NOTES

IS *O CENTRO* A SIGN OF HOPE FOR RFRA CLAIMANTS?

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> *Justice Holmes once wrote that it brought him the greatest pleasure to enforce those laws which he believed 'to be as bad as possible,' because he thereby marked the boundary between his beliefs and the law. His faith was never tested by the Religious Freedom Restoration Act of 1993.*
>
> —Judge James Robertson[1]

INTRODUCTION

LITIGANTS seeking religious exemptions from general laws under the Religious Freedom Restoration Act of 1993 (RFRA) have an ostensibly strong test on their side.[2] According to the test, the government may not substantially burden a person's religious exercise, even by a generally applicable law, unless it demonstrates that the burden advances a compelling interest by the least restrictive means.[3] If this test were applied as strictly as it is in other contexts, then one would expect judges to excuse religious individuals from general laws quite often.[4]

But as it turns out, the compelling interest test has been "strict in theory but feeble in fact" when applied to laws that burden religion.[5] One leading scholar estimates that the government prevails in

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[1] Potter v. District of Columbia, Civ. Nos. 01-1189 (JR), 05-1792 (JR), 2007 WL 2892685, *1 (D.D.C. Sept. 28, 2007) (internal citations omitted).

[2] 42 U.S.C. §§ 2000bb–2000bb-4 (2006). Since 1997, RFRA has not applied to the states. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[3] § 2000bb-1(b).

[4] See Employment Div. v. Smith, 494 U.S. 872, 888 (1990) ("[I]f 'compelling interest' really means what it says . . . many laws will not meet the test.").

[5] Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1247 (1994). It is well established that courts have applied the compelling interest test much more deferentially in the context of free exercise than in contexts like free

eighty-five percent of RFRA cases—a record he calls "surprisingly tepid."[6] Judges, it seems, are uncomfortable with carving religious exceptions out of general laws. The likely reason, as that scholar once put it, is that "[b]ehind every . . . claim is a spectral march: grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe."[7]

To halt this "spectral march," judges have employed several interpretive moves that weaken RFRA's compelling interest test in the government's favor.[8] One popular move has been to frame governmental interests at a very high level of generality in order to make them seem more compelling.[9] Instead of focusing on the government's reasons for denying the particular exemption in question, courts have tended to look more categorically at the much more significant interests served by the law as a whole.

The Supreme Court recently rejected this move in a unanimous decision. In *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, the Court interpreted RFRA to require a "an inquiry more focused than the . . . categorical approach."[10] To satisfy RFRA, the government must demonstrate a compelling interest in applying the challenged law to "the particular claimant."[11] Lower courts must therefore look "beyond broadly formulated interests

speech and equal protection. See Eugene Volokh, A Common-Law Model for Religious Exemptions, 465 UCLA L. Rev. 1465, 1499–1500 & n.106 (1999) (making this point and collecting sources).

[6] Ira C. Lupu, The Failure of RFRA, 20 U. Ark. Little Rock L.J. 575, 591–92 (1998) (finding that RFRA claimants lost 143 of 168 cases in federal and state courts between 1993 and 1997); see also Eric Alan Shumsky, The Religious Freedom Restoration Act: Postmortem of a Failed Statute, 102 W. Va. L. Rev. 81, 100 (1999) (finding that "fewer than one in six RFRA claims" won in state and federal court between 1993 and 1997). This dismal record is unsurprising in light of the similar record of free exercise claimants under the now-defunct constitutional compelling interest test. See James E. Ryan, *Smith* and the Religious Freedom Restoration Act: An Iconoclastic Assessment, 78 Va. L. Rev. 1407, 1414, 1417 (1992) (finding that Free Exercise claimants lost thirteen of seventeen claims in the Supreme Court between 1963 and 1990 and lost eighty-five of ninety-seven claims heard in the federal courts of appeals between 1980 and 1990).

[7] Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 947 (1989).

[8] Shumsky, supra note 6, at 102–03.

[9] Id. at 111.

[10] 546 U.S. 418, 430 (2006).

[11] Id. at 430–31.

justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants."[12] The Court also identified an underinclusiveness inquiry to evaluate the government's interest in burdening the particular religious claimant: if the government leaves "appreciable damage" to that same "supposedly vital" interest elsewhere, then the interest is less than compelling.[13]

After *O Centro*, an important question is whether RFRA claimants will be more successful. In the days following the decision, many religious interest groups were publicly optimistic that the decision would lead to more successful claims.[14] And early scholarly commentary, while avoiding any definite predictions, generally hailed the decision as a good sign for RFRA claimants.[15] Professor

[12] Id. at 431.

[13] Id. at 433 (internal quotation marks and alterations omitted).

[14] See Case Overview, *in* Issues on Trial: Religious Liberty 143, 145 (Sylvia Engdahl, ed. 2007) (noting that *O Centro* "was applauded by many large religious groups"); Kevin Eckstrom & Sarah Pulliam, There is Now a Bright Future for Religious Liberty Cases, *in* Issues on Trial, supra, at 167, 167 ("[R]eligious freedom advocates agree that the case means it will likely be harder for the government to limit [religious] expression after the ruling."). For some specific examples, see Eckstrom & Pulliam, supra, at 169 (quoting the chief counsel for Liberty Legal Institute as saying that the decision laid down "important doctrines" that "will protect religious freedom for decades"); Michael Doyle, Court Upholds Church Rite; Chief Justice Roberts Writes Opinion on Use of Hallucinogen, The Sacramento Bee, Feb. 22, 2006, at A13 (quoting the attorney for the religious group in *O Centro* as saying "Everyone who cares about religious freedom is going to be very, very relieved."); Jeremy Leaming, Invitation to Tea: Unanimous Supreme Court Says Federal Religious Freedom Law Protects Small Group's Use Of Hallucinogenic Sacrament, Church & State, Apr. 2006, at 13 (quoting a press release from the Alliance Defense Fund as saying that the decision will "pave the way" for new religious exemptions); Reform Jewish Leader Praises Supreme Court Decision Protecting Religious Freedom, U.S. Fed. News, Feb. 21, 2006 (quoting a Jewish leader as saying, "The Court's recognition of the high standard that the government must meet to abridge religious freedom in this nation is welcome news"). Some were perhaps *too* optimistic in the wake of the decision. For instance, one supposedly religious leader set up a church he called "Temple 420" to distribute marijuana as a religious sacrament. See Brad A. Greenberg, A Higher Calling: Temple Weeds out 'Tree of Life,' The Daily News of L.A., Feb. 27, 2007, at N1. Things did not end well for him; he was convicted of violating state drug laws and lost his appeal. A state appellate court reasoned that RFRA, and hence *O Centro*, did not apply to state laws. People v. Rubin, 86 Cal. Rptr. 3d 170, 176 (Cal. Ct. App.2008).

[15] See Richard Garnett, Separation of Church and State Is a Means of Implementing Religious Freedom, *in* Issues on Trial, supra note 14, at 181, 184–85 ("[*O Centro*'s] reaffirmation that the 'least restrictive means' and 'compelling interest' requirements are not toothless is one that should shape courts' interpretations and applications of

Douglas Laycock, for instance, praised the decision for giving RFRA "full and vigorous scope," making it "an *important* protection for religious liberty."[16] Professor Richard Garnett was also somewhat upbeat, arguing the decision could "soothe, *if not dispel*" the concern that lower courts would continue diluting the compelling interest test.[17] A few student notes have been more explicit in their predictions.[18] One, for example, argued that claimants are

many *other* religious-accommodations laws, federal and state."); Angela C. Carmella, Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good, 110 W. Va. L. Rev. 403, 429 (2007) (arguing that the decision "helps to lay the groundwork" for more robust protection of religious liberty by "placing the onus on the state to specify harms that would warrant the denial of the exemption"); Erwin Chemerinsky, Civil Rights, 34 Pepp. L. Rev. 535, 543 (2007) (describing the decision as "important" for "using a very robust, traditional form of strict scrutiny"); Eugene Volokh, Freedom of Expressive Association and Governmental Subsidies, 58 Stan. L. Rev. 1919, 1964 (2006) (noting that while courts have often applied strict scrutiny leniently in the context of religion, *O Centro* "seems to suggest some reinvigoration"); Phillip Weinberg, *O Centro Espirita*: The Supreme Court Raises the Spirits of the Free Exercise Clause, 32 U. Dayton L. Rev. 385, 385–86 (2007) (applauding the decision but calling on the Supreme Court to go further by overturning *Smith*). A number of other commentators have argued that *O Centro* may be the key to unlocking particular exemptions that courts have denied in the past. For sources on exceptions to military dress codes, see Rajdeep Singh Jolly, The Application of the Religious Freedom Restoration Act to Appearance Regulations that Presumptively Prohibit Observant Sikh Lawyers from Joining the U.S. Army Judge Advocate General Corps, 11 Chap. L. Rev. 155, 175 (2007) (arguing that *O Centro* "offers a roadmap for demonstrating that the Army's asserted interest in preserving uniformity [of dress] is not compelling"); Neha Singh Gohil & Dawinder S. Sidhu, The Sikh Turban: Post-911 Challenges to this Article of Faith, Rutgers J. L. & Religion, Spring 2008, at i, 57, http://org.law.rutgers.edu/publications/law-religion/articles/sidhu.pdf (same). For sources on exceptions to anti-discrimination laws, see Carl H. Esbeck, The Application of RFRA to Override Employment Nondiscrimination Clauses Embedded in Federal Social Service Programs, Engage, June 2008, at 140 (arguing that after *O Centro* religious groups receiving federal funds have a RFRA defense against religious nondiscrimination clauses); Steven M. Shepard, Comment, *Hankins v. Lyght*: The RFRA Defense to Federal Discrimination Claims, 26 Yale L. & Pol'y Rev. 359, 361 (2007) (arguing that after *O Centro*, RFRA is a defense to federal anti-discrimination laws generally).

[16] Douglas Laycock, Church and State in the United States: Competing Conceptions and Historic Changes, 13 Ind. J. Global Legal Stud. 503, 537 (2006) (emphasis added).

[17] Richard W. Garnett & Joshua D. Dunlap, Taking Accommodation Seriously: Religious Freedom and the *O Centro* Case, 2005–2006 Cato Sup. Ct. Rev. 257, 271 (2006) (emphasis added).

[18] See Amit Shah, Note, The Impact of *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2006), Rutgers J. L. & Religion, Fall 2008, at 1, 26, http://org.law.rutgers.edu/publications/law-religion/articles/A10-4Shah.pdf; Anneliese M. Wright, Note, Dude, Which Religion Do I Have to Join to Get Some Drugs? How

"more likely to succeed in RFRA litigation" because of *O Centro* and concluded that the decision "will likely increase the religious freedom in this country."[19]

Purely as a matter of doctrine, this optimism makes sense. *O Centro* increases the government's burden by requiring it to satisfy a more focused inquiry, but it leaves the claimant's burden constant. Therefore, one might expect more claimants to prevail in the long run because of the decision.

Only time will tell if *O Centro* will actually improve the success rate of RFRA claimants, but this Note argues that there are already good reasons for doubt. Although *O Centro* takes away one method that courts traditionally used to deny RFRA claims, it does not prevent courts from turning to other methods to achieve similar results. This Note examines RFRA cases decided by the courts of appeals after *O Centro*, and it identifies four such interpretive moves.[20] The first two moves avoid the need to confront *O Centro*'s interpretation of the compelling interest test altogether, and the last two moves weaken the test itself. If courts remain uncomfortable with granting religious exemptions, they may increasingly employ these four moves to reduce *O Centro*'s impact.

