception); Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013); State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017). Thus, political arguments that new state RFRAs could be used as a "license to discriminate" against the LGBT community are inconsistent with how courts have treated the issue. *See* Brett Wilkins, *Other States Considering Arizona-Inspired Anti-gay Bills*, DIGITAL J. (Feb. 27, 2014), http://www.digitaljournal.com/news/politics/other-states-considering-arizona-inspired-anti-gay-bills/article/373441.

State RFRAs, then, do not appear to be a good solution for the perceived face-off between religious exercise and non-discrimination. Smaller, more focused legislative exemptions, such as those enacted in Utah, resolve these questions with greater confidence, finality, and respect. *See* S.B. 296, 61st Leg., Gen. Sess. (Utah 2015); S.B. 297, 61st Leg., Gen. Sess. (Utah 2015); Dennis Romboy, *Utah Anti-bias, Religious Rights Law Could Be Model for Other States*, DESERET NEWS (Mar. 14, 2015, 3:30 PM), https://www.deseretnews.com/article/865624241/Utah-anti-bias-religious-rights-law-could-be-model-for-other-states.html; Robin Fretwell Wilson, *Summary of the Utah Compromise* (Mar. 24, 2015) (unpublished manuscript), https://ssrn.com/abstract=2584543. Despite this, federal and state RFRAs serve an important role in vindicating the free exercise rights of religious minorities because religious minorities, lacking political power, are unlikely to successfully be able to petition legislatures to enact smaller, focused legislative exemptions for their religious practice. Robin Fretwell Wilson, *Common Ground Lawmaking: Lessons for Peaceful Coexistence from* Masterpiece Cakeshop *and the Utah Compromise*, 51 CONN. L. REV. (forthcoming 2019).

122. Sample v. Lappin, 479 F. Supp. 2d 120, 124 (D.D.C. 2007).

III. Moving Forward in RFRA Litigation

Applying RFRA's "to the person" standard to both the compelling interest and least restrictive means analyses should reduce the perception that RFRA is a tool of controversy, a sword for Christian oppressors,[123] or an unsustainable exemption regime.[124] But to separate RFRA from controversy and produce a sustainable RFRA jurisprudence, participants in RFRA litigation, whether they be religious claimants, government defendants, or the judiciary itself, must fully take the "to the person" language into account.

A. Religious Claimants

RFRA's "to the person" language is particularly important for religious claimants. Although courts' due diligence should bring the "to the person" language into consideration in all RFRA cases that make it past the substantial burden hurdle, plaintiffs should invoke the "to the person" standard obviously in their pleadings, in oral argument, in briefs, and in any other stage of litigation. Shying away from a plaintiff-specific standard allows the government to successfully argue broadly asserted compelling interests, which, because of their breadth, portend much greater harms during litigation than could be possible if the interest were narrowed to the plaintiff at hand. Similarly, missing the plaintiff-specific mark of RFRA's least restrictive means analysis permits the government, in its least restrictive means analysis, to take into account the harms and benefits to the population at large—not the individualized burden to a religious plaintiff.

B. Government Defendants

Rather than asserting unparticularized RFRA arguments, government defendants should recognize RFRA's plaintiff-level specificity. In some cases, plaintiff-specific compelling interests may be difficult to articulate, and plaintiff-specific least restrictive means may be impossible to show. In those cases, the government may not win the day. But the government should rest assured that

123. Goodrich & Busick, *supra* note 12, at 353.
124. Koppelman & Gedicks, *supra* note 7, at 224.

the resulting religious exemption will be as narrow and particular as it can be while respecting free exercise. Of course, the government will not always lose under RFRA's "to the person" specificity. Indeed, the government should follow cases like *Christie*, *Armstrong*, *Epstein*, and *Lafley* to success. If the current administration follows its own guidance, it seems like it will employ a plaintiff-specific approach to RFRA litigation.[125]

C. The Judiciary

Analyzing RFRA with "to the person" particularity should be in judges' self-interest. If judges are afraid to grant religious exemptions because "[b]ehind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe,"[126] then RFRA's track record since *O Centro* shows this fear is unfounded. Additionally, the reemphasis of the "to the person" language provided by *O Centro*, *Hobby Lobby*, and other decisions should comfort judges—instructing (not whispering) that exemptions can be granted to particularized plaintiffs so narrowly that a flood of exemption claims will not ensue. And even if a flood did ensue, RFRA's statutory burdens would shut out the meritless claims.

