NOTE

RFRA AT THE BORDER: IMMIGRATION'S ENTRY FICTION AND RELIGIOUS FREE EXERCISE

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RFRA and RLUIPA have greatly enhanced the religious free exercise rights of individuals, but it is not clear that all immigrants in detention in the United States are able to claim these protections. One lower court has applied the entry fiction doctrine, which limits the constitutional rights of immigrants at the border, to hold that these immigrants do not have statutory rights under RFRA because they are not "person[s]" within the meaning of the statute. This Note contends that the Supreme Court's recent analysis of RFRA in Burwell v. Hobby Lobby Stores, Inc. *calls into question this lower court decision. Contemplating the various methods of statutory interpretation from* Hobby Lobby *and other lower courts, this Note argues that the plain meaning of "person[s]" should govern its interpretation in RFRA and, thus, should include immigrants subject to the entry fiction.*

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"No society is free where government makes one person's liberty depend upon the arbitrary will of another."[1]

INTRODUCTION

For many, religion is a solace in times of crisis.[2] However, for some immigrants in detention centers across the country, their ability to practice their religion has been limited.[3] In Glades County, Florida, Muslim immigrant detainees were denied access to the Quran and forced to use bedsheets as prayer rugs.[4] In both Port Isabel, Texas and Miami, Florida, Muslim detainees were given only pork sandwiches to eat.[5] In Sheridan,

[1] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 217 (1953) (Black, J., dissenting).

[2] Maryam Saleh, A Second Chance, Intercept (Dec. 22, 2018, 10:44 AM), https://theintercept.com/2018/12/22/georgia-ice-raids-muslim-refugees/ [https://perma.cc/Q3Q5-MLWS] ("You know, it's just the belief that you have that you don't have no control of everything, so, you know, that's what keeps us going, just prayers . . . .").

[3] Conrad Wilson, Hundreds of Immigrant Detainees Held in Federal Prisons, NPR (Aug. 23, 2018, 7:28 AM), https://www.npr.org/2018/08/23/641165251/legal-battles-began-when-migrants-were-sent-to-federal-prisons [https://perma.cc/8A3F-6GN4] ("If you lock somebody up in a foreign country and cut them off from the outside world . . . it's going to cause all kinds of psychological trauma at the minimum . . . .").

[4] See ACLU, Letter from ACLU to U.S. Dep't of Homeland Sec. 4 (Mar. 15, 2019), https://www.aclu.org/letter/investigating-religious-freedom-violations-border-patrol-and-ice [https://perma.cc/ET7C-TAG6] [hereinafter ACLU Letter]; Complaint at 12–13, Abdulkadir v. Hardin, No. 2:19-CV-00120-SPC-MRM (M.D. Fla. Feb. 27, 2019).

[5] Roque Planas, Border Patrol Fed Pork to Muslim Detainee for 6 Days, Huffington Post (Feb. 27, 2019, 4:45 PM), https://www.huffpost.com/entry/border-patrol-fed-pork-to-muslim-detainee-for-six-days_n_5c76f474e4b0d3a48b5627a2#:~:text=A%20permit%20allowing

Oregon, Sikh detainees were denied turbans, and other detainees were denied access to pastoral care or spaces to worship.[6] In Victorville, California, detainees were likewise denied meals that complied with their religious needs, were denied appropriate religious counseling, and were prevented from wearing head coverings.[7] Indeed, one individual was chastised by officers for using his cell to pray, even though he was given no other space to do so.[8]

These stories are reminiscent of the shocking stories relating to immigrant detention centers over the past decade.[9] The COVID-19 pandemic has not only grossly over-affected immigrant detainees in terms of the virus's impact,[10] but it has led to greater opportunities for mistreatment.[11] Other accounts of abuse in immigration detention also

%20him%20to,Parveen%20from%20landinl%20in%20detention [https://perma.cc/F2JZ-ZFKM]; Groups: Muslim Detainees at Miami Facility Are Served Pork, Associated Press (Aug. 20, 2020), https://apnews.com/article/a4cdb2edd79edfc83adde71fdcafb079 [https://perma.cc/A8GJ-4LHJ].

[6] See ACLU Letter, supra note 4, at 5; Decl. in Support of Habeas Petition at 2, ICE Detainee No. 2 v. Salazar, No. 3:18-CV-01280-MO (D. Or. July 18, 2018); Memo in Support of Petition for Habeas Corpus at 22–23, ICE Detainee Nos. 1-74 v. Salazar, No. 3:18-CV-01279-MO (D. Or. July 30, 2018).

[7] See ACLU Letter, supra note 4, at 5; Decl. of Atinder Paul Singh ¶ 5, 10–11, Teneng v. Trump, No 5:18-cv-01609 (C.D. Cal. Aug. 1, 2018), ECF No. 1-4; Decl. of Gurjinder Singh ¶¶ 4–8, id., ECF No. 1-5.

[8] Decl. of Gabriel Antonio Manzanilla Pedron ¶ 24, Teneng v. Trump, No 5:18-cv-01609 (C.D. Cal. Aug. 1, 2018), ECF No. 45-3.

[9] See Michael D. Shear, Katie Benner & Michael S. Schmidt, 'We Need to Take Away Children,' No Matter How Young, Justice Dept. Officials Said, N.Y. Times (Oct. 6, 2020), https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html [https://perma.cc/EPE8-HDCX]; Jacob Soboroff & Julia Ainsley, Lawyers Can't Find the Parents of 666 Migrant Kids, A Higher Number Than Previously Reported, NBC News (Nov. 9, 2020, 4:32 PM), https://www.nbcnews.com/politics/immigration/lawyers-can-t-find-parents-666-migrant-kids-higher-number-n1247144 [https://perma.cc/G8KR-AWJH]; Tell Me More: Child Detention Centers: A 'Headache' for the Obama Administration NPR (June 23, 2014, 12:54 PM), https://www.npr.org/2014/06/23/324857970/child-detention-centers-a-headache-for-the-obama-administration [https://perma.cc/3CMF-WM8L].

[10] Alisa Reznick, 'You Can Either Be a Survivor or Die': COVID-19 Cases Surge in ICE Detention, NPR (July 1, 2020, 9:17 AM), https://www.npr.org/2020/07/01/871625210/you-can-either-be-a-survivor-or-die-covid-19-cases-surge-in-ice-detention [https://perma.cc/NBC3-JWK4].

[11] Ike Swetlitz, 'Suddenly They Started Gassing Us': Cuban Migrants Tell of Shocking Attack at ICE Prison, Guardian (July 2, 2020, 6:00 PM), https://www.theguardian.com/us-news/2020/jul/02/cuban-migrants-detention-ice-facility-new-mexico [https://perma.cc/QP2N-AYNV] (describing immigrant detainees who were corralled into their dormitory and pepper sprayed by prison guards in "full riot gear of gas masks" and

raise religiously motivated concerns, albeit not as directly as those previously mentioned. For example, in deciding a due process challenge to the Trump administration's family separation policies, a district court judge wrote that separating her from her child "absolutely precludes" a mother's "involvement in any aspect of her sons' care, custody, and control, from *religion* to education."[12] Additionally, recent claims of unwanted gynecological procedures in detention centers[13] could raise concerns of bodily integrity that are violative of certain religious beliefs. While there would need to be an individualized assessment of whether these practices burdened individuals' religious practices, all of these stories demonstrate the pressing importance of protecting the religious rights of immigrants in detention centers.

What may be most surprising about the previous stories is not that they happened, but that there may not be a remedy under the law for these violations. The Religious Freedom Restoration Act ("RFRA")[14] and the Religious Land Use and Institutionalized Persons Act ("RLUIPA")[15] provide the broadest grants of religious free exercise protections against laws made or actions taken by the federal government.[16] The First Amendment Free Exercise Clause also provides more limited protections against religious liberty violations.[17] However, because of the complex doctrine known as the "entry fiction," certain immigrants may not be able to bring a suit under RFRA or RLUIPA.[18]

The entry fiction says that certain individuals, while physically inside the United States are legally considered to be still outside of the United

"shields" as a response to their hunger strike protesting against their vulnerability to COVID-19).

[12] Jacinto-Castanon de Nolasco v. U.S. Immigr. & Customs Enf't, 319 F. Supp. 3d 491, 501 (D.D.C. 2018) (emphasis added). While it is not clear that the mother in this case would be able to claim that this burdened *her* religious beliefs, it shows the scope of religion-related issues present in the immigration detention context.

[13] Caitlin Dickerson, Seth Freed Wessler & Miriam Jordan, Immigrants Say They Were Pressured Into Unneeded Surgeries, N.Y. Times (Sept. 29, 2020), https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html [https://perma.cc/7TQX-8QKZ].

[14] 42 U.S.C. § 2000bb-1.

[15] 42 U.S.C. §§ 2000cc–2000cc-1.

[16] While both RFRA and RLUIPA apply to federal actions, only RLUIPA applies to state actions as well. See City of Boerne v. Flores, 521 U.S. 507, 529, 532–36 (1997); Cutter v. Wilkinson, 544 U.S. 709, 713, 715–16 (2005); infra Section I.A.

[17] U.S. Const. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ."); see Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 878–79 (1990).

[18] See infra Section I.B.

States because they have not "effected an entry."[19] While controversial,[20] it has primarily been applied to deny certain immigrants their *procedural* due process rights in immigration proceedings.[21] However, relying on this doctrine, at least one lower court has recently interpreted this fiction to deny immigrants their rights under RFRA by holding that they are not "person[s]" under the statute.[22]

At the same time, the Supreme Court has arguably expanded the scope of free exercise protections available to individuals under RFRA.[23] In deciding *Burwell v. Hobby Lobby Stores, Inc.*,[24] the Court suggested a new, larger role for RFRA in affording religious liberty protections that go even beyond the Constitutional guarantees of the older, more protective free exercise precedents.[25] While this move to untether RFRA from the First Amendment could prove troublesome, in that it allows for broader religion-based challenges to federal laws that protect civil rights,[26] this Note will contend that this decision is good for immigrants

[19] Zadvydas v. Davis, 533 U.S. 678, 693 (2001); see Wong v. United States, 373 F.3d 952, 971 (9th Cir. 2004) (summarizing the entry fiction doctrine).

[20] Recent dissents by the Court have argued vehemently against this legal fiction. See Jennings v. Rodriguez, 138 S. Ct. 830, 862 (2018) (Breyer, J., dissenting) ("We cannot here engage in this legal fiction. No one can claim, nor since the time of slavery has anyone to my knowledge successfully claimed, that persons held within the United States are totally without constitutional protection."); Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 2013 (2020) (Sotomayor, J., dissenting) ("Taken to its extreme, a rule conditioning due process rights on lawful entry would permit Congress to constitutionally eliminate all procedural protections for any noncitizen the Government deems unlawfully admitted . . . .").

[21] See *Wong*, 373 F.3d at 971–72; see also *Zadvydas*, 533 U.S. at 703–04 (Scalia, J., dissenting) (claiming that the distinction between "aliens" who have effected an entry and those who have not "makes perfect sense" with regard to the procedures "necessary to prevent entry" but he is "sure they cannot be tortured").

[22] Bukhari v. Piedmont Reg'l Jail Auth., No. 01:09-CV-1270, 2010 WL 3385179, at *5 (E.D. Va. Aug. 20, 2010).

