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IMMIGRATION LAW VS. RELIGIOUS FREEDOM: USING THE RELIGIOUS FREEDOM RESTORATION ACT TO CHALLENGE RESTRICTIVE IMMIGRATION LAWS AND PRACTICES.

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I. INTRODUCTION

The free exercise of religion and restrictive U.S. immigration laws may be on a collision course. This is because, although the power of the federal government is near its apex when it comes to regulating the nation's admission of aliens, it is almost entirely prohibited from interfering with religious exercise. This tension became evident in November 2008, when the U.S. Citizenship and Immigration Services ("USCIS") amended its rules on how religious organizations in America may sponsor foreign-born religious workers.[2] The new rules made sweeping changes to the process by which religious workers would be admitted to the United States based on the government's concern with what it perceived as widespread fraud in its religious visa programs.[3] The summary to the amended regulations addressed the concern of many religious organizations that the government was interfering with religion:

> Commenters asserted that the proposed regulation would violate the First Amendment, Const. of the United States, Amdt. 1 (1791), and the Religious Freedom Restoration Act of 1993, Public Law 103-141, sec. 3, 107 Stat. 1488 (Nov. 16, 1993) (RFRA), found at 42 U.S.C. 2000bb-1, by placing a substantial burden on a religion that is not in the furtherance of a compelling government

[2] Special Immigrant and Nonimmigrant Religious Workers, 73 Fed. Reg. 72,2767 (Nov. 26, 2008) (codified as amended in scattered sections of 8 C.F.R. pts. 204, 214, 299).
[3] *Id.* at 72,277.

> interest, or at least not furthered by the least restrictive means.[4]

The commenters said that, while preventing fraud was commendable, the rule was not supported by a compelling interest and placed substantial burdens on the exercise of religion.[5] In particular, the commenters complained that the proposed rule's requirement that religious organizations apply for multiple extensions of R-1 status and pay substantial filing fees placed significant financial and paperwork burdens on religion, and that the proposed definitions of religious occupation and religious vocation prohibited some denominations from utilizing the program altogether. [6]

USCIS rejected the view that the new rule violates either the First Amendment or the Religious Freedom Restoration Act ("RFRA").[7] Instead, USCIS reasoned that the rule facilitates religious workers' admission to the United States "under restrictions that have less than a substantial impact on the individual's or an organization's exercise of religion."[8] USCIS stated that "a petitioner's rights under RFRA are not impaired unless the organization can establish that a

[4] *Id.* at 72,283.
[5] *Id.*
[6] *Id.*. The summary did not specify other concerns of substantial burden on some religious organizations, but the rules also require religious organizations to file petitions for the first time with USCIS, undergo more stringent documentation and administrative requirements, incur expenses to obtain federal tax-exempt status under Section 501(c)(3) of the Internal Revenue Code, submit to mandatory background checks, including on-site visits, before a petition can be approved, and exclude self-supporting missionaries whose missionary organizations have not previously participated in the R-1 visa program. *See* Immigration Regulations, Petitions for Employment-Based Immigrants, 8 C.F.R. § 204.5(m) (2011); Immigration Regulations, Special Requirements for Admission, Extension, and Maintenance of Status, 8 C.F.R. § 214.2(r) (2011).
[7] 42 U.S.C. §§ 2000bb to 2000bb-4 (2010).
[8] Special Immigrant and Nonimmigrant Religious Workers, 73 Fed. Reg. at 72,283.

specific provision of the rule imposes a significant burden on the organization's religious beliefs or exercise."[9] It also observed that the rule is not the sole means by which religious organizations can bring religious workers to the United States and that religious petitioners can utilize other provisions "within the confines of the RFRA."[10] It also noted that "an organization or individual who believes that the RFRA may require specific relief from any provision of this regulation may assert such a claim at the time they petition for benefits under the regulation."[11]

So what is RFRA, why was it enacted by Congress, and how might it be applied to challenge specific immigration decisions that result in a religious organization not having access to a selected foreign born religious worker? This Article will describe the RFRA and consider how it has been used to present a claim or defense in various civil and criminal cases. It will also address whether RFRA applies to immigration related actions by the U.S. Department of Homeland Security, U.S. Department of State, and other federal departments and agencies. Finally, it will consider some of the objections the government might raise in response to a RFRA claim, and indicate how it has been applied and might be applied to provide relief in future immigration cases.

For immigration lawyers and scholars accustomed to restrictive and often unreviewable decision-making,[12] RFRA appears to be a

[9] *Id.*
[10] *Id. See also id.* at 72,278, 72,280 (referring to use of the B-1 visa classification for missionaries, as provided for in 8 C.F.R. § 214.2(b)(1) and 9 F.A.M. 41.31 N9.1).
[11] *Id.* at 72,283.
[12] Since 1996, when Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as

promising and broad remedial statute that, in appropriate cases, could conceivably provide an exemption from most or all immigration restrictions and decisions that place a substantial burden on religious exercise. Yet, almost two decades after its passage, there are very few immigration cases that even mention RFRA. The ones that have applied it have done so in limited factual contexts, and virtually no courts have relied exclusively on RFRA to grant substantive relief to an immigrant claimant. Perhaps not fully acknowledging Congress's apparent purpose in passing RFRA or rejecting its implications, courts may be interpreting RFRA restrictively or may simply prefer to review immigration decisions through the more common provisions of the Immigration and Nationality Act or the Administrative Procedure Act. Another reason for the paucity of decisions may be that religious organizations decide not to litigate RFRA claims for various reasons that can range from the expense of litigation to concerns over negative publicity in an anti-immigration and anti-immigrant political climate. Still, attorneys who represent religious workers or organizations in immigration matters should understand that RFRA amounts to a genuine revision of all federal laws to accommodate religious exercise by individuals and organizations, and can provide powerful arguments to challenge restrictive agency interpretations and actions that interfere with religious exercise. The remainder of this Article will discuss the history of RFRA, the interpretations the courts have placed on the statute's definitions of religious exercise, substantial burden, and

amended in scattered sections of 8 and 18 U.S.C.), federal courts have been stripped of jurisdiction over many administrative decisions that were previously challenged as arbitrary, capricious, or an abuse of discretion. *See, e.g.,* 8 U.S.C. § 1252(a)(2)(B)-(C) (2005).

compelling state interest, and the implications those interpretations have for religious workers and institutions seeking relief from the harsh effects of U.S. immigration law.[13]

II. THE RELIGIOUS FREEDOM RESTORATION ACT, 42 U.S.C. SECTION 2000BB-1

In 1993, in the wake of a series of increasingly restrictive Supreme Court First Amendment Free Exercise Clause decisions, Congress proclaimed:

> Free exercise of religion protected
>
> (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.[14]

[13] *See, e.g.*, Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted."); Landon v. Plasencia, 459 U.S. 21, 34 (1982) ("Plasencia's interest here is, without question, a weighty one. She stands to lose the right to stay and live and work in this land of freedom. Further, she may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual." (citation omitted) (internal quotation marks omitted)).

[14] Religious Freedom Restoration Act (RFRA) § 3, 42 U.S.C. § 2000bb–1 (2006). RFRA passed without dissent in the House, 139 CONG. REC. H8713-04 (daily ed. Nov. 3, 1993), and only three dissents in the Senate, 139 CONG. REC. S14,461-01

The intent and practical effect of this provision is to shift the burden to the government to justify its enforcement of a rule of general applicability that substantially burdens religion. The government can only satisfy that burden by establishing a compelling governmental interest and employing the least restrictive means to further that interest.

III. WHY RFRA? CONGRESSIONAL FINDINGS AND PURPOSES

Congress passed RFRA in direct response to the Supreme Court's decision in *Employment Division v. Smith*,[15] which upheld the denial of unemployment benefits to members of the Native American Church in Oregon after they were dismissed from their jobs for using peyote in sacramental rituals.[16] The benefits were denied under a state law that prohibited employees who were discharged for misconduct from receiving unemployment benefits. The Supreme Court held that the First Amendment's Free Exercise Clause does not protect persons from state action applying a neutral law that does not specifically target religious exercise:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his

(daily ed. Oct. 27, 1993), and was signed by President Clinton on November 16, 1993, 139 CONG. REC. D1315-01 (daily ed. Nov. 16, 1993).

[15] *See* 139 CONG. REC. S14,461-01; 139 CONG. REC. H8713-04.

[16] 494 U.S. 872, 890 (1990).

> religious beliefs, except where the State's interest is 'compelling' . . . contradicts both constitutional tradition and common sense.[17]

In deciding that the Constitution does not impede the government from applying neutral laws of general applicability, the Supreme Court departed from existing precedent.

Prior to 1990, Free Exercise claims were decided largely by reference to two landmark First Amendment cases: *Sherbert v. Verner*[18] and *Wisconsin v. Yoder*.[19] In *Sherbert*, the Court ruled that denying unemployment benefits to a Seventh Day Adventist because she refused, due to her religious beliefs, to accept jobs requiring work on Saturdays violated the First Amendment.[20] In *Yoder*, the Court held that the State of Wisconsin violated the First Amendment rights of Amish parents when it fined them under its truancy laws after they refused, due to religious convictions, to send their children to school.[21] These two cases are significant for their conclusions that the government must sometimes allow exceptions to laws when those laws have the effect of substantially impeding a person's exercise of his or her religious beliefs, even if those laws were not designed to penalize particular religious practices.[22]

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[17] *Id.* at 885 (citation omitted) (internal quotation marks omitted).
[18] 374 U.S. 398 (1963).
[19] 406 U.S. 205 (1972).
[20] 374 U.S. at 399-402.
[21] 406 U.S. at 207.
[22] *Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."); *Sherbert*, 374 U.S. at 404 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)) ("[I]f the purpose *or effect* of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." (emphasis added)).