Moreover, strictly applying RFRA's "to the person" language serves another judicial interest: faithfully interpreting statutes by their plain meaning.[127] Not only does this allow courts to avoid mental gymnastics to kick out a possible exemption, but it also allows the court to disengage from political controversy—focusing on the specificity of RFRA's standard of proof. And judges' confidence in the end product of RFRA litigation—the narrowest exemptions possible to otherwise beneficial legislation—should strengthen courts' resolve to apply RFRA's obvious "to the person" language.

125. Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49670 (Oct. 26, 2017) ("[I]nterests must be evaluated not in broad generalities but as applied to the particular adherent.").

126. *Where Rights Begin*, *supra* note 12, at 947.

127. Moskal v. United States, 498 U.S. 103, 108 (1990) ("'In determining the scope of a statute, we look first to its language,' giving the 'words used' their 'ordinary meaning.'" (citations omitted) (first quoting United States v. Turkette, 452 U.S. 576, 580 (1981); and then quoting Richards v. United States, 369 U.S. 1, 9 (1962))).

Thus, judges should demand plaintiff-level "to the person" specificity when evaluating RFRA claims, both on the compelling interest and least restrictive means considerations. Doing so will focus litigation and ensure that RFRA's original purpose is achieved, without disrupting the government's enforcement of otherwise beneficial legislation. Courts should not forget that RFRA, like the legislation from which RFRA may grant exemptions, was also enacted legislatively.

CONCLUSION

Proper application of RFRA's "to the person" language puts fear, controversy, and speculation to rest. This language, and its intended effect, was contemplated from the beginning of RFRA. After *O Centro*, *Hobby Lobby*, and other cases, the "to the person" standard has finally been applied as RFRA's textual blueprint so obviously intended: equally and separately to both the compelling interest and least restrictive means requirements. This is the basis for RFRA's sustainable exemption framework, which promotes narrow accommodations in the interests of all concerned. These narrow exemptions simply have not swallowed legislative regimes. Rather, RFRA permits religious adherents to live according to their faith while allowing Congress's interests to advance. To sustain RFRA's balance, religious claimants, government defendants, and the judiciary must all play their part. Only then may RFRA be decoupled from controversy.

APPENDIX A

Federal Appellate Decisions Citing RFRA After *O Centro*

Last updated June 13, 2018

Case Name	Category
Borzych v. Frank, 439 F.3d 388 (7th Cir. 2006)	RLUIPA
Webman v. Fed. Bureau of Prisons, 441 F.3d 1022 (D.C. Cir. 2006)	Non-TTP
Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006)	Non-TTP
Guru Nanak Sikh Soc. of Yuba City v. Cty. of Sutter, 456 F.3d 978 (9th Cir. 2006)	RLUIPA
Vill. of Bensenville v. Fed. Aviation Admin., 457 F.3d 52 (D.C. Cir. 2006)	Non-TTP
Madison v. Virginia, 474 F.3d 118 (4th Cir. 2006)	RLUIPA
Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007)	TTP
Spratt v. Rhode Island Dep't Of Corr., 482 F.3d 33 (1st Cir. 2007)	RLUIPA
San Juan Cty., Utah v. United States, 503 F.3d 1163 (10th Cir. 2007)	Non-TTP
Francis v. Mineta, 505 F.3d 266 (3d Cir. 2007)	Non-TTP
Longoria v. Dretke, 507 F.3d 898 (5th Cir. 2007)	RLUIPA
Tabbaa v. Chertoff, 509 F.3d 89 (2d Cir. 2007)	TTP
Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007)	RLUIPA
United States v. Zimmerman, 514 F.3d 851 (9th Cir. 2007)	Non-TTP
Fernandez v. Mukasey, 512 F.3d 553 (9th Cir. 2008)	Substantial Burden
Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008)	Non-TTP
Greene v. Solano Cty. Jail, 513 F.3d 982 (9th Cir. 2008)	RLUIPA
Patel v. U.S. Bureau of Prisons, 515 F.3d 807 (8th Cir. 2008)	Substantial Burden
Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008)	Non-TTP
Fernandez v. Mukasey, 520 F.3d 965 (9th Cir. 2008)	Substantial Burden