[23] See infra Section III.A.

[24] 573 U.S. 682 (2014).

[25] See id. at 695 n.3 ("RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions."); see also infra Section III.A.

[26] See Micah Schwartzman, Richard C. Schragger & Nelson Tebbe, The New Law of Religion, Slate (July 3, 2014, 11:54 AM), https://slate.com/news-and-politics/2014/07/after-hobby-lobby-there-is-only-rfra-and-thats-all-you-need.html [https://perma.cc/92GW-D4GT]; Marty Lederman, *Hobby Lobby* Part XVIII—The One (Potentially) Momentous Aspect of *Hobby Lobby*: Untethering RFRA from Free Exercise Doctrine, Balkinization (July 6, 2014), https://balkin.blogspot.com/2014/07/hobby-lobby-part-xviii-one-potentially.html [https://perma.cc/2A3B-MSRX]; see also Ira C. Lupu, *Hobby Lobby* and the Dubious Enterprise of Religious Exemptions, 38 Harv. J.L. & Gender 35, 93 (2015) (noting a potential

subject to the entry fiction as it establishes a framework under which they can bring a RFRA claim.

This Note will attempt to resolve a fragment of the jurisprudential conflict between expanded religious liberty rights and restricted immigration rights by answering the narrow question of whether immigrants who are subject to the entry fiction are "person[s]" under RFRA. The normative analysis of this question is clear: the United States should not prevent relief to individuals who have been subjected to some of the treatment described above at the hands of government actors. Unfortunately, the doctrinal analysis is murkier, and it is this analysis with which this Note will contend. Part I will give an overview of RFRA and RLUIPA, including the relevant statutory history. It will then outline in more detail the doctrine of the entry fiction, laying out its import to the constitutional rights of immigrants, and the relevance of these constitutional rights to the statutory interpretation question at the heart of this issue.

Part II will confront the decisions of lower courts that have waded into this murky analysis. Only one lower court has directly ruled on this question as it relates to immigrants subject to the entry fiction.[27] That court relied heavily on a case from the U.S. Court of Appeals for the D.C. Circuit, which confronted the question as it relates to Guantanamo detainees.[28] As the law around Guantanamo detainees is more developed, this Note will delve deeply into that case and other similar cases from the D.C. Circuit.

Part III will then focus on the Court's decision in *Burwell v. Hobby Lobby Stores, Inc.* This Part will explore the Court's enlarged view of RFRA and how its analysis casts doubt on the reasoning of the decisions in the lower courts. Finally, Part IV will propose a way to answer the question of who are "person[s]" under RFRA. Contending with three separate methods of statutory interpretation, this Note will demonstrate why a plain meaning approach to the term "person[s]" is the most logical from a doctrinal perspective. By reading "person[s]" to include all people who are subject to government burdens on their free exercise, immigrants

wave of RFRA litigation regarding employer objections to paying benefits for same-sex spouses).

[27] See *Bukhari*, 2010 WL 3385179.

[28] Id. at *4; see Rasul v. Myers (*Rasul II*), 563 F.3d 527, 528 (D.C. Cir. 2009); Rasul v. Myers (*Rasul I*), 512 F.3d 644, 649 (D.C. Cir. 2008), cert. granted, judgment vacated, 555 U.S. 1083 (2008).

subject to the entry fiction will have rights under the RFRA and RLUIPA statutory regimes.

I. BACKGROUND

A. Why Look to a Statutory Remedy at All? A Primer on RFRA

This Note will seek primarily to address the statute, RFRA, which protects the free exercise rights of individuals. RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)."[29] Subsection (b) of the statute states that, if there is a burden on religion, the government must prove that it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[30]

The statute generally provides more protections for religious free exercise than are afforded under the First Amendment. Enacted in response to the Court's decision in *Employment Division, Department of Human Resources v. Smith*, it attempts to mandate a heightened standard of review for free exercise violations.[31] In *Smith*, the Court reshaped its prior free exercise jurisprudence by abandoning its prior "compelling interest test"[32] in favor of a less stringent form of review of laws that may burden an individual's religious exercise.[33] *Smith* held that if a law is neutral and generally applicable, it will not receive heightened scrutiny, even if it has the effect of burdening an individual's religion.[34] As Justice

[29] 42 U.S.C. § 2000bb-1(a).

[30] 42 U.S.C. § 2000bb-1(b).

[31] 42 U.S.C. § 2000bb(a)–(b) ("The purposes of this chapter are . . . to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened."); see also Ira C. Lupu, Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act, 56 Mont. L. Rev. 171, 172–73 (1995) ("RFRA is designed to reject the approach of *Employment Division v. Smith* . . . .").

[32] 42 U.S.C. § 2000bb(b)(1). But see James E. Ryan, Note, *Smith* and the Religious Freedom Restoration Act: An Iconoclastic Assessment, 78 Va. L. Rev. 1407, 1416 (1992) (suggesting that *Smith* did not represent such an about-face from the Court's prior free exercise cases, but instead "that the clause had already been hollowed by the Court before *Smith*").

[33] Emp. Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878–79 (1990); see Ryan, supra note 32, at 1408 n.10 (1992).

[34] *Smith*, 494 U.S. at 879–82 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

Scalia's majority opinion laid out, *Smith*'s changes to the free exercise jurisprudence had the effect of prohibiting an individual from successfully bringing a free exercise claim to "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[35]

Commentators and legislators alike viewed *Smith* as a sharp departure from the Court's prior free exercise cases and bad for the protection of religious liberty.[36] Thus, Congress overwhelmingly voted to enact RFRA[37] as a direct response to this more relaxed test enacted in *Smith* and to restore the compelling interest test previously used by the Court to review free exercise cases.[38] First laid out in *Sherbert v. Verner*, the compelling interest test mandated that any law that burdened an individual's free exercise rights be the least restrictive means of furthering a compelling interest.[39] RFRA's operative language mirrors this compelling interest test almost directly[40] and explicitly rejects *Smith*, writing that government shall not burden religion "*even if the burden results from a rule of general applicability . . . .*"[41]

In response to the Court's decision in *City of Boerne v. Flores*, which invalidated RFRA as it applied to state laws,[42] Congress enacted RLUIPA to regulate a narrower set of state and federal practices dealing with land use by religious groups and the religious rights of prisoners.[43] Most importantly for the purposes of this Note, RLUIPA amended RFRA's definition of "exercise of religion" to exclude any mention of the First

[35] *Smith*, 494 U.S. at 878–79. But see Ryan, supra note 32, at 1413.

[36] See Ryan, supra note 32, at 1409–10.

[37] The Senate voted 97-3 to pass RFRA, and the House had previously voted to enact a similar bill by unanimous voice vote. Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 210 (1994).

[38] See supra note 32 and accompanying text.

[39] 374 U.S. 398, 406 (1963); Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981); see also Ryan, supra note 32, at 1408 & n.10 (laying out the compelling interest test used by the Court and acknowledging that it "was first announced . . . in *Sherbert*").

[40] 42 U.S.C. § 2000bb-1(b).

[41] 42 U.S.C. § 2000bb-1(a) (emphasis added).

[42] 521 U.S. 507, 529, 532–36 (1997) (concluding that RFRA was not a valid use of Congress's enforcement powers under § 5 of the Fourteenth Amendment).

[43] 42 U.S.C. § 2000cc; 42 U.S.C. § 2000cc-1; see Cutter v. Wilkinson, 544 U.S. 709, 713, 715–16 (2005) (upholding the constitutionality of RLUIPA and noting the areas targeted by it are "[l]ess sweeping than RFRA").

Amendment.[44] Prior to RLUIPA, RFRA defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution."[45] After RLUIPA, the definition was changed to mirror RLUIPA's definition: "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[46] This shift is relevant to whether RFRA should be analyzed under First Amendment precedents.[47]

This Note focuses on RFRA rather than RLUIPA for two central reasons. First, RLUIPA applies to "a person residing in or confined to an institution,"[48] and it defines "person" as "an individual, a trust or estate, a partnership, an association, or a corporation."[49] Because this Note contends that "person[]" under RFRA should encompass immigrants subject to the entry fiction, this clearer definition of person under RLUIPA will pose no threat to this conclusion. Second, while RFRA applies to the federal government,[50] RLUIPA only applies to state-run prisons, and some private prisons that have contracted with a state.[51] Therefore, the analysis under RFRA will govern the rights of immigrants in either federal prisons or federal immigration detention centers.[52] The differences between these two statutes will be highlighted in this Note,[53] but, as there has been much more litigation and discussion of RFRA, and

[44] Pub. L. No. 106–274, 114 Stat. 803 (2000); see also Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695–96 (2014) (concluding that the RLUIPA amendment evidences Congress's intent to separate the definition of "exercise of religion" from First Amendment case law).

[45] 42 U.S.C. § 2000bb-2(4) (1994 ed.).

[46] 42 U.S.C. § 2000cc-5(7)(A).

[47] See infra Section III.A.

[48] 42 U.S.C. § 2000cc-1(a).

[49] 42 U.S.C. § 1997(3).

[50] City of Boerne v. Flores, 521 U.S. 507, 529, 532–36 (1997).

[51] 42 U.S.C. §§ 1997(1)(A), 1997(2), 2000cc–1(a).

[52] 42 U.S.C. § 2000bb–2(1). While almost no immigrants detained civilly remain detained in federal prisons, see Conrad Wilson, ICE Appears to End Use of Federal Prisons for Immigrant Detainees, NPR (Oct. 20, 2018, 6:01 AM), https://www.npr.org/2018/10/20/658988420/ice-appears-to-end-use-of-federal-prisons-for-immigrant-detainees [https://perma.cc/JFP6-BGQB], many detainees remain in Immigration and Customs Enforcement ("ICE") or Customs and Border Patrol ("CBP") facilities, see Immigration Detention in the United States by Agency, Am. Immigr. Council (Jan. 2, 2020), https://www.americanimmigrationcouncil.org/research/immigration-detention-united-states-agency [https://perma.cc/S27M-4BX6].

[53] See infra Section IV.C.

as RLUIPA provides this specific definition, the majority of the Note will focus on RFRA rather than RLUIPA.[54]

Finally, a note on why this statutory analysis is preferred to a First Amendment analysis is necessary. The First Amendment, in relevant parts, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[55] The statutory frameworks around free exercise are preferable to this for two reasons. First, as discussed, by mandating a heightened standard of review, RFRA provides for arguably more protections for an individual's free exercise than the First Amendment. Indeed, particularly in detention, most restrictions on inmates' behavior will be generally applicable and neutral laws, and, because of the need to maintain order in correctional facilities, they will be difficult to challenge under *Smith*'s rational basis framework.[56] Second, while it may seem unlikely at first glance that the Supreme Court would categorically deny immigrants subject to the entry fiction their First Amendment rights, at least one lower court has found that they do lack them.[57] Furthermore, the argument that immigrants subject to the entry fiction lack other substantive constitutional rights has appeared in even more litigation.[58] If this is the case, then the statutory application of RFRA and RLUIPA to these individuals is even more crucial to safeguard their religious liberties.

B. Who Is at Risk? A Background on the "Entry Fiction" in Immigration Law

It is key to understand the specific immigrants who this Note contends currently may lack a remedy for violations of their religious freedom. While a full discussion of the entry fiction is beyond the scope of this Note, a primer to its contours is key to the statutory analysis that is the

[54] Kevin L. Brady, Comment, Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?, 78 U. Chi. L. Rev. 1431, 1436 (2011) ("Courts generally interpret the relevant standards in RFRA and RLUIPA uniformly.").

[55] U.S. Const. amend. I.

[56] T.W. Brown, Ensuring the Application of RFRA and RLUIPA in Pro Se Prisoner Litigation, 41 Ohio N.U. L. Rev. 29, 31 (2014) ("[S]uits brought under the Free Exercise Clause are exceedingly deferential to prison administrators.").

[57] Bukhari v. Piedmont Reg'l Jail Auth., No. 01:09-CV-1270, 2010 WL 3385179, at *5 (E.D. Va. Aug. 20, 2010).

[58] See Garza v. Hargan, 874 F.3d 735, 746–47 (D.C. Cir. 2017) (Henderson, J., dissenting); Michael Kagan, When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment, 57 B.C. L. Rev. 1237, 1244–45 (2016).

focus of this Note. Specifically, the fact that immigrants subject to the entry fiction lack certain constitutional rights is crucial to understanding the reasoning in certain lower court cases about the RFRA rights of non-resident "aliens,"[59] and to understand why the statutory analysis of whether they are "person[s]" under RFRA is so contested. If the constitutional rights of immigrants under the entry fiction were clear, then there would be no argument to be made that these individuals in detention are not "person[s]" under the law. This Section will briefly outline the origins of the entry fiction doctrine, its scope, and, to highlight the severity of this statutory issue, how many immigrants are subject to it.

Generally, all individuals within the United States have constitutional rights and protections, regardless of their citizenship status.[60] Many constitutional rights do not, however, extend to noncitizens beyond American borders.[61] The entry fiction, first developed by the Court in *Shaughnessy v. Mezei*,[62] throws a wrench into these easy-to-understand propositions. This doctrine establishes that individuals who are physically within American borders, but who are stopped at a port of entry, are "treated as if stopped at the border," and, therefore, physically outside the United States.[63] Some lower courts have held that this status of being

[59] Federal courts typically use the term "alien" to describe immigrants. However, this Note will refrain from doing so as the term is pejorative. See Kevin R. Johnson, A "Hard Look" at the Executive Branch's Asylum Decisions, 1991 Utah L. Rev. 279, 281 n.5 (1991); Brian L. Owsley, Distinguishing Immigration Violations from Criminal Violations: A Discussion Raised by Justice Sonia Sotomayor, 163 U. Pa. L. Rev. Online 1, 1–2 (2014). Because the courts use this terminology, this Note will do so when appropriate, but, in a possibly vain attempt to mitigate the harm, will put the word "alien" in quotations.

[60] See Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[61] See *Zadvydas*, 533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); see also United States v. Verdugo-Urquidez, 494 U.S. 259, 262, 269 (1990) (holding that the Fourth Amendment does not apply to the search by American agents of a Mexican citizen's home in Mexico); Johnson v. Eisentrager, 339 U.S. 763, 784 (1950) (finding that enemy combatants held in Germany by American forces lacked Fifth Amendment rights).

[62] 345 U.S. 206, 213, 215 (1953); see Zainab A. Cheema, A Constitutional Case for Extending the Due Process Clause to Asylum Seekers: Revisiting the Entry Fiction After Boumediene, 87 Fordham L. Rev. 289, 306 (2018).

[63] *Shaughnessy*, 345 U.S. at 215; see Allison Wexler, The Murky Depths of the Entry Fiction Doctrine: The Plight of Inadmissible Aliens Post-*Zadvydas*, 25 Cardozo L. Rev. 2029, 2035–36 (2004).

legally outside the United States excludes these immigrants from all constitutional protections,[64] even though the Supreme Court and other lower courts have only directly held that these immigrants subject to the entry fiction are not able to claim procedural due process rights.[65] Deriving the rationale for the entry fiction from Congress's and the Executive's plenary power to exclude individuals from the country, the Court has held that immigrants are only entitled to the procedural rights derived from Congressional statute.[66] While beyond the scope of this Note, the limit of the entry fiction to *procedural* rights only may be under threat,[67] as justices in dissent have recently sounded alarm bells at the expansion of the fiction in scope and application to individuals. [68]

A general picture of the types of paths that immigrants subject to the entry fiction may take is helpful both to contextualize which and how many individuals are subject to it. First, immigrants who are residents in the United States for an extended period of time, but who have an order of removal against them are not subject to the entry fiction.[69] Therefore, if an immigrant who lives in the country for such time that she has "beg[un] to develop the ties that go with permanent residence" is apprehended by immigration enforcement officials and subject to removal

[64] Aguilera-Montero v. Mukasey, 548 F.3d 1248, 1253 (9th Cir. 2008); Bukhari v. Piedmont Reg'l Jail Auth., No. 01:09-CV-1270, 2010 WL 3385179, at *5 (E.D. Va. Aug. 20, 2010); see also supra note 58 (describing entry fiction's potential limits on First Amendment speech rights).

[65] See Wong v. United States, 373 F.3d 952, 971 (9th Cir. 2004); cf. *Zadvydas*, 533 U.S. at 693–94 ("Indeed, this Court has held that the Due Process Clause protects an alien subject to a final order of deportation, though the nature of that protection may vary depending upon status and circumstance." (citations omitted)).

[66] Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982–83 (2020).

[67] Amanda L. Tyler, Thuraissigiam and the Future of the Suspension Clause, Lawfare (July 2, 2020, 12:31 PM), https://www.lawfareblog.com/thuraissigiam-and-future-suspension-clause [https://perma.cc/E43K-FXN8] (arguing that, taking two 2020 Supreme Court decisions "to their extremes," the Court could be signaling an attempt to deny all constitutional rights for immigrants subject to the entry fiction). But see Ahilan Arulanantham & Adam Cox, Immigration Maximalism at the Supreme Court, Just Sec. (Aug. 11, 2020), https://www.justsecurity.org/71939/immigration-maximalism-at-the-supreme-court/ [https://perma.cc/HSH9-CBKJ] (acknowledging the possibility that lower courts could interpret the same 2020 decisions as eroding constitutional rights, but ultimately disagreeing with the interpretation).

[68] See supra note 20.

[69] See *Zadvydas*, 533 U.S. at 693–94; Landon v. Plasencia, 459 U.S. 21, 32–33 (1982); Clay McCaslin, Comment, "My Jailor Is My Judge": Kestutis Zadvydas and the Indefinite Imprisonment of Permanent Resident Aliens by the INS, 75 Tul. L. Rev. 193, 216–17 ("A permanent alien does not become excludable merely because a final order of removal has been entered against him.").

proceedings, she will be not subject to the entry fiction.[70] Second, if a resident "alien" leaves the country for a short period of time, defined in at least one case as five months or less, she will likewise not lose the constitutional benefits that she would have had otherwise had she not left the country, and will not be subject to the entry fiction.[71] However if, as in *Mezei*, the individual takes a more extended absence from the country, she will be subject again to the entry fiction.[72]

Those who are not residents of the United States, and arrive and are apprehended at the border will almost always be subject to the entry fiction because they will not have had time to develop the relevant contacts with the country.[73] The Court has recently expanded this doctrine to include those apprehended close to the border, even if physically already within the United States.[74] Holding that the individual who had been apprehended twenty-five yards into the country lacked due process rights, the Court extended the entry fiction to people in his position.[75] As Justice Sotomayor noted in her dissent, the majority's decision, if taken to the extreme, could signal a desire to extend the entry fiction to those who have had even more contacts with the country.[76] Therefore, under the Court's current doctrine, the entry fiction applies to individuals who have been apprehended at or near the border, and it precludes them from claiming any procedural constitutional rights related to their detention. Importantly, this group encompasses a large number of people who are in detention, often for lengthy periods. In a recent dissent, Justice Breyer

[70] *Plasencia*, 459 U.S. at 32–33. Clearly, this is a vague assessment of how long an immigrant must be physically within the borders of the country before they are subject to the entry fiction. Unfortunately, this doctrine is generally unclear, but, at least the maximum level of contacts that an individual may have within the country while still being subject to the entry fiction has been clarified. See infra note 75 and accompanying text.

[71] See *Plasencia*, 459 U.S. at 33 (citing Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953)).

[72] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 208, 214 (1953) (absence totaling 19 months); *Plasencia*, 459 U.S. at 33–34.

[73] Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020); see *Plasencia*, 459 U.S. at 32–33.

[74] *Thuraissigiam*, 140 S. Ct. at 1982–83.

[75] Id. at 1964, 1982–83.

[76] Id. at 2013 (Sotomayor, J., dissenting) ("Taken to its extreme, a rule conditioning due process rights on lawful entry would permit Congress to constitutionally eliminate all procedural protections for any noncitizen the Government deems unlawfully admitted and summarily deport them no matter how many decades they have lived here, how settled and integrated they are in their communities, or how many members of their family are U. S. citizens or residents.").

assessed three categories of immigrants subject to the entry fiction[77] and concluded that they number in the "thousands" and face detention "for at least six months and on average one year."[78]

II. LOWER COURT DECISIONS ON WHO IS A "PERSON[]" UNDER RFRA

The central question for whether immigrants subject to the entry fiction have protected free exercise rights, then, is whether they are able to bring a RFRA claim. Under the language of RFRA, the antecedent questions are whether there has been government action that burdens a "person's" religion.[79] Because immigrants in detention are almost always going to be subject to government restrictions,[80] the question to answer here is whether non-resident immigrants are "person[s]" who are able to exercise religion under RFRA.[81] Only two federal courts have dealt with similar questions, one addressing the applicability to Guantanamo detainees,[82] and another directly addressing applicability to immigrants in detention.[83] This section will outline these cases in detail, as their different avenues of statutory analysis are relevant to Part IV.

A. The Limited Case Law on Immigrants and Enemy Combatants

In *Bukhari v. Piedmont Regional Jail Authority*, the U.S. District Court for the Eastern District of Virginia concluded that the term "person[]" as used in RFRA did not apply to non-resident "aliens."[84] Bukhari, a

[77] Jennings v. Rodriguez, 138 S. Ct. 830, 859 (2018) (Breyer, J., dissenting) ("[A]sylum seekers, persons who have finished serving a sentence of confinement (for a crime), or individuals who, while lacking a clear entitlement to enter the United States, claim to meet the criteria for admission . . . .").

[78] Id. at 860.

[79] 42 U.S.C. § 2000bb-1(a).

[80] 42 U.S.C. § 2000bb-2(1) ("'[G]overnment' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States . . . ."). While some immigrants may be held in privately owned prisons, this should not bar RLUIPA's application. See Dep't of Just., Report on the Twentieth Anniversary of the Religious Land Use and Institutionalized Persons Act 7 (2020) (explaining that private prisons are generally covered by the statute because they operate on behalf of states or municipalities and because RLUIPA applies to institutions receiving federal funding or otherwise affecting interstate commerce).

[81] See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 705 (2014); *Rasul I*, 512 F.3d 644, 668 (D.C. Cir. 2008).

[82] *Rasul I*, 512 F.3d 644; *Rasul II*, 563 F.3d 527 (D.C. Cir. 2009).

[83] Bukhari v. Piedmont Reg'l Jail Auth., No. 01:09-CV-1270, 2010 WL 3385179 (E.D. Va. Aug. 20, 2010).

[84] Id. at *4–5.

Pakistani national, came to the United States for a medical residency interview, and, when entering, Customs and Border Patrol ("CBP") officers found he had presented invalid documentation and had violated the terms of his prior visa with the United States.[85] While in Immigration and Customs Enforcement ("ICE") detention, officials denied Bukhari, a Muslim, food that met the dietary requirements of his faith.[86] Among other claims relating to the non-religious elements of his detention, he brought a RFRA claim against an officer at the detention center. The district court dismissed this claim, finding that Bukhari was not a "person[]" under the meaning of RFRA.[87]

The court claimed that because Bukhari was subject to the entry fiction, making him "for constitutional purposes, as if stopped at the border,"[88] he did not retain First Amendment rights, and this, therefore, meant that he was not allowed the protections of RFRA.[89] This conclusion encompasses two distinct and essential arguments: first, immigrants who are subject to the entry fiction do not retain First Amendment rights and, second, those who do not have First Amendment rights are likewise unprotected by RFRA. The court cited a case from the U.S. Court of Appeals for the Ninth Circuit to support the idea that immigrants subject to the entry fiction not only lack First Amendment rights, but broadly lack all constitutional rights, procedural and substantive.[90] This Ninth Circuit case, while promulgating broad dicta that immigrants subject to the entry fiction did not have constitutional rights, did not specifically hold that immigrants lacked *substantive* rights.[91] Instead, it stated that immigrants subject to the entry fiction have no constitutional right to the same procedural protections in the immigration process as other immigrants.[92] Therefore, while the *Bukhari* court's reliance on this specific case was perhaps misguided, the attempt to expand the entry fiction to substantive

[85] Id. at *1.
[86] Id.
[87] Id. at *5.
[88] Id. at *4 (citing Zadvydas v. Davis, 533 U.S. 678, 693 (2001)) (internal quotation marks omitted).
[89] Id. at *5.
[90] Id at *4–5 (citing Aguilera-Montero v. Mukasey, 548 F.3d 1248, 1253 (9th Cir. 2008)).
[91] *Aguilera-Montero*, 548 F.3d at 1253, 1255–56.
[92] Id. at 1253; see also Alvarez-Garcia v. Ashcroft, 378 F.3d 1094, 1097 (9th Cir. 2004) ("[E]xcludable aliens have no constitutional right to the same procedures afforded deportable aliens in the admission process.").

constitutional rights is not unique to this case, and has appeared in other arguments in lower courts as well.[93]

Fundamental to the court's second claim that those who are not protected by the First Amendment do not retain rights under RFRA was the conclusion that Congress did not intend RFRA to "expand the scope of the free exercise of religion beyond that encompassed by the First Amendment prior to *Smith*."[94] The court derived this from its survey of the history of RFRA, stating that because Congress enacted RFRA "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*,"[95] and as a direct reaction to *Employment Division v. Smith*, this implies that it intended the application of RFRA to be confined to the case law of the First Amendment prior to *Smith*.[96] As this Note will directly contend, this analysis tethering RFRA to the First Amendment should be inapplicable under the Supreme Court's current precedent.[97]

The *Bukhari* court primarily relied on a D.C. Circuit decision which determined that that non-resident "aliens" held as enemy combatants at Guantanamo Bay were not "person[s]" under RFRA.[98] Determining that *Rasul v. Meyers*, while dealing with non-resident "aliens" who were enemy combatants instead of immigrants, was "persuasive" and "the only circuit case directly on point," the court held that immigrants like Bukhari were similarly not "person[s]" under RFRA.[99] In both *Rasul I* and *Rasul II*,[100] the D.C. Circuit considered a RFRA suit brought by Guantanamo detainees who, among other allegations of torture, were allegedly harassed while practicing their Muslim faith, "including forced shaving of their beards, banning or interrupting their prayers, denying them copies of the Koran and prayer mats and throwing a copy of the Koran in a toilet

[93] See supra note 58.

[94] *Bukhari*, 2010 WL 3385179, at *3.

[95] Id. (citations omitted) (quoting 42 U.S.C. § 2000bb(b)(1)).

[96] Id. at *5.

[97] See infra Section III.A.

[98] *Rasul II*, 563 F.3d 527, 533 (D.C. Cir. 2009); see also *Rasul I*, 512 F.3d 644, 671–72 (D.C. Cir. 2008) (holding that the Supreme Court's interpretation of "person" in Fifth and Fourth Amendment contexts should extend to the RFRA context and exclude non-resident "aliens").

[99] *Bukhari*, 2010 WL 3385179, at *4–5 (referencing *Rasul II*, 563 F.3d at 533).

[100] The Supreme Court remanded *Rasul I* in light of its decision in *Boumediene v. Bush*. Boumediene v. Bush, 553 U.S. 723 (2008); Rasul v. Myers, 555 U.S. 1083 (2008). Because "*Boumediene* could not possibly have altered—retroactively—the meaning of RFRA," the court in *Rasul II* primarily summarized the RFRA analysis from *Rasul I*. *Rasul II*, 563 F.3d at 532. Therefore, both opinions are relevant to the RFRA analysis.

bucket."[101] In determining whether plaintiffs had mounted a claim under RFRA, the court first identified that the threshold question was whether they are "person[s]" under RFRA.[102] This was meant to specifically reject the district court's analysis, which concentrated on the plain meaning of RFRA, declining to extensively address the issue of whether non-resident "aliens" were "person[s]" under RFRA because the government had not presented evidence that would suggest "Congress specifically intended to vest the term 'persons' with a definition . . . at odds with its plain meaning."[103]

The D.C. Circuit conducted a lengthy historical analysis of RFRA's enactment, noting, as the *Bukhari* court did, the statute's growth out of Congress's reaction to *Smith* and its stated desire to reinstate the free exercise jurisprudential regime of *Sherbert* and *Yoder*.[104] After reviewing the history of the statute, the court concludes that because RFRA intended to reenact the pre-*Smith* First Amendment jurisprudence, "'person' as used in RFRA should be interpreted as it is in constitutional provisions."[105] The court makes two distinct moves here to reach this conclusion. First, the court analyzes the history of RFRA and concludes that because Congress's only goal in enacting it was to bring the religious liberty protections of the pre-*Smith* era back to bear, RFRA did not "expand the scope of free exercise of religion beyond that protected by the First Amendment pre-*Smith*."[106]

Second, in an odd statutory construction, the court holds that because Congress intended RFRA to enact its view of the First Amendment, "'person' as used in RFRA should be interpreted *as it is* in constitutional provisions."[107] In other words, they do not state that "person[s]" should be interpreted as it was at the time of RFRA's enactment and, therefore, as the legislators at the time would have understood it, but as "person[s]" in the Constitution has been and can be interpreted even after RFRA's passage. This interpretation is different than *Bukhari*'s choice to tether

[101] *Rasul I*, 512 F.3d at 650.
[102] Id. at 668.
[103] Rasul v. Rumsfeld, 433 F. Supp. 2d 58, 66–67 (D.D.C. 2006). Instead, the district court primarily focused on whether RFRA could apply outside of the continental United States. Id. at 62–66.
[104] *Rasul I*, 512 F.3d at 668–69.
[105] Id. at 671.
[106] Id.
[107] Id. (emphasis added).

RFRA's applicability to those who have a First Amendment right,[108] as it instead connects the interpretation of "person[s]" in RFRA to, presumably, the general understanding of the term in the Constitution at the time of the Court's decision in *Rasul I*. Indeed, the D.C. Circuit itself may have found this description unsatisfactory. In *Rasul II*, while summarizing its prior holding in *Rasul I*, the court specifically clarified that it meant to interpret "person[s]" in RFRA "consistently with similar language in constitutional provisions, *as interpreted by the Supreme Court at the time Congress enacted RFRA*."[109] The court clarified that this was an appropriate reading of the word "person[s]" because Congress likely legislated with the backdrop of what the Court had previously defined "person[s]" to mean under the Constitution.[110]

The court in both *Rasul I* and *Rasul II* then outlined what precedents Congress purportedly relied on to exclude non-resident "aliens" from RFRA's protections. These precedents are relevant to the court's use of the *in pari materia* canon of statutory construction to interpret "person[s]" in RFRA as consistent with other "statutes addressing the same subject matter."[111] The court analyzed two Supreme Court decisions, one of which determined that "person[s]" under the Fifth Amendment did not include German nationals at a U.S. army base,[112] and another which said that "the people" under the Fourth Amendment did not mean to include a search by the U.S. government of a Mexican-national's home in Mexico.[113] Notably, both of these decisions considered the application of the Constitution outside of the physical geographic confines of America.[114]

The concurring opinion in both *Rasul I* and *Rasul II* took issue with the majority's focus on the analysis of the word "person[]" in RFRA as being dispositive of the claim.[115] Judge Brown first stated that the court must

[108] Bukhari v. Piedmont Reg'l Jail Auth., No. 01:09-CV-1270, 2010 WL 3385179, at *5 (E.D. Va. Aug. 20, 2010).

[109] *Rasul II*, 563 F.3d 527, 533 (D.C. Cir. 2009) (emphasis added).

[110] Id.

[111] *Rasul I*, 512 F.3d at 671 (citing Wachovia Bank v. Schmidt, 546 U.S. 303, 315–16 (2006)); see infra Section IV.B.

[112] *Rasul I*, 512 F.3d at 671 (citing Johnson v. Eisentrager, 339 U.S. 763, 783 (1950)).

[113] Id. (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990)).

[114] See *Johnson*, 339 U.S. at 783; *Verdugo-Urquidez*, 494 U.S. at 269. While the court disputes the territorial sovereignty of Guantanamo, it ultimately determines that the physical location of Guantanamo is irrelevant to the RFRA analysis. *Rasul I*, 512 F.3d at 667 n.19.