It was that determination, reached by the Court in both *Sherbert* and *Yoder*, that troubled the *Smith* Court. The Court later explained the reasoning behind the *Smith* decision as follows:

> The application of the *Sherbert* test . . . would have produced an anomaly in the law, a constitutional right to ignore neutral laws of general applicability. The anomaly would have been accentuated, [we] reasoned, by the difficulty of determining whether a particular practice was central to an individual's religion. We explained, moreover, that it 'is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.'[23]

Despite this explanation, the *Smith* decision was widely criticized for stripping the Free Exercise Clause of any real power to protect minority faiths.[24] In the view of critics, the point of the Free Exercise Clause is not simply to protect minority religions from intentional discrimination. It is, they argue, also meant to protect them from the unintentional discrimination that results when lawmakers in a majoritarian system of government, most of whom adhere to mainstream religions, take care to ensure that laws of general applicability do not burden their own faiths, but are indifferent to, or

[23] City of Boerne v. Flores, 521 U.S. 507, 513 (1997) (quoting Emp't Div. v. Smith, 494 U.S. 872, 887 (1990)).

[24] *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 137-40 (1992); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 215-19 (1992); Stephen L. Carter, Comment, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 121-23 (1993).

ignorant of, the burdens such laws may place on faiths that are unknown or strange to them.[25]

Congress also reacted negatively to the holding in *Smith*, and rejected it by enacting RFRA, in which it explained:

> (a) Findings. The Congress finds that--
>
> > (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
> >
> > (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
> >
> > (3) governments should not substantially burden religious exercise without compelling justification;
> >
> > (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
> >
> > (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.
>
> (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

[25] McConnell, *supra* note 24, at 138-39; Sullivan, *supra* note 24, at 215-16; Carter, *supra* note 24, at 121-22.

> (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.[26]

Thus RFRA explicitly reinstated the test laid down in the *Sherbert* and *Yoder* decisions for deciding religious freedom claims, and overturned *Employment Division v. Smith*'s holding that neutral laws of general applicability would prevail over claims that such laws imposed burdens on religious exercise.

IV. RFRA'S SCOPE AND APPLICABILITY TO USCIS AND OTHER U.S. AGENCIES

Initially, RFRA applied to all U.S. federal, state, and local governmental entities. But in *City of Boerne v. Flores*, involving a Catholic Archbishop's challenge to the denial of a city zoning permit to expand a church, the Supreme Court declared RFRA to be unconstitutional as applied to the states.[27] After that, the federal courts continued to accept challenges against federal government agencies that RFRA was entirely unconstitutional.[28] Finally, in 2006, the

[26] RFRA § 2, 42 U.S.C. § 2000bb (2006).

[27] 521 U.S. 507, 511 (1997) (holding that RFRA exceeded Congress's authority under Section 5, the Enforcement Clause of the Fourteenth Amendment to the Constitution).

[28] The principal argument against RFRA, that it violated separation of powers by exceeding the First Amendment's Free Exercise Clause, was rejected by all courts considering the question. *See, e.g.*, Hankins v. Lyght, 441 F.3d 96, 106 (2d Cir. 2006) ("We join the other circuits in holding that the RFRA is constitutional as applied to federal law under the Necessary and Proper Clause of the Constitution."); O'Bryan v. Bureau of Prisons, 349 F.3d 399, 400-01 (7th Cir. 2003); Guam v. Guerrero, 290 F.3d 1210, 1218-21 (9th Cir. 2002); Henderson v. Kennedy, 265 F.3d

Supreme Court applied RFRA to the federal government without questioning its constitutionality.[29]

RFRA now provides that "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."[30] RFRA's reach is broad, effecting changes to all federal government action. As the Supreme Court observed in deciding to strike RFRA as to state and local governments:

> Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

The reach and scope of RFRA distinguish it from other measures passed under Congress' enforcement power, even in the area of voting rights.[31] One lower court similarly noted that "RFRA, in

1072, 1073 (D.C. Cir. 2001); Kikumura v. Hurley, 242 F.3d 950, 958-60 (10th Cir. 2001); In re Young, 141 F.3d 854, 859 (8th Cir. 1998).

[29] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

[30] RFRA § 5(1), 42 U.S.C. § 2000bb-2(1) (2006). In *Guam v. Guerrero*, the court held that U.S. territory Guam is a federal government entity subject to RFRA, 290 F.3d at 1221-22.

[31] *Flores*, 521 U.S. at 532 (internal citations omitted). *See also* Religious Freedom Restoration Act § 6, 42 U.S.C. § 2000bb-3(a) ("This Act applies to all Federal law . . . whether statutory or otherwise, and whether adopted before or after November 16, 1993.").

effect, amends all federal laws to provide enhanced protection for the free exercise of religion," but that it also "reveals its enumerated powers basis only upon application in each particular case."[32]

The breadth of RFRA is important in the context of immigration law because the options for challenging decisions of the various agencies which control immigration to the United States are becoming increasingly limited. Beginning in the 1990s, Congress began passing a series of laws to restrict federal judicial review of immigration decisions. In particular, it eliminated review of many decisions which Congress labeled discretionary, such as decisions to grant adjustment of status to a lawful permanent resident or various waivers of inadmissibility.[33] It also restricted review of removal orders and eliminated review of decisions involving aliens with certain criminal convictions.[34] For those decisions that are reviewable, it mandated that federal courts review certain aspects of an immigration judge's decision by a deferential standard.[35] Still other decisions involving immigration, such as decisions of officials at U.S. consulates abroad to grant or deny visas, have long been unreviewable by the federal courts under common law doctrines.[36]

Courts, accustomed to giving deference to the often discretionary and unreviewable actions of the Department of

[32] Jama v. INS (*Jama 1*), 343 F. Supp. 2d 338, 369 n.17 (D.N.J. 2004) (quoting In re Hodge, 220 B.R. 386, 398 (Bankr. D. Idaho 1998)).
[33] Immigration and Nationality Act (INA) § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (2006).
[34] *Id.* §§ 1252(a)(2)(C), 1252(a)(5).
[35] *Id.* § 1252(b)(4).
[36] *See, e.g.*, United States *ex rel.* Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929); United States *ex rel.* London v. Phelps, 22 F.2d 288 (2d Cir. 1927).

Homeland Security,[37] may balk at the argument that RFRA amends all federal laws and subjects all federal government action, including actions of the U.S. immigration agencies, to a more searching review. But Congress nevertheless determined that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing governmental interests."[38] Thus, RFRA expressly subjects federal officers, including immigration officials, to strict scrutiny in appropriate cases.

V. RFRA AND IMMIGRATION DECISIONS

After *Smith*, courts are unlikely to find that actions taken by federal immigration officials pursuant to the Immigration and Nationality Act ("INA") violate the First Amendment's Free Exercise or Establishment of Religion Clauses, since the INA would be considered as a neutral law of general application.[39] Rules relating to lawful admission,[40] maintenance of status,[41] and removal of persons who violate these rules[42] are uniformly applied to clergy and laity, religious adherents and non-believers alike. Yet, religious organizations frequently rely on immigration officials to allow them to exercise their religion. This occurs any time they seek to classify

[37] *See, e.g.*, 8 U.S.C. § 1252(a)(2) ("Matters not subject to judicial review").
[38] RFRA § 2(a)(5), 42 U.S.C. § 2000bb(a)(5) (2006).
[39] Indeed, the Immigration and Nationality Act expressly prohibits certain discriminatory decision making practices. *See, e.g.*, INA § 202(a)(1), 8 U.S.C. § 1152(a)(1) (2006) (prohibiting discrimination in visa issuance due to a person's race, sex, nationality, place of birth, or place of residence).
[40] INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A); § 211, 8 U.S.C. § 1181(a).
[41] INA § 214(k)(3), 8 U.S.C. § 1184(k)(3); 8 C.F.R. § 214.1 (2010).
[42] INA §§ 237-241, 8 U.S.C. §§ 1227-1231.; 8 C.F.R. §§ 1001.1-[?].

foreign-born religious workers, religious students, or religious visitors in a variety of immigrant[43] and nonimmigrant[44] categories as a means to further their religious missions in the United States. And, while the federal agencies deciding what benefits to confer under the immigration laws may not apply the laws in a discriminatory manner, they are still free to narrowly interpret the laws,[45] and in that way might exercise their discretion in restrictive and harsh ways.

Religious organizations and religious workers may file various petitions and applications with the U.S. Citizenship and Immigration Services, the U.S. Department of State, and, sometimes, the U.S. Department of Labor in order to secure a person's availability to provide religious services and engage in religious activity in the United States. Administrative decisions under the Immigration and Nationality Act and federal immigration regulations can greatly impact the ability of a religious organization to exercise its religion in that way.[46] By failing to provide any exception for immigration laws in RFRA, Congress must have anticipated that immigration rules of general application, like other federal laws, might inhibit religious exercise. This can occur when the federal government impedes an organization's ability to select or place ministers, bars the admission

[43] INA § 101(a)(27)(C), 8 U.S.C. § 1101(a)(27)(C); 8 C.F.R. § 204.5(m).
[44] INA § 101(a)(15)(R), 8 U.S.C. § 1101(a)(15)(R); 8 C.F.R. § 214.2(r).
[45] *See, e.g.*, INS v. Yang, 519 U.S. 26 (1996) (recognizing that the INS's discretion is virtually unfettered).
[46] In any given immigration case, it may be necessary to analyze separately the "substantial burden" on petitioners and beneficiaries, each having their own interests and potential claims under RFRA. U.S. citizens and organizations may also have separate claims under other clauses of the First Amendment which, in addition to protecting the free exercise of religion, protects free speech, the right of assembly, and the right to petition the Government for redress of grievances. U.S. CONST. amend. I. *See e.g. Kleindeinst v. Mandel*, 408 U.S. 753 (1972).

of seminary students or religious candidates to the United States for training, refuses to permit persons residing abroad to gain access to the United States to engage in religious activity, or rejects a request from a foreign religious worker to remain in the United States.