United States v. Vasquez-Ramos, 522 F.3d 914 (9th Cir. 2008)	TTP
Koger v. Bryan, 523 F.3d 789 (7th Cir. 2008)	RLUIPA
Larsen v. U.S. Navy, 525 F.3d 1 (D.C. Cir. 2008)	Non-TTP
United States v. Friday, 525 F.3d 938 (10th Cir. 2008)	Substantial Burden, TTP
United States v. Vasquez-Ramos, 531 F.3d 987 (9th Cir. 2008)	TTP
Fowler v. Crawford, 534 F.3d 931 (8th Cir. 2008)	RLUIPA
Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008)	Substantial Burden
Fegans v. Norris, 537 F.3d 897 (8th Cir. 2008)	RLUIPA
Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231 (3d Cir. 2008)	Non-TTP
Olsen v. Mukasey, 541 F.3d 827 (8th Cir. 2008)	Non-TTP
Snoqualmie Indian Tribe v. F.E.R.C., 545 F.3d 1207 (9th Cir. 2008)	Substantial Burden
St. John's United Church of Christ v. F.A.A., 550 F.3d 1168 (D.C. Cir. 2008)	Non-TTP
Kaemmerling v. Lappin, 553 F.3d 669 (D.C. Cir. 2008)	TTP
Carroll Coll., Inc. v. N.L.R.B., 558 F.3d 568 (D.C. Cir. 2009)	Non-TTP
Potter v. D.C., 558 F.3d 542 (D.C. Cir. 2009)	TTP
Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009)	Non-TTP
Merced v. Kasson, 577 F.3d 578 (5th Cir. 2009)	RLUIPA, Non-TTP
Jama v. Esmor Corr. Servs., Inc., 577 F.3d 169 (3d Cir. 2009)	Non-TTP
S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior, 588 F.3d 718 (9th Cir. 2009)	Non-TTP
Newdow v. Lefevre, 598 F.3d 638 (9th Cir. 2010)	Non-TTP
A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248 (5th Cir. 2010)	Non-TTP
Boardley v. U.S. Dep't of Interior, 615 F.3d 508 (D.C. Cir. 2010)	Non-TTP
Gen. Conference Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402 (6th Cir. 2010)	Non-TTP

United States v. Wilgus, 638 F.3d 1274 (10th Cir. 2011)	TTP
Harrell v. Donahue, 638 F.3d 975 (8th Cir. 2011)	Non-TTP
Sossamon v. Texas, 563 U.S. 277 (2011)	RLUIPA
Mahoney v. Doe, 642 F.3d 1112 (D.C. Cir. 2011)	Substantial Burden
United States v. Lafley, 656 F.3d 936 (9th Cir. 2011)	TTP
Guttman v. Khalsa, 669 F.3d 1101 (10th Cir. 2012)	Non-TTP
Walden v. Centers for Disease Control & Prevention, 669 F.3d 1277 (11th Cir. 2012)	Non-TTP, Substantial Burden, TTP
Oklevueha Native Am. Church of Hawaii, Inc. v. Holder, 676 F.3d 829 (9th Cir. 2012)	Non-TTP
Johnson v. Killian, 680 F.3d 234 (2d Cir. 2012)	Non-TTP
United States v. Ali, 682 F.3d 705 (8th Cir. 2012)	Non-TTP
Opulent Life Church v. City of Holly Springs, Miss., 697 F.3d 279 (5th Cir. 2012)	RLUIPA
Ruiz-Diaz v. United States, 703 F.3d 483 (9th Cir. 2012)	Substantial Burden
Wheaton Coll. v. Sebelius, 703 F.3d 551 (D.C. Cir. 2012)	Non-TTP
Hobby Lobby Stores, Inc. v. Sebelius, 568 U.S. 1401 (2012)	Non-TTP
Grote v. Sebelius, 708 F.3d 850 (7th Cir. 2013)	Substantial Burden
Garner v. Kennedy, 713 F.3d 237 (5th Cir. 2013)	RLUIPA
Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013)	TTP
Liberty Univ., Inc. v. Lew, 733 F.3d 72 (4th Cir. 2013)	Substantial Burden
Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78 (1st Cir. 2013)	RLUIPA
Knight v. Thompson, 723 F.3d 1275 (11th Cir. 2013)	RLUIPA
Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013)	Non-TTP
Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013)	Non-TTP
Eden Foods, Inc. v. Sebelius, 733 F.3d 626 (6th Cir. 2013)	Non-TTP

Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208 (D.C. Cir. 2013)	Non-TTP
Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013)	TTP
Tagore v. United States, 735 F.3d 324 (5th Cir. 2013)	TTP
In re McGough, 737 F.3d 1268 (10th Cir. 2013)	Non-TTP
Aamer v. Obama, 742 F.3d 1023 (D.C. Cir. 2014)	Non-TTP
Univ. of Notre Dame v. Sebelius, 743 F.3d 547 (7th Cir. 2014)	Non-TTP
Newdow v. Peterson, 753 F.3d 105 (2d Cir. 2014)	Substantial Burden
Michigan Catholic Conference & Catholic Family Servs. v. Burwell, 755 F.3d 372 (6th Cir. 2014)	Substantial Burden
Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)	TTP
Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs., 756 F.3d 1339 (11th Cir. 2014)	Non-TTP
Wheaton Coll. v. Burwell, 134 S. Ct. 2806 (2014)	Non-TTP
Bormes v. United States, 759 F.3d 793 (7th Cir. 2014)	Non-TTP
Haight v. Thompson, 763 F.3d 554 (6th Cir. 2014)	RLUIPA
McAllen Grace Brethren Church v. Salazar, 764 F.3d 465 (5th Cir. 2014)	TTP
O'Brien v. U.S. Dep't of Health & Human Servs., 766 F.3d 862 (8th Cir. 2014)	Non-TTP
Annex Med., Inc. v. Burwell, 769 F.3d 578 (8th Cir. 2014)	Non-TTP
Priests For Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229 (D.C. Cir. 2014)	Substantial Burden, TTP
Davila v. Gladden, 777 F.3d 1198 (11th Cir. 2015)	TTP
Holt v. Hobbs, 135 S. Ct. 853 (2015)	RLUIPA
Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422 (3d Cir. 2015)	Substantial Burden
Listecki v. Official Comm. of Unsecured Creditors, 780 F.3d 731 (7th Cir. 2015)	Non-TTP
Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015)	Non-TTP

Priests for Life v. U.S. Dep't of Health & Human Servs., 808 F.3d 1 (D.C. Cir. 2015)	Non-TTP
Wheaton Coll. v. Burwell, 791 F.3d 792 (7th Cir. 2015)	Non-TTP
Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151 (10th Cir. 2015)	Substantial Burden
Wieland v. U.S. Dep't of Health & Human Servs., 793 F.3d 949 (8th Cir. 2015)	Non-TTP
Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015)	Non-TTP
Knight v. Thompson, 797 F.3d 934 (11th Cir. 2015)	RLUIPA
Catholic Health Care Sys. v. Burwell, 796 F.3d 207 (2d Cir. 2015)	Substantial Burden
Grace Sch. v. Burwell, 801 F.3d 788 (7th Cir. 2015)	Substantial Burden
Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927 (8th Cir. 2015)	TTP
Dordt Coll. v. Burwell, 801 F.3d 946 (8th Cir. 2015)	Substantial Burden
E. Texas Baptist Univ. v. Burwell, 807 F.3d 630 (5th Cir. 2015)	Substantial Burden
Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs., 818 F.3d 1122 (11th Cir. 2016)	Substantial Burden
Oklevueha Native Am. Church Of Hawaii, Inc. v. Lynch, 828 F.3d 1012 (9th Cir. 2016)	Substantial Burden
United States v. Christie, 825 F.3d 1048 (9th Cir. 2016)	TTP
Mack v. Warden Loretto FCI, 839 F.3d 286 (3d Cir. 2016)	Substantial Burden
United States v. Comrie, 842 F.3d 348 (5th Cir. 2016)	Non-TTP
United States v. Anderson, 854 F.3d 1033 (8th Cir. 2017)	TTP
Ghailani v. Sessions, 859 F.3d 1295 (10th Cir. 2017)	TTP
United States v. Stimler, 864 F.3d 253 (3d Cir. 2017)	Substantial Burden
Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs., 867 F.3d 338 (3d Cir. 2017)	Substantial Burden