First, courts may respond to *O Centro* by tightening the definition of a "substantial burden" on religion. In order to trigger the compelling interest test, a RFRA claimant must first demonstrate that the government is substantially burdening his religion. For some time, courts have taken a very narrow view of when government interference substantially burdens religion, thus denying many claims without ever assessing the government's actions under the compelling interest test. To the extent that *O Centro* makes it even more difficult for the government to pass the compelling interest test, courts that are reluctant to grant exemptions may re-

the Supreme Court Got it Wrong in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 86 Neb. L. Rev. 987, 1001 (2008) (arguing that RFRA claimants are so much "more likely to get . . . exemption[s] due to the existence of *O Centro* as precedent" that the decision may "seriously undermine the government's ability to enforce the Controlled Substances Act").

[19] Shah, supra note 18, at 26, 29.

[20] The analysis here supports the thesis advanced by Professors Lupu and Ryan that judges are strongly inclined to deny religious exemptions and will consequently find ways to gut the compelling interest test. See Lupu, The Failure of RFRA, supra note 6, at 593; Ryan, supra note 6, at 1423.

strict what counts as a substantial burden even further. The Ninth Circuit's en banc opinion in *Navajo Nation v. United States Forest Service* best illustrates this move.[21]

Second, courts may deny RFRA claims by relying on the precedential or preclusive effects of pre-*O Centro* cases, even though those cases rest on the now-defunct categorical approach. This approach is attractive because it allows courts to reject RFRA claims without devising new substantial burden tests or evaluating the government's justifications under *O Centro*. And best of all, this approach has its roots in *O Centro* itself. Although the Supreme Court mandated a more focused approach in that case, it also characterized the exemplars of the old categorical approach—*Braunfeld v. Brown*,[22] *United States v. Lee*,[23] and *Hernandez v. Commissioner*[24]—as good precedent. Following this example, some circuit courts have declined to cast doubt on their own pre-*O Centro* cases, thus avoiding the need to revisit RFRA claims under the new focused approach. The Second Circuit's opinion in *Jenkins v. Commissioner* best illustrates this move.[25]

Third, courts that are reluctant to grant exemptions may defer to the government's judgment that an interest is compelling, as long as the government framed the interest narrowly. *O Centro* bars the government from relying on "broadly formulated interests" to justify its actions,[26] but it says very little about how lower courts are to decide whether a narrowly formulated interest is compelling. The superlatives in earlier cases like *Sherbert v. Verner*[27] ("paramount interests") and *Wisconsin v. Yoder*[28] ("interests of the highest order") likewise offer little guidance for resolving concrete cases. So even after *O Centro*, lower courts retain considerable discretion over the compelling interest inquiry. And if history is any guide, many of them will probably exercise that discretion in favor of the government by accepting narrowly framed interests, which while

[21] 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc).
[22] 366 U.S. 599 (1961).
[23] 455 U.S. 252 (1982).
[24] 490 U.S. 680 (1989).
[25] 483 F.3d 90, 92 n.5 (2d Cir. 2007).
[26] 546 U.S. at 431.
[27] 374 U.S. 398, 406 (1963) (internal quotation marks omitted).
[28] 406 U.S. 205, 215 (1972).

legitimate, hardly seem compelling. The D.C. Circuit's decision in *Kaemmerling v. Lappin* best illustrates this move.[29]

Fourth, courts may apply *O Centro*'s underinclusiveness inquiry in a deferential way. *O Centro* gives RFRA claimants what seems like a powerful weapon with which to attack the government's interest in burdening religion. If claimants can show that the government leaves "appreciable damage" to that same interest elsewhere, then the government's claim that the interest is compelling lacks credibility.[30] Unless the government readily gives exceptions to very similarly situated parties as it did in *O Centro*, this test may not prove all that helpful to RFRA claimants. Besides being vague, the test asks courts to do something they may be uncomfortable doing: second-guessing the government's use of its police powers. In many cases, the government will leave at least some harm to an interest that it claims is compelling. But as long as the government states some plausible explanation for that underinclusiveness, courts that are reluctant to grant exemptions may choose not to inquire carefully into whether better enforcement schemes were available; instead, they may defer to the government's judgment that any remaining damage is less than appreciable. The Tenth Circuit's opinion in *United States v. Friday* best illustrates this move.[31]

The purpose of this Note is not to pronounce a final verdict on *O Centro*'s impact; it is too early for that conclusion. Instead, this Note aims to serve as an early warning to potential RFRA claimants. Although the case put some teeth into RFRA's compelling interest test by mandating a more focused inquiry, courts that remain reluctant to grant religious exemptions may use the four interpretive moves above to weaken that bite, or avoid it altogether. Hence, potential claimants would be wise to take these potential judicial moves into account before deciding to litigate. Likewise, academics and policymakers ought to consider these moves when assessing RFRA's effectiveness as a source of protection for religious liberty.

This Note will proceed in five parts. Part I will discuss the doctrinal and historical background to the *O Centro* decision, and then

[29] 553 F.3d 669, 682–83 (D.C. Cir. 2008).
[30] *O Centro*, 546 U.S. at 433 (internal citations and quotation marks omitted).
[31] 525 F.3d 938, 959 (10th Cir. 2008).

Part II will examine the decision itself in detail. Part III will discuss the reasons why many greeted the decision as a sign of hope for RFRA claimants, and then Part IV will suggest reasons to doubt that the decision will make a significant difference in the success rate of RFRA claimants. Part V will conclude the Note by briefly discussing the implications of this analysis for the protection of religious liberty.

I. BACKGROUND TO *O CENTRO*

*A. The Two Pre-*Smith *Compelling Interest Tests*

From 1963 until 1990, the Supreme Court purported to apply strict scrutiny to most general laws that burdened religion.[32] While the Court stated the test in roughly the same terms in each case, many scholars concluded that the Court had actually applied two different tests: a strong test in its early cases and a much weaker version in the later cases.[33] A key difference between the two tests was the level of generality at which the Court framed the government's interests. In its early cases, the Court focused on the government's interest in denying an exemption to the *particular* claimant. In the later cases, the Court inquired more categorically into whether the law *as a whole* advanced a compelling interest and

[32] The Supreme Court made exceptions to the application of strict scrutiny for laws and regulations in two contexts: prisons and the military. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (prisons); Goldman v. Weinberger, 475 U.S. 503, 506–07 (1986) (military).

[33] See, e.g., Laurence H. Tribe, American Constitutional Law § 14-13, at 1261 (2d ed. 1988) (contrasting the two tests); Eugene Gressman & Angela C. Carmella, The RFRA Revision of the Free Exercise Clause, 57 Ohio St. L.J. 65, 81 (1996) (describing the two approaches as ad hoc and definitional balancing); Michael Stokes Paulsen, A RFRA Runs Through It: Religious Freedom and the U.S. Code, 56 Mont. L. Rev. 249, 256 (1995) ("[L]ater Supreme Court decisions . . . watered down the 'compellingness' of what it takes to be a compelling interest."); Aaron D. Bieber, Note, The Supreme Court Can't Have it Both Ways Under RFRA: The Tale of Two Compelling Interest Tests, 7 Wyo. L. Rev. 225, 236–37 (2007) ("It is clear that the Supreme Court employed both a stronger, fact-specific compelling interest test, like that used in *Sherbert* and *Yoder*, and a weaker, generalized compelling interest test used prior to, and after, *Sherbert* and *Yoder* in *Braunfield*, *Lee*, *Goldman*, and *Bowen*."). But see Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 222 n.57 (1994) (describing the difference not as a "change in the general standard" but "rather a necessary adjustment to the risk of many false claims in tax cases").

asked whether a large (but unspecified) number of exemptions would threaten that interest.

This difference in generality is important for two reasons.[34] First, defining a governmental interest broadly makes it seem far more important—and thus compelling.[35] For example, compare the weight of the government's interest in protecting the public's health and safety by prohibiting the use of illegal drugs generally with the weight of its interest in preventing a particular Rastafarian from smoking one joint of marijuana. The government will obviously prefer the former description; the Rastafarian the latter.

Second, the least-restrictive-means inquiry is "left untethered" when a court defines the government interest very broadly.[36] To illustrate this, suppose a court concludes that the government has a compelling interest in the uniform application of a tax provision. It follows that no means other than across-the-board enforcement can achieve this broadly formulated interest as effectively.[37] If the court, instead, frames the government's compelling interest narrowly, such as obtaining a workable level of revenue or avoiding sky-high administrative costs, then it probably follows that the government can achieve those interests through the less restrictive alternative of allowing a particular exemption.

For these two reasons, a focused approach to strict scrutiny favors individuals, whereas a more categorical approach favors the government. The Supreme Court's religious exemption cases have

[34] For general discussions of interest definition in constitutional law, see Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1323 (2007) ("[I]t will frequently be crucial how the government's interest is defined. In other words, there will often be an important level-of-generality question involving purportedly compelling governmental interests."); Roger Craig Green, Note, Interest Definition in Equal Protection: A Study of Judicial Technique, 108 Yale L.J. 439, 447 (1998) (arguing that "[c]ourts possess enormous discretion over how broadly or narrowly government interests are defined," allowing them "to strike down government policies that they just as easily could have upheld").

[35] See Shumsky, supra note 6, at 111; see also Ryan, supra note 6, at 1423.

[36] Fallon, supra note 34, at 1325. Professor Fallon argues that strict scrutiny is best understood in one step: "whether the government has a compelling interest in achieving a specific quantum of reduction in the risk or incidence of harm." Id. Whether one agrees with Professor Fallon's reformulation or not, one still must acknowledge that the application of strict scrutiny requires courts to pick a level of generality at either the first step (compelling interest) or the second (least restrictive means).

[37] See also Ryan, supra note 6, at 1419 (arguing that after broadly defining an interest, courts pay little attention to narrow tailoring).

swung like a pendulum between these two approaches—stopping for now on the focused approach in *O Centro*. This Note discusses some significant cases predating *O Centro* below.

1. The Focused Approach

The Court used the focused approach to evaluate the governmental interests at stake in *Sherbert v. Verner*[38] and *Wisconsin v. Yoder*.[39] In *Sherbert*, a woman was fired from her job because she would not work on Saturdays, her Sabbath. The state determined that she did not qualify for unemployment compensation under its generally applicable policies. When she challenged that denial, the state argued that if it granted her an exception, it would be deluded by "spurious claims" that would "threaten to dilute the fund and disrupt the scheduling of work."[40] The Supreme Court rejected this argument, finding "no proof" that these harms would flow from granting the particular exemption in question.[41] And it made clear that its analysis was fact-specific, explaining that it was not declaring a general right to benefits for "all persons whose religious convictions are the cause of their unemployment."[42]

Yoder even better illustrates the focused approach. In that case, Amish parents removed their children, aged fourteen and fifteen, from school. Consequently, the state fined them for violating a law that required children to remain in private or public school until age sixteen. While evaluating the state's interests, the Court acknowledged that education "ranks at the very apex of the function of a State"[43]; however, it defined the state's relevant interest more narrowly. To the Court, the question was whether the state's interest in "an additional one or two years of formal high school for Amish children" was compelling.[44] After closely reviewing the facts surrounding each of the state's proffered reasons, the Court concluded that the state would have to "show with more particularity

[38] 374 U.S. 398 (1963).
[39] 406 U.S. 205 (1972).
[40] *Sherbert*, 374 U.S. at 407.
[41] Id.
[42] Id. at 410. It also suggested the case might have come out differently had Ms. Sherbert's religion rendered her "a nonproductive member of society." Id.
[43] *Yoder*, 406 U.S. at 213.
[44] Id. at 222.

how its admittedly strong interest . . . would be adversely affected by granting an exemption *to the Amish*."[45]

Both cases employed a fact-specific, focused approach that favored the individual claimants over the government. While in each case the government had a strong interest in avoiding the total repeal of the law in question, it did not demonstrate a compelling interest in denying the particular exemption.

2. The Categorical Approach

The categorical approach has its roots in a pre-strict scrutiny case, *Braunfeld v. Brown*.[46] In that case, a merchant who was a Saturday Sabbath observer sought an exemption from the state's Sunday closing law. The state argued that granting an exemption would seriously undermine the purpose of the statute: to provide a day free of noise and activity. The glaring problem with the state's argument was that several other states allowed exactly such exemptions,[47] yet the state presented no evidence that those other states had experienced any problems as a result. Nonetheless, the Court accepted the state's highly speculative argument, concluding that significant administrative harms "*might*" flow from allowing exceptions to the policy.[48]

Years later, under the guise of strict scrutiny, the Court returned to the categorical approach in *United States v. Lee*.[49] There, an Amish man refused to pay social security taxes on behalf of his employees because of his religious beliefs. He argued that the government did not have a compelling interest in applying the tax law to him, given that it already provided an exception for the self-employed Amish. No major harm, he contended, would flow from extending that well-established exception to cover his case.

The Court disagreed, finding that "the Government's interest in assuring mandatory and continuous participation" in the social security system was compelling.[50] That interest, it reasoned, would be greatly undermined by "*myriad* exceptions flowing from a wide va-

[45] Id. at 236 (emphasis added).
[46] 366 U.S. 599 (1961).
[47] Id. at 608 & n.5.
[48] Id. at 608–09 (emphasis added).
[49] 455 U.S. 252 (1982).
[50] Id. at 258–59 (emphasis added).

riety of religious beliefs."[51] Justice Stevens, concurring in the judgment, identified the shift in the Court's methodology. Had the Court "confine[d] the analysis to the Government's interest in rejecting the particular claim to an exemption at stake in this case," the government could not have met its burden.[52] Because Congress had already exempted the self-employed Amish, it would have been "relatively simple" to extend the exemption to cover Mr. Lee and his employees.[53] Furthermore, their nonpayment would probably be "offset by the elimination of their right to collect benefits," thus improving, rather than undermining, the solvency of the system.[54] As Justice Stevens aptly concluded, the Court's analysis was blatantly inconsistent with its analysis in *Yoder*;[55] or, in other words, the Court had shifted from a focused approach to a categorical one.

The Court also applied the categorical approach in *Hernandez v. Commissioner*.[56] In that case, members of the Church of Scientology wanted to deduct payments for church services called "auditing" and "training" from their taxable incomes, but the IRS rejected their requests based on its rule against deducting payments made in exchange for services. Citing its decision in *Lee*, the Court found that any burden on religion that this decision created was justified by the "'broad public interest in maintaining a sound tax system,' free of 'myriad exceptions flowing from a wide variety of religious beliefs.'"[57] And it made clear that "[t]he fact that Congress has already crafted some deductions and exemptions in the Code . . . is of no consequence."[58]

Had the Court focused on the government's interest in denying the particular exemption, it may well have concluded that the government had failed to carry its burden. There was evidence that the IRS routinely granted exemptions to adherents of other religions for similar quid pro quos.[59] It would have been relatively easy for

[51] Id. at 259–60.
[52] Id. at 262 (Stevens, J., concurring).
[53] Id.
[54] Id.
[55] Id. at 263 n.3.
[56] 490 U.S. 680, 699–700 (1989).
[57] Id. (quoting United States v. Lee, 455 U.S. 252, 260 (1982)).
[58] Id. at 700.
[59] Id. at 706–12 (O'Connor, J., dissenting).

the IRS to extend those exemptions to cover Scientologists as well. Yet, the Court did not consider how those exemptions bore on the government's supposedly compelling interest in uniformity. Instead, it discussed them only as they related to a separate "administrative consistency argument" which the Court declined to resolve because of supposed inadequacies in the record.[60] Not impressed by this move, Justice O'Connor criticized the Court for "abjur[ing] its responsibility to address serious constitutional problems."[61]

The Court's shift back to the categorical approach in *Lee* and *Hernandez* greatly reduced the government's burden from the highpoint it reached in *Sherbert* and *Yoder*.[62] No longer did the government have to demonstrate its interest in burdening a particular religious person; instead, the government could rely on its "usually much greater interest in maintaining the underlying rule or program for unexceptional cases."[63] Furthermore, the government could assert an interest in uniformity to defeat a free exercise claim while simultaneously allowing other exceptions.[64] Although this categorical approach was originally associated with tax cases where concerns about fraudulent claims were probably high, the lower courts readily applied it in a variety of contexts.[65] As a result, strict scrutiny of free exercise claims began to look a lot like rational basis review.

B. Smith *and RFRA*

In *Employment Division v. Smith*, the Court explicitly abandoned strict scrutiny in cases where neutral and generally applica-

[60] Id. at 703.

[61] Id. at 713 (O, Connor, J., dissenting). Justice O'Connor focused on the Court's failure to consider this inconsistency as it bore on the establishment issue in the case, but her critique can easily be applied to the Court's failure to consider the implications for the free exercise claim as well.

[62] The Court did, however, consistently apply the focused approach in cases involving unemployment benefits. See Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 832 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139–40 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 713–14 (1981).

[63] Tribe, supra note 33, at 1261.

[64] See *Hernandez*, 490 U.S. at 700 (noting that exceptions made by Congress in the tax scheme are "of no consequence").

[65] Ryan, supra note 6, at 1418–21 (describing a variety of contexts in which the court of appeals applied this approach).

ble laws burdened religion.[66] Referring to cases like *Lee*, the Court wrote that it had only "purported" to apply the *Sherbert* compelling interest test.[67] Claiming that actually applying the test "across the board" would "court[] anarchy," the Court concluded it was better to give up the test in all but a few cases.[68]

Congress disagreed. In the wake of the uproar generated by the decision,[69] Congress reestablished the pre-*Smith* test with the Religious Freedom Restoration Act of 1993 (RFRA).[70] RFRA provides that the government may not "substantially burden a person's exercise of religion," even by a general rule, without demonstrating that the application of the burden is "the least restrictive means" to advance a "compelling governmental interest."[71]

One puzzling thing about RFRA is that it does not make clear whether judges are required to apply the focused version of the compelling interest test. On one hand, some textual provisions suggest that they must. The statute requires the government to justify the "application of the burden *to the person*,"[72] and one of the stated purposes of the statute is "to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*"—the exemplars of the focused approach.[73] But on the other hand, some aspects of RFRA suggest that judges are free to resort to the more lenient categorical approach. The statute states that "the compelling interest test as set forth in prior Federal court rulings is a workable test"—without distinguishing between these rulings.[74] In addition, the Senate and House Judiciary Committee Reports state that Congress did not intend to approve or disapprove of any particular pre-*Smith* decision.[75] Perhaps the solution to this puzzle

[66] 494 U.S. 872, 879 (1990).

[67] Id. at 883.

[68] Id. at 888. *Smith* left open the possibility that strict scrutiny might apply in cases where general laws burdened "hybrid" rights and in cases involving "individualized governmental assessment[s]." Id. at 881–82, 884.

[69] See Ryan, supra note 6, at 1409–10 (describing the controversy).

[70] 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

[71] Id. § 2000bb-1(a), (b).

[72] Id. § 2000bb-1(b) (emphasis added).

[73] Id. § 2000bb(b)(1) (citations omitted).

[74] Id. § 2000bb(a)(5).

[75] House Comm. on the Judiciary, Religious Freedom Restoration Act of 1993, H.R. Rep. No. 103-88, at 7 (1993); Senate Comm. on the Judiciary, Religious Freedom Restoration Act of 1993, S. Rep. No. 103-111, at 9 (1993).

is simply that Congress could not agree on how strictly the compelling interest test ought to be applied. Rather than splintering the broad coalition behind the bill, Congress may have simply decided to punt the issue to the courts.[76]

Whatever Congress' intentions may have been, the Supreme Court had little to say about the statute for the first thirteen years after its enactment.[77] Supporters of RFRA warned that the statute would become "a dead letter" if lower courts were permitted to take the categorical approach.[78] Left to their own devices, many lower courts did exactly that. While they decided many cases by finding that the claimant in question had failed to demonstrate a substantial burden on his religion, lower courts also watered down the compelling interest test.[79]

Assessing the litigation record of RFRA claims, one scholar surmised that the statute had "failed to live up to its promise."[80] Another was more frank, declaring the statute "all but dead."[81] There seemed to be little hope that RFRA would provide significant protection for religious liberty. That is, some say, until a little-known religious sect took its case to the Supreme Court.[82]

II. *O CENTRO ESPIRITA BENEFICENTE UNIAO DO VEGETAL V. GONZALES*

In *O Centro*, the Supreme Court finally confronted the question of whether RFRA requires courts to use the focused version of the compelling interest test. The case involved a small religious sect based in Brazil that had an American branch of about 130 mem-

[76] Cf. Laycock, supra note 33, at 219 (noting that one plausible explanation for RFRA's "generality" is "political necessity").

[77] The Supreme Court did, however, strike down the statute as applied to the states. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[78] See Laycock, supra note 33, at 244–45.

[79] Lupu, The Failure of RFRA, supra note 6, at 594–96; Shumsky, supra note 6, at 111–21, 123–29 (describing representative cases). For an example, see *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996) (holding that a university's "interest in the health and well being of its students[] advanced by its mandatory fee policy" was compelling).

[80] Shumsky, supra note 6, at 84.

[81] Lupu, The Failure of RFRA, supra note 6, at 575.

[82] See sources, supra note 14.

bers.[83] Members received communion through a sacramental tea called hoasca. This tea contained dimethyltryptamine ("DMT"), a hallucinogen which is prohibited under the Controlled Substances Act as a Schedule 1 drug. When the sect attempted to import three drums of the tea, customs inspectors seized the shipment and threatened prosecution. In response, the sect filed suit seeking declaratory and injunctive relief under RFRA.[84]

During the district court's hearing on the issuance of a preliminary injunction, the government conceded that its actions would substantially burden the sect's sincere religious exercise. The only issue at stake was whether the government could justify its actions under RFRA's compelling interest test.[85] The district court opted to take the focused approach, finding that the government had failed to demonstrate that the sect's *particular* use of DMT was significantly dangerous to the health of its members or presented a serious risk of diversion to nonmembers. The Tenth Circuit affirmed, both in a panel decision and en banc.[86]

On appeal to the Supreme Court, the government argued that the lower courts had applied the wrong legal standard. RFRA, it contended, required courts to take the more lenient categorical approach. Thus, there was "no need to assess the particulars of the [sect's] use or weigh the impact of an exemption for that specific use" because the Controlled Substances Act as a whole served a compelling interest.[87] The Court unanimously disagreed. It held that "RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach."[88] RFRA's text, the Court reasoned, requires the government to demonstrate a compelling interest in applying its law "'to the person.'"[89] Moreover, the Court observed, RFRA "expressly

[83] For a more detailed discussion of the case's background, see Jeffrey Toobin, High Tea, The New Yorker, Dec. 20 & 27, 2004, at 48.

[84] *O Centro*, 546 U.S. at 425.

[85] Id. at 426.

[86] Id. at 426–27 (discussing these rulings).

[87] Id. at 430.

[88] Id. Although the case involved an appeal of a preliminary injunction, the holding of the case will apply to RFRA decisions on the merits. The Supreme Court explained that the burdens at the preliminary injunction stage track the burdens at trial. Id. at 428–29.

[89] Id. at 430 (quoting 42 U.S.C. § 2000bb-1(b)).

adopted" the test as it appeared in *Sherbert* and *Yoder*—cases in which the Court had "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants."[90]

Applying this "more focused inquiry,"[91] the Court rejected each of the government's arguments. First, the government contended that Congress' decision to list DMT as a Schedule I drug was sufficient to establish a compelling interest in preventing all uses of the substance. The Court disagreed, reasoning that there was "no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here."[92] It also noted that the government's position was belied by two facts: (1) the Controlled Substances Act allows the Attorney General to make exceptions by regulation and (2) Congress itself had created an exception by statute allowing Native Americans to use peyote, another Schedule I drug.[93] Therefore, the government's first argument was plainly wrong.

Second, the government argued that it had a compelling interest in uniformly applying the Controlled Substances Act. The Court responded that the "well-established" peyote exception defeated this argument as well.[94] Moreover, the Court observed that government had failed to put on any evidence showing that allowing other exceptions would seriously "undercut" its ability to administer the act.[95] Ridiculing the government's position, the Court wrote that it "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."[96] Such unsubstantiated "slippery-slope concerns," the Court reasoned, did not satisfy the compelling interest test.[97]

Lastly, the government argued that it had a compelling interest in complying with an international treaty on psychotropic drugs.

[90] Id. at 431.
[91] Id. at 432.
[92] Id.
[93] Id. at 432–33.
[94] Id. at 434.
[95] Id. at 435–36.
[96] Id. at 436.
[97] Id. at 435–36.

Making short work of this argument, the Court observed that the government had not argued that granting this particular exemption would lead to any international consequences. And the government's "general interests" in treaty compliance "standing alone" were plainly insufficient.[98] Having rejected all three of the government's arguments, the Court affirmed the issuance of the preliminary injunction.[99]

III. WHY *O CENTRO* SEEMS LIKE A SIGN OF HOPE FOR RFRA CLAIMANTS

Religious groups and academic commentators have hailed *O Centro* as an important case for various reasons, three of which are discussed below. First, the decision tacitly resolves an issue left lingering after the Court's decision in *City of Boerne v. Flores*: whether RFRA is constitutional as applied to federal statutes. The Court seemed to settle the issue in the affirmative by unanimously[100] applying RFRA to the Controlled Substances Act without explicitly raising any constitutional concerns.[101] Soon after the decision came down, lower courts interpreted the Court's silence that way.[102] RFRA claimants might hope that, with this issue resolved, lower courts will more fully embrace their duties under the statute.

[98] Id. at 438.

[99] Id. at 439.

[100] Id. at 439. Justice Alito did not take part in *O Centro*, but one of his decisions while on the Third Circuit suggests that he is sympathetic to granting religious exemptions. See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999) (granting an injunction barring the city from enforcing a no-beard policy on two Muslim policemen based on the Free Exercise Clause).

[101] See Garnett & Dunlap, supra note 17, at 260 ("[I]t appears that the justices have, with one voice, rejected the notion that such accommodations amount to an unconstitutional privileging, endorsement, or establishment of religion."); Shah, supra note 18, at 10–11 (noting that lower courts had previously struggled with this issue but the Court's "silence" in *O Centro* resolves it).

[102] See, e.g., United States v. Winddancer, 435 F. Supp. 2d 687, 691 n.1 (M.D. Tenn. 2006); see also Frank J. Ducoat, Comment, Clarifying the Religious Freedom Restoration Act: *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, Rutgers J. L. & Religion, Fall 2006, at 1, 5–6, http://org.law.rutgers.edu/publications/law-religion/new-devs/Ducoat.pdf (making this observation).

Second, *O Centro* puts some teeth into the compelling interest test.[103] Had the Court approved the categorical approach, RFRA would have certainly continued to be moribund, but because the Court selected the focused approach, the statute at least gives claimants a fighting chance to win exemptions. One can imagine a variety of cases that the government would have easily won under the categorical approach but might lose now, given the difficulty of showing a compelling interest in denying a particular exemption.[104] To take one example, imagine that the government gives a religious group a grant to run some secular program, subject to the condition that the group refrains from discriminating on the basis of religion in its hiring. Under the categorical approach, a court may have said that the interest in eliminating employment discrimination on the basis of religion is, generally speaking, compelling—case closed. But under the focused approach, it is at least debatable that the government has a strong enough reason to make a particular group comply with its policy.[105]

Third, *O Centro* suggests that an interest is not really compelling if the government inconsistently protects it.[106] The Court reasoned that it was "difficult to see" how the government had a compelling interest in preventing all Schedule I drug uses given that it has long allowed Native Americans to use peyote.[107] And the Court cited a strict scrutiny case in constitutional law for the proposition that "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital

[103] See, e.g., Garnett & Dunlap, supra note 17, at 273 (writing that *O Centro* affirms the "toothiness" of the test).

[104] For a few examples, see Jolly, supra note 15, at 175 (arguing that religious individuals may be able to obtain exceptions to the military's dress code after *O Centro*); Shepard, supra note 15, at 361 (arguing that RFRA provides a defense to federal nondiscrimination laws after *O Centro*).

[105] In the wake of *O Centro*, the Bush Administration's Office of Legal Counsel took the position that the government lacked a compelling interest in this situation. See Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, 31 Op. Off. Legal Counsel, 22 (June 29, 2007).

[106] *O Centro*, 546 U.S. at 433; see Garnett & Dunlap, supra note 17, at 273 (calling this point "an important consideration for litigants and judges").

[107] *O Centro*, 546 U.S. at 433.

interest unprohibited."[108] This language, while admittedly vague, seems to lay down a pretty difficult underinclusiveness test for the government to pass. Given that many enforcement schemes have gaps, RFRA claimants will often be able to invoke this language to cast doubt on whether the government's proffered interest really is a compelling one.

For these three reasons, one can see why religious interest groups greeted the *O Centro* decision with optimism.[109] The decision's unanimity may indeed signal that the Supreme Court is more sympathetic to religious accommodation than it used to be. But whether the decision will have a noticeable impact on the historically dismal record of RFRA claimants depends largely on how lower courts apply the decision in practice.

IV. WHY *O CENTRO* MAY HAVE LITTLE IMPACT

Only time will tell if *O Centro* will improve the success rate of RFRA claimants. Nonetheless, this Part argues that there are already good reasons to doubt the decision will make much of a difference. This Part reviews recent decisions from the courts of appeals and identifies four interpretive moves that have the potential to reduce *O Centro*'s pro-claimant effects.

To RFRA's critics, it will not be surprising that these moves exist. It is well established that courts have been "gutting" strict scrutiny of free exercise claims for a long time.[110] Although *O Centro* takes away one method for doing so—the application of the categorical compelling interest test—lower courts still have the interpretive leeway necessary to achieve the same pattern of results if they remain hesitant to grant exceptions. But to potential RFRA litigants, this analysis may come as an early warning that the *O Centro* decision, standing alone, will probably not be the key to unlocking many new exemptions.

The first Section below identifies two interpretive moves that avoid the need to confront *O Centro*'s interpretation of the com-

[108] Id. (quoting Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993)) (internal quotation marks and alterations omitted).

[109] See sources, supra note 14.

[110] See Lupu, The Failure of RFRA, supra note 6, at 596; Ryan, supra note 6, at 1413.

pelling interest test altogether. The second Section then discusses two moves that weaken the test itself.

A. Interpretive Moves that Avoid the Need to Apply O Centro

O Centro increases the government's burden in RFRA cases by requiring it to show a compelling reason for denying the particular exemption rather than a compelling reason for the law as a whole. But that increased burden only matters when courts actually apply the compelling interest test. If they are hesitant to grant exemptions, courts may be tempted to find ways to resolve RFRA cases without reaching the test at all. The Subsections below discuss two interpretive moves that courts have already used to achieve that result: (1) taking a very narrow view of what counts as a "substantial burden" on religion and (2) letting the government rely on pre-*O Centro* cases for their preclusive or precedential effects.

1. Limiting What Counts as a Substantial Burden

In response to the increased possibility that the government could fail the compelling interest test after *O Centro*, lower courts may simply make it more difficult for claimants to make out the prima facie case for a religious exemption. If courts do so, they will most likely turn to a familiar method: narrowly defining what counts as a "substantial burden" on religion.[111] And if this practice becomes widespread, *O Centro*'s potentially pro-claimant effects will be cabined to cases involving indisputable burdens.

The individual's prima facie case under RFRA has three elements: one must show that the government is (1) substantially burdening (2) a sincere (3) religious exercise.[112] By finding that the individual has failed to make out any of those elements, courts can avoid shifting the burden of proof to the government to satisfy the compelling interest test. Over time, though, courts have been reluctant to deny claims based on either a lack of sincerity or religiosity for a few reasons. Inquiring into sincerity can be distasteful and difficult. The factfinder may wish to avoid the appearance of an inquisition and may be hesitant to conclude that a claimant is lying

[111] Lupu, Where Rights Begin, supra note 7, at 948.
[112] *O Centro*, 546 U.S. at 428.

about his beliefs based on the length of time he has been proffering them because the claimant may have had a recent change of heart.[113] Inquiring into religiosity may be even more difficult. There is no settled definition of religion among philosophers, and a judge may be understandably reluctant to try his hand at crafting one.[114]

By comparison, narrowly defining what types of governmental interference count as substantial burdens seems far less inquisitorial and more objective. The Supreme Court itself took this approach in *Lyng v. Northwest Indian Cemetery Protective Association*.[115] The Court ruled that the claimants—Native Americans objecting to development of land they considered sacred—had to demonstrate that the government's actions had a "tendency to *coerce* [them] into acting contrary to their religious beliefs," not just that its actions made their religion more difficult or costly to practice.[116] Picking up on this technique, lower courts in the pre-*Smith* era frequently denied claims on the basis of insufficient burdens and thus avoided the need to assess the government's reasons for its actions at all.[117] Unsurprisingly, lower courts commonly did the same thing after Congress enacted RFRA.[118]

Because *O Centro* did not address what constitutes a substantial burden under RFRA, the lower courts remain free to continue defining the concept narrowly.[119] And to the extent that *O Centro* makes it harder for the government to justify its actions, courts that are wary about creating exemptions may tighten the definition of substantial burden even further to defeat RFRA claims.[120] Put an-

[113] Lupu, Where Rights Begin, supra note 7, at 954.
[114] Id. at 957.
[115] 485 U.S. 439 (1988).
[116] Id. at 450 (emphasis added).
[117] Ryan, supra note 6, at 1421–22.
[118] Lupu, The Failure of RFRA, supra note 6, at 576.
[119] The case involved a threat of prosecution, and the government conceded that the burden was substantial. *O Centro*, 546 U.S. at 426. Hence, the Court had no occasion to address the contours of the burden concept.
[120] That is not, however, the only thing that could happen. Courts might increasingly scrutinize sincerity in cases that involve tough questions about the existence of a burden or the sufficiency of the government's justification. For a possible example in the post-*O Centro* case law, see *United States v. Manneh*, No. 06 CR 248(RJD), 2008 WL 5435885, at *14 (E.D.N.Y. Dec. 31, 2008) (finding that the individual's alleged belief in the religious importance of monkey flesh was insincere). Courts usually, however, remain reluctant to rest their decisions on a finding of insincerity. See, e.g., United States v. Lepp, No. CR 04-00317 MHP**,** 2008 WL 3843283, at *5 (N.D. Cal. Aug. 14,

other way, *O Centro* may actually put hydraulic pressure on the burden inquiry.

The Ninth Circuit's recent en banc decision in *Navajo Nation v. United States Forest Service* may illustrate this hydraulic pressure in action.[121] As discussed in detail below, the case shows the stakes of the burden inquiry after *O Centro*. Had the circuit found a substantial burden, the government probably would have failed to justify its actions under a faithful application of the compelling interest test as interpreted by *O Centro*, and the court would have had to grant a major religious accommodation. Thus, there was enormous pressure to deny the claim on some other basis.

In this case, the Forest Service approved a commercial ski resort's use of recycled wastewater to make artificial snow for several mountain slopes. In response, several Native American tribes brought a RFRA claim, arguing that the mountain range was sacred to them and that spraying it with human affluent would degrade their religious experience.[122] In the district court, there appeared to be little dispute that the Native Americans had sincerely held religious beliefs.[123] The major issues were therefore (1) whether the government's decision would substantially burden their religion, and (2) if so, whether the government had a strong enough justification to satisfy the compelling interest test.

At that time, the Ninth Circuit's test for substantial burden was rather vague. It asked whether a government action "'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'"[124] While the circuit had stated that the govern-

2008) (noting that "numerous facts . . . cast doubt upon [the claimant's] sincerity" but assuming sincerity arguendo).

[121] 535 F.3d 1058 (9th Cir. 2008) (en banc).

[122] Id. at 1064. The tribes brought other causes of action as well, which are not relevant here. Additionally, several tribes had previously tried to block the creation of the ski resort itself. See Wilson v. Block, 708 F.2d 735, 739 (D.C. Cir. 1983).

[123] Navajo Nation v. United States Forest Serv., 408 F. Supp. 2d 866, 905 (D. Ariz. 2006) (implicitly finding that the plaintiffs had sincere and religious beliefs by proceeding to the substantial burden inquiry).

[124] Guam v. Guerrero, 290 F.3d 1210, 1222 (9th Cir. 2002) (quoting Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981)). At one time, the Ninth Circuit also required that the burden fall on a central belief to be considered substantial. Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995). But this requirement was apparently foreclosed by the 2000 amendment to RFRA, which defined religion more broadly. 42 U.S.C. § 2000cc-5(7)(A) (2006) (defining "religious exercise" as

ment's actions had to cause "more than an inconvenience" to satisfy the test,[125] it had not clarified how much pressure was required. An earlier case, *Mockaitis v. Harcleroad*, had suggested that a government action that was not blatantly coercive might qualify.[126] In that case, the circuit had found that a district attorney's decision to tape a confession substantially burdened a Catholic priest's religion—even though the priest did not know at the time that he was being recorded.[127] Ninth Circuit precedent thus left courts with considerable discretion to decide what types of government conduct qualified as substantial burdens.

Evaluating whether the tribes had demonstrated a substantial burden, the district court in *Navajo Nation* quoted the Ninth Circuit's general standards but then turned to the Supreme Court's decision in *Lyng* for more specific guidance. When government land management decisions are at stake, the district court reasoned, no substantial burden exists absent a showing of coercion.[128] Applying this coercion test, the district court ruled against the Native Americans. Using artificial snow did not coerce them into abandoning their beliefs, the court concluded; it only interfered with their subjective religious experiences.[129]

In the alternative, the district court proceeded to evaluate the government's justifications for imposing on the Native Americans' religion. Because the case was decided before *O Centro*, the court used the categorical approach. It ruled that the government had "a compelling interest in selecting the alternative that best achieves its multiple-use mandate" and in "[t]he protection of public safety."[130]

"any exercise of religion, whether or not compelled by, or central to, a system of religious belief").

[125] Worldwide Church of God v. Phila. Church of God, 227 F.3d 1110, 1121 (9th Cir. 2000) (internal citations omitted).

[126] 104 F.3d 1522 (9th Cir. 1997).

[127] Id. at 1531.

[128] *Navajo Nation*, 408 F. Supp. 2d at 904.

[129] Id. at 905.

[130] Id. at 906. The district court also found that the government had a compelling interest in avoiding a violation of the Establishment Clause, but the government dropped this argument on appeal. Navajo Nation v. United States Forest Serv., 479 F.3d 1024, 1044 (9th Cir. 2007). The ski resort itself advanced the argument, but the panel rejected it. Id.

The court then flatly stated it would not "second-guess" the government's choice of means to advance these broad interests.[131]

Through Judge William Fletcher, a Ninth Circuit panel reversed on both issues.[132] On the issue of substantial burden, the panel found that use of waste water would be "more than an inconvenience" to the Native Americans.[133] Indeed, the panel found that this practice would "fundamentally undermine their entire system of belief and the associated practices" which depended on the purity of the mountains.[134] To the panel, this was enough to qualify as a substantial burden.

Having found a substantial burden, the panel shifted the burden of proof to the government to satisfy the compelling interest test. Armed with *O Centro*, the panel slashed through the government's arguments. First, the government's interests in managing the forest for multiple uses were, according to the panel, "'broadly formulated interests'" and therefore "insufficient" after *O Centro*.[135] The government's interest in this *particular* case was solely increasing the number of snow days for the commercial resort—hardly an interest "of the highest order."[136] Second, the government's general interest in promoting safety was insufficient after *O Centro*, and it had not shown any particular safety risks at the resort that could be solved most effectively by approving the use of wastewater.[137] Because each of the government's interests failed after *O Centro*, the panel concluded that the tribes had prevailed on their RFRA claims.[138]

The Ninth Circuit subsequently voted to hear the case en banc to "clarify [the] circuit's interpretation of 'substantial burden' under RFRA," and reversed.[139] In doing so, the circuit stated a new, more restrictive test:

[131] *Navajo Nation*, 408 F. Supp. 2d at 907.
[132] *Navajo Nation*, 479 F.3d at 1043, 1044.
[133] Id. at 1042 (internal citations omitted).
[134] Id. at 1043.
[135] Id. at 1044 (quoting *O Centro*, 546 U.S. at 431).
[136] Id. (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).
[137] Id. at 1045.
[138] Id. at 1048.
[139] Navajo Nation v. United States Forest Serv., 535 F.3d 1058, 1067 (9th Cir. 2008) (en banc).

> 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 no 'substantial burden' on the exercise of their religion.[140]

According to this test, a substantial burden exists only when one of two mechanisms is present: (1) a governmental sanction as in *Yoder* or (2) a loss of benefits as in *Sherbert*. The majority reasoned that the Supreme Court had "found a substantial burden on the exercise of religion *only* when the burden fell within the *Sherbert/Yoder* framework" and that Congress had subsequently adopted that understanding when it enacted RFRA.[141] Applying the new test, the court found that no substantial burden existed in the case, because neither mechanism was present. Since the plaintiffs had failed to demonstrate a prima facie case under RFRA, the court declined to evaluate the government's interests in light of *O Centro*.[142]

This time in dissent, Judge Fletcher firmly disagreed with the majority's reasoning. In his view, *Sherbert* and *Yoder* identified two *possible* types—rather than the *only* types—of government interference that could qualify as substantial burdens.[143] He warned of the effects of this new test: "In the hands of the majority, that test is *extremely* restrictive, allowing a finding of 'substantial burden' only in those cases where the burden is imposed by the same mechanisms as in those two cases."[144] Several RFRA cases in which the Ninth Circuit had found substantial burdens, he observed, would have come out differently had this test been in place.[145]

The outcome of *Navajo Nation* is relatively unsurprising. The facts of the case closely resemble those that the Supreme Court faced in *Lyng*: both cases involved land management decisions by the government that altered sites sacred to Native Americans. Moreover, granting an injunction in either case would have raised serious policy concerns. The Ninth Circuit feared, as the Supreme

[140] Id. at 1063.
[141] Id. at 1075.
[142] Id. at 1076.
[143] Id. at 1088–89 (Fletcher, J., dissenting).
[144] Id. at 1086 (emphasis added).
[145] Id. at 1090–91.

Court had in *Lyng*,[146] that granting such a claim would make federal land decisions "subject to the personalized oversight of millions of citizens."[147] Given that the Supreme Court rejected the claim in *Lyng*, it is hardly shocking that the Ninth Circuit followed suit in its en banc decision.

Although its outcome may be unsurprising, *Navajo Nation* may prove important for doctrinal reasons. Under its more restrictive definition of substantial burden, fewer claimants will be able to make out prima face cases for religious exemptions. The priest in *Mockatitis*, for example, would have failed under the new definition because he was only being monitored by the government—not threatened with sanction or a deprivation of benefits. And the more often claimants fail at the prima face stage, the less often the government will have to satisfy the compelling interest test as interpreted by *O Centro*. Thus, *Navajo Nation* cabins the potentially pro-claimant effects of *O Centro* to cases that involve the two paradigmatic burdens. If other courts are wary that the government will fail the compelling interest test after *O Centro*, they too may adopt the *Navajo Nation* approach to dispose of more claims at the prima facie stage.[148]

*2. Relying on Pre-*O Centro *Cases for Their Precedential and Preclusive Effects*

In many cases, though, claimants will clearly make out the elements of the prima facie case. If so, must the government then offer evidence to justify its actions in light of *O Centro*'s interpretation of the compelling interest test? Not necessarily, some circuit

[146] 485 U.S. 439, 452 (1988).

[147] *Navajo Nation*, 535 F.3d at 1063.

[148] At the present, only two other circuits have such a restrictive definition of substantial burden. Henderson v. Kennedy, 253 F.3d 12, 16 (D.C. Cir. 2001); Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 172–73 (4th Cir. 1995). Other circuits—at least for now—employ somewhat more lenient standards that give judges discretion to find that other types of government conduct trigger the compelling interest test. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003); Weir v. Nix, 114 F.3d 817, 820 (8th Cir. 1997); Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995). Also relevant, some circuits have more lenient standards for substantial burden in RLUIPA cases. See Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007); Adkins v. Kaspar, 393 F.3d 559, 568–70 (5th Cir. 2004).

courts say.[149] The government, these courts have reasoned, can instead rely on pre-*O Centro* cases for their precedential or preclusive effects to defeat RFRA claims—even if those old cases rest on the now-defunct categorical approach.

At first glance, allowing the government to rely on those cases seems odd. After all, *O Centro* seems to mark a major shift in the law: the Supreme Court emphatically rejected the categorical approach, even to the point of ridiculing it.[150] Since many lower court decisions rest on that approach, they would seem to lose their precedential or preclusive effects. Based on this reasoning, at least one district court has concluded that a claimant could relitigate a RFRA claim.[151]

How then have a few circuits concluded that old cases resting on the categorical approach retain their precedential or preclusive effects? The answer is simple: they have looked to how the Supreme Court treated its own precedent in *O Centro*. After stating that RFRA requires a very fact-specific, focused inquiry, the Court proceeded to characterize the exemplars of the old categorical approach—*Braunfeld*, *Lee*, and *Hernandez*—as good law under RFRA.[152] The Court explained: "Those cases did not embrace the notion that a general interest in uniformity justified a substantial burden on religious exercise; they instead *scrutinized* the asserted need and explained why the denied exemptions could not be accommodated."[153] This reading is, to put it mildly, charitable.[154] As

[149] Olsen v. Mukasey, 541 F.3d 827, 831 (8th Cir. 2008); United States v. Vasquez-Ramos, 531 F.3d 987, 991–92 (9th Cir. 2008); Jenkins v. Comm'r, 483 F.3d 90, 92 (2d Cir. 2007).

[150] *O Centro*, 546 U.S. at 436 (ridiculing the government's argument for uniformity as "classic rejoinder of bureaucrats throughout history").

[151] Multi Denominational Ministry of Cannabis and Rastafari v. Gonzales, 474 F. Supp. 2d 1133, 1143 (N.D. Cal. 2007) (holding that *O Centro* "shifted the legal terrain surrounding plaintiffs' suit, thereby warranting reexamination of the grounds for relief raised in plaintiffs' previous petition").

[152] *O Centro*, 546 U.S. at 435. Over ten years ago, Professor Paulsen argued that the Supreme Court should interpret RFRA to require a focused compelling interest test and rule that *Lee* and *Hernandez* were not controlling RFRA precedents. Paulsen, supra note 33, at 287–88. It looks like he got half of his wish.

[153] *O Centro*, 546 U.S. at 435 (emphasis added).

[154] A few commentators have aptly identified the inconsistency between the Court's holding and its characterization of that line of cases. See Bieber, supra note 33, at 229; Nicholas Nugent, Note, Toward a RFRA That Works, 61 Vand. L. Rev. 1027, 1062 (2008).

discussed above, the Court subjected the government's arguments to hardly any scrutiny in those cases.[155] If those cases are good law after *O Centro*, then it is hard to see how any case resting on the categorical approach would not be. And some circuits seem to have concluded as much.

The Second Circuit's decision in *Jenkins v. Commissioner* best illustrates this hesitancy to view *O Centro* as a major shift in the law.[156] Prior to *O Centro*, the Second Circuit employed the categorical approach in a RFRA case to find that the government had a compelling interest in the uniform enforcement of its tax laws.[157] In *Jenkins*, the plaintiff requested a tax exemption under RFRA despite this earlier holding in the government's favor; that holding, he argued, was no longer good law because *O Centro* now mandated a more focused inquiry.[158]

The Second Circuit explicitly rejected Jenkins's contention that *O Centro* "breathe[d] new life" into his argument.[159] Although it conceded that the Supreme Court had rejected the categorical approach, it observed that the Court had not overturned *Lee*.[160] Thus, it remained "well settled" that RFRA does not permit religious exemptions from the tax code.[161] Hence, the government did not have to put on new evidence to demonstrate a compelling interest.

The Eighth Circuit similarly refused to cast doubt on pre-*O Centro* case law in *Olsen v. Mukasey*.[162] In this case, the plaintiff sought a declaratory judgment that his use of marijuana was protected under RFRA. Under pre-*Smith* free exercise law, he had twice asked for exemptions from the Controlled Substances Act and twice been denied.[163] Yet he argued that he was not precluded

[155] See infra Subsection I.A.2.
[156] 483 F.3d 90 (2d Cir. 2007).
[157] Browne v. United States, 176 F.3d 25, 26 (2d Cir. 1999).
[158] *Jenkins*, 483 F.3d at 92 & n.5.
[159] Id.
[160] Id.
[161] Id. at 92.
[162] 541 F.3d 827 (8th Cir. 2008).
[163] Olsen v. DEA, 878 F.2d 1458, 1459 (D.C. Cir. 1989); United States v. Rush, 738 F.2d 497, 500–01 (1st Cir. 1984). The Eighth Circuit also discussed Mr. Olsen's failed attempt to get an exemption from a state drug law. See *Olsen*, 541 F.3d at 830 (discussing *State v. Olsen*, 315 N.W.2d 1, 8 (Iowa 1982)). But that case is not truly relevant to the issue of collateral estoppel because the opposing party there was the state of Iowa, not the federal government.

from asking again because *O Centro* had shifted the legal standard for evaluating the government's interests. The Eighth Circuit quickly brushed this argument aside. It stated that the pre-*Smith* standard applicable in *both* the prior cases was the "same standard" as the one described in *O Centro*.[164] Because there was "*no difference* in the controlling law," the court barred him from relitigating his claim.[165]

The circuit court was probably correct that Mr. Olsen was precluded from raising his claim again. In one of Olsen's previous cases, then-Judge Ruth Bader Ginsburg analyzed his particular use of marijuana, which he admitted to smoking "continually all day."[166] She found that the government could not give him an exemption without creating a serious risk of diversion to nonadherents and to children.[167] This seems to be the sort of focused analysis that *O Centro* envisions, so this case would have preclusive effects.

But the Eighth Circuit's statement that there is "no difference" in the controlling law is striking in light of the reasoning in Mr. Olsen's other case. The court in that case rejected his claim based on the following rationale: "In enacting substantial criminal penalties . . . Congress has weighed the evidence and reached a conclusion which it is not this court's task to review *de novo*."[168] Compare that statement to the Supreme Court's words in *O Centro*: "RFRA . . . plainly contemplates that *courts* would recognize exceptions—that is how the law works."[169] The pre-*O Centro* decision clearly rests on the categorical approach and would therefore seem to be bad law after *O Centro*. But rather than recognizing that some pre-*O Centro* cases have preclusive effects while others do not, the Eighth Circuit followed the Supreme Court's lead and declined to cast doubt on any previous cases.[170]

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[164] *Olsen*, 541 F.3d at 831.
[165] Id. (emphasis added).
[166] *Olsen*, 878 F.2d at 1464 (internal quotation marks omitted).
[167] Id. at 1462.
[168] *Rush*, 738 F.2d at 512.
[169] *O Centro*, 546 U.S. at 434.
[170] The Ninth Circuit declined to revisit past precedent in *United States v. Vasquez-Ramos*, 531 F.3d 987, 992 (9th Cir. 2008). The government charged two Native Americans with possession of eagle feathers without permits. Under federal law, only members of federally recognized tribes are eligible for such permits, and the two defen-

One can see why these circuit courts have been reluctant to conclude that *O Centro*, in the words of one district court, "shifted the legal terrain."[171] That conclusion would open a Pandora's Box of previously settled RFRA issues. Instead, these circuits have tended to minimize the decision's importance, thus obviating the need to consider whether the government could satisfy the compelling interest test as it is now interpreted. In this way, they have tended to cabin *O Centro*'s potentially pro-claimant effects to situations in which there are no prior cases with preclusive or precedential effects.

Of course, many RFRA claims will be novel, so no preexisting case will potentially stand in the way. If that happens, courts that are reluctant to grant exemptions may turn to one of the two approaches discussed below.

B. Interpretive Moves that Reduce the Impact of O Centro*'s Focused Inquiry*

When RFRA claimants clearly make out the prima face case and there are no pre-*O Cento* cases on which the government can rely, courts will have to assess the government's actions in light of *O Centro*'s interpretation of the compelling interest test. One might expect that *O Centro* would make a major difference in this subset of cases. But, as explained below, the opinion leaves lower courts with enough interpretive leeway to continue applying the compelling interest test in a deferential manner.

O Centro lays out a two-pronged attack plan for RFRA claimants to challenge whether the government's interests are compelling. First, they can argue that the government's interests are "broadly formulated" and thus cannot justify denying the particular exemption. And second, they can argue that the government so

dants were not in such a tribe. They brought a RFRA defense, arguing that they should be exempt from criminal sanction. Id. at 989. The main obstacle to their defense was a prior Ninth Circuit opinion, holding that the interest in protecting eagles was compelling and that the existing permit process was the least restrictive means to achieve it. United States v. Antoine, 318 F.3d 919, 924 (9th Cir. 2003). Even though that case had not examined whether the government's interest in preventing a particular person's possession was compelling, the Ninth Circuit nonetheless deemed it controlling. *Vasquez-Ramos*, 531 F.3d at 992.

[171] Multi Denominational Ministry of Cannabis and Rastafari v. Gonzales, 474 F. Supp. 2d 1133, 1143 (N.D. Cal. 2007).

underinclusively protects the interest in question that it cannot be considered compelling. In the abstract, these arguments may seem like powerful weapons. The first prevents the government from relying on its usually much weightier reasons for having a law as a whole, and the second allows claimants to point to gaps in an enforcement scheme to cast doubt on whether the government's interests are really compelling. In practice, however, these arguments may not prove all that potent.

Regarding the first argument, courts do have to reject broadly formulated interests after *O Centro*, but the government will often be able avoid that pitfall by stating some specific reason for denying the particular exemption. And if it does, courts will then have to decide if the harms that would flow from a particular exemption would be so great that the government has a compelling interest in combating them. *O Centro* provides little guidance for resolving that question and thus leaves lower courts with substantial discretion to make these determinations on their own. Courts that are uncomfortable with RFRA may exercise that discretion in a way that favors the government by deeming a wide range of legitimate reasons for denying exemptions as compelling. Put another way, *O Centro*'s bar on broadly formulated interests may not matter much if lower courts are willing to rubberstamp almost any narrowly framed interest as compelling.

Regarding the second argument, courts may have to reject the government's reasons for denying an exemption in cases of blatant underinclusiveness (that is, cases where the government readily gives exemptions to very similarly situated parties). But in many cases, any underinclusiveness will be less blatant; the government may underregulate threats to its interest that are different in kind or magnitude from the threat posed by the religious claimant. *O Centro* may not be much help in these cases, for it does not clarify at what point any underinclusiveness becomes too severe. Lower courts thus retain significant discretion over this inquiry as well, and they may choose to defer to the government's view that any underinclusiveness is within tolerable bounds. Thus, in the absence of exceptions for very similarly situated parties, *O Centro*'s underinclusiveness inquiry may not prove all that helpful to RFRA claimants either.

These two moves—accepting almost any narrowly formulated interest as compelling and deferring to the government's view that any underinclusiveness is tolerable—are discussed in more detail below.

1. Requiring Only a Legitimate Interest in the Particular Case

O Centro certainly creates one pitfall for the government when the compelling interest test is triggered. It establishes that the "broadly formulated interests justifying the general applicability of government mandates" are insufficient to justify denying particular exemptions.[172] If the government makes the mistake of relying on such general interests after *O Centro*, then lower courts may have little choice but to deem those interests irrelevant for purposes of RFRA.[173]

[172] *O Centro*, 546 U.S. at 431.

[173] See Navajo Nation v. United States Forest Serv., 479 F.3d 1024, 1044 (9th Cir. 2007) (rejecting the government's interests in managing the forest and promoting safety as too broadly formulated), rev'd on other grounds, 535 F.3d 1058 (9th Cir. 2008) (en banc); United States v. Holmes, No. 2:02-CR-0349-DFL, 2007 WL 529830, at *3 (E.D. Cal. Feb. 20, 2007) (finding that the government's interest in collecting DNA was not framed with "sufficient particularity" in light of *O Centro*); see also Hankins v. N.Y. Annual Conf. of the United Methodist Church, 516 F. Supp. 2d 225, 237 (E.D.N.Y. 2007) (finding, in a discrimination suit between private parties, that the government's general interest in eradicating age discrimination did not justify applying the law to the particular claimant). Some courts have found that one or more of the government's interests were insufficient after *O Centro* but nonetheless sided with the government for some other reason. Harris v. Mukasey, 265 F. App'x 461, 462 (9th Cir. 2008) (finding that a district court decision deeming general interests to be compelling conflicted with *O Centro* but affirming the dismissal below because the remedy sought was unavailable as a matter of equity); United States v. Lepp, No. CR 04-00317 MHP, 2008 WL 3843283, at *8–10 (N.D. Cal. Aug. 14, 2008) (rejecting the government's general interests in protecting health and safety but finding that its interest in preventing the diversion of marijuana was a compelling reason to deny the particular exception). Some courts, however, continue to accept pretty general interests as compelling. See, e.g., United States v. Hilsenrath, No. CR 03-00213 WHA, 2008 WL 2620909, at *4 (N.D. Cal. July 1, 2008) (finding that the government had a generally compelling interest in collecting DNA from "violent and nonviolent felons" with no discussion of how the government's interest applied to the particular claimant).