Questions remain regarding the extent to which such organizations or individuals can claim religious protection under RFRA, the types of exemptions that might be available under the INA in individual cases, and the procedures claimants must follow to assert their rights under the statute. It is also unanswered whether the USCIS's denial of an I-129R or I-360 petition[47] for a particular religious worker may be said to substantially burden the petitioner's or the beneficiary's exercise of religion. If so, under RFRA, the USCIS would need to justify its actions by establishing a compelling interest and showing that the denial is the least restrictive means of furthering that compelling interest.[48] The same question might be asked of a U.S. consulate's denial of a visitor or student visa on the basis of lack of nonimmigrant intent.[49]

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[47] A religious employer must file an I-129 petition with an R-1 Classification Supplement to request temporary employment authorization for a religious worker. It files an I-360 petition to classify a religious worker as a Special Immigrant qualified to work permanently in the United States. The forms are available at http://www.uscis.gov/files/form/i-129.pdf and http://www.uscis.gov/files/form/i-360.pdf.

[48] RFRA § 3(b), 42 U.S.C. § 2000bb-1(b) (2006).

[49] Many foreign visitors, students and temporary workers applying for temporary admission are presumed to be coming permanently to the U.S., and thus must demonstrate that they will comply with the terms and conditions of their stay in the U.S. Failure to persuade a consular officer that a visa applicant has sufficient ties to his or her home country or compelling reasons to return there is the most common reason for visa denials. *See* INA §214(b), 8 U.S.C. § 1184(b) ("Every alien . . . shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 1101(a)(15) of this title."). It has been widely recognized that a

Reported cases applying RFRA to immigration decisions are still rare. Many cases involving RFRA or the related statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA),[50] are brought by prisoners claiming that policies or practices limiting or prohibiting their religion violate those statutes.[51] Similarly, those reported cases in which plaintiffs have sought to apply RFRA to actions against immigration officials have tended to arise from detainees' claims that conditions of immigration detention interfered with their religious practices.[52]

So far, there have been few reported RFRA challenges to immigration related decisions outside of the detention setting. In one

consular official's decision to grant or deny a visa is nonreviewable, unless expressly authorized by Congress. *See, e.g.*, Saavedra Bruno v. Albright, 197 F.3d 1153, 1159-60 (D.C. Cir. 1999); Doan v. INS, 160 F.3d 508, 509 (8th Cir. 1998); Centeno v. Shultz, 817 F.2d 1212, 1213-14 (5th Cir. 1987) (per curiam); Ventura-Escamilla v. INS, 647 F.2d 28, 30 (9th Cir. 1981); United States *ex rel.* Ulrich v. Kellogg, 30 F.2d 984, 986 (D.C. Cir. 1929); United States *ex rel.* London v. Phelps, 22 F.2d 288 (2d Cir. 1927); Garcia v. Baker, 765 F. Supp. 426, 427-28 (N.D. Ill. 1990); Pena v. Kissinger, 409 F. Supp. 1182, 1185-89 (S.D.N.Y. 1976); James A. R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1 (1991); Leon Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 SAN DIEGO L. REV. 887, 894-98 (1989). It remains to be seen whether RFRA, which provides for jurisdiction in the federal district court, might overcome the consular nonreviewability doctrine.

[50] 42 U.S.C. §§ 2000cc to 2000cc-5 (2006).

[51] *See supra* notes 33-34, 36-37. *See also*, Shakur v. Schriro, 514 F.3d 878 (9th Cir. 2008); Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995); Carty v. Farrelly, 957 F. Supp. 727 (D.V.I. 1997); Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1996) (Sotomayor, J.); Africa v. Vaughn, No. 96-649, 1996 U.S. Dist. LEXIS 17339 (E.D.Pa. Nov. 22, 1996); Alameen v. Coughlin, 892 F. Supp. 440 (E.D.N.Y. 1995).

[52] Jama v. Esmor Corr. Servs., Inc. (*Jama 2*), No. 97-3093, 2008 U.S. Dist. LEXIS 20530 (D.N.J. Mar. 17, 2008); *Jama 1*, 343 F. Supp. 2d at 371-76; Wong v. Beebe, No. 01-718, 2002 U.S. Dist. LEXIS 20340 (D. Or. Apr. 5, 2002), *aff'd in part, rev'd in part sub nom.* Wong v. United States, 373 F.3d 952 (9th Cir. 2004). The plaintiffs in both *Jama* and *Wong* sought damages under RFRA for conditions in immigration detention that included refusals to provide an appropriate religiously mandated diet, unwarranted strip searches, and denials of religious worship opportunities. *Jama 2*, 2008 U.S. Dist. LEXIS 20530, at *7-8; *Wong*, 2002 U.S. Dist. LEXIS 20340, at *2-3.

immigration case involving a defense against removal, *Fernandez v. Mukasey*, the Ninth Circuit rejected the petitioners' First Amendment and RFRA claims that the INA's requirement of a qualifying relative, for the defense called cancellation of removal,[53] burdened them as devout Catholics who were unable to conceive a child due to the Church's teachings disfavoring *in vitro* fertilization.[54] The Court found that the petitioners had not shown they opposed adoption on religious grounds, so their lack of a qualifying relative required by the cancellation statute was not due to their religious beliefs.[55] It also found that the relief of cancellation of removal requires "exceptional and extremely unusual hardship," so the statute could not have placed pressure on the petitioners to modify their religious beliefs since they did not yet have a child and thus could not prove serious hardship to that child.[56] The court reasoned: "No sensible person would abandon his religious precepts to have a child in the hope that the child would be so very ill or learning disabled as to come within the small number of children as to whom 'exceptional and extremely unusual hardship' can be shown."[57]

[53] *See* INA §240A(b), 8 U.S.C. § 1229b(b) (2006) (Cancellation of removal and adjustment of status for certain nonpermanent residents).
[54] 520 F.3d 965, 966 (9th Cir. 2008) (per curiam).
[55] *Id.*
[56] *Id.* at 966-67.
[57] *Id.* at 967. The court further stated:

> Petitioners have no reason to expect that a child born to them as a result of in vitro fertilization would have the serious health or learning issues generally required to merit a grant of cancellation of removal. They therefore have not shown that the cancellation statute puts "substantial pressure on [them] to modify [their] behavior and to violate [their] beliefs."

In an unpublished order in a significant religious freedom case, *Ruiz-Diaz v. United States*, the district court initially ruled that a RFRA challenge to a regulation barring concurrent filing of an I-360 petition for a religious worker with an I-485 application for adjustment of status, while permitting concurrent filing of visa petitions and adjustment applications for all other workers, stated a viable claim.[58] However, in its final ruling, the court held that USCIS's actions were unlawful under the Administrative Procedure Act, and expressly refrained from deciding the RFRA claim on the merits. [59] The government appealed the court's statutory ruling and, on August 20, 2010, the Ninth Circuit Court of Appeals reversed the district court's decision, but remanded for further proceedings on the plaintiffs' RFRA and constitutional claims.[60] Thus, it can be anticipated that RFRA will be invoked in another decision in *Ruiz-Diaz*, which involves a challenge to a restrictive immigration regulation that results in certain religious workers not being allowed to remain in the United States.

These decisions provide only the most general guidance on how the federal courts interpret and apply RFRA. At this time, there are many unanswered questions. Numerous provisions of the immigration laws can have a direct impact on religious exercise where they are applied in such a manner as to keep a religious adherent or religious worker out of the United States or prohibit him or her from

Id. (alteration in original) (quoting Guam v. Guerrero, 290 F.3d 1210, 1222 (9th Cir. 2002)).

[58] No. C07-1881RSL, 2008 U.S. Dist. LEXIS 91967, at *15-16 (W.D. Wash. Oct. 31, 2008).

[59] No. C07-1881RSL, 2009 U.S. Dist. LEXIS 23814, at *10-11(W.D. Wash. March 23,2009).

[60] No. 09-35734, 2010 U.S. App. LEXIS 17415, at 16-17 (9th Cir. Aug. 20, 2010).

being employed in the United States. In addition to burdens caused by adjudications of religious worker petitions, particular grounds of inadmissibility might be waived under RFRA.[61] But would RFRA exempt an otherwise qualified religious worker from statutory penalties, including three or ten year bars for unlawful presence,[62] or protect him or her from deportability?[63] Perhaps the answer will depend in part on whether the religious adherent will be able to freely exercise religion in his or her own country. Still, the religious worker's absence might also infringe upon the religious exercise of his or her U.S. based religious employer. If RFRA's substantial burden test is vigorously applied by a federal court, it may declare a particular religious adherent or religious organization to be exempt from any or all immigration rules that restrict admission to or require removal from the United States. Similarly, a court may rule that a church cannot be subject to employer sanctions if it were to employ an unauthorized religious worker.[64] Conversely, a religious worker might be able to claim an exemption from the provision making someone who has been employed without authorization ineligible to adjust his or her status to that of a lawful permanent resident.[65] RFRA could also restore jurisdiction to review discretionary or other decisions that Congress stripped from the federal courts in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[66] RFRA might also provide