[115] *Rasul II*, 563 F.3d at 533 (Brown, J., concurring); *Rasul I*, 512 F.3d at 673–74 (Brown, J., concurring).

look to the plain meaning of the term when the statute does not provide a definition and that, here, "person" includes nonresident "aliens."[116] She wrote that, while RLUIPA removed the term "First Amendment" from RFRA's definition of "exercise of religion,"[117] this was merely "Congress inadvertently delet[ing] the textual hook precluding persons who did not have First Amendment rights from asserting RFRA claims."[118] Disagreeing with the majority's "constricted definition of 'person'" as a remedy to this careless drafting, she instead claimed that RFRA's statutory history suggests that the removal of "First Amendment" from the definition of "exercise of religion" was intended "to broaden the scope of the kinds of practices protected by RFRA, not to increase the universe of individuals protected by RFRA."[119]

However, Judge Brown concurred, rather than dissented, because she believes that the statutory history of RFRA indicates that Congress did not mean to include non-resident enemy combatants.[120] Highlighting that Congress in drafting RFRA was not focused on how to promote religious free exercise in military detention, which might have required more careful balancing of interests, she concluded that these detainees should not be able to bring a RFRA claim.[121]

B. Continuing Relevance of the Question

Over the course of both decisions, the essential holding of *Rasul* was that non-resident "aliens" were not "person[s]" under the meaning of RFRA because "person[s]" was to be interpreted consistently with its use in other constitutional provisions, and this meant that it did not include non-resident "aliens."[122] While *Bukhari* is the only federal court to have applied *Rasul* to RFRA claims by immigrants in detention who have not

[116] *Rasul II*, 563 F.3d at 533 (Brown, J., concurring).
[117] See supra notes 45–47 and accompanying text.
[118] *Rasul II*, 563 F.3d at 533–34 (Brown, J., concurring).
[119] Id. at 534–35; see also H.R. Rep. No. 106–219, at 30 (1999) (specifying that the amendment was "clarifying issues that had generated litigation under RFRA," specifically that "[r]eligious exercise need not be compulsory or central to the claimant's religious belief system").
[120] *Rasul II*, 563 F.3d at 535 (Brown, J., concurring).
[121] Id. at 535–36.
[122] *Rasul I*, 512 F.3d 644, 671–72 (D.C. Cir. 2008); *Rasul II*, 563 F.3d at 532–33.

effected an entry, the D.C. Circuit and District Court have continued to apply *Rasul* in RFRA claims brought by Guantanamo Bay detainees.[123]

One decision in particular illuminates the contours of the doctrine in the face of changes to First Amendment doctrine by the Supreme Court.[124] In *Aamer v. Obama*, the D.C. Circuit considered a challenge to force feeding practices at Guantanamo Bay, which Muslim detainees claimed violated their ability to observe fasting during Ramadan.[125] Relying on *Rasul*, the court determined that the detainees were not "person[s]" under RFRA, and therefore could not bring a claim.[126] Notably here, the petitioners argued that the Supreme Court's decision in *Citizens United v. FEC Commission*, decided after *Rasul* but before *Aamer*, should alter the court's reasoning on whether detainees were "person[s]" under RFRA.[127] Specifically, the detainees claimed that because *Citizens United* "espoused a dramatically expansive view of the scope of constitutional protection for 'persons,'" this should signal that the status of "person[s]" under RFRA is no longer controlled by *Rasul*.[128] The court rejected this argument, citing to its recent decision in *Gilardi v. United States Department of Health and Human Services*, where it explicitly refused to expand the definition of "person[s]" under RFRA to include secular corporations after the challenger in that case made a similar argument as to why *Citizens United* should dictate that corporations are people who can exercise religion under RFRA.[129] Linking the two cases, the court wrote the following about the continued application of *Rasul* to RFRA interpretation: "If nothing in *Citizens United* compels the conclusion that corporations are 'person[s]' within the meaning of RFRA, that decision certainly does not compel us to revisit our conclusion that nonresident aliens are likewise excluded from RFRA's protections."[130] Therefore,

[123] Celikgogus v. Rumsfeld, 920 F. Supp. 2d 53, 60 (D.D.C. 2013); Allaithi v. Rumsfeld, 753 F.3d 1327, 1334 (D.C. Cir. 2014).

[124] Aamer v. Obama, 742 F.3d 1023 (D.C. Cir. 2014).

[125] Id. at 1026–27; Aamer v. Obama, 953 F. Supp. 2d 213, 215–16 (D.D.C. 2013).

[126] *Aamer*, 742 F.3d at 1043 ("[T]he law of this circuit clearly forecloses petitioners' RFRA claim.").

[127] Id.

[128] Brief of Appellants at 42–43, Aamer v. Obama, 742 F.3d 1023 (D.C. Cir. 2014) (No. 13-5223) ("It hardly advances domestic and international respect for American democracy when the Supreme Court treats corporations as 'persons' but the President insists that human beings detained at Guantánamo Bay are not.").

[129] *Aamer*, 742 F.3d at 1043.

[130] Id. The dramatic irony of this statement to the reader is plain from the Supreme Court's ruling in *Burwell v. Hobby Lobby Stores, Inc.*, where, while not relying directly on *Citizens*

while dicta, this statement squarely establishes an opening for a change in the analysis if corporations are determined to be "person[s]" under RFRA.[131]

Notably, the reason that only one lower court has conducted this reading of RFRA is not because cases are not brought by immigrants in detention claiming RFRA violations but because the question of whether RFRA even applies to immigrants in detention is not frequently litigated. First, as previously stated, not all immigrants in detention are subject to the entry fiction.[132] Because only those subject to the entry fiction would be susceptible to this challenge to a RFRA claim, this necessarily excludes certain cases from containing this challenge from the outset.

Second, even in cases where the immigrant is subject to the entry fiction, there are a number of other rejoinders to a RFRA claim which may be more successful. For example, in *Wong v. United States*, the Ninth Circuit considered a RFRA challenge by an immigrant subject to the entry fiction who, among other allegations, claimed she was denied meals that complied with her religious practices while in detention.[133] While the government did argue in their appellate brief that because Ms. Wong had not entered the country, she was not a "person[]" under RFRA,[134] this argument went to their qualified immunity defense, rather than as an underlying defense of the applicability of RFRA. Noting Ms. Wong's status as an immigrant who had not effected an entry, the government argued that the defendants were entitled to qualified immunity "because it would not be clear to [a] reasonable person that Ms. Wong was a 'person' entitled to assert a RFRA claim in United States court."[135] In the appellate briefs, only this one sentence appears to make the argument that Ms. Wong is not a "person[]" under RFRA, and the court declined even to reach the qualified immunity defense to RFRA, deciding the claim on other grounds.[136] In other cases where immigrants in detention brought RFRA claims, the government argued that the claims were moot, as defendants were no longer in detention and were seeking only injunctive

United, the Court held that for-profit corporations that are closely held are "person[s]" under RFRA. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707, 719 (2014); see also infra Section III.A.

[131] See infra Section III.A.

[132] See supra Section I.B

[133] 373 F.3d 952, 959 (9th Cir. 2004).

[134] Brief for the Appellants at 60, *Wong*, 373 F.3d 952 (No. 02-35727).

[135] Id.

[136] *Wong*, 373 F.3d at 977–78.

relief.[137] Additionally, another dispute centered on whether RFRA provided for money damages rather than just injunctive relief.[138]

Despite *Bukhari* being the only federal court to have determined that immigrants in detention subject to the entry fiction are not "person[s]" under RFRA, this is a live issue for two reasons. First, free exercise violations are clearly occurring in immigrant detention centers across the country. If, as the *Bukhari* court suggests, immigrants who have not effected an entry lack First Amendment rights, and if the *Rasul* doctrine applies to their RFRA rights as well, they may lack any ability to adjudicate the degrading violations of their religious freedom that they could, and some do, suffer. Second, recent arguments made in lower courts[139] and cautions from Supreme Court dissents[140] suggest that the entry fiction may be ripe for expansion to preclude immigrants' access to substantive constitutional rights. At the same time, decisions on RFRA have suggested that the very underpinnings of *Rasul* and its interpretation of RFRA rights are at odds with the Court's interpretation of religious freedom. Therefore, the question of whether immigrants in detention are "person[s]" under RFRA is squarely in the middle of this doctrinal conflict and is urgently applicable to real violations against immigrants in detention.

III. RFRA UNTETHERED: RECENT SUPREME COURT DECISIONS CHANGE THE STATUTORY ANALYSIS

Rasul's and *Bukhari*'s analysis of RFRA may no longer be viable as it applies to immigrants in detention. This Note will contend that, as the Court in *Burwell v. Hobby Lobby Stores, Inc.* expanded RFRA to be a statute separate and apart from the First Amendment jurisprudence that preceded it, RFRA provides protections for individuals regardless of their constitutional status. If the statutory interpretation of "person[s]" under RFRA depends on the First Amendment rights of those bringing the claim, then the entry fiction may be interpreted by lower courts to preclude these immigrants from bringing a RFRA claim. However, if the analysis is divorced from the First Amendment, it is inconceivable that a court could so limit the remedies available to immigrants. While this

[137] Defendant's Motion to Dismiss at 4–5, Abdulkadir v. Hardin, No. 2:19-CV-00120 (M.D. Fla. Feb. 27, 2019), ECF No. 106.
[138] Order at 2, id., No. 2:19-CV-00120, ECF No. 135.
[139] See supra note 58.
[140] See supra note 20.

dramatic expansion of free exercise rights, particularly combined with the lack of protections for third-party harms that the Court in *Hobby Lobby* also seems to espouse,[141] is generally conceived of as portending dramatic consequences for protecting civil rights more broadly,[142] this Note contends that this actually aids immigrants in detention because it establishes that they are able to bring suit under RFRA.

A. Hobby Lobby*: New Approaches to Defining "Person[]" Under RFRA*

In its decision in *Burwell v. Hobby Lobby Stores, Inc.*, the Court laid out a framework of statutory analysis under RFRA that is crucial to understanding whether non-resident immigrants subject to the entry fiction are "persons[s]" under the statute. While the Court considered multiple questions in *Hobby Lobby*,[143] the most relevant here is the question of whether closely held, for-profit corporations are "person[s]" who can exercise religion within the meaning of RFRA.[144] Holding that these for-profit corporations were "person[s]" who could "exercise religion," the Court staked a position in a crucial underlying question of RFRA interpretation: Was the statute meant to reenact a pre-*Smith* regime entirely, or was it meant to go beyond the constitutional guarantees of free exercise under the *Smith* regime?[145] This question is essential to resolving whether non-resident immigrants are "person[s]" under RFRA because, as stated, if "person[s]" under RFRA are not tied to prior constitutional provisions, but instead are to be interpreted as they would in any other statutory analysis, there is stronger reason to believe that "person[s]" includes immigrants subject to the entry fiction. This Section will first give an overview of the Court's approach in holding that for-profit corporations are "person[s]" under RFRA and will then highlight the dispute about the scope of the First Amendment in RFRA's statutory interpretation.

In *Hobby Lobby*, the Court considered a RFRA challenge brought by "three closely held" for-profit corporations to the contraceptive mandate

[141] See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 764 (2014) (Ginsburg, J., dissenting).

[142] See Schwartzman, Schragger & Tebbe, supra note 26; see also Lupu, supra note 26, at 93.

[143] *Hobby Lobby*, 573 U.S. at 688–92; see Lupu, supra note 26, at 41–42.

[144] *Hobby Lobby*, 573 U.S. at 705, 709.

[145] Id. at 684; see Lupu, supra note 26, at 75–76.

of the Affordable Care Act ("ACA").[146] The ACA required employers with fifty or more full-time employees to provide group health insurance that complies with the ACA requirements, or incur a penalty for not doing so.[147] As a part of these ACA requirements, employers, unless excepted, must provide "preventive care and screenings" for women,[148] defined by the Department of Health and Human Services to require "[a]ll Food and Drug Administration [("FDA")] approved contraceptive methods, sterilization procedures, and patient education and counseling."[149] In *Hobby Lobby*, the Supreme Court consolidated two cases in which for-profit companies had challenged the contraceptive mandate as a violation of the sincerely held religious beliefs of the companies' owners[150] because some of these FDA-approved contraceptive methods included those that, according to the Court, "may have the effect of preventing an already fertilized egg from developing any further . . . ."[151]

In the majority opinion, Justice Alito answered two questions in determining whether the plaintiffs can bring a RFRA claim. First, are the for-profit corporations "person[s]"?[152] Second, and perhaps more important to the holding of *Hobby Lobby*, are they "person[s]" that can exercise religion?[153] Justice Alito began by describing the goals behind defining "person[s]" as including for-profit corporations.[154] Noting that it is a "familiar legal fiction" that corporations are people, and that this fiction is intended to protect those individuals who "are associated with a corporation in one way or another,"[155] Justice Alito specified that protecting the rights of corporations to religious free exercise is done to

[146] *Hobby Lobby*, 573 U.S. at 688–90.

[147] Id. at 696–97. If the employer's provided health insurance does not comply with the ACA's group-health-care requirements, employers are required to pay $100 per employee per day. If the employer chooses to not provide health insurance at all, but if even one of its employees gets healthcare via a subsidy from the ACA exchanges, the employer must pay $2,000 per year per employee. Id.

[148] Id. at 697 (citing 42 U.S.C. § 300gg–13(a)(4)).

[149] Id. (citing 77 Fed. Reg. 8725 (Feb. 15, 2012)).

[150] Id. at 689–90; see Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Conestoga Wood Specialties Corp. v. Sec'y of United States Dep't of Health & Hum. Servs., 724 F.3d 377 (3d Cir. 2013), rev'd and remanded sub nom. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[151] *Hobby Lobby*, 573 U.S. at 697–98.

[152] Id. at 707–09.

[153] Id. at 709.

[154] Id. at 706.

[155] Id.

"protect[] the religious liberty of the humans who own and control those companies."[156]

He then moved to the statutory interpretation question. Remarking that RFRA itself does not anywhere define "person," he looked to the Dictionary Act, which he said "we must consult '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.'"[157] This reference quickly disposed of the matter. The Dictionary Act specifically indicates that "the wor[d] 'person' . . . include[s] corporations,"[158] and, because nothing in RFRA indicates that Congress intended an alternate meaning, this controls.[159] Justice Alito bolstered this determination with the government's concession that *non-profit* corporations are properly considered "person[s]" under RFRA. [160] This confirmed for the Court that *for-profit* corporations must be "person[s]" under RFRA because "no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations."[161]

Crucially, in the analysis of whether for-profit corporations are "person[s]" under RFRA and whether they are persons who can engage in "exercise of religion," Justice Alito not only rejected an attempt to cabin RFRA's applicability to the types of cases brought to the Court before *Smith*,[162] but actually went beyond this to suggest that an analysis of a claim under RFRA may be completely divorced from analysis under the First Amendment.[163] The moves that are made to accomplish this are subtle, so this Section will outline them carefully. This conclusion about the Court's interpretation of RFRA is not, by any means, unique to this Note.[164] Instead, this Note seeks to highlight this analysis in order to answer the ultimate question of whether immigrants subject to the entry fiction are "person[s]" under RFRA. The choice made by the Court in

[156] Id. at 707.
[157] Id. (quoting 1 U.S.C. § 1).
[158] Id. (quoting 1 U.S.C. § 1).
[159] Id. at 708.
[160] Id.
[161] Id.
[162] Id. at 713.
[163] Id. at 695 n.3 ("On [*City of Boerne*'s] understanding of our pre-*Smith* cases, RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions."); see Schwartzman, Schragger & Tebbe, supra note 26; Lederman, supra note 26; see also Lupu, supra note 26, at 76.
[164] See Schwartzman, supra note 26; Lederman, supra note 26.

Hobby Lobby to allow the language of RFRA, rather than lurking First Amendment precedents, to control the outcome is instrumental to the understanding of whether non-resident immigrants could receive protection under RFRA, even if they were ineligible for constitutional protection under the First Amendment.

In the most obvious section in which the Court distances RFRA's interpretation from that of the pre-*Smith* free exercise case law, Justice Alito directly disclaimed any attempt by the government to restrict the scope of RFRA to only include those types of cases litigated before *Smith*, relying on the language of the statute, its legislative history, and practical arguments to do so.[165] The government had argued that for-profit corporations could not exercise religion, even if they were properly classified as "person[s]" under the statute, because no pre-*Smith* decision had affirmatively held that a for-profit corporation could bring a free exercise claim.[166] Because, in the government's view, the purpose of RFRA was to reinstate the pre-*Smith* jurisprudence of the Court, this lack of precedent precluded the Court in *Hobby Lobby* from allowing these corporations to bring their claims.[167] Justice Alito definitively rejected this, stating that RFRA, particularly as amended by RLUIPA, could not be read to reinstate the "Court's pre-*Smith* decisions in ossified form."[168]

First, he noted that the language in RFRA as first enacted defined the exercise of religion as "the exercise of religion under the First Amendment."[169] Remarking that Congress has previously included limiting statements in statutes, defining terms to mean "law, as determined by the Supreme Court of the United States," he concluded that the fact that Congress did not include this type of limitation in RFRA suggests that they did not intend for it to reinstate prior case law.[170] Further confirming this, and, indeed, laying any potential dispute to rest in Justice Alito's view, RLUIPA amended RFRA by eliminating the First Amendment reference in the definition of "exercise of religion," instead mandating that "exercise" "shall be construed in favor of a broad

[165] *Hobby Lobby*, 573 U.S. at 713–14.
[166] Id. at 713.
[167] Id.
[168] Id. at 715.
[169] Id. at 714 (quoting 42 U.S.C. § 2000bb-2(4) (1994)).
[170] Id.

protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[171]

Finally, Justice Alito remarked on the practical implications that this position would have. Specifically, it would preclude a whole host of plaintiffs from suing under RFRA just because their particular type of plaintiff had not come before the court prior to RFRA.[172] In particularly relevant dicta, Justice Alito wrote that there is not "any pre-*Smith* case in which this Court entertained a free-exercise claim brought by a resident noncitizen," then asking the rhetorical question: "Are such persons also beyond RFRA's protective reach simply because the Court never addressed their rights before *Smith*?"[173] While no commentators have directly addressed this statement, it is of course illustrative of the different types of challenges to the scope of the word "person[s]" in RFRA. It also potentially underscores the importance of the question of whether RFRA protects *non-resident* "aliens" as well as the resident "aliens" who Justice Alito seems to be sure are protected under the law.

Notably, the rejection of the government's claim that pre-*Smith precedents* control may not, alone, completely divorce RFRA's analysis from the First Amendment. Justice Alito, in the previously described passages, only rejects this argument insofar as it would force the Court to rely on pre-*Smith case law* to analyze RFRA cases, rather than because it would tether the RFRA statutory analysis to a First Amendment analysis.[174] In other words, this discussion merely confirms that RFRA is not cabined to the exact situations that comprised pre-*Smith* case law, but it does not directly preclude the Court from using the current interpretation of who can bring a First Amendment claim as a method of analyzing "person[s]" under the statute. However, other parts of the opinion do make this clear.

From the outset, Justice Alito states that RFRA, as amended by RLUIPA, was intended by Congress to "effect a complete separation from First Amendment case law . . . ."[175] Noting that RFRA requires a showing by the government that any burdens imposed on an individual "[are] the least restrictive means of furthering [a] compelling government

[171] Id. (quoting 42 U.S.C. § 2000cc-3(g)).
[172] Id. at 715–16.
[173] Id. at 716.
[174] Id. at 715 ("[T]he results would be absurd if RFRA merely restored this Court's pre-*Smith* decisions in ossified form.").
[175] Id. at 696.

interest,"[176] Justice Alito references the Court's statement in *City of Boerne v. Flores* where it wrote that the "least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify."[177] Here, Justice Alito makes his most explicit statement to distance RFRA analysis from any First Amendment analysis, claiming that "[o]n this understanding of our pre-*Smith* cases, RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions."[178]

In arguing that RFRA did mean to codify the Court's pre-*Smith* jurisprudence, Justice Ginsburg, in dissent, disputes the claim that pre-*Smith* cases used any tailoring requirements other than the "least restrictive means," notwithstanding the language in *City of Boerne* to which Justice Alito points.[179] Justice Alito dismisses this claim again in a footnote, writing that "it is unnecessary to adjudicate this dispute" because "[e]ven if RFRA simply restored the *status quo ante*, there is no reason to believe, as [the government] and the dissent seem to suggest, that the law was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases."[180] Therefore, while the majority chooses not to stand completely firm in its assessment of RFRA as "a complete separation from First Amendment case law,"[181] a majority of the Court expressed approbation for this position. Indeed, coupled with Justice Alito's denial that RFRA codified only an "ossified form" of the Court's prior precedents,[182] as well as the analytical method detailed below, even this qualified set of statements goes far to show RFRA's status as a statute almost fully divorced from First Amendment analysis.[183]

Justice Alito's use of the Dictionary Act to conduct this analysis can also be read to confirm his desire to shift the RFRA analysis away from

[176] Id. at 695 (quoting 42 U.S.C. § 2000bb–1(b)(2)).
[177] Id. at 695 n.3.
[178] Id.
[179] Id. at 749–50 (Ginsburg, J., dissenting).
[180] Id. at 706 n.18.
[181] Id. at 696; see Caleb C. Wolanek & Heidi Liu, Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases, 78 Mont. L. Rev. 275, 289 (2017).
[182] *Hobby Lobby*, 573 U.S. at 715.
[183] See Lederman, supra note 26 ("[T]he majority blinks: In footnote 18, Justice Alito writes that '[f]or present purposes, it is unnecessary to adjudicate this dispute' about whether RFRA established a new, much more searching, form of a 'least restrictive means' test. Therefore it is not a *holding* of *Hobby Lobby*. Even so, lower courts are bound to take heed when the Court calls a test 'exceptionally demanding' and 'stringent.'").

the First Amendment. The procedural history of *Hobby Lobby* and the two consolidated cases it considered from the U.S. Courts of Appeals for the Tenth and Third Circuits,[184] as well as the three other circuits that considered this specific question, took a variety of approaches to this statutory interpretation.[185] On one end of these precedents, the Tenth Circuit in *Hobby Lobby Stores, Inc. v. Sebelius* viewed the interpretation of "person[s]" in the Dictionary Act as dispositive to resolving the question of how to interpret "person[s]" under RFRA.[186] On the other end, the Third Circuit in *Conestoga Wood Specialties Corp. v. Secretary of United States Department of Health & Human Services*, the case which the Court compiled with the Tenth Circuit's decision in *Hobby Lobby* for review in its eventual *Hobby Lobby* decision, instead determined that the "threshold question" for the court to determine the definition of "person[s]" under RFRA was the question of whether for-profit corporations have First Amendment rights.[187] The other circuits to have addressed this case took various intermediary positions between these two poles. Some considered both the Dictionary Act as well as other sources of definitions for "person[s]" and pre-*Smith* case law,[188] while the D.C. Circuit only focused on the pre-*Smith* line of cases.[189] Therefore, if the range of possible interpretive methods used in this multi-circuit split are to be viewed on a continuum, one might view the exclusive use of the Dictionary Act as the opposite end of the continuum to believing that First Amendment free exercise pre-*Smith* jurisprudence should control.[190] Arguably then, Justice Alito's decision to resolve this multi-circuit split by selecting the interpretive method furthest on this continuum from the pre-*Smith* jurisprudence might suggest an attempt to clearly stake out that he intends RFRA to have independence from the First Amendment as a statute.

[184] See sources cited supra note 150.

[185] Emily J. Barnet, *Hobby Lobby* and the Dictionary Act, 124 Yale L.J.F. 11, 13 (2014).

[186] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1129 (10th Cir. 2013), aff'd sub nom. *Hobby Lobby*, 573 U.S. 682 (2014).

[187] Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Hum. Servs., 724 F.3d 377, 382–83 (3d Cir. 2013), rev'd and remanded sub nom. *Hobby Lobby*, 573 U.S. 682 (2014).

[188] See Autocam Corp. v. Sebelius, 730 F.3d 618, 626 (6th Cir. 2013); Korte v. Sebelius, 735 F.3d 654, 674 (7th Cir. 2013); Barnet, supra note 185, at 13–14.

[189] See Gilardi v. U.S. Dep't of Health & Hum. Servs., 733 F.3d 1208, 1211–12 (D.C. Cir. 2013); Barnet, supra note 185, at 13–14.

[190] Cf. Barnet, supra note 185, at 13–14 (listing the various resolutions of the question by circuit courts prior to *Hobby Lobby*).

It should not be understated how far of a departure this analysis is from the Court's pre-*Hobby Lobby* decisions on RFRA.[191] Indeed, Justice Ginsburg, in dissent, does not let the reader lose sight of this potentially radical reinterpretation of RFRA, noting that the specific aim of the Act to restore *Sherbert*'s compelling interest test is directly written into the law, and was acknowledged during the legislative history.[192] She takes issue with the majority's analysis of the deletion of "First Amendment" from RFRA's definition of "exercise of religion," noting, as the concurrence in *Rasul* did, that this "in no way suggests that Congress meant to expand the class of entities qualified to mount religious accommodation claims."[193] Finally, as noted, she rejects the attempt to use RFRA's "least restrictive means" requirements to divorce it from First Amendment law, as she determines that the pre-*Smith* jurisprudence did, in effect, use a least restrictive means requirement.[194] While Justice Ginsburg may be correct in her "powerful dissent['s]"[195] analysis of RFRA and its relationship to the First Amendment,[196] particularly given the explicit purposes laid out in the statute itself, the majority of the Court's decision to untether RFRA from First Amendment jurisprudence is resolute, with Justice Kennedy concurring only primarily to acknowledge the government's compelling interest in providing healthcare to women.[197]

B. Landscape Post-Hobby Lobby

After *Hobby Lobby*, then, it seems that the Court has suggested that RFRA analysis, at least when considering which "person[s]" may be able to bring a claim under it, should be divorced from First Amendment analyses. Scholars did forewarn the possibility that RFRA would advance protections of religious free exercise far beyond the pre-*Smith*

[191] See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006) ("[RFRA] adopts a statutory rule comparable to the constitutional rule rejected in *Smith*.").

[192] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 746–47 (2014) (Ginsburg, J., dissenting).

[193] Id. at 748 (Ginsburg, J., dissenting) (citing *Rasul II*, 563 F.3d 527, 535 (D.C. Cir. 2009) (Brown, J., concurring)).

[194] Id. at 749–50 & n.11 (Ginsburg, J., dissenting).

[195] Id. at 736 (Kennedy, J., concurring).

[196] See Schwartzman, supra note 26; Lederman, supra note 26.

[197] *Hobby Lobby*, 573 U.S. at 737 (Kennedy, J., concurring).

jurisprudence,[198] and comments on the decision just after its publication also focused on this concern.[199] Generally, some have worried that this decision, coupled with *Hobby Lobby*'s disregard for third-party harms that may flow from successful free exercise claims, broadens the ability of individuals to bring religious free exercise challenges that harm the civil rights of other individuals.[200] However, for the question of whether non-resident immigrants are "person[s]" under RFRA, it is a welcome development to treat the question as a statutory one devoid of any First Amendment questions. If RFRA is to be interpreted just as other statutes are to be interpreted, there is very little in the way to stop courts from interpreting "person[s]" as individual human beings, which would have to include non-resident immigrants. Therefore, relevant to the analysis of whether non-resident immigrants are "person[s]" under RFRA, it is essential to determine whether the total separation of RFRA from First Amendment free exercise jurisprudence has been understood to be good law coming out of *Hobby Lobby*.

Notably, in one of the Court's decisions on RFRA from the October 2020 term, Justice Thomas's majority opinion appeared to reject the theory that RFRA is completely divorced from pre-*Smith* jurisprudence.[201] In *Tanzin v. Tanvir*, a case that presents the question of whether RFRA allows for money damages, Justice Thomas, writing for a unanimous court, held that RFRA did permit litigants to recover money damages against federal officials in their individual capacities.[202] In doing so, Justice Thomas noted multiple times in dicta that "RFRA reinstated pre-*Smith* protections and rights,"[203] seemingly contradicting the Court's prior holding in *Hobby Lobby*, which Justice Thomas joined.[204] However, the two seemingly contradictory opinions can be reconciled by looking to the actual holding of *Tanzin*. Justice Thomas, in determining what "appropriate relief" in RFRA meant, wrote that parties suing under "RFRA must have at least the same avenues for relief against officials that they would have had before *Smith*."[205] The statement that RFRA

[198] See Lupu, supra note 31, at 195 ("RFRA, literally construed, would thus insulate religious exercise far beyond its most stringent protection in the prior law.").
[199] See Schwartzman, supra note 26; Lederman, supra note 26.
[200] See supra note 142 and accompanying text.
[201] Tanzin v. Tanvir, 141 S. Ct. 486, 489 (2020).
[202] Id. at 493.
[203] Id. at 489, 492.
[204] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 687 (2014).
[205] *Tanzin*, 141 S. Ct. at 492.

cannot be read to limit relief beyond what would have been protected under pre-*Smith* jurisprudence, as Justice Thomas expressed in *Tanzin*, does not itself directly contradict the belief that RFRA protects more religious activity than pre-*Smith* decisions, as expressed by Justice Alito's decision in *Hobby Lobby*.[206] While dicta in the opinion indicating that RFRA codified pre-*Smith* jurisprudence is relevant to whether or not *Hobby Lobby*'s analysis will continue to be relevant in future cases, the holding of *Tanzin* itself did not cast doubt on *Hobby Lobby*'s analysis.

Litigants prior to the decision in *Tanzin* have continued to use *Hobby Lobby* to stand for the proposition that RFRA ushered in a break from pre-*Smith* jurisprudence. In the oral arguments for *Tanzin*, Justice Breyer, asking a question about the merits of the case, stated: "But this whole statute, RFRA, is really an effort to put into statutory form a certain kind of constitutional interpretation that *Smith*, in fact, rejected."[207] In response, counsel for the respondents, plaintiffs who originally brought the RFRA claims, responded that, as *City of Boerne* and *Hobby Lobby* made clear, the Court has stated that RFRA "did something more than merely restore free exercise claims as they existed under jurisprudence pre-*Smith*," but that instead it enacted a regime of which the "net result is a very broad protection for religious freedom that goes beyond the constitutional baseline."[208] Additionally, in *Hassan v. Obama*, counsel for detainees objecting to free exercise violations at Guantanamo expressly invoked *Hobby Lobby*'s language on the broad scope of RFRA and its disconnect from prior First Amendment laws to claim that *Rasul* should be overturned.[209] Noting *Hobby Lobby*'s language that Congress intended for RFRA "to effect a complete separation from First Amendment case law,"[210] and noting *Rasul*'s complete reliance on prior constitutional case law to hold that detainees at Guantanamo were not "person[s]" under RFRA,[211] the detainee argued, as this Note does,[212] "[t]he holding and express reasoning in *Hobby Lobby* makes *Rasul* a dead letter."[213] While

[206] See supra Section III.A.

[207] Transcript of Oral Argument at 38, Tanzin v. Tanvir, 141 S. Ct. 486 (2020) (No. 19-71).

[208] Id. at 1, 38–39.

[209] Petitioner's Emergency Application for a Temporary Restraining Order at 1, 4–7, Hassan v. Obama, No. 04-1194 (D.D.C. July 3, 2014).

[210] Id. at 4.

[211] Id.

[212] See infra Section IV.B.

[213] Petitioner's Emergency Application for a Temporary Restraining Order at 5, Hassan v. Obama, No. 04-1194, (D.D.C. July 3, 2014).

the court denied this motion without much discussion, the effect of this petition and the arguments therein is to confirm that this understanding of *Hobby Lobby*'s effect on RFRA has broad connotations.

It is not just *Hobby Lobby* that suggests that *Rasul*'s analysis should not be applied to immigrants in detention. The Court recently decided *Department of Homeland Security v. Thuraissigiam* and declined to apply precedents involving Guantanamo detainees to the immigration context.[214] While this particular discussion in the opinion focused on immigrants' ability to receive judicial review on a habeas claim, it suggests that the Court may not be inclined to mechanically apply precedents involving Guantanamo detainees to the immigration context.

Finally, one other case potentially suggests that the Court may be prepared to deny immigrants their rights under RFRA, although its applicability to this question seems less compelling. The Court in *Trump v. Hawaii* considered an Establishment Clause challenge to President Trump's "Muslim Ban" excluding individuals from Muslim majority countries from the United States.[215] While this was a constitutional, rather than a statutory, challenge, and while it did not deal directly with immigrants and the entry fiction, it is relevant because of how the Court characterized the Executive's plenary power over immigration. Specifically, the Court afforded great deference to the Executive's "fundamental sovereign" ability to exclude and admit individuals.[216] However, this case will not greatly affect the outcome of a decision on the question this Note presents because, while the Executive and Congress have great power to exclude or admit people to America, the Court will likely not find that this same power extends to the ability to harm immigrants in detention without consequence.[217]

IV. CRAFTING A REMEDY: WHY NON-RESIDENT IMMIGRANTS ARE "PERSON[S]" UNDER RFRA

This Note has already argued that a plain reading of RFRA is, normatively, the best approach to guarantee rights to immigrants subject to the entry fiction, as it eliminates any concerns about their potential lack

[214] 140 S. Ct. 1959, 1975 (2020).
[215] Trump v. Hawaii, 138 S. Ct. 2392, 2403, 2417 (2018).
[216] Id. at 2418 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).
[217] See Zadvydas v. Davis, 533 U.S. 678, 703–04 (2001) (Scalia, J., dissenting) (noting approval of the entry fiction, based on the same plenary power of the Executive and Congress, but stating that he is "sure [immigrants] cannot be tortured").

of constitutional rights. The purpose of this Part is to show that this approach is not just morally correct, but that, after *Hobby Lobby*, it is what lower courts should, and the Supreme Court will likely, follow. To do this, this Part will outline various paths of statutory interpretation that could be used, noting the likely outcomes under each and, based on precedents, the likelihood that they are the correct form of analysis under RFRA.

As noted, the Court's recent decision in *Thuraissigiam* suggests that *Rasul*, as a case about Guantanamo detainees, cannot be mechanically applied to non-resident immigrant detainees. While *Rasul* may not provide a clean answer to the question of whether non-resident immigrants are "person[s]" under RFRA, the logic used throughout the many opinions that result from *Rasul v. Meyers*[218] provides a useful summary of the types of statutory approaches that a court might take to resolve this issue. This Part will survey examples of statutory interpretation from *Rasul v. Meyers*, as well as contraceptive mandate cases involving for-profit companies as parties that preceded *Hobby Lobby* in the lower courts, to identify the correct methodology to answer the question: Who are "person[s]" under RFRA?

A. RFRA Tethered to First Amendment Protections

As a first approach, courts could limit those who are classified as "person[s]" under RFRA to those who have First Amendment free exercise rights. This method was used by the district court in *Bukhari*[219] and by two circuits in cases that, very similarly to *Hobby Lobby*, involved a challenge by for-profit corporations to the ACA's contraceptive mandate: the D.C. Circuit in *Gilardi v. United States Department of Health & Human Services*[220] and the Third Circuit in *Conestoga Wood Specialties Corp. v. Secretary of United States Department of Health & Human Services*.[221] As *Conestoga Wood* was one of the consolidated

[218] *Rasul II*, 563 F.3d 527, 533 (D.C. Cir. 2009); *Rasul I*, 512 F.3d 644, 671 (D.C. Cir. 2008); Rasul v. Rumsfeld, 433 F. Supp. 2d 58, 66–67 (D.D.C. 2006).

[219] Bukhari v. Piedmont Reg'l Jail Auth., No. 01:09-CV-1270, 2010 WL 3385179, at *5 (E.D. Va. Aug. 20, 2010).

[220] 733 F.3d 1208, 1212 (D.C. Cir. 2013) ("The query is simple: do corporations enjoy the shelter of the Free Exercise Clause?").

[221] Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Hum. Servs., 724 F.3d 377, 388 (3d Cir. 2013), rev'd and remanded sub nom. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) ("Our conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular

cases in the Court's decision in *Hobby Lobby*, and as the Court roundly rejected this analysis in its *Hobby Lobby* decision,[222] it is unlikely that this approach would be appropriate for courts to use in the immigration context as well.

If the analysis were to move forward, it would prove tricky, as evidenced by the fact that the general First Amendment rights for immigrants subject to the entry fiction may be under threat.[223] Because the Court has not yet ruled directly on whether immigrants subject to the entry fiction have First Amendment rights, any interpretation of RFRA under this framework would likely result in unequal application of the law.[224] And, if an immigrant happened to have the law applied in such a way as to deny her constitutional rights, she would per se lose her RFRA statutory remedy as well. Thus, tying the interpretation of "person[s]" under RFRA directly to the First Amendment's protections is not only inadvisable from a jurisprudential standpoint, but may also prove disastrous at protecting immigrants. Fortunately, it would appear that the Court's decision in *Hobby Lobby* has effectively prohibited this analysis.[225] At the very least, the cautions in *Hobby Lobby*, espoused by Justice Alito, that RFRA had in fact gone beyond the protections of the First Amendment may mean that the Court will rely on a different analysis to deny immigrants relief under RFRA.

B. In Pari Materia *Canon*

If the Court does not completely tether the analysis to the First Amendment, as this Note suggests it will not, it could employ the *in pari materia* canon of statutory construction, which states that statutes on the same subject should be interpreted as though they are one.[226] The court in *Rasul I* and *Rasul II* applied this framework to RFRA, using the Constitution as the material "on the same subject" as RFRA and interpreting RFRA consistently with the rest of the constitutional

corporation cannot engage in the exercise of religion. Since Conestoga cannot exercise religion, it cannot assert a RFRA claim.").

[222] See supra Section III.A.

[223] See supra note 58; see supra note 63.

[224] Cf. Kagan, supra note 58, at 1240 (highlighting how the "muddle[d]" case law leaves immigrants vulnerable to government suppression of First Amendment speech rights).

[225] See supra Section III.A.

[226] *Rasul I*, 512 F.3d 644, 671 (D.C. Cir. 2008) (quoting Wachovia Bank v. Schmidt, 546 U.S. 303, 315–16 (2006)); Anuj C. Desai, The Dilemma of Interstatutory Interpretation, 77 Wash. & Lee L. Rev. 177, 182 (2020).

provisions.[227] Note that the *in pari materia* canon requires two steps, even if they are not commonly delineated[228]: First, the court must determine which statutes are "on the same subject," and second, the court must determine how the relevant provisions in those statutes are construed.[229] Crucially, it is *Rasul*'s analysis of the first step in this series which causes it to fail for the same reasons discussed above. In order to use the other constitutional provisions as comparator statutes to determine the definition of "person," the court needed to state that the purpose of RFRA "was to restore what, in Congress's view, is the free exercise right the Constitution guaranteed—in both substance and scope."[230] For the same reasons that *Hobby Lobby* limits the tethering of First Amendment definitions to the statutory analysis of "person[s]" under RFRA, it also limits the use of the Constitution as the comparator statute for the *in pari materia* construction. Indeed, this is the very reasoning which the detainees in *Hassan v. Obama* picked up on as the faultline that *Hobby Lobby* created in *Rasul*'s reasoning: if *Hobby Lobby* limits the First Amendment's applicability to RFRA, then *Rasul*'s reasoning is completely undermined.[231] In other words, "*Hobby Lobby* makes *Rasul* a dead letter."[232]

Even if *Hobby Lobby*'s reasoning could not be extended to undermine the first step in *Rasul*'s *in pari materia* construction, *Rasul*'s application of the second step—interpreting the two provisions in statutes on the same subject as consistent with each other—would likely be insufficient. The court in *Rasul* determined that "person[s]," if interpreted in line with other constitutional provisions, would not include "aliens" under RFRA, relying on two cases applying the Fourth and Fifth Amendments to non-resident "aliens" to do so.[233] As the *Rasul* concurrence noted, one of these two cases, *Eisentrager*, which determined that German enemy combatants being held by American troops were not entitled to due process rights under the Fifth Amendment, made no mention of the term

[227] *Rasul I*, 512 F.3d at 671; *Rasul II*, 563 F.3d 527, 533 (D.C. Cir. 2009).

[228] Desai, supra note 226, at 184 (calling "the determination of *whether* two statutes are *in pari materia* . . . Step Zero" of the analysis).

[229] Id.

[230] *Rasul II*, 563 F.3d at 532–33.

[231] Petitioner's Emergency Application for a Temporary Restraining Order at 5, Hassan v. Obama, No. 04-1194 (D.D.C. July 3, 2014).

[232] Id.

[233] *Rasul II*, 563 F.3d at 533.

"person[s]" in its analysis.[234] Likewise, the concurrence, referencing *Verdugo-Urquidez*, called into question analogizing the term "person[s]" in a statute to the term "people" in the Fourth Amendment, as "people" generally connotes the American community and is more restrictive.[235] Therefore, while there may be more precedents the Court could rely on in this step of the analysis, those used by the D.C. Circuit in *Rasul* might prove unworkable.

Importantly, the courts did not have to look to the Constitution as a comparator statute for RFRA, as there is another statute on the same subject as RFRA which clearly defines "person[s]" as "individual[s]": RLUIPA.[236] Therefore, if a court is determined to follow the *in pari materia* approach, RLUIPA provides a clear comparator, and a strong indication that "person[s]" in RFRA should be defined as they are in RLUIPA: individuals.

C. Plain Meaning Approach

Given the issues detailed with other approaches, and given the Court's treatment of RFRA as a statute disconnected from the First Amendment, the cleanest, and likely most correct, way to read "person[s]" in RFRA is by its plain meaning: persons are human beings, including immigrants subject to the entry fiction. Of course, while the Court in *Hobby Lobby* relied on the Dictionary Act and its definition of "person," which includes "corporations,"[237] a court interpreting RFRA as it applies to immigrants subject to the entry fiction need not even go that far, as the Dictionary Act only applies when "the context [does not] indicate[]" the meaning of the word.[238] Because RFRA's direct text indicates that it covers "person[s]," courts need not go beyond this.

As the *Rasul* concurrence noted, "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[239] In RFRA,

[234] Id. at 531; id. at 534 (Brown, J., concurring).

[235] Id. at 535 (Brown, J., concurring); see also Kagan, supra note 58, at 1247.

[236] 42 U.S.C. § 1997(3).

[237] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707 (2014).

[238] 1 U.S.C. § 1; see also Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 751 (2014) (Ginsburg, J., dissenting) ("The Dictionary Act's definition, however, controls only where 'context' does not 'indicat[e] otherwise.' Here, context does so indicate. RFRA speaks of 'a person's exercise of religion.'" (citations and emphasis omitted)).

[239] *Rasul II*, 563 F.3d at 533 (quoting Perrin v. United States, 444 U.S. 37, 42 (1979) (Brown, J., concurring)).

"person[s]" is not defined, but under any plain understanding of the term, it applies to natural persons.[240] Because the plain meaning doctrine applies when the text of the statute is unambiguous—and it is unambiguous that persons are individual, natural persons—the plain language of the statute should control.[241] As noted, RFRA and RLUIPA, while typically addressed through the same analysis, have one crucial difference: RLUIPA provides a statutory definition for "person[s]."[242] As this definition clearly states that "person[s]" under RLUIPA are "individuals," immigrants subject to the entry fiction, as individual human beings, should undoubtedly have a remedy under RLUIPA if not under RFRA.

Finally, the determination of whether immigrants subject to the entry fiction are "person[s]" is just one step in the analysis of whether there is a valid RFRA claim. The claimant then needs to prove that there is a substantial burden on her free exercise of religion, and the government will have a chance to prove that this burden is the least restrictive means of achieving a compelling government interest.[243] Additionally, as previously noted, there are questions about whether qualified immunity can protect individual government officials.[244] This Note will not endeavor to answer these questions, many of which are heavily fact dependent. For the time, it is sufficient to claim that immigrants subject to the entry fiction should, and under the plain reading of RFRA and RLUIPA do, have statutory remedies for violations of their religious free exercise while in detention.

CONCLUSION

This Note seeks to outline what may seem like a small question in the RFRA doctrine: whether immigrants subject to the entry fiction doctrine are "person[s]" under RFRA. By tracking the lower court decisions on the subject and evaluating *Hobby Lobby*'s effect on RFRA interpretation generally, it takes the position that immigrants subject to this fiction *are* "person[s]" under the statute and that this should be derived from the statute's plain meaning. In answering this question, it hopes to not just outline the statutory interpretation that the Supreme Court and lower

[240] Id.
[241] Id.
[242] 42 U.S.C. § 1997(3).
[243] 42 U.S.C. § 2000bb-1.
[244] See Wong v. United States, 373 F.3d 952, 977 (9th Cir. 2004).

courts should and will likely use in addressing a RFRA claim asserted by an immigrant in detention who is subject to the entry fiction, but also hopes to communicate a bigger idea. Namely, RFRA decisions that seem to portend disaster for civil rights can, perhaps in narrow ways, signal hope for those who seek to protect the religious free exercise of some of the most vulnerable. Immigrants in detention who are subject to the entry fiction have their liberty controlled almost absolutely and lack the constitutional rights to challenge this detention. It should not be, and this Note hopes to suggest it will not be, the case that they are likewise subject to degrading treatment because of their religion without a remedy. Courts should adopt the plain meaning of RFRA and declare definitively that immigrants are persons whose free exercise rights are protected.