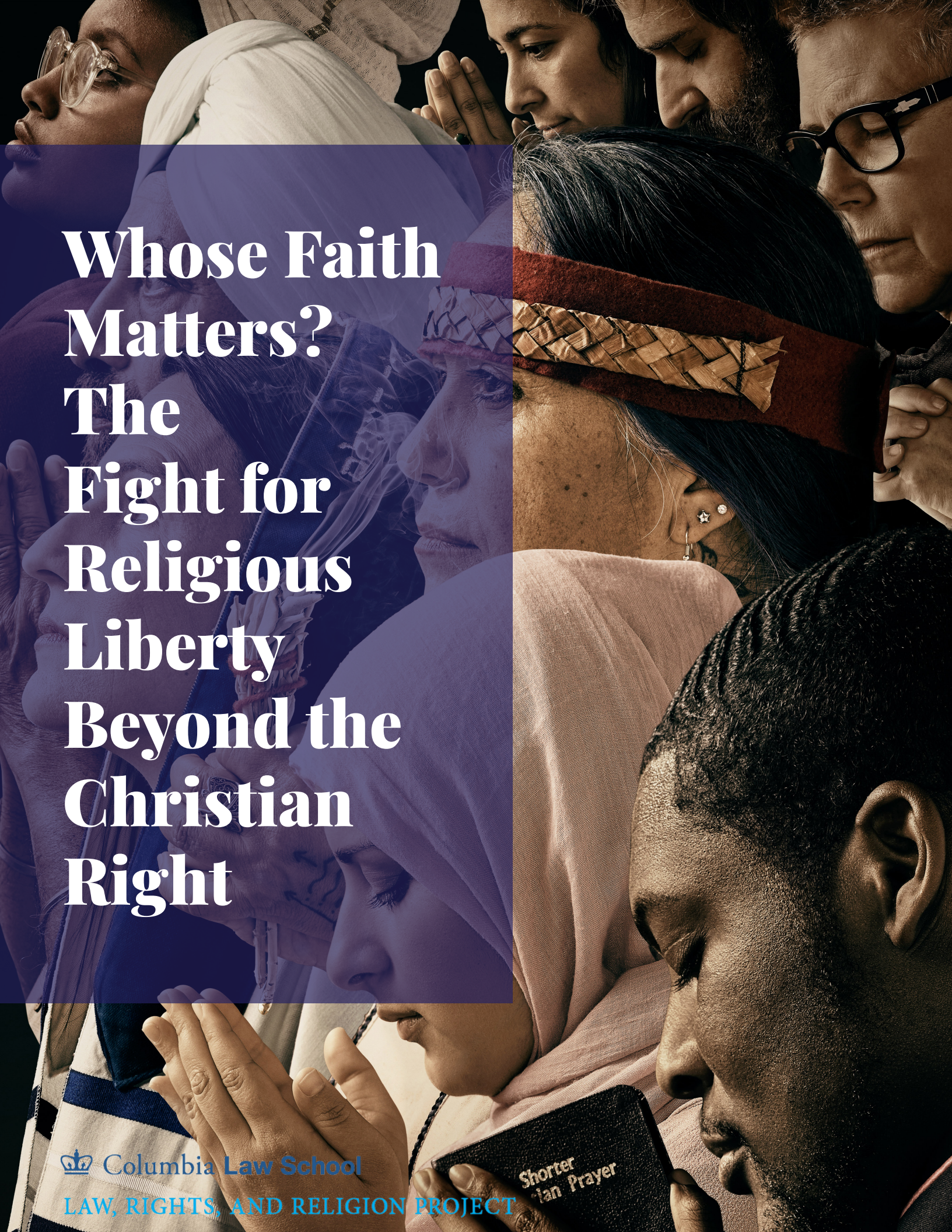

Whose Faith Matters? The Fight for Religious Liberty Beyond the Christian Right

Columbia Law School
LAW, RIGHTS, AND RELIGION PROJECT

November 2019

Acknowledgements

The Law, Rights, and Religion Project thanks the brilliant advocates, attorneys, faith leaders, and academics who participated in our convenings over the past two years for their valuable contributions to, and thoughts on, this important issue. Special thanks to the teams at No More Deaths/No Más Muertes, The Kings Bay Plowshares, Rev. Kaji Douša, and Safehouse, and to their attorneys. For editing assistance, thanks to Tessa Baizer. Finally, thanks for the generous support of the Alki Fund of the Rockefeller Family Foundation and the Rockefeller Brothers Fund.

Note

Much of the litigation described in this report is ongoing. We therefore apologize for any legal developments that occurred after our editing process was finalized, but before the report was released.

Cover Image

For Freedoms (Hank Willis Thomas and Emily Shur in collaboration with Eric Gottesman and Wyatt Gallery of For Freedoms), Freedom of Worship, 2018. Archival pigment print, 42 x 52.5 in.

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Scott Warren receives a blessing from clergy before his trial. Photograph by Ash Ponders, courtesy of the Unitarian Universalist Service Committee.