[61] *See* INA § 212, 8 U.S.C. § 1182 (2006).
[62] INA § 212(a)(9)(B)-(C), 8 U.S.C. § 1182(a)(9)(B)-(C).
[63] INA § 237, 8 U.S.C. § 1227.
[64] INA § 274A, 8 U.S.C. § 1324a.
[65] INA § 245(c)(2), 8 U.S.C. § 1255(c)(2). Conversely, a religious employer might challenge a denial of its employee's adjustment of status if that decision might make the religious worker unavailable to it for up to 3 or 10 years. *Supra,* note 64.
[66] RFRA § 3, 42 U.S.C. § 2000bb-1(c) (2006).

for review of consular decisions that would otherwise be immune from review under the doctrine of consular nonreviewability.[67]

If RFRA truly amends the entirety of federal law, then the federal government and courts should conscientiously strive to apply it to any situation in which federal action impacts religious exercise. RFRA, by its own terms, requires that all immigration laws be subject to exemptions in cases where application of the generally applicable law substantially restricts someone from exercising their religion. The difficulty is in determining when a restriction on religious activity is severe enough that RFRA is implicated. Although a literal reading of RFRA suggests that a substantial burden on religion is to be defined broadly, courts are somewhat wary of requiring the government to make exemptions to laws in such a potentially large number of cases.[68] As a result, at least one court has read into the statute additional limitations on what qualifies as a substantial burden, namely that RFRA claimants must lose a government benefit or suffer a governmentally imposed penalty if they practice their religion.[69] Other courts appear to apply a slightly more expansive version of the compelling interest test in RFRA cases.[70] The remainder of this article will explore this tension between the breadth of the RFRA statute and the way it is applied in practice by the courts, as well as what this

[67] *See supra* note 52; Kleindeinst v. Mandel, 408 U.S. 753 (1972); United States *ex rel.* Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929).

[68] For an argument that federal judges are incapable of applying the *Sherbert* and *Yoder* substantial burden and compelling interest tests even-handedly, see Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1243-49 (2008).

[69] Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069-70 (9th Cir. 2008).

[70] *See, e.g.*, Muhammad v. City of N.Y. Dep't of Corr., 904 F. Supp. 161, 194-95 (S.D.N.Y. 1995) (recognizing logistical problems in providing particular religious services in a prison setting as a compelling interest).

means to immigrants and their sponsors bringing RFRA claims to challenge decisions of the immigration service or the immigration courts.

VI. ASSERTING A RFRA CLAIM

To date, the USCIS has not been particularly receptive to the idea of adapting its procedures in order to accommodate RFRA claims. Although the USCIS's anti-fraud regulations say that a petitioner or beneficiary applying for benefits under the INA may raise a RFRA claim in conjunction with his or her application or petition,[71] there is no defined procedure for doing so. Nor has USCIS written regulations providing exceptions to the normal rules governing immigration petitions and applications to account for petitioners or applicants who may have religious interests at stake and whose petitions or applications may implicate RFRA. Currently, the only way to raise a RFRA claim in conjunction with an application for immigration benefits is to include a letter or brief with the application for benefits that expressly invokes RFRA. Although USCIS itself is unlikely to divert from the requirements of the INA or related regulations to consider a RFRA claim, presenting the claim to USCIS or any other government agency involved in making the initial immigration decision is still important to ensure that the issue is preserved for review in an administrative appeal,[72] or before the

[71] Special Immigrant and Nonimmigrant Religious Workers, 73 Fed. Reg. 72,276, 72,283 (Nov. 26, 2008) (codified as amended in scattered sections of 8 C.F.R. pts. 204, 214, 299).
[72] *See* 8 C.F.R. §§ 103.3, 214.2(r)(17) & (19) (2011).

federal courts,[73] which in practice are where most RFRA claims in connection with immigration decisions are likely to be considered.[74]

RFRA provides a specific grant of jurisdiction to the federal district courts to review and order appropriate relief from agency decisions that place a substantial burden on the exercise of religion.[75] As mentioned above, there are essentially three elements of a RFRA claim. First, the plaintiff must establish that he or she is motivated to take part in the activity at issue by a sincere religious belief.[76] Second, the plaintiff must establish that the government's actions place a substantial burden on his or her ability to exercise his or her religion through that activity.[77] Finally, if those two elements are established, the burden shifts to the government to establish that it has a compelling interest in substantially burdening religious exercise and

[73] RFRA § 3(c), 42 U.S.C. § 2000bb-1(c) (2006).

[74] Administrative agencies like the USCIS and its Administrative Appeals Office (AAO) will often ignore RFRA claims, while deciding a case under the INA and regulations. For example, in a challenge to a denial of a religious organization's H-1B visa petition for a minister on the ground that the employer was not "affiliated with" an institution of higher education and thus not exempt from the annual H-1B cap, the AAO ruled in an unpublished decision that the agency's interpretation of affiliation was too restrictive, and granted the petition without addressing the alternate argument that the agency's interpretation violated RFRA. *In re X*, File No. WAC 1006750624 (AAO August 9, 2010).

[75] *Id.* ("A person whose religious exercise has been burdened . . . may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."). *See also* 42 U.S.C. § 2000bb-1(a) ("Government shall not substantially burden a person's exercise of religion . . . ."); RFRA § 2, 42 U.S.C. §2000bb(b)(2) (explaining that one purpose of RFRA is "to provide a claim or defense to persons whose religious exercise is substantially burdened by government"); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

[76] 42 U.S.C. § 2000bb-1(a); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068 (9th Cir. 2008).

[77] 42 U.S.C. § 2000bb-1(a); *Navajo Nation*, 535 F.3d at 1068.

that it has used the least restrictive means to do so.[78] The case law dealing with each of these three elements, but particularly that relating to the first two, reflects a tension between the broad language of the statute and the courts' concerns about the large practical burdens that enforcement of RFRA might place on government's ability to conduct its daily business. As a result of this tension, many RFRA decisions show a tendency by the courts to try to narrow the definitions of sincere exercise of religion or substantial burden, perhaps further than the statute allows.[79]

VII. SINCERE EXERCISE OF RELIGION

Some cases raise the issue of what constitutes an "exercise of religion." In *Employment Division v. Smith*, the Supreme Court said:

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the *First Amendment* obviously excludes all governmental regulation of religious *beliefs* as such. The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma. But the "exercise of religion" often involves not only belief and profession but the performance of (or

[78] 42 U.S.C. § 2000bb-1(b); *O Centro Espirita*, 546 U.S. at 429-32; *Navajo Nation*, 535 F.3d at 1068-70.

[79] It is interesting to note that the Supreme Court, in *O Centro Espirita*, pointedly rejected the government's slippery slope argument as being inconsistent with congressional intent in passing RFRA. *O Centro Espirita*, 546 U.S. at 435-36.

> abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.[80]

Despite this broad definition of what qualifies as religion, courts interpreting RFRA at first attempted to narrow the definition of religious exercise to include only activity that was central to a system of religious belief.[81] Many such cases involved claims by prisoners, and appear to have been driven in large part by practical concerns about the ability of government entities, particularly prisons, to accommodate numerous special religious requests.[82] Under this more

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[80] 494 U.S. 872, 887 (1990) (first emphasis added) (citations omitted) (internal quotation marks omitted).

[81] *See, e.g.*, Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995) The court in *Bryant* rejected a claim that a prison's failure to provide full Pentecostal services violated RFRA, where interfaith Christian services and Pentecostal literature were made available:

> In order to show a free exercise violation using the 'substantial burden' test, 'the religious adherent . . . has the obligation to prove that a governmental [action] burdens the adherent's practice of his or her religion . . . by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.

Id. at 949 (alterations in original) (quoting Graham v. C.I.R., 822 F.2d 844, 850-51 (9th Cir. 1987).

[82] *See, e.g.*, Weir v. Nix, 890 F. Supp. 769, 778-79 (S.D. Iowa 1995) (concluding that attending worship services on Sunday, as opposed to another day of the week, was not a central tenet of prisoner-plaintiff's religion, but also noting practical concerns with making the prison chapel available to all inmates on Sunday); Prins v. Coughlin, No. 94 Civ. 2053, 1995 U.S. Dist. LEXIS 8673, at *4-5 (S.D.N.Y. June 26, 1995) (stating that a prisoner cannot make out a RFRA claim based on the prison's failure to allow him access to an Orthodox Jewish rabbi because providing prisoners access to particular clergy on an individual basis is not practical).

restrictive interpretation of religious exercise, courts were able to regularly uphold various restrictions that the government imposed on religious practices without forcing the government to provide a compelling interest to justify them.[83] This narrowing of the definition of religious exercise is problematic from the standpoint of the separation of church and state, for, as the cases using this definition show, in order to decide whether a practice is central to or required by a system of religious belief, the courts have to make judgments about what a particular system of belief entails.[84] This forces the courts to interpret religious theology or doctrine, a practice traditionally seen as inappropriate for the federal courts.[85] Perhaps recognizing this, Congress passed the RLUIPA,[86] which amended RFRA and expanded the definition of "religious exercise." Now, RFRA provides that "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[87] This definition encompasses a range of religiously-motivated conduct that

[83] *See, e.g.*, *Bryant*, 46 F.3d at 949-50; Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995) (citing *Bryant*); *Weir*, 890 F. Supp. at 787-90.

[84] *Bryant*, 46 F.3d at 949 (discussing whether speaking in tongues or laying on of hands are practices required of Pentecostal Christians during worship services); Muhammad v. City of N. Y. Dep't of Corr., 904 F. Supp. 161, 191 (S.D.N.Y. 1995) (discussing similarities between Islam as practiced by Orthodox Muslims and Islam as practiced by members of the Nation of Islam, and explaining that those similarities mean the religious exercise of Nation of Islam inmates is not substantially burdened because they are forced to attend services led by an Orthodox Imam); *Weir*, 890 F. Supp. at 778-79 (discussing whether Sunday worship is required of Fundamentalist Christians).

[85] *See Smith*, 494 U.S. at 887 ("[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith . . . ." (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)).

[86] 42 U.S.C. §§ 2000cc to 2000cc-5 (2006). Incidentally, RLUIPA also partially overturned the U.S. Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and restored protection to religious activity in the face of certain limited kinds of interference by state governments.

[87] RLUIPA § 8(7)(A), 42 U.S.C. § 2000cc-5(7)(A).

goes beyond the limited ability to believe, pray, or attend worship services. Among the activities that courts have recognized as constituting religious exercise under this amended definition are: the importation and use of a controlled substance as part of a Christian spiritist sect's ritual communion;[88] the ability to follow religiously-based dietary restrictions, wear religious head coverings, and pray without interference in the manner prescribed by one's religion;[89] the ability to possess and use religious items publicly;[90] the ability to access federal land for the purpose of traditional religious worship, plant gathering, and other religious activities, including the aspect of "spiritual fulfillment" inherent in such activities;[91] the ability to wear particular religiously-mandated hairstyles;[92] the ability to access

[88] Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 423, 428 (2006); *c.f.* Guam v. Guerrero, 290 F.3d 1210, 1222-23 (9th Cir. 2002) (ruling that possession, but not importation, of a controlled substance, i.e. marijuana for Rastafarian religion, was protected as an exercise of religion).

[89] *Jama 2*, 2008 U.S. Dist. LEXIS 20530, at *7-8. The *Jama* cases, arising from the deplorable treatment of asylum seekers and conditions at the Esmor, New Jersey detention facility, generated numerous decisions that serve as a virtual primer on civil rights litigation on behalf of immigration detainees. *See* Jama v. Esmor Corr. Servs., Inc. (*Jama 3*), 549 F. Supp. 2d 602, 603 n.2 (D.N.J. 2008) (citing the numerous opinions issued since the case's inception in 1997).

[90] Alameen v. Coughlin, 892 F. Supp. 440, 441-42, 448 (E.D.N.Y. 1995) (use of dihkr beads by Sufi Muslims); Campos v. Coughlin, 854 F. Supp. 194, 200 (S.D.N.Y. 1996) (Sotomayor, J.) (use of colored beads by adherents of Santeria); *Jama* 2, 2008 U.S. Dist. LEXIS 20530, at *9 (use of Koran).

[91] *Navajo Nation*, 535 F.3d at 1070 n.12 ("[T]he question in this case is not whether a subjective spiritual experience constitutes an 'exercise of religion' under RFRA. That question is undisputed: The Indians' religious activities on the Peaks, including the spiritual fulfillment they derive from such religious activities, are an 'exercise of religion.'").

[92] Rourke v. N.Y. Dep't of Corr., 915 F. Supp. 525, 532, 543 (N.D.N.Y. 1995).

religious literature;[93] and the ability to fully engage in one's duties as a religious leader.[94]

The government occasionally attempts to dispute that a claimed activity constitutes a sincere religious exercise.[95] However, the broad definition of religious exercise currently in use by the courts should make it extremely difficult to defend against a RFRA claim on the ground that the activity at issue does not meet that definition. Such a defense is not impossible though. For, although the courts cannot question whether a particular practice is part of a system of religious belief, they can question whether the specific claimant in front of them truly believes the practice is religious in nature. Therefore, if RFRA plaintiffs' statements about what practices they view as being part of their religion are inconsistent, a court might find that they lack credibility and have failed to establish that the activities they wish to participate in are sincerely motivated by their personal religious beliefs.[96] Particularly in cases where a RFRA claimant appears to interpose RFRA as a pretext to avoid criminal prosecution or other government action, the courts may find that the practices at issue are not sincerely religious in nature.[97] Furthermore, in an immigration

[93] Lawson v. Dugger, 844 F. Supp. 1538, 1542 (S.D. Fla. 1994).
[94] Wong v. Beebe, No. 01-718, 2002 U.S. Dist. LEXIS 20340, at *12-13, *64-66 (D. Or. Apr. 5, 2002), *aff'd in part, rev'd in part sub nom.* Wong v. United States, 373 F.3d 952 (9th Cir. 2004).
[95] *See, e.g.*, *Campos*, 854 F. Supp. at 200-201 (rejecting defendants' argument that use of colored beads in Santeria religion was not a sincere expression of plaintiffs' religion).
[96] *See* Lindell v. Casperson, 360 F. Supp. 2d 932, 951-53 (W.D. Wis. 2005) (finding no sincere religious belief in a claim brought by a state prison inmate under RLUIPA).
[97] *See, e.g.*, United States.. v. Adeyemo, 624 F. Supp. 2d 1081, 1088-90 (N.D. Cal. 2008) (denying defendant's motion to dismiss indictment for failure to declare importation of leopard skins where credibility of claim of religious belief in Santeria

context, the government might claim that religious exercise is not implicated where an activity does not fall within the limited definition of a religious occupation.[98] Still, Congress' decision to expand the definition of religious exercise under RFRA has led the courts to look for other ways to narrow RFRA's scope and prevent the government from having to justify its restrictions under the compelling interest test.

VIII. SUBSTANTIAL BURDEN

With it now being increasingly difficult to argue that a particular activity is not a sincere exercise of religion, the government and courts seeking to narrow RFRA's application focus most of their attention on the substantial burden test. This issue is closely related to the issue of whether the claimant seeks to protect a sincere religious practice. In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, for example, the government's concession that a church's use

was at issue and government met its burden to show least restrictive means to protect its compelling interest in enforcing Endangered Species Act provisions); United States v. Manneh**,** 645 F. Supp. 2d 98, 112 (E.D.N.Y. 2008) (finding religious belief not sincerely held and denying motion to dismiss indictment for defendant's failure to seek license to import primate parts); Fernandez v. Mukasey, 520 F.3d 965, 966-67 (9th Cir. 2008) (rejecting claim that religious beliefs could reasonably include the hope of conceiving or adopting a child that might suffer exceptional and extremely unusual hardships).

[98] *See* 8 C.F.R. §§ 204.5(m)(5), 214.2(R)(3) (defining religious occupation, religious vocation, and religious worker); Tenacre Found. v. INS, 78 F.3d 693, 696-97 (D.C. Cir. 1996) (analyzing dispute over whether Christian Science nurse "trainee" position constituted a religious occupation); *cf.* Holy Virgin Protection Cathedral v. Chertoff, 499 F.3d 658, 662-63 (7th Cir. 2007) (considering a non-RFRA challenge to a USCIS decision to revoke an I-360 religious worker petition and finding that USCIS did not interfere with the church's internal governance, but only determined secular legal consequences where a factual basis to find a religious occupation was lacking).

of prohibited plants to make a sacramental tea was a sincere religious practice led the court to directly address whether the government's assertion of a compelling interest was sufficient to meet its burden of proof, since the prohibition of such use necessarily substantially burdened the church's free exercise.[99] In other situations, however, the government may concede that a particular practice is sincerely religious, but challenge whether the limitations it places on the practice are enough to substantially burden the claimant's religious exercise.[100]

What constitutes a substantial burden on religion is the subject of some dispute in the case law. In particular, it is not clear whether a substantial burden is truly created any time a person is prevented or impeded from taking part in a religiously motivated activity or whether, as the government often argues, certain prohibitions affect such a minor aspect of religious exercise that they cannot be considered substantial. This issue is framed by the majority and dissenting opinions in the Ninth Circuit case, *Navajo Nation v. U.S. Forest Service*.[101] The majority, relying on Congress' decision to restore the pre-*Smith* case law and the compelling interest test of *Sherbert v. Verner* and *Yoder v. Wisconsin,* held: "Under RFRA, a 'substantial burden' is imposed *only* when individuals are forced to choose between following the tenets of their religion and receiving a

[99] 546 U.S. 418, 423, 428 (2006).
[100] *See, e.g.*, Special Immigrant and Nonimmigrant Religious Workers, 73 Fed. Reg. 72,276, 72,283 (Nov. 26, 2008) (codified as amended in scattered sections of 8 C.F.R. pts. 204, 214, 299) (referring to immigration restrictions that have less than a substantial burden on the individual's or organization's exercise of religion).
[101] 535 F.3d 1058 (9th Cir. 2008).

governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)."[102]

In *Navajo Nation*, several Indian tribes and their members challenged the federal government's decision to use snow made from recycled wastewater to create a ski slope on a small portion of the San Francisco Peaks in Arizona, a sacred mountain range for the tribes.[103] The plaintiffs argued that the contaminated snow would desecrate the mountain and ruin their religious experience.[104] The court decided that the government's action did not substantially burden the plaintiffs' religious exercise, noting that plaintiffs continued to have virtually unlimited access to the mountain for religious and cultural purposes and determining that the artificial snow would not harm, physically affect, or otherwise interfere with any of the plaintiffs' religious ceremonies or activities.[105] The court declared:

> [A] government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a "substantial burden"—a term of art chosen by Congress to be defined by reference to Supreme Court precedent—on the free exercise of religion. Where, as here, there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is

[102] *Id.* at 1069-70.
[103] *Id.* at 1062.
[104] *Id.* at 1062-63.
[105] *Id.* at 1063.

> no "substantial burden" on the exercise of their religion.[106]

Thus the majority would require government action to be coercive in nature, threaten criminal or civil sanctions, or otherwise place substantial pressure on a person or group to forego a benefit or modify religious beliefs or practices, before finding that RFRA is violated.[107]

The lengthy dissent in *Navajo Nation* criticized the majority for creating an unnecessarily restrictive "substantial burden" test that it believed was neither justified by a common understanding of the phrase, nor required by the *Sherbert* and *Yoder* decisions.[108] The dissent argued that religious exercise can be substantially burdened by government action that does not compel either a choice between violating one's religious tenets and forfeiting a government benefit, or between altering one's religious practices and facing civil or criminal penalties.[109] It referred to other Ninth Circuit cases that found RFRA or RLUIPA violations even though they fell outside of the *Sherbert* and *Yoder* framework.[110]

The dissent's criticism of the majority decision has force. Importantly, the majority in *Navajo Nation* determined that the spiritual fulfillment the individuals received from worshipping on the

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[106] *Id.* The court emphasized that a substantial burden means there must be some pressure placed on the plaintiff to modify religious behavior and violate religious beliefs, even if the coercion is indirect. *Id.* at 1069 n.11 (citing Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981)).
[107] *Navajo Nation*, 535 F.3d at at 1069-1070.
[108] *Id.* at 1085-90 (Fletcher, J., dissenting).
[109] *Id.* at 1088-89. "*Sherbert* and *Yoder* held that certain interferences with religious exercise trigger the compelling interest test. But neither case suggested that religious exercise can be 'burdened,' or 'substantially burdened,' *only* by the two types of interference considered in those cases." *Id.* at 1089.
[110] See *id.* at 1091-94.

uncontaminated mountain was a genuine element of their religious exercise.[111] It is hard to understand how a court can agree that a particular practice is sincerely religious and that the claimants have been precluded from taking part in it, but still conclude that no substantial burden has been placed on their religious exercise. There does not seem to be any principled distinction between burdens on religion which can only be maintained through coercive measures, like the imposition of fines or the denial of benefits, and burdens on religion which can be maintained without those measures. A burden on a religious practice can be severe regardless of whether the government needs to punish people to enforce it. In *Navajo Nation*, for example, one could argue that allowing the government to destroy the sacredness of the mountain by contaminating it is no different from allowing it to prohibit members of the Navajo Nation from going onto the mountain under penalty of a trespassing charge. If the mountain loses its sacred quality, it is not of much use as a worship site anymore.

The dispute between the majority and dissent in *Navajo Nation* demonstrates how difficult it is to apply RFRA without making judgment calls about the legitimacy of certain religious practices. In some ways, the substantial burden test may be even more difficult to apply in a principled way than the sincere exercise of religion test. When determining whether an activity is a sincere exercise of religion, courts can assess whether a plaintiff's claim that he or she is

[111] *Id.* at 1070 n.12 (majority opinion) ("[T]he question in this case is not whether a subjective spiritual experience constitutes an 'exercise of religion' under RFRA. That question is undisputed: The Indians' religious activities on the Peaks, including the spiritual fulfillment they derive from such religious activities, are an 'exercise of religion.'").

religiously motivated to participate in a particular activity is credible. That inquiry does not necessarily force a court to assess whether an activity is an important aspect of a religious belief system. An activity can have religious significance to some people, but not to the individual plaintiff before the court. In contrast, it is extremely difficult to see how a court, after determining that a restricted activity is a genuine part of the plaintiff's religious exercise, can decide whether the plaintiff's religious exercise has been substantially burdened without deciding whether the restricted activity is an important or minor part of the plaintiff's religious belief system. When the majority opinion in *Navajo Nation* noted that the government's actions only interfere with the spiritual fulfillment of the tribe members when worshipping on the mountain,[112] it implied, at least in terms of a RFRA analysis, that this spiritual fulfillment is a less important aspect of the tribe's religious beliefs and practices than the ability to worship on the mountain itself. This closely resembles an improper inquiry into the centrality of a particular religious practice, something that RFRA and RLUIPA prohibit.

If courts are not allowed to make this sort of inquiry when applying the substantial burden test, what is the alternative? If taken seriously, the requirement that courts refrain from determining the centrality of a particular activity to a person's faith obliges them to find a substantial burden anytime a government action prevents someone from taking part in an activity that is sincerely motivated by his or her religious beliefs, no matter how many alternative activities in which he or she is able to participate. Not surprisingly, courts,

[112] *Id.* at 1063.

aware of how broadly such an interpretation of RFRA would reach and of how demanding the compelling interest test is, are reluctant to take this approach.[113]

This tension in RFRA between the literal language of the statute and practical concerns about how it should be applied makes it very difficult to determine how RFRA claims brought by applicants for immigration benefits will fare. This is especially true given the recent trend to restrict judicial review in immigration cases and to require the courts to defer to the decisions of the immigration service.

In analyzing whether a prima facie RFRA case has been made out in the immigration context, there are two situations that are likely to raise the issue of how far RFRA's protections extend. One is the case of the individual clergy person or religious worker who is able to worship, but unable to practice his or her profession of ministering to others because of restrictions immigration laws place on the employment of foreign nationals. The other is the case of a religious organization that is unable to employ the clergy person or religious worker of its choice for similar reasons.

Cases of individual religious workers are unique in that they raise the question of whether RFRA can override the immigration service's traditional prerogative to decide when and under what circumstances foreign nationals may work in the United States.[114] For example, the religious exercise of clergy members and religious workers may consist of engaging in various religious rituals, as well as

[113] *See* Krotoszynski, *supra* note 68, at 1195-96 ("Asking a federal judge to draw a material equivalency between her, more likely mainstream, religious commitments and those of Gozer worshippers requires a real leap of faith.").
[114] *See* 8 C.F.R. § 274a.12.

engaging in their religious profession by undertaking employment for a religious organization. Yet the U.S. government places various restrictions on the ability of foreign nationals to accept employment in the United States.[115] So there is a potential for a conflict here. If a religious worker is badly needed in a particular U.S. community, but does not qualify for a work visa due to reasons unrelated to his or her religious work, that worker could theoretically use RFRA as a means to insist that the government make an exception to the normal visa requirements. Arguably, working in a religious profession is an expression of religious belief that qualifies as religious exercise, given the broad meaning of the term in the statute and the relatively broad way it has been interpreted in the case law.

Yet it is hard to know if the courts will agree because this issue remains unaddressed by the RFRA case law. The closest the case law comes to tackling this issue is in *Wong v. Beebe*, where a District Court refused to dismiss a religious leader's claim that her religious exercise was substantially burdened by the government's refusal to allow her to fulfill her duties as the spiritual leader of an Eastern religious group.[116] But the case did not discuss this issue in great detail. Furthermore, it did not address the issue of someone seeking a visa to work in the United States in a religious occupation. The claimant in *Wong* was merely challenging a restriction the immigration service placed on her ability to travel abroad.

[115] *See, e.g.*, In re Bennett, 19 I. & N. Dec. 21, 23-24 (B.I.A. 1984) (concluding that minister had engaged in unauthorized employment and was thus ineligible to adjust his status or avoid deportation); In re Dupka, 18 I. & N. Dec. 282, 284 (B.I.A. 1981).
[116] Wong v. Beebe, No. 01-718, 2002 U.S. Dist. LEXIS 20340, at *1-2, *12-13, *65-66 (D. Or. Apr. 5, 2002, *aff'd in part, rev'd in part sub nom.* Wong v. United States, 373 F.3d 952 (9th Cir. 2004).

Specifically, she argued that her inability to travel abroad without abandoning a pending application for immigration benefits prevented her from fulfilling her duty of accompanying the body of her predecessor as spiritual leader back to Hong Kong for burial.[117]

Another question is whether the courts would consider the refusal to grant an employment-based visa to a religious worker a substantial burden on the worker's religious exercise when the worker may still be free to attend religious services or practice his or her religion in other ways. This issue has been discussed by the courts with varying results. Some cases, like *Navajo Nation*, suggest that being able to participate in many, or at least the majority, of one's desired religious activities is enough.[118] Other cases suggest a restriction on one aspect of religious exercise is not cured by the availability of alternative religious experiences. For example, in *Alameen v. Coughlin*, a group of Muslim inmates at a correctional facility sued over restrictions on their ability to pray using dhkir beads.[119] The prison staff, concerned that such beads could be used as gang insignia, restricted their use to prisoners' cells and to organized religious services.[120] Prisoners were allowed to possess the beads when out of their cells and not attending a religious service, but they could not publicly display them during these times.[121] The court, in considering a motion by the plaintiffs for a preliminary injunction restraining this policy, decided that the plaintiffs did show a likelihood

[117] *Id.* at *12-13.
[118] *Navajo Nation*, 535 F.3d at 1070.
[119] 892 F. Supp. 440, 441-42 (E.D.N.Y. 1995).
[120] *Id.* at 444-46.
[121] *Id.* at 446.

of success on their RFRA claim under these facts.[122] Even though the plaintiffs were free to use their dhikr beads in certain circumstances, the court still found that the restriction on public display of the beads outside of religious services was a substantial burden on the plaintiffs' religious exercise.[123]

The inconsistency in the case law on this issue is even more clearly demonstrated by two federal court decisions involving very similar facts. In one, prison inmates who were members of the Sunni Muslim Brotherhood objected to the fact that the only group worship services available to them were run by the American Muslim Mission, a Muslim group with differing religious views.[124] The Third Circuit in that case denied the government's motion for summary judgment, concluding that the plaintiffs had raised a material issue of fact on whether their religion was substantially burdened by their inability to attend group worship services specifically designed for their practice of Islam.[125] Yet just a year earlier, the Southern District Court of New York held that inmates who were followers of the Nation of Islam could not succeed in a RFRA claim based on their prison's decision to provide only a generic group worship service for Muslims, rather than a service led by Nation of Islam clergy.[126]

The disparities in the court decisions on this issue make it hard to predict how a court might rule in a case involving religious workers whose lack of visas make them unable to practice their religious

[122] *Id.* at 449-51.
[123] *Id.* at 448.
[124] Small v. Lehman, 98 F.3d 762, 764-65, 767 (3d Cir. 1996).
[125] *Id.* at 767-68.
[126] Muhammad v. City of N.Y. Dep't of Corr., 904 F. Supp. 161, 190-91 (S.D.N.Y. 1995).

profession in the United States, but who may still participate in religious activities as spectators. The *Small* and *Muhammad* decisions mentioned above were both decided before Congress amended RFRA to eliminate the requirement that the government burden a "central tenet" of the claimant's religion before the courts may intervene. This suggests that courts will now be more likely to find a substantial burden, even in situations where the claimant continues to have many alternative opportunities to worship. Still, religious workers arguing that a denial of a U.S. visa substantially burdens their religious practice will have to convincingly establish that their religious beliefs are motivating them, not just to work in a religious profession, but to serve a particular community in the United States. This may be a tall order given that courts are likely to suspect that a person's desire to perform religious work in the United States is motivated, not by a religious belief that he or she is needed in a particular U.S. community, but simply by a personal desire to live in the United States.

Similar issues could arise in cases involving religious organizations attempting to place clergy or other religious workers in the United States. The two main questions in such cases are (1) whether the inability of a religious organization to perform some, but not all, of its desired tasks due to the unavailability of its religious worker is truly a substantial burden, and (2) whether a church's selection of, and ability to place, a particular religious worker is in itself a religious exercise. The first question is simply a parallel of the question discussed above with respect to individual religious workers, and the analysis of how a court might decide such a question would be similar.

The second question is unique to claims by religious organizations. In response to a religious organization's claim that its religious exercise has been burdened because the immigration laws are preventing it from placing a particular worker in the United States, the government is likely to argue that this particular worker is not needed. Specifically, it might contend that there is an available pool of U.S. workers from which the organization can choose, and thus a refusal to permit a foreign religious worker admission or legal status would not place a substantial burden on the organization's religious exercise. But even if that is the case,[127] there is significant case law describing a religious organization's choice of a particular minister or religious worker as an internal church matter which is itself a part of the organization's religious exercise.[128] Thus, an argument that a particular religious worker is not really needed by a religious organization comes dangerously close to inviting the court determination as to what is actually required by a particular religious organization's belief system—a determination RFRA expressly prohibits the courts from making.

[127] Shortages of certain kinds of religious workers in the United States have been well-documented. *See, e.g.*, Kent Garber, *What to do About the Priest Shortage*, U.S. NEWS & WORLD REP., Apr. 18, 2008, http://www.usnews.com/articles/news/2008/04/18/what-to-do-about-the-priest-shortage (noting continuous decline in American priests since the 1970s).

[128] *See, e.g.*, Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 946 (9th Cir. 1999) ("A church's selection of its own clergy is one such core matter of ecclesiastical self-governance with which the state may not constitutionally interfere."); Petruska v. Gannon Univ., 462 F.3d 294, 306 (3d Cir. 2006) ("A minister serves as the church's public representative, its ambassador, and its voice to the faithful. Accordingly the process of selecting a minister is *per se* a religious exercise."); McClure v. Salvation Army, 460 F.2d 553, 559 (5th Cir. 1972) ("The minister is the chief instrument by which the church seeks to fulfill its purpose.").

The case law provides quite broad protection to a religious organization's ability to freely choose clergy and other religious personnel. For example, in *Petruska v. Gannon University*, a female plaintiff brought an employment discrimination claim against Gannon University, a Catholic institution, alleging that she was constructively discharged from her position as university chaplain based on her gender.[129] The court described significant evidence in the record suggesting that the claimant had indeed been demoted and forced to resign based on her gender.[130] In particular, it described how decisions made to restructure the plaintiff's department and reduce her authority were taken without following required university procedures.[131] It also explained how these decisions took place shortly after the plaintiff played a leading role in having the university's president removed from his post for sexually harassing another woman.[132] Finally, and most importantly, it described how the acting president of the university conceded to the plaintiff that the chair of the university's board of trustees reduced the plaintiff's authority because she was a woman and that the chair was determined to remove plaintiff from her post as chaplain.[133]

Despite all of this evidence, the court still dismissed the plaintiff's employment discrimination claims on the ground that the Free Exercise Clause absolutely protects a religious organization's ability to select its leaders and that the court's to interference with such a decision would risk violating the university's free exercise

[129] *Petruska*, 462 F.3d at 299-302.
[130] *Id.* at 300-01.
[131] *Id.*
[132] *Id.* at 300.
[133] *Id.* at 300-01.

rights.[134] The court even asserted that it could not examine whether the university's decision was actually motivated by religious concerns or whether religion was simply a pretext being used to discriminate against the plaintiff based on her gender.[135] In this sense, the protection offered by these cases is even greater than that provided by RFRA, which requires that conduct be motivated by a sincere religious belief in order to be covered by the statute.

Petruska and other similar cases have involved claims of employment discrimination under Title VII rather than challenges under RFRA. Still, the broad First Amendment protections they offered to religious organizations in making employment decisions suggest that a substantial burden on religion could include any attempt by government to prevent a religious organization from hiring the religious worker of its choice. This would include attempts by U.S. immigration agencies to restrict a religious organization's ability to hire a foreign religious worker.[136] Interpreting RFRA in this way would require U.S. immigration agencies to make major departures from their traditional policies. Traditionally, U.S. immigration policy has been built around the idea that employers should employ U.S. workers first, if they can be considered at all qualified for the position.[137] An employer is thus not completely free to employ the person it believes is best-qualified for the position because if that

[134] *Id.* at 306-07.
[135] *Petruska*, 462 F.3d at 304 n.7.
[136] Some courts have reversed decisions denying religious worker petitions where the court disagreed with the agency as to whether, under the INA and regulations, the position offered by the religious employer was a religious occupation. *See* Perez v. Ashcroft, 236 F. Supp. 2d 899 (N.D. IL 2002); Kent First Korean Church and Myung Hee Lee v. INS, 2002 U.S. Dist. LEXIS 27081 (W.D. Wash. 2002).
[137] *See* INA § 212(a)(5)(A), 8 U.S.C. § 1182(a)(5)(A); 20 C.F.R. § 656.1(a).

person happens to come from abroad, various restrictions will be placed on his or her ability to work in the United States. RFRA, if interpreted as broadly as proposed above, would require that religious organizations always be free to employ the person they determine is subjectively the best-qualified person for a religious job within their organization. Such employment should be permitted regardless of that person's nationality, unless the government can establish a compelling reason why that person should not be allowed to work in the United States. It is unclear whether courts will, in practice, accept such a broad interpretation of RFRA's reach. There are no cases dealing with this issue in a RFRA context, and the idea that RFRA renders the application of any immigration prohibition or restriction to a church's chosen leaders presumptively unlawful has not been decided by the courts.[138]

The dearth of case law on RFRA's application in the immigration law context presents an opportunity to test the statute and see just how far its protections extend. Although the approaches suggested above for using RFRA to overcome restrictive decisions of the various federal immigration agencies are not arguments typically made in immigration law practice, there is currently no case law specifically precluding them. RFRA's broad definition of religious exercise thus has the potential to, and should, significantly change the way U.S. immigration agencies handle cases. It deserves to be used

[138] Some courts have reversed the Immigration Service's restrictive interpretations of whether a particular religious worker qualifies to be employed in the United States, though not on RFRA or First Amendment grounds. *See, e.g.*, Kent First Korean Church v. INS, No. C02-867P, 2002 U.S. Dist. LEXIS 27801, at *15-17 (W.D. Wash. Dec. 11, 2002); Perez v. Ashcroft, 236 F. Supp. 2d 899, 904-05 (N.D. Ill. 2002).

more frequently. But when RFRA challenges are brought, they should be directed first and foremost to articulating a substantial burden to the religious exercise of the religious employer or worker.

IX. THE COMPELLING INTEREST TEST

For most RFRA claimants, successfully making out a prima facie RFRA case will be the biggest challenge, as the compelling interest test generally favors the plaintiff. Because establishing a prima facie RFRA case is so challenging, the majority of RFRA case law focuses on whether the plaintiffs have shown that their sincere religious exercise has been substantially burdened. But there is one particularly important U.S. Supreme Court decision addressing what is required of the government to satisfy its burden of establishing a compelling governmental interest: *Gonzales v. O Centro Espirita*.[139]

In constitutional law, the compelling interest test is viewed as one of the strictest standards available for reviewing government action, and that view that has been reaffirmed by the main RFRA case law in this area.[140] *Gonzales v. O Centro Espirita* presents a comprehensive discussion of how the courts must apply the compelling interest test to a government action that substantially burdens religious exercise under RFRA. In that case, the government conceded that the plaintiff church's sacramental use of a tea made from a plant native to the Amazon rainforest, which contained a

[139] 546 U.S. 418 (2006).

[140] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 534 (1997) ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.").

hallucinogen banned under the Controlled Substances Act, was a sincere exercise of religion.[141] The government also conceded that forbidding the church's importation of the plant, and subjecting church members to prosecution for doing so, constituted a substantial burden on the church's religion.[142] Still, it argued that the government's interest in the uniform enforcement of the nation's drug laws constituted a compelling interest and that enforcing criminal penalties was the least restrictive means of protecting that interest.[143] In applying the compelling interest standard, and rejecting the government's arguments, the Court declared that it would not accept a generalized assertion of a compelling interest, but instead would require "a case-by-case determination of the question, sensitive to the facts of each particular claim."[144]

A court reviewing a RFRA claim 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."[145] Therefore, the government cannot satisfy the compelling interest test simply by invoking the general importance of legislative policies that underlie a statute:

> RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that

[141] *O Centro Espirita*, 546 U.S. at 423.
[142] *Id*. at 426.
[143] *Id*. at 423.
[144] *Id.* at 431 (quoting Emp't Div. v. Smith, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring)).
[145] *Id.*

> 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.[146]

Nor is the government's interest in the uniform application of a statute necessarily sufficient to meet its burden of proof, unless it can show that a failure to apply the statute undermines the effectiveness of the statute altogether. Distinguishing cases that rejected religious exemptions from Social Security taxes,[147] and Sunday closing laws,[148] the Supreme Court concluded that "the Government can 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."[149]

However, in the case of *O Centro Espirita*, the Court rejected the government's argument that not applying the statute uniformly would allow for non-religious uses of controlled substances and thereby undermine the Controlled Substances Act:

> Here the Government's argument for uniformity . . . rests not so much on the particular statutory program at issue as on slippery-slope concerns

[146] *Id.* at 430-31.

[147] *See* United States v. Lee, 455 U.S. 252, 260 (1982) (refusing to grant an exception to the obligation to pay Social Security taxes because the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief"); Hernandez v. Comm'r, 490 U.S. 680 (1989).

[148] *See* Braunfeld v. Brown, 366 U.S. 599, 608-09 (1961) (plurality opinion) (declining to grant an exception to Sunday closing laws because such an exception might provide some individuals with an economic advantage over competitors who still had to remain closed on that day").

[149] *O Centro Espirita*, 546 U.S. at 435.

> that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rules of general applicability." Congress determined that the legislated test "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." This determination finds support in our cases; in *Sherbert*, for example, we rejected a slippery-slope argument similar to the one offered in this case, dismissing as "no more than a possibility" the State's speculation "that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work" would drain the unemployment benefits fund.[150]

The government's burden may be even more difficult to meet if the statute contains exceptions to its general purposes. In *O Centro Espirita,* the government sought to defend its import ban by punishing the possession of a controlled substance that it listed in the Controlled Substances Act as one of the most dangerous. Yet the Court noted that the CSA itself contained an exception for Native American Indians' sacramental use of peyote, and observed:

> Everything the Government says about the DMT in *hoasca*—that, as a Schedule I substance, Congress has determined that it "has a high potential for abuse," "has no currently accepted medical use," and has "a lack of accepted safety for use . . . under medical

[150] *Id.* at 435-36 (citations omitted).

> supervision, applies in equal measure to the mescaline in peyote, yet both the Executive and Congress itself have decreed an exception from the Controlled Substances Act for Native American religious use of peyote. If such use is permitted in the face of the congressional findings in § 812(b)(1) for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs.[151]

X. JUDICIALLY CRAFTED EXEMPTIONS TO ACCOMMODATE RELIGIOUS EXERCISE

Not only does RFRA appear to require the government to make exceptions to generally applicable rules when those rules substantially burden religion, it also provides courts with the authority to craft those exemptions. In rejecting the government's argument that courts cannot fashion remedies that Congress has not contemplated, the Supreme Court in *Gonzales v. O Centro Espirita* noted:

> RFRA, however, plainly contemplates that *courts* would recognize exceptions—that is how the law works . . . Congress' role in the peyote exemption . . . confirms that the findings in the Controlled Substances Act do not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.[152]

[151] *Id.* at 433.
[152] *Id.* at 434.

Thus, courts are required to evaluate a RFRA claimant's proposal of less restrictive alternatives in the form of exceptions to generally applicable statutes that substantially burden religious exercise. In *O Centro Espirita*, that meant that the courts had to craft an exception that was less restrictive than the outright ban of the controlled substance.

Clearly then, the compelling interest test is a difficult test for the government to meet. Indeed, it may be the very strictness of this test that is causing the courts to interpret the substantial burden test more narrowly. While the compelling interest test is not impossible to satisfy, it does require the government to present significant evidence beyond the statute it is trying to enforce to explain why it cannot make an exception to the rules for the individual claimant.

As with the substantial burden test, it is uncertain just how broadly courts will interpret RFRA's compelling interest standard in the immigration context. It is likely that the government will be able to successfully argue that a compelling interest justifies denying immigration benefits to certain dangerous individual religious workers with serious criminal convictions or who pose threats to national security.[153] But it is less clear when or if concerns about governmental efficiency, or the infeasibility of implementing case-by-case exceptions to particular rules, would qualify as a compelling interest.

[153] Tabaa v. Chertoff, 509 F.3d 89, 106-07 (2d Cir. 2007) (concluding that national security was a compelling interest that permitted the government to briefly stop, fingerprint, and photograph foreign nationals returning from an Islamic conference when government officials had intelligence that terrorist suspects would be attending the conference.); *see also* Africa v. Vaughn, No. 96-649, 1996 U.S. Dist. LEXIS 17339, at *6-7 (E.D. Pa. Nov. 22, 1996) (concluding that protecting health of other inmates was a compelling interest justifying the temporary segregation of an inmate whose religious beliefs prevented him from being tested for TB).

In RFRA suits brought by prisoners, courts have allowed prisons to restrict the variety of religious experiences provided to inmates on the ground that it would be too expensive and too difficult for prisons to provide every religious activity that any single inmate might demand.[154] However, in a non-prison setting, concerns about efficiency should not be as great. In a typical RFRA case, brought by an individual seeking immigration benefits, the claimant will not usually be asking the government to provide him or her with materials or services that cost the government money. Rather, he or she will simply be asking the government to waive rules that would otherwise restrict receipt of the benefit being sought.

It might be difficult for the government to meet RFRA's stringent compelling interest test, as articulated in *Gonzales v. O Centro Espirita*, in cases where the claimant has no negative discretionary factors other than being ineligible for the immigration benefit at issue. Even more than the Controlled Substances Act, the Immigration and Nationality Act is full of congressionally mandated exemptions and waivers, including ones for persons with serious criminal records. Inadmissibility waivers, constituting congressionally mandated exceptions, are scattered throughout the statute. There are exceptions for health related grounds of inadmissibility;[155] criminal grounds;[156] misrepresentation and fraud;[157] lack of required documents

[154] Muhammad v. City of N.Y. Dept. of Corr., 904 F. Supp. 161, 194-95 (S.D.N.Y. 1995) (recognizing logistical problems in providing particular religious services in a prison setting as a compelling interest); *see also* Franklin v. District of Columbia, 960 F. Supp. 394, 433-34 (D.D.C. 1997) (permitting prison to place reasonable time, place, and manner restrictions on religious activities for inmates).
[155] INA § 212(g), 8 U.S.C. § 1182(g) (2006).
[156] 8 U.S.C. § 1182(h).
[157] 8 U.S.C. § 1182(i).

for both immigrants[158] and nonimmigrants;[159] and exchange visitors in J-1 or J-2 status who are ordinarily prohibited from changing to H and L visa status or acquiring permanent residence.[160] There are likewise many exceptions to removal that include: cancellation of removal for permanent resident aliens and non-permanent residents;[161] waivers for conditional residents;[162] smugglers;[163] permanent residents who obtained their immigrant visas by misrepresentation or fraud;[164] criminal offenses, including ones considered aggravated felonies;[165] document fraud;[166] certain false claims to citizenship;[167] threats to foreign policy interests;[168] unlawful voters;[169] A and G nonimmigrants (foreign diplomats and employees of certain international organizations) who violated status;[170] and special immigrant juveniles.[171] Indeed, there are very few non-waivable grounds of inadmissibility or removability that the government could point to in the INA. Thus, under *Gonzales v. O Centro Espirita*, immigration officials may have a difficult time arguing that it would be unduly burdensome or expensive for them to implement exceptions for people

[158] 8 U.S.C. § 1182(k).
[159] 8 U.S.C. § 1182(d)(4); 8 U.S.C. § 1182(d)(3) (waiving most grounds of inadmissibility for nonimmigrants).
[160] 8 U.S.C. § 1182(e).
[161] INA § 240A, 8 U.S.C. § 1229(b).
[162] INA § 237(a)(1)(D)(ii), 8 U.S.C. § 1227(a)(1)(D)(ii).
[163] 8 U.S.C. § 1227(a)(1)(E)(iii).
[164] 8 U.S.C. § 1227(a)(1)(H).
[165] 8 U.S.C. § 1227(a)(2)(A)(vi) (executive pardon); 8 U.S.C. § 1227(a)(7) (waiver for victims of domestic violence).
[166] 8 U.S.C. § 1227(a)(3)(C)(ii).
[167] 8 U.S.C. § 1227(a)(3)(D)(ii).
[168] 8 U.S.C. § 1227(a)(4)(C)(ii).
[169] 8 U.S.C. § 1227(a)(6)(B).
[170] 8 U.S.C. § 1227(b).
[171] 8 U.S.C. § 1227(c).

with valid RFRA claims, and will likely focus on arguments that their decisions do not substantially burden the claimants' religious exercise.

XI. CONCLUSION

Immigration agency decisions often impact and burden religious exercise. Religious workers are lost to religious organizations when they are unable to come to the United States, or must leave due to immigration restrictions on foreign nationals. Perhaps due to the initial uncertainty over its constitutionality and the limiting of its scope to actions of the federal government, RFRA remains a largely untested statute in the field of immigration law. On its face, the substantial burden test described in the RFRA statute appears to sweep broadly and cover a wide range of activities. But in practice, courts sometimes appear eager to limit its application and avoid forcing the government to provide the significant evidence necessary to satisfy the compelling interest test, even when this has required the courts to pass judgments about the relative importance of religious practices. Nonetheless, RFRA was enacted to provide generous protection to religious practices and, in the immigration law context, it is an underused tool that could provide foreign nationals, and the religious organizations seeking to employ them, with an additional means of challenging both restrictive immigration laws and poorly reasoned decisions of the immigration agencies. Religious organizations and religious workers who are advancing their religious interests through immigration procedures should not ignore RFRA, and should continue to test the legislation to obtain the full measure of protection that it offers, as Congress intended.