Islamic Ctr. of Nashville v. Tennessee, 872 F.3d 377 (6th Cir. 2017)	Non-TTP
Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n, No. 15-2597, 2018 WL 2400763 (4th Cir. Mar. 1, 2018)	Non-TTP
Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018)	Substantial Burden, TTP
Penn v. New York Methodist Hosp., 884 F.3d 416 (2d Cir. 2018)	Non-TTP
Tanvir v. Tanzin, 889 F.3d 72 (2d Cir. 2018)	Non-TTP
New Doe Child #1 v. Cong. of United States, No. 16-4345, 2018 WL 2410806 (6th Cir. May 29, 2018)	Substantial Burden
Mayle v. United States, No. 17-3221, 2018 WL 2437325 (7th Cir. May 31, 2018)	Substantial Burden

APPENDIX B

"To the Person" Cases in Federal Courts After *O Centro*

Last updated June 13, 2018

Case Name	Category
Sample v. Lappin, 424 F. Supp. 2d 187 (D.D.C. 2006)	TTP w/ CI & LRM
Redhead v. Conference of Seventh-Day Adventists, 440 F. Supp. 2d 211 (E.D.N.Y. 2006)	TTP w/ CI Only
Sample v. Lappin, 479 F. Supp. 2d 120 (D.D.C. 2007)	TTP w/ CI Only
Tabbaa v. Chertoff, 509 F.3d 89 (2d Cir. 2007)	TTP w/ CI & LRM
United States v. Adeyemo, 624 F. Supp. 2d 1081 (N.D. Cal. 2008)	TTP w/ CI & LRM
United States v. Vasquez-Ramos, 531 F.3d 987 (9th Cir. 2008)	TTP w/ CI & LRM
Kaemmerling v. Lappin, 553 F.3d 669 (D.C. Cir. 2008)	TTP w/ CI & LRM
Forde v. Baird, 720 F. Supp. 2d 170 (D. Conn. 2010)	TTP w/ CI & LRM
United States v. Wilgus, 638 F.3d 1274 (10th Cir. 2011)	TTP w/ CI & LRM
United States v. Lafley, 656 F.3d 936 (9th Cir. 2011)	TTP w/ CI & LRM
Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012)	TTP w/ CI & LRM
Legatus v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012)	TTP w/ CI & LRM
Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106 (D.D.C. 2012)	TTP w/ CI Only
Monaghan v. Sebelius, 916 F. Supp. 2d 802 (E.D. Mich. 2012)	TTP w/ CI Only
Geneva Coll. v. Sebelius, 929 F. Supp. 2d 402 (W.D. Pa. 2013)	TTP w/ CI Only
Monaghan v. Sebelius, 931 F. Supp. 2d 794 (E.D. Mich. 2013)	TTP w/ CI & LRM
Geneva Coll. v. Sebelius, 941 F. Supp. 2d 672 (W.D. Pa. 2013)	TTP w/ CI & LRM
Geneva Coll. v. Sebelius, 960 F. Supp. 2d 588 (W.D. Pa. 2013)	TTP w/ CI Only

Beckwith Elec. Co. v. Sebelius, 960 F. Supp. 2d 1328 (M.D. Fla. 2013)	TTP w/ CI Only
Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013)	TTP w/ CI & LRM
Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013)	TTP w/ CI & LRM
Tagore v. United States, 735 F.3d 324 (5th Cir. 2013)	TTP w/ CI & LRM
Zubik v. Sebelius, 983 F. Supp. 2d 576 (W.D. Pa. 2013)	TTP w/ CI Only
Roman Catholic Archdiocese of New York v. Sebelius, 987 F. Supp. 2d 232 (E.D.N.Y. 2013)	TTP w/ CI & LRM
Legatus v. Sebelius, 988 F. Supp. 2d 794 (E.D. Mich. 2013)	TTP w/ CI & LRM
Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius, 988 F. Supp. 2d 958 (N.D. Ind. 2013)	TTP w/ CI Only
E. Texas Baptist Univ. v. Sebelius, 988 F. Supp. 2d 743 (S.D. Tex. 2013)	TTP w/ CI Only
Catholic Diocese of Beaumont v. Sebelius, 10 F. Supp. 3d 725 (E.D. Tex. 2014)	TTP w/ CI Only
Ave Maria Found. v. Sebelius, 991 F. Supp. 2d 957 (E.D. Mich. 2014)	TTP w/ CI Only
Dobson v. Sebelius, 38 F. Supp. 3d 1245 (D. Colo. 2014)	TTP w/ CI Only
Colorado Christian Univ. v. Sebelius, 51 F. Supp. 3d 1052 (D. Colo. 2014)	TTP w/ CI Only
Archdiocese of St. Louis v. Burwell, 28 F. Supp. 3d 944 (E.D. Mo. 2014)	TTP w/ CI & LRM
Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)	TTP w/ CI & LRM
Louisiana Coll. v. Sebelius, 38 F. Supp. 3d 766 (W.D. La. 2014)	TTP w/ CI & LRM
McAllen Grace Brethren Church v. Salazar, 764 F.3d 465 (5th Cir. 2014)	TTP w/ CI & LRM
Catholic Benefits Ass'n LCA v. Burwell, 81 F. Supp. 3d 1269 (W.D. Okla. 2014)	TTP w/ CI Only
Davila v. Gladden, 777 F.3d 1198 (11th Cir. 2015)	TTP w/ CI & LRM
Sch. of the Ozarks, Inc. v. U.S. Dep't of Health & Human Servs., 86 F. Supp. 3d 1066 (W.D. Mo. 2015)	TTP w/ CI & LRM
N. Arapaho Tribe v. Ashe, 92 F. Supp. 3d 1160 (D. Wyo. 2015)	TTP w/ CI & LRM

United States v. Epstein, 91 F. Supp. 3d 573 (D.N.J. 2015)	TTP w/ CI & LRM
Singh v. McHugh, 109 F. Supp. 3d 72 (D.D.C. 2015)	TTP w/ CI & LRM
Mar. for Life v. Burwell, 128 F. Supp. 3d 116 (D.D.C. 2015)	TTP w/ CI & LRM
Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927 (8th Cir. 2015)	TTP w/ CI & LRM
Armstrong v. Jewell, 151 F. Supp. 3d 242 (D.R.I. 2015)	TTP w/ CI & LRM
Real Alternatives, Inc. v. Burwell, 150 F. Supp. 3d 419 (M.D. Pa. 2015)	TTP w/ CI & LRM
Real Alternatives, Inc. v. Burwell, 150 F. Supp. 3d 419 (M.D. Pa. 2015)	TTP w/ CI & LRM
United States v. Girod, 159 F. Supp. 3d 773 (E.D. Ky. 2015)	TTP w/ CI Only
Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs., 818 F.3d 1122 (11th Cir. 2016)	TTP w/ CI & LRM
Singh v. McHugh, 185 F. Supp. 3d 201 (D.D.C. 2016)	TTP w/ CI & LRM
United States v. Christie, 825 F.3d 1048 (9th Cir. 2016)	TTP w/ CI & LRM
Wieland v. United States Dep't of Health & Human Servs., 196 F. Supp. 3d 1010 (E.D. Mo. 2016)	TTP w/ CI & LRM
Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837 (E.D. Mich. 2016)	TTP w/ CI & LRM
Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016)	TTP w/ CI & LRM
United States v. Anderson, 854 F.3d 1033 (8th Cir. 2017)	TTP w/ CI & LRM
Ghailani v. Sessions, 859 F.3d 1295 (10th Cir. 2017)	TTP w/ CI & LRM
O Centro Espirita Beneficiente Uniao Do Vegetal v. Duke, 286 F. Supp. 3d 1239 (D.N.M. 2017)	TTP w/ CI & LRM