Also relevant are cases applying the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to the states. 42 U.S.C. § 2000cc (2006). Many courts have considered *O Centro* to be persuasive authority for interpreting RLUIPA because both RLUIPA and RFRA contain the same compelling interest test. And courts have sometimes cited *O Centro* in RLUIPA cases for the proposition that the government may not rely on general interests alone. See Spratt v. R.I. Dept. of Corrections, 482 F.3d 33, 40 n.9 (1st Cir. 2007) (finding that a state prison that banned all

But what happens when the government states a specific reason for applying the challenged law to the particular claimant? Government lawyers, who heed the warning of *O Centro*, will often be able to come up with some narrowly framed reason to justify burdening the claimant. And if they do, courts will then have to decide if that reason qualifies as a compelling one. That is, courts will have to determine whether granting a particular exception would create such a risk of harm that the government has a compelling interest in burdening that claimant's religion.

O Centro itself offers very little guidance for resolving that question. Recall that the district court in *O Centro* found that there was some risk that DMT would adversely affect the health of sect members and that it would be diverted to nonmembers. The district court concluded, however, that the government had not demonstrated that those risks were significant enough to justify burdening the sect's religion.[174] On appeal, the government did not challenge that finding, and the Supreme Court consequently had no occasion to evaluate it.[175] Thus, *O Centro* itself is silent about which narrowly framed interests count as compelling. Prior case law, cited in the opinion, likewise does not provide much guidance for resolving concrete cases. The superlatives in *Sherber* ("paramount interests")[176] and *Yoder* ("interests of the highest order")[177] certainly suggest that the risk of harm associated with granting an exemption must be high. But those phrases are so vague that courts must exercise considerable subjective judgment when applying them.

Some cases, of course, will be easy wins for the government under any plausible view of what counts as a compelling reason to deny a particular exemption. To take the clearest example, suppose

preaching had failed to give "individualized consideration of the necessity of a burden on religious exercise" as required by *O Centro*); Washington v. Klem, 497 F.3d 272, 283 (3d Cir. 2007) (rejecting a state prison's assertion of general interests in safety and health and citing *O Centro*); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 353 (2d Cir. 2007) (rejecting a city's interests in zoning and safety as too generalized and citing *O Centro*); Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp. 2d 309, 323 (D. Mass. 2006) (finding that preventing traffic generally was not a compelling reason to deny a particular zoning exemption).

[174] *O Centro*, 546 U.S. at 426 (discussing the district court's finding that the evidence on these questions was "in equipoise") (internal quotation marks omitted).

[175] Id. at 427–28.

[176] 374 U.S. 398, 406 (1963) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[177] 406 U.S. 205, 215 (1972).

that an individual brings a RFRA claim seeking an injunction so that he can conduct a human sacrifice. No one would dispute that the government has a compelling interest in protecting the particular victim by burdening the particular claimant's religion.[178] In other cases, however, there will be room for disagreement. The government's reason for burdening a particular person's religion may clearly qualify as legitimate, but reasonable people may disagree about whether that reason counts as compelling. In these cases, much will turn on how strictly courts exercise their discretion.

If history is any guide, lower courts will probably exercise that discretion in favor of the government in the run of cases. RFRA cases often pose difficult questions of "police power" that some courts think "best entrusted to the politically accountable branches."[179] Courts that take that point of view may not require the government to demonstrate conclusively that a particular exemption would lead to catastrophe. Instead, as long as the government asserts some reason for applying the law to the particular person, such courts may rubberstamp that reason as compelling. In this way, courts that are so inclined may render the compelling interest test largely toothless despite *O Centro*'s bar on broadly formulated interests.

The D.C Circuit's recent decision in *Kaemmerling v. Lappin* illustrates this approach.[180] During the course of the litigation, the government made some attempts to frame its interests narrowly. But at the time of the circuit's decision, the government had not yet presented any evidence to demonstrate that its interests were compelling. Despite obvious unanswered questions about the true importance of those interests, the circuit accepted each one as a separate compelling reason to burden the claimant's religion.

The basic facts of the case were as follows. Kaemmerling was convicted of conspiracy to commit wire fraud and sentenced to federal prison. Federal law required the Bureau of Prisons to take a fluid or tissue sample from him for DNA analysis and made his

[178] See William P. Marshall, In Defense of *Smith* and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308, 312 n.21 (1991).

[179] Potter v. District of Columbia, Civ. Nos. 01-1189 (JR), 05-1792 (JR), 2007 WL 2892685, at *1 (D.D.C. Sept. 28, 2007).

[180] 553 F.3d 669 (D.C. Cir. 2008).

failure to cooperate in collection a misdemeanor.[181] Kaemmerling claimed that this government program substantially burdened his Christian Evangelical beliefs, and he sought an injunction under RFRA. Because of the odd procedural posture of the case, the D.C. Circuit considered this claim in the first instance, before any evidentiary hearing had been held.[182]

Although the D.C. Circuit first found that the plaintiff had failed to make out a prima facie case,[183] it proceeded in the alternative to determine whether the government had satisfied the compelling interest test. Kaemmerling did not dispute that the DNA collection program as a whole served several important interests, such as solving crimes, identifying felons, and deterring recidivism. But he contended that these "broadly formulated interests" were insufficient after *O Centro*.[184] Without further evidence, he argued, the government could not demonstrate that the interests served by the law were compelling as applied to him—"a first-time offender convicted of a non-violent crime that did not turn on DNA evidence."[185]

Kaemmerling's argument seems quite plausible. Because he was a convicted felon, the government surely had legitimate reasons to take his DNA. But, given that he was a nonviolent, first-time offender, it seems debatable whether the government had a compelling need to do so. Because the government had not yet presented any evidence of the harms that would flow from granting him an

[181] 42 U.S.C. § 14135a(a)(5) (2006).

[182] The district court had previously dismissed the suit, without holding an evidentiary hearing or making findings on the RFRA claim, due to a failure to exhaust administrative remedies. Kaemmerling v. Lappin, No. 06-1389 (RBW), 2006 WL 3469533, at *3 (D.D.C. Nov. 30, 2006). On appeal, the D.C. Circuit reversed on the question of exhaustion but affirmed the dismissal, finding that Kaemmerling could prove "no set of facts" to establish his RFRA claim. *Kaemmerling*, 553 F.3d at 677 (internal quotation marks omitted).

[183] Taking a very strict approach, the court ruled that the plaintiff had not alleged a "substantial burden" on his religious exercise. *Kaemmerling*, 553 F.3d at 680. Thus, this case actually illustrates two approaches that reduce *O Centro*'s impact: (1) strictly construing what counts as a burden and (2) broadly construing what counts as a compelling interest for denying an exemption. Because the D.C. Circuit found that no substantial burden existed, the discussion on compelling interests is technically dicta. Nonetheless, it illustrates an approach that other courts may follow to reduce *O Centro*'s potential pro-claimant effect.

[184] Id. at 682 (internal quotation marks omitted).

[185] Id. (internal quotation marks omitted).

exemption, one could argue that the court should have sided with Kaemmerling on this issue.

Instead, the court did the exact opposite. It found, as a matter of law, that the "interests served by the DNA Act are compelling as to nonviolent first-time felons [like Kaemmerling] and violent recidivists alike."[186] It considered each interest in turn. First, the government argued that it had a compelling interest in collecting DNA from Kaemmerling because it might need to identify him as a felon in the future, even if he never became a repeat offender.[187] DNA profiling, the argument went, would be "an effective way to identify and keep tabs on him" as a convicted felon if, for example, he "attempted to alter or conceal" his true identity.[188]

On its face, this argument is not very persuasive. Of course, DNA profiling might be a useful way to "keep tabs" on Kaemmerling since one's DNA is unalterable. But it is hard to imagine that any serious harm would flow from exempting him from the program. In all but the wildest scenarios, the government would probably be able to identify him by other means (for example, fingerprints, dental records, or photographs). In the absence of any evidence, it is at least debatable that the government has a compelling interest in obtaining the marginal advantages of identifying Kaemmerling by DNA rather than some other method. Yet the court, at this pre-evidentiary stage of the litigation, deemed this interest to be compelling as a matter of law.[189]

Second, the government argued that it had a compelling need to collect Kaemmerling's DNA in order to solve crimes "accurately and expeditiously."[190] Kaemmerling, it argued, might commit another white collar crime in the future, and if so, the government might be able to use his DNA profile to solve that crime. Even if he never committed a crime, the government might still be able to use his DNA profile to eliminate him from any future investigations in which he was a suspect "swiftly and efficiently."[191]

[186] Id.
[187] Id.
[188] Id. (internal quotation marks omitted).
[189] Id.
[190] Id.
[191] Id. at 683.

This argument, like the one above, has some significant shortcomings. First of all, as the court acknowledged, law enforcement officers typically use DNA evidence to solve violent crimes like rape and murder, not the nonviolent ones that it argued Kaemmerling was likely to commit in the future.[192] Although the court noted that the police could use DNA to solve nonviolent crimes as well,[193] the government had presented no evidence on how widespread or important that practice was. Second, being able to exclude Kaemmerling from future investigations by using DNA certainly seems useful, but it is contestable whether that interest is compelling. The government had presented no evidence of how likely it was that Kaemmerling would be a suspect in the future or how much more quickly it would be able to exclude him from an investigation by using DNA in lieu of more traditional methods. Despite these unanswered questions about the government's interest, the court nonetheless concluded that solving crimes was another compelling reason to burden his religion.

Third, the government argued that it had a compelling interest in collecting Kaemmerling's DNA in order to deter him from committing future crimes. As the court explained the government's argument, "his knowledge that the government has stored an unchangeable aspect of his identity that can be used to ferret out his best attempts at concealing future crime certainly furthers the government's deterrence interest."[194] Whether this interest is compelling is also highly contestable. If the government exempted Kaemmerling, it would still be able to deter him through other means; it just would miss out on the quantum of specific deterrence added by the DNA program. The government had presented no evidence about how significant this quantum was, yet the court concluded as a matter of law that it had a compelling interest in obtaining it.[195]

If *Kaemmerling* is any indication of how courts in the future will apply the compelling interest test, then *O Centro* may not have much effect on the success rate of RFRA claimants. The government framed its interests as they applied to the particular claimant in question—thus satisfying the letter if not the spirit of *O Centro*.

[192] Id.
[193] Id.
[194] Id. at 683–84.
[195] Id.

Once the government did that, the court seemed quite eager to rubberstamp each of its reasons for denying the particular exception as "compelling," no matter how marginal or contestable they were. In other words, the circuit court conducted something similar to rational basis review—only requiring the government to assert legitimate interests for applying the law rather than requiring it to demonstrate compelling ones. This case illustrates that *O Centro*'s bar on broadly formulated interests will not make litigation much easier for RFRA claimants if courts are willing to defer to the government's view that almost any narrowly framed interest is compelling.[196]

2. Deferring to the Government on Underinclusiveness

If a RFRA claimant cannot fault the government for relying on broadly formulated interests, *O Centro* offers a second line of attack. If a claimant can show that the government does not consistently protect the interest it asserts, then that "supposedly vital" interest may not be so compelling after all.[197] Put another way, underinclusiveness may show that the government's arguments lack credibility.[198] Because many enforcement schemes have gaps, this line of attack will often be available.

When claimants make this argument, how are courts to identify the point at which underinclusiveness becomes so severe that it reveals the interest in question to be less than compelling? *O Centro*

[196] Some lower courts have continued to stress the need for deference to the government in certain institutional settings. For instance, several lower courts have argued that *O Centro*'s appreciation of "context" permits them to apply strict scrutiny more deferentially in the prison setting. See Townsend v. Vazquez, No. CV207-043, 2008 WL 4179828, at *20 (S.D. Ga. Sept. 10, 2008); Jefferson v. Gonzalez, No. 05-442 (GK), 2006 WL 1305224, at *3 (D.D.C. May 10, 2006); see also Ragland v. Angelone, 420 F. Supp. 2d 507, 514 (W.D. Va. 2006) (same reasoning in an RLUIPA case). And the only court to apply *O Centro* to military regulations so far deferred explicitly to the government's judgment. United States v. Webster, 65 M.J. 936, 946–48 & n.9 (A. Ct. Crim. App. 2008).

[197] 546 U.S. at 433 (quoting Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 547 (1993)) (internal quotation marks omitted).

[198] Underinclusiveness is often considered under the "least restrictive means" prong of strict scrutiny, but it also casts doubt on whether an interest is compelling in the first place. See United States v. Friday, 525 F.3d 938, 958 (10th Cir. 2008) ("Underinclusive enforcement of a law suggests that the government's supposedly vital interest is not really compelling, and can also show that the law is not narrowly tailored.") (internal quotation marks omitted).

offers limited guidance on this question. It quotes a strict scrutiny case from constitutional law for the proposition that "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited."[199] Not only is this "appreciable damage" standard vague, but also the Court's application of it did little to elucidate it. Recall that in *O Centro* the government argued that it had a compelling interest in preventing all uses of Schedule I drugs, down to the "rigorously policed use of one drop of [a controlled] substance once a year."[200] That assertion was clearly belied by the fact that it made exceptions for "hundreds of thousands of Native Americans" to use peyote.[201] Both O Centro members and Native Americans alike threatened the government's interest in preventing all drug use; yet the government only regulated one of them—suggesting that its interest was less than compelling. Given the wide disparity between the government's words and deeds, *O Centro* was a blatant case of underinclusiveness. The Court, therefore, did not need to elaborate on the meaning of "appreciable damage."[202]

Many cases, however, will not be as easy for RFRA claimants as *O Centro* was. The government may not make exceptions for other very similarly situated parties. Instead, it may underregulate other threats to its interests that differ in kind or magnitude. In such cases, a claimant may argue that, if the government really cared about the interest at stake, it would do more to police those remaining threats. In response, the government will likely argue that it is doing the best it can with the limited resources at its disposal and that any underinclusiveness is within tolerable limits. Given these conflicting arguments, courts may find themselves at an impasse, and they may be hesitant to break that impasse by second-guessing the government's use of its police powers. Instead, they may prefer to (1) ignore the issue entirely or (2) defer to the gov-

[199] *O Centro*, 546 U.S. at 433 (quoting Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 547 (1993)) (internal quotation marks and alterations omitted).

[200] Id. at 437 (internal quotation marks omitted).

[201] Id. at 433.

[202] The Court has not provided much guidance on this question in strict scrutiny cases generally. See Fallon, supra note 34, at 1327 ("It is far from clear . . . that every underinclusive statute [that is subject to strict scrutiny] is therefore necessarily unconstitutional.").

ernment's judgment that any remaining harm is less than "appreciable."

United States v. Adeyemo, a recent district court case, illustrates the first approach.[203] The defendant was prosecuted for importing leopard skins and raised a RFRA claim in defense. The government argued that it had a compelling interest in prosecuting him because leopards were so endangered that allowing even one take would have a detrimental impact on the population.[204] The defendant countered that any harm he caused to the population paled in comparison to the harm caused by other pressures on leopards (like destruction of habitat) that the government was doing little or nothing about. Therefore, he argued, the government's claim lacked credibility.[205]

The district court rejected the defendant's argument on the ground that he had failed to rebut the evidence that his action would hurt the leopard population.[206] But this argument hardly answers the defendant's contention. The defendant was not saying that his action would have no negative impact on leopards. Instead, he was arguing that the government's underinclusive protection of leopards cast doubt on whether its interest in protecting them was truly compelling in the first place. This argument raised a tough question, and the district court sidestepped it.

The Tenth Circuit confronted a very similar question in *United States v. Friday*.[207] But instead of avoiding it, the circuit resolved it by explicitly deferring to the government's judgment.[208] In this case,

[203] No. CR 03-40220 MJJ, 2008 WL 928546 (N.D. Cal. Apr. 4, 2008). The defendant in *United States v. Manneh* raised a very similar argument about the government's protection of monkeys. Brief in Support of Motion to Dismiss Indictment Pursuant to the Religious Freedom Restoration Act at 21–27, United States v. Manneh, No. 06 CR 248, 2008 WL 5435885 (E.D.N.Y. Dec. 31, 2008). But the court ruled that she was not sincere and thus did not address whether the underinclusiveness defeated the government's claim. *Manneh*, 2008 WL 5435885, at *12–14. Some RLUIPA claimants have also advanced underinclusiveness arguments. Some have been successful, see Washington v. Klem, 497 F.3d 272, 286 (3d Cir. 2007), while others have not, see Hammons v. Jones, No. 00-CV-143-GKF-SAJ, 2007 WL 2219521, at *4 (N.D. Okla. July 27, 2007) (reasoning that prisons may regulate threats to compelling interests one at a time).

[204] *Adeyemo*, 2008 WL 928546, at *8.

[205] Id. at *10.

[206] Id.

[207] 525 F.3d 938 (10th Cir. 2008).

[208] Id. at 958.

a Native American shot an eagle for use in a religious ceremony; the government charged him with taking the eagle without a permit; and he responded with a RFRA defense.[209] Among other things, the defendant argued that the government's inconsistent protection of eagles showed that its interest in protecting them was not truly compelling. He pointed to two pieces of testimony in particular. First, the head of the government's Migratory Bird Program admitted that thousands of eagles died every year from electrocution on power lines. Second, the government's top biologist in that program admitted that "there remains much work to be done" to fix that problem.[210] If the government really cared about protecting eagles, the defendant argued, it would have already done much more to address the problem of electrocution. The district court seemed to agree, observing that "a more significant cause of eagle mortality [than takings] is electrocution."[211] In response, the government argued that it was dealing with the problem in the best way it could. It had prosecuted one power company for unintentionally killing eagles in the past, and since then, it had tried to encourage companies to adopt "avian protection plans" in exchange for prosecutorial discretion.[212]

On these facts, the Tenth Circuit could have reasonably concluded that the government had left "appreciable damage" to its "supposedly vital" interest in protecting eagles. As the defendant showed, there was evidence that the so-called "avian protection plans" were not all they were cracked up to be and that high level administrators knew it. But the Tenth Circuit declined to do so. Unlike the district court in *Adeyemo*, however, it clearly confronted the issue, stating that "[u]nderinclusive enforcement of a law suggests that the government's supposedly vital interest is not really compelling."[213] After reviewing the arguments from both sides, the court noted that thousands of eagles were dying each

[209] Id. at 942.

[210] Appellee's Supplemental Answer Brief at 36–37, *Friday*, 525 F.3d 938 (No. 06-8093), 2007 WL 4778824 (internal quotation marks omitted) (containing both statements).

[211] United States v. Friday, No. 05-CR-260-D, 2006 WL 3592952, at *5 (D. Wyo. Oct. 13, 2006). It is not entirely clear from the district court's opinion whether this point was relevant to any legal conclusion. See *Friday*, 525 F.3d at 958.

[212] *Friday*, 525 F.3d at 959 (internal quotation marks omitted).

[213] Id. at 958 (internal quotation marks omitted).

year from electrocution. Nonetheless, it concluded: "We have no basis for doubting [the government's] assessment, and in light of the executive's vested and exclusive authority over criminal prosecution, we must defer."[214]

As *Friday* shows, the underinclusiveness test in *O Centro* may not be all that helpful to RFRA claimants if courts prefer to defer to the government's judgment in close cases. While courts could take *O Centro*'s invocation of the "appreciable damage" standard as an invitation to scrutinize the government's enforcement schemes closely, they may prove hesitant to do so because sensitive questions of police power are at stake. Instead, they may prefer, as the court did in *Friday*,[215] to defer to the government's expertise in these matters. Provided that the government does not grant exceptions to other very similarly situated groups like it did in *O Centro*, courts that are wary about granting exceptions may choose to accept the government's judgment that any remaining harm to its interests is less than "appreciable."

CONCLUSION

Many religious interest groups and some scholars greeted *O Centro* with optimism because the decision eliminated a method that lower courts had commonly used to dilute the compelling-interest test. These reactions raise the question of whether *O Centro* will actually improve the historically dismal success rate of RFRA claimants. While it is too early to tell, this Note argues that there are already good reasons to doubt that the decision will make much difference. Based on the past reluctance of courts to grant religious exemptions,[216] one might predict that courts will respond to *O Centro* by increasingly employing other methods to deny RFRA claims. And this Note finds support for that hypothesis; various circuit courts have employed four interpretive moves that favor the government. If other courts remain reluctant to grant religious exemptions, they may apply these moves and reduce the impact of *O*

[214] Id. at 959 (internal citations omitted).

[215] Interestingly, the author of *Friday* is Judge Michael McConnell, a well-known critic of *Smith*. See Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1111 (1990).

[216] See sources, supra note 6.

Centro. This Note draws no final conclusion about the legacies of *O Centro* in particular or RFRA in general. But the analysis here does bolster the argument, often made in the literature, that general formulas like RFRA's compelling-interest test do not provide reliable protection for religious liberty.[217] Courts that are uncomfortable with granting religious exceptions will exploit the vagueness of such tests to reach the results they favor. Supporters of RFRA may contend that the analysis here, even if correct, does not show that all hope is lost. *O Centro*, they would argue, may be just the first step toward giving RFRA its full vigor. By litigating test cases, religious interest groups may be able to get the Supreme Court to strike down more pro-government doctrines. And by lobbying Congress for statutory changes, such groups may be able to confine the discretion of the lower courts.

Perhaps. But even if Congress and the Supreme Court were to act in these ways, the overall success rate of RFRA claimants might not change in any appreciable manner. The resulting dynamic might resemble a game of "Whac-A-Mole"; that is, for every pro-government doctrine those institutions mashed down, others might pop up. Tweaking RFRA's general formula here and there would probably not change the inclinations of those who are charged with implementing it.

A better strategy for accommodationists may be to encourage religious minorities to seek specific statutory exemptions from Congress.[218] Of course, small religious groups will have difficulty forming coalitions to push through such legislative exemptions. But the history of RFRA litigation may suggest that their efforts are better spent on those legislative endeavors than on trying to convince judges that the statute actually "means what it says."[219]

[217] See, e.g., Lupu, The Failure of RFRA, supra note 6, at 596.

[218] See, e.g., Ryan, supra note 6, at 1443–55.

[219] See Employment Div. v. Smith, 494 U.S. 872, 888 (1990) ("[I]f 'compelling interest' really means what it says . . . many laws will not meet the test.").