Long before U.S. courts began to grant religious exemption claims under the Free Exercise Clause, many early progressive and social justice movements were led by people of faith and inspired by religious beliefs. In the 18th century, members of the Religious Society of Friends, also known as Quakers, were some of the first organized abolitionists, believing that slavery violated Christian principles, including their belief that all were equal in the eyes of God. Religion was also an inspiration for many Black abolitionists: Frederick Douglass was an ordained minister of the African Methodist Episcopal Zion Church, and Harriet Tubman, nicknamed "Moses" during her lifetime for her fearless leadership of the Underground Railroad, was guided by dreams and visions that she considered to be messages from God. Later movements of the Progressive Era, including the settlement house movement and the temperance movement, also had significant religious factions.[1]

Perhaps most famously, religious leaders including Rev. Dr. Martin Luther King, Jr.—who according to one biographer "fused the political promise of equal votes with the spiritual doctrine of equal souls"[2]—were key organizers of the civil rights movement of the 1950s and 60s. Notably, the primary tactic of the civil rights movement was civil disobedience, which required activists to accept the mandated punishment for violating segregation and other laws rather than to request religious or other legal exemptions. This approach, echoing a kind of religious martyrdom, was used to draw attention to the laws' immorality, not just as applied to those of particular religious faiths, but to everyone. Some civil rights activists even adopted a "jail, no bail" approach, choosing to stay behind bars rather than pay into a corrupt legal system. Thus, these early social justice movements, though closely intertwined with religious faith, sought to transform laws rather than gain individual, faith-based exemptions from compliance with the law.

Since religious exemption litigation became more prevalent in the 1960s, however, it has been used as a tool by many faith-based social justice movements. From the right to "welcome the stranger" to the right to protect sacred land, religious practitioners have turned to the courts seeking protection for faith-based activities in an enormous variety of contexts.

Unfortunately, the diversity of beliefs represented in current religious liberty litigation is not often well-reflected in mainstream reporting and political commentary on religion, resulting in a public discourse that collapses "religious liberty" into a discussion about conservative Christian beliefs. As political scientist Laura Olson wrote in her examination of religious progressives, since the 1980s "[t]he right benefited from the fact that the media focused a great deal of attention on its conservative brand of faith-based politics, to the virtual exclusion of religious progressivism.

The religious left, to the extent that it has remained visible at all, seems largely to have been perceived as a dinosaur."[3] Similarly, history professor Timothy J. Williams has reflected "since the 1970s, it is the Christian right that has set the discourse about religion in America."[4]

Even the titles of recent news articles—such as "You Know the Religious Right. Here's the Religious Left" and "The Christian Left—Possibly the Most Interesting Group You've Never Heard Of" underscore the lack of attention that has been paid to religious movements outside the Christian right.[5] And while some observers have noted a modest uptick in coverage of religious progressives over the past year, even this reporting often fails to acknowledge those outside the Christian tradition.[6] This intense focus on the beliefs and practices of conservative Christians in the press has been, unsurprisingly, absorbed by media consumers. A 2016 study found that "religious and political conservatives who follow the news closely perceive [religious] freedoms as increasingly under assault."[7]

The discussion of religious liberty advocacy that follows seeks to correct this narrow focus on the religious beliefs and practices of conservative Christians by shining a spotlight on religious liberty advocacy that has been largely forgotten, overlooked, or mistakenly described as secular rather than religious.[8]

Religious Minority Rights

Before addressing more cutting-edge religious liberty litigation, it is important to note the ways in which religious liberty laws have been used to secure significant but typically modest religious exemptions for members of minority faiths. Prior to the enactment of RFRA, nearly every Supreme Court case involving the Free Exercise Clause was brought by a religious minority, including Seventh Day Adventists, the Amish, Jews, and members of Native American religions. Religious exemptions continue to be a critical legal tool for ensuring that the faith practices of religious minorities are not unintentionally restricted by government policies.

RFRA was passed with support from many progressive groups precisely because the beliefs and practices of religious minorities—unlike mainstream Christians—are not already incorporated into U.S. law. Federal and state RFRA laws have been used, for example, to ensure that members of the military can wear religious headwear,[9] male Native American schoolchildren can wear their hair in traditional braids,[10] Santería practitioners can perform ritual animal sacrifice,[11] and Sikh federal employees can carry a kirpan (a small, blunt, ceremonial knife) to work.[12] In addition to RFRA, federal antidiscrimination law requires

most employers to accommodate the religious beliefs of their employees unless this would cause a significant hardship.[13] For example, in *E.E.O.C. v. Abercrombie & Fitch*, the Supreme Court found that a clothing store could not deny a job to Samantha Elauf, a Muslim woman, because her headscarf violated their dress code requiring an "All American look."[14]

Samantha Elauf. Courtesy of Samantha Elauf Mustapha.

"Wearing a headscarf every day, it's a reminder of my faith."

~Samantha Elauf, litigant in *EEOC v. Abercrombie & Fitch*.

These protections are especially important for people in prison and immigration detention, where other rights and liberties are severely restricted. Countless inmates have relied on the protections afforded by RLUIPA and RFRA to secure access to kosher and halal food, exemptions from prison clothing and grooming rules, access to sweat

lodges and other religious rituals and services, and permission to keep religious books and other materials in their living spaces. In the Supreme Court's 2015 opinion in *Holt v. Hobbs*, for example, the Court held that RLUIPA guaranteed a Muslim inmate's right to grow a short beard, notwithstanding a state prison rule that prohibited facial hair.[15]

While exemption laws have undoubtedly been helpful to many religious minorities, it is worth mentioning that the vast majority of RFRA claims are unsuccessful.[16] A sampling of rejected RFRA claims includes a number of appellate court opinions which deny Native American religious practitioners an exemption from laws banning the collection of eagle feathers;[17] a Seventh Day Adventist mail carrier who was denied the right to take Saturdays, his Sabbath, off work;[18] and Orthodox Jewish children who were denied an exemption from having to testify against their parents contrary to their religious beliefs.[19]

In 2019, the Supreme Court received widespread condemnation when it refused to suspend the execution of a Muslim man on death row so that he could pursue a religious liberty claim.[20] The Alabama Department of Corrections had refused to allow the man's imam to join him in the execution chamber, despite the fact that it allowed a Christian chaplain who was a prison employee to enter the chamber for other inmates. The man argued that this violated his rights under RLUIPA and the U.S Constitution. In a dissent, Justice Elena Kagan called the majority's decision "profoundly wrong."[21] Only weeks later, perhaps in response to the public outcry, the Court halted another execution so that a Buddhist inmate in Texas could pursue a religious liberty claim with nearly identical facts.[22]

Thus, while RFRA, RLUIPA, and other exemption laws have been used to protect the religious exercise of many minority practitioners, such claims have by no means been universally successful.

Immigration & Immigrants' Rights

For decades (if not centuries), people of faith have been moved to provide support to refugees and other migrants as part of their religious practice—in some cases guided by the Bible's repeated calls to "love the stranger."[23] In the U.S., some of these activities, such as the provision of food, water, transportation, and shelter to undocumented people, have occasionally triggered prosecution by the federal government under criminal laws including the prohibition on "bringing in and harboring certain aliens."[24] This has led people of faith to seek religious exemptions as a means of protecting their work with and for migrants.

The first significant wave of religious liberty litigation in the immigration context occurred in the 1980s. After the Reagan administration denied refugee status to thousands of people escaping violence in Central America, church leaders as well as religious and secular activists created an underground network to help refugees cross the border and provide them with shelter and assistance. At its peak, this "sanctuary movement" included more than 500 congregations of many different denominations, who by some estimates aided up to 500,000 migrants.[25] Eventually, the Federal Bureau of Investigation (FBI) launched a covert investigation of several sanctuary communities using paid informants. Two groups of sanctuary volunteers were subsequently charged with violations of federal law for conspiracy, "bringing in and landing," "transporting," "harboring," and "aiding and abetting the unlawful entry of aliens."[26] The arrests led to two "sanctuary trials."[27] In both cases, the volunteers argued that they should be entitled to a religious exemption from federal harboring laws. None of their claims succeeded.

In *U.S. v. Merkt*, the Fifth Circuit Court of Appeals held that the Free Exercise Clause did not entitle the volunteers to an exemption because, according to the court, "[i]n this case, the claims of conscience must yield to the twin imperatives of evenhanded enforcement of criminal laws and preservation of our national identity."[28] Similarly, in *U.S. v. Aguilar*, the Ninth Circuit found that "a religious exemption for these particular appellants would seriously limit the government's

"[T]here is no question that faith communities will continue to provide sanctuary whenever refugees need protection from government officials, that many of these communities consider sanctuary to be an essential part of what it means for the church to be the church..."

~Jim Corbett, Defendant in *U.S. v. Aguilar*

Jim Corbett helps a woman climb a border fence in Arizona. Photo by Ron Medvescek, © 1984 Arizona Daily Star.

ability to control immigration."[29] Other cases of the sanctuary movement era—including a case brought by religious nonprofits that sought permission to hire undocumented immigrants in violation of the Immigration Reform and Control Act (ICRA)—were also unsuccessful.[30]

Now, thanks to the more expansive right to religious exemptions created by RFRA—as well as increasingly aggressive federal policies related to migrants and those who assist them—religious practitioners are again turning to the courts to protect their faith-based commitment to serving immigrants.[31] In 2018, volunteers working with the Unitarian-affiliated organization No More Deaths/No Más Muertes in Arizona were criminally charged for providing food, water, and shelter to migrants in the Arizona desert.[32] While the volunteers were of varying religious backgrounds, all considered their work with No More Deaths to be motivated by their religious and spiritual commitments.

One of the volunteers, geographer Dr. Scott Warren, was charged with two felony counts of harboring and one count of "conspiracy to commit harboring" after he provided food and

Courtesy of No More Deaths.

water to two men he encountered in the desert—charges that could have resulted in up to a 20-year prison sentence. Dr. Warren sought to have the charges dismissed based on RFRA. He argued that assisting the migrants was motivated by his sincerely held religious views, including the responsibility to "do unto others as we would want to have done unto us," and as such he was entitled to a religious exemption from prosecution.[33] In his legal papers and at trial, Dr. Warren and the other No More Deaths volunteers emphasized the perils of crossing the desert, explaining that "in the deadly border region in which at least 412 individuals died in 2017 alone, Dr. Warren could not, consistent with his conscience, turn away two exhausted, injured men seeking food, water, and shelter."[34] It is worth mentioning that much of the media coverage surrounding Dr. Warren's trial neglected to discuss his religious liberty defense, and even news sources specializing in religion issues referred to him as a "border activist" rather than a person of faith.[35]

In June 2019, Dr. Warren's trial resulted in a hung jury, with eight jurors who wished to acquit him and four who voted to convict.[36] The government will retry Dr. Warren for harboring, but is dropping the conspiracy charge.[37]

Eight additional No More Deaths volunteers were charged with misdemeanors for entering a national wildlife refuge without a permit and discarding property (jugs of drinking water) in the refuge. All of the volunteers brought defenses based on RFRA and four were tried before a magistrate judge (appointed to assist district court judges) in January 2019. Only hours after the non-jury trial ended, the judge issued an opinion finding the volunteers guilty. The opinion openly demeaned the volunteers' RFRA claim, calling it "a modified Antigone defense, in that they are acting in accordance with a higher law."[38] As noted by a group of religious scholars responding to the judge, RFRA is, of course, not a "higher law" but a federal statute that requires judges to undertake a complex multi-step analysis.[39] Instead, the judge treated the claim as little more than a whim and refused to offer even cursory scrutiny of the RFRA defense. While the volunteers faced up to six months in prison, they were ultimately sentenced to fifteen months of probation as well as monetary fines.[40] They have appealed the decision to the District Court.[41] In February 2019, charges against the other four volunteers were dropped after they pled to civil infractions.[42]

In addition to the No More Deaths cases, in May 2019 the District Court of Nebraska adopted a magistrate judge's recommendation rejecting a claimant's argument that the government's prosecution of him for "harboring" violated his religious liberty rights under RFRA and the Free Exercise Clause. The claimant had argued that his actions were a "living expression of sincerely held religious convictions as espoused by The United Methodist Church."[43] The

Zaachila Orozco-McCormick. Photograph by/courtesy of Mary Orozco.

"I have a strong and abiding moral, ethical and spiritual belief that every person has a right to basic human necessities such as food and water and shelter, regardless of their status, even if that means taking the shirt off my back or the food off my plate."

~ Zaachila Orozco-McCormick, No More Deaths volunteer and litigant.

magistrate, relying on pre-RFRA cases of the sanctuary movement era, held that "[a] judicially created religious exemption to the uniform application and enforcement of border security laws would fatally undermine the alien residency requirements promulgated and enforced pursuant to the Immigration and Nationality Act of 1952."[44]

The two ongoing No More Deaths cases will be closely watched by members of what has been deemed the "new sanctuary movement." Inspired by the sanctuary movement of the 1980s, over the past decade clergymembers and people of faith, as well as secular activists, have embraced a range of tactics to resist immigration laws, including providing physical shelter to people at risk of deportation. This movement has grown enormously since the 2016 presidential election; there are now dozens of people who have publicly gone into sanctuary in houses of worship to escape deportation orders. Furthermore, hundreds of houses of worship—as well as individuals, hospitals, schools, and other institutions—have expressed willingness to offer sanctuary to migrants. This puts them at risk of prosecution for harboring as well as other punishments, such as loss of 501(c)(3) tax-exempt status. Many are, therefore, considering

bringing RFRA defenses in the event that they are targeted for their faith-based sanctuary activities. Moreover, given that the No More Deaths volunteers were prosecuted for little more than providing food to migrants, religious facilities including homeless shelters and soup kitchens may similarly turn to RFRA defenses if they are prosecuted for providing assistance to undocumented people.

One leader of the new sanctuary movement has already brought a RFRA claim challenging the harassment she has suffered from the U.S. government on account of her ministry to migrants. Kaji Douša, a Christian pastor and co-chair of the New Sanctuary Coalition in New York City, filed a case in federal district court in July 2019 arguing that she was being subject to government harassment and surveillance because of her religiously motivated activities on behalf of migrants, in violation of the First Amendment and RFRA.[45] As she explains in her legal papers, Pastor Douša has been "called to pray with and protect refugees, asylum seekers, and other migrants."[46] As a means of answering this call, she was a lead organizer and participant of several "sanctuary caravans" beginning in 2018 that brought religious leaders to Tijuana, Mexico to minister to Central American migrants seeking refuge in the U.S.[47]

Upon reentering the U.S. after a trip to the border in January 2019, Pastor Douša was detained and interrogated by border agents, and her access to expedited border crossing was revoked.[48] The interrogation revealed that the government had been surveilling and collecting information about her pastoral work in New York. Pastor Douša later learned that a migrant whose marriage had been blessed by another member of the sanctuary caravan was subsequently interrogated by immigration officials about her relationship to Pastor Douša.[49]

Pastor Kaji Douša. Courtesy of Park Avenue Christian Church.

"My faith teaches me to see Jesus Christ in those who suffer as he suffered... I am thus called to pray with and protect refugees, asylum seekers, and other migrants—remembering that Jesus, too, was received as a refugee in Egypt."

~ Pastor Kaji Douša

Douša is arguing that this type of surveillance and questioning thwarts her religious exercise, in part by making it impossible for her to provide pastoral guidance, including the rites of confession and absolution, with a guarantee of confidentiality.[50]

Religious organizations whose tenets motivate them to assist in resettling refugees have also made claims under RFRA. In 2016, a group of clergymembers filed an amicus brief in *Texas Health & Human Services Commission v. U.S.*[51] arguing that Texas' attempt to prevent the U.S. government from settling refugees in the state violated their rights under the Texas state RFRA. This case did not explicitly involve a state RFRA claim. Rather, the state of Texas filed a complaint against the federal government arguing that the U.S. was resettling Syrian refugees without consulting the state, in violation of the Refugee Act of 1980. Texas religious leaders' amicus brief in support of the federal government argued that the faith groups had a religious right to serve Syrian refugees.[52] A federal court dismissed Texas' lawsuit without discussing the organizations' religious liberty claim.[53]

The Trump administration's efforts to build a wall along the U.S.–Mexico border as a method of immigration control has also been subject to RFRA challenges. In 2018, the federal government filed a condemnation suit to conduct surveying for the planned construction of a border wall on land owned by a Roman Catholic diocese in Texas and containing the historic La Lomita chapel. The diocese responded with an argument based on RFRA.[54] The Church raised several objections: the border wall would chill their congregants' religious practice; it would prevent the Church from ensuring that its property is used "in a manner that protects rather than injures human life"; and it would "stand as a counter-sign to the Church's teachings on the universal nature of humanity."[55]

The Church explained that some of its members were undocumented, and that even documented Latinx worshipers might cease coming to La Lomita Chapel if doing so required crossing a border wall, for fear of being stopped or detained. Even for those willing to cross a barrier to visit the chapel, the Church argued that turning the property into an immigration enforcement zone—"cleared of vegetation, lighted, and subjected to surveillance cameras"[56] —would impair the chapel's identity as a sacred space. Further, the Church argued that it had "a moral obligation to adhere to and uphold Catholic social teaching in all of its actions, including in its stewardship of Church-owned lands," and therefore it could not consent to a use of its land that "threatens life and limb."[57] Lastly, the Church explained that "[u]niversality—the understanding that all people share a common humanity and dignity" was a key element of Catholic faith, and that "[t]he proposed border wall is the antithesis

La Lomita Chapel in Mission, Texas. © 2008 Anthony Acosta via flickr.

"I consider a border wall likely to increase human suffering in the local community and in the world, in contravention of Catholic moral principles. The foundation of Catholic social teaching is that all human life is sacred."

~Daniel E. Flores, Bishop of Brownsville, Texas

of this message of universality."[58] Thus, it explained, "the Diocese cannot consent to the erection of a physical symbol of division and dehumanization on its Property."[59]

In February 2019, a district court judge allowed U.S. government surveyors initial entry onto the land to conduct surveillance.[60] Shortly thereafter, however, Texas Representative Henry Cuellar secured language in an appropriations bill that prohibited funding for construction of a wall on La Lomita and several other locations.[61] While this has provided some temporary protection to the chapel, President Trump's subsequently issued Declaration of Emergency and continuing efforts to secure money for the border wall leave the fate of La Lomita, and its RFRA claim, unclear.[62]

In a recently filed amicus brief, a group of 75 religious organizations argued that Trump's appropriation of funds for the border wall threatened their religious liberty. They argued that the President had "on multiple occasions drawn a connection between the supposed threat of Islam and the need for a border wall," and that "when the president can redirect funds at will—even in the face of congressional opposition—nothing stands in the way of using such funds to surveil, harass, and sanction disfavored religious groups."[63]

Finally, RFRA has been used to directly challenge the deportation of immigrants and help migrants to secure legal status. In *Rodriguez et al v. Sessions,* the U.S. citizen wife and daughter of undocumented Salvadorian immigrant Juan Rodriguez brought a claim arguing that his deportation violated their rights under RFRA.[64] As Seventh Day Adventists, they argued that family unity is essential to their religious belief and practice, and that therefore deporting their husband and father to El Salvador would infringe on their religious exercise.[65] The claim was dismissed when the government agreed to allow Mr. Rodriguez to remain in the country to pursue his asylum claim.[66]

In *Odei v. DHS*, Ghanaian pastor Ernest Odei was prevented from entering the U.S. by border patrol agents at O'Hare Airport because he lacked a proper visa.[67] Odei had planned to visit Spirit of Grace Outreach, a religious organization of which he was a founding member, speak at churches, perform missionary work, and meet with his academic advisors at the Christian university where

Juan Rodriguez family. Marie D. De Jesús/ ©Houston Chronicle.

"Just as David defeated Goliath and had faith, so my father and my family will defeat our Goliath with the help of God."

~Kimberly Rodriguez, youngest daughter of Juan Rodriguez

he was a Ph.D. candidate. Following his return to Ghana, Odei and Spirit of Grace Outreach challenged the decision not to admit him on several grounds, including RFRA, arguing that denying Odei entry to the U.S. burdened both the pastor's and the organization's religious exercise.[68] In September 2019, the Seventh Circuit rejected his claim, holding that a provision of the Immigration and Nationality Act barred courts from having the jurisdiction to review an order of removal, and that "[n]othing in the Religious Freedom Restoration Act overrides [this] jurisdictional bar."[69]

While neither Rodriguez's nor Odei's RFRA claims were fully litigated, immigrants have won more limited RFRA claims brought within immigration proceedings. In 2005, Chukwuezue Henry Nworu, a Nigerian man who was married to a U.S. citizen, was exempted under RFRA from the requirement to submit to a blood test in order to become a legal permanent resident of the U.S.[70] Nworu was a member of the Faith Tabernacle Congregation, which rejects medical interventions, including drawing blood. While an immigration judge initially claimed that he lacked the authority to interpret RFRA, the Board of Immigration Appeals and Attorney General reversed this decision, finding that requiring Nworu to take a blood test "was not the 'least restrictive means' of furthering [the government's] compelling interest as there exist other reasonably accurate methods of determining whether [Nworu] is suffering from a communicable disease."[71]

Similarly, an Old Order Amish couple sued the federal government in 2018 for a RFRA exemption from the requirement that they submit photographs as part of the wife's application for permanent residency.[72] The couple "believe that photographs of people are graven images prohibited by the Second Commandment." Despite the administration's alleged commitment to religious liberty, the Department of Homeland Security repeatedly refused to grant them an exemption from the requirement.[73] The case eventually settled.[74] In *Sabra v. Pompeo*, U.S. citizen Mohammed Sabra brought a RFRA claim against the State Department after it refused to recognize his daughter's citizenship and admit her into the U.S. for medical treatment. The Department requested additional evidence of paternity including photos of Sabra's wife during pregnancy—photos that "for religious reasons, the family is unwilling to provide as she is less than fully attired.[75] This case is ongoing.[76]

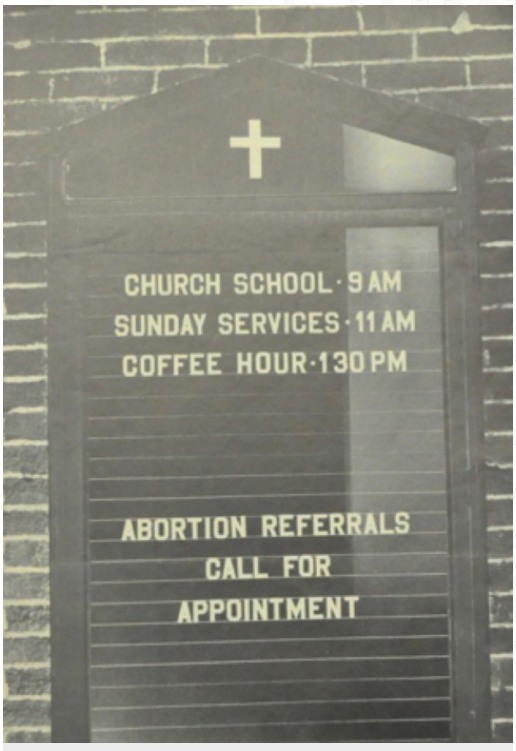
People of faith have sought to use RFRA and other exemption laws to protect both immigrants and those who are committed to providing them with spiritual and material assistance. This trend is likely to continue in the face of the federal government's ever-harsher immigration policies.

Reproductive Rights

Conversations around the intersection of religious liberty and reproductive rights typically equate people of faith with opposition to abortion and other reproductive healthcare. However, people of faith and religious denominations hold a wide and often quite nuanced range of views on bodily autonomy and the right to reproductive healthcare. Several religious denominations even hold that the right to make decisions about one's reproductive healthcare is an essential aspect of religious freedom.

For example, in a 2019 Statement on Reproductive Freedom, The Rabbinical Assembly, an international association of Conservative Jewish rabbis, stated that "Denying a woman and her family full access to the complete spectrum of reproductive healthcare, including contraception, abortion-inducing devices, and abortions, among others, on religious grounds, deprives women of their Constitutional right to religious freedom."[77] Acknowledging the spectrum of views on abortion held by its members, the Evangelical Lutheran Church in America (ELCA) has stated that "[f]or some, the question of pregnancy and abortion is not a matter for governmental interference, but a matter of religious liberty and freedom of conscience protected by the First Amendment."[78]

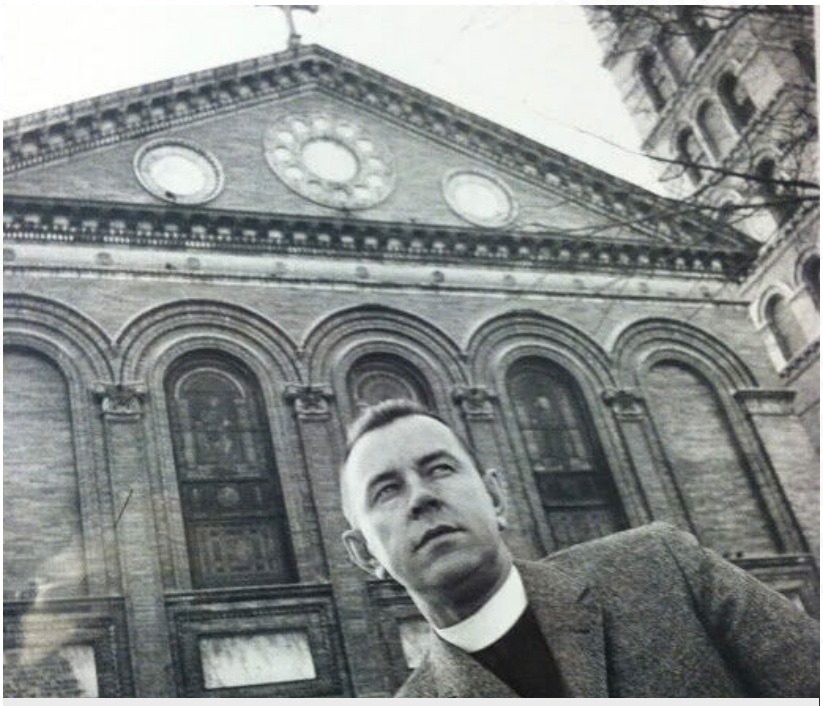
A number of large denominations, including the Presbyterian Church,[79] Reform[80] and Conservative[81] Judaism, the United Church of Christ,[82] and the Unitarian Universalist Association,[83] support the right of individuals, based on their personal circumstances and beliefs, to make their own decisions regarding abortion in most or all circumstances. Other denominations, including the ELCA,[84] United Methodist Church,[85] and the Episcopal Church,[86] have expressed some ambivalence about abortion, but nevertheless oppose absolute legal restrictions on the procedure. Perhaps unsurprisingly, given the large number of denominations supportive of reproductive rights, religious leaders, healthcare providers, and patients have all brought religious liberty claims as a means of protecting the right to obtain or provide reproductive healthcare.



Courtesy of Susan Brownmiller.

Prior to the legalization of abortion nationwide in 1973, a group of faith leaders established the Clergy Consultation Service (CCS), an underground network of ministers, rabbis, and other faith leaders who helped tens (or by some estimates, hundreds) of thousands of people nationwide access safe abortion.[87] Only three clergymembers ever faced formal legal charges for their activities, one of whom defended himself on the grounds that he had a constitutional right to provide such counseling—though this was based on the Free Speech rather than Free Exercise Clause.[88] None of the clergy were ultimately convicted.

In addition to these defensive suits, CCS member Rev. Jesse Lyons brought an affirmative lawsuit, *Lyons v. Lefkowitz,* challenging New York State's prohibition on abortion. Rev. Lyons, a Methodist clergymember, argued that the ban "restricted his right to offer pastoral counseling



Rev. Howard Moody. Courtesy of Judson Memorial Church.

"My understanding of free choice is that the right to choose is a God-given right with which persons are endowed…Freedom of choice is what makes us human and responsible. And for women, the preeminent freedom is the choice to control her reproductive process."

~Rev. Howard Moody, Co-founder of the Clergy Consultation Service

Religious Exemptions After *Roe*

The current makeup of the Supreme Court has renewed concerns that *Roe v. Wade* may be overturned in the coming years. If this comes to pass, religious liberty laws, including state RFRAs, could provide potential avenues for medical providers, activists, clergy, and patients to preserve abortion care.

Many healthcare providers have noted that their decision to offer abortion care is motivated by, not in spite of, their religious beliefs.[246] And it is likely that in the event *Roe* is overturned, a new version of the Clergy Consultation Service will arise to assist patients in accessing abortion.

Thus, healthcare providers, faith leaders, and patients could use RFRA as a defense to potential criminal prosecution for performing, coordinating, or receiving an abortion. Such defenses may become more common even if *Roe* is not explicitly overturned, as increasingly severe restrictions on abortion may make it all but impossible to access the procedure legally in some states, leaving illegal abortion as the only or most affordable option.

that referred women to qualified physicians."[89] The state legislature legalized abortion in New York before any of the multiple challenges to the law were decided, and New York's branch of CCS subsequently opened an abortion clinic.

In *Landreth v. Hopkins*, two CCS members in Florida similarly challenged a state law that prohibited advising on, advertising, or distributing printed material about abortion, arguing that it violated their rights to free speech and free exercise of religion.[90] The suit was dismissed on procedural grounds.[91]

After *Roe* but before RFRA, in the 1973 case *Watkins v. Mercy Medical Center,* Dr. Wilfred E. Watkins sued a Catholic hospital for denying his medical staff privileges after he refused to abide by the hospital's prohibition on sterilization and abortion.[92] Dr. Watkins claimed that the denial violated his First Amendment Free Exercise rights. The Ninth Circuit ruled against him because the hospital was private and constitutional claims can only be brought against the government. (Now, however, RFRA might be used in similar circumstances in a circuit that has found RFRA to apply in suits between private parties.[93])

Since the passage of RFRA and state mini-RFRAs, people of faith have sought to use these laws to preserve access to reproductive healthcare. In fact, as mentioned in Section I, the ability to use the federal RFRA to protect abortion rights was contemplated even before the law was enacted: in the early 1990s, the U.S. Conference of Catholic Bishops opposed RFRA on the grounds that advocates of abortion rights were using religious freedom as a justification for—not against—a person's right to choose whether to terminate a pregnancy.[94]

Most recently, the City of Baltimore brought a RFRA claim challenging a federal regulation promulgated by the Trump administration that prohibits doctors within the Title X program—a federal grant program that provides individuals with family planning and related

services—from offering their patients information about or referrals to abortion services.[95] Baltimore argued that this "Gag Rule" "violates rights of religious conscience recognized by [RFRA] by prohibiting physicians from counseling patients on comprehensive reproductive health services even when their religious exercise requires them to engage in such counseling."[96]

Interestingly, the complaint alleges that the rule violates the religious rights of doctors who both support and oppose abortion rights. It explains that the rule burdens "health care providers whose religious beliefs require them to inform patients of their religious views against abortion as well as [those] whose religious beliefs require them to inform patients of information necessary for patients to make informed decisions about their health care in light of the importance certain faiths place on individual self-determination."[97] The complaint also notes that the rule contains no exemption for "patients whose religious exercise would be substantially burdened by the inability of their physician to provide honest counseling."[98]

In September 2019, Baltimore's RFRA complaint was dismissed without prejudice by a district court judge, who found that the city had "done little more than allege conclusory statements with no support to demonstrate any religious belief or how it has been substantially burdened."[99] The court held that "[t]hese allegations are insufficient to state a plausible claim that the Final Rule violates the RFRA."[100]

Finally, several cases brought by members of The Satanic Temple (TST) in Missouri have sought religious exemptions under that state's RFRA from state-mandated abortion requirements that conflict with their belief in bodily autonomy and respect for science.[101] The law at issue required patients seeking an abortion to, among other things, undergo an ultrasound at least seventy-two hours before the procedure and certify receipt of a booklet that states "[t]he life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being."[102]

In *Doe v. Greitens* (later *Doe v. Parson*), plaintiff Mary Doe, a member of the Satanic Temple, brought a case in Missouri state court requesting an exemption from these mandates under the Missouri RFRA. Doe also argued that the law violated her Free Exercise rights under the First Amendment, as well as the Establishment Clause—which requires separation of church and state. As to the Establishment Clause argument, Doe argued that the law "unconstitutionally fosters an excessive government entanglement with religion" as "the sole purpose of the law is to indoctrinate pregnant women into the belief held by some, but not all, Christians that a separate and unique human being begins at conception."[103]

After a trial, the Supreme Court of Missouri issued an opinion in February 2019 finding that the state law did not impose a substantial burden on Mary Doe's religious exercise in violation of the state RFRA, since the law did not "require a woman seeking an abortion to read the booklet containing the objected-to [statement] much less to agree with it."[104] The Court also found that the law did not contravene the Establishment Clause.

Despite this loss, Doe's case was successful on at least one front: during oral argument, Missouri's Solicitor General told the court that the challenged law did not in fact legally require patients to undergo an ultrasound as a prerequisite for receiving an abortion. Previously, "abortion clinics in Missouri had interpreted the law as requiring an ultrasound for the purposes of hearing a fetal heartbeat in order for an abortion to be performed."[105] The Missouri Supreme Court relied on the Solicitor General's statement in finding that it "need not determine whether requiring Ms. Doe to have an ultrasound [or] to listen to the fetal heartbeat…would have constituted a restriction on her religious freedom, for the statute imposes no such requirements."[106] This new interpretation of the state statute, which may not have been clearly adopted by the state absent Doe's lawsuit, will reduce one barrier to abortion care in Missouri.

A similar challenge to the Missouri law brought on Free Exercise and Establishment Clause grounds was initiated by a different Satanic Temple member, called Judy Doe, in federal court.[107] In February 2019, a district court judge dismissed her claim, finding among other things that the statements "'[t]he life of each human being begins at conception' and that '[a]bortion will terminate the life of a separate, unique, living human being' are not facially religious," and therefore do not violate the Establishment Clause.[108] The opinion has been appealed to the Eighth Circuit.[109] TST has also threatened to challenge an Indiana law requiring the burial or cremation of fetal remains as a violation of its members' religious freedom.[110]

LGBTQ Rights

As in the reproductive rights context, the public too often conflates "religious liberty" with opposition to LGBTQ rights and marriage equality, despite the fact that people of faith hold a wide variety of views about sex, sexuality, and marriage, and many people of faith identify as LGBTQ. Several commentators have noted the media's tendency to overlook LGBTQ people of faith,[111] and one study of mainstream media articles about LGBTQ issues found that "[t]hree out of four of the messages with some religious identification were communicated by people affiliated with faith groups that have formal church policy, religious decrees or traditions opposing the

rights of LGBT people."[112] The study concluded that a "'gays versus religion' frame is present in the news" and that when media "use religious sources in news stories on LGBT issues, they tend to choose sources from more conservative Christian backgrounds – sources who voice negative messages about LGBT people and their rights. Conversely, pro-gay sources, or openly LGBT people…are predominantly presented without any religious affiliation noted in the story."[113]

Not every religious liberty litigant has opposed LGBTQ rights, however. Before the Supreme Court case *Obergefell v. Hodges* established a constitutional right to marry for same-sex couples,[114] a group of interfaith clergy whose faith instructed that same-sex couples should be allowed to marry, and members of their congregations who wished to marry, filed a suit arguing that a North Carolina law that criminalized performing a same-sex marriage violated their religious beliefs and practices.[115] This case, *General Synod of the United Church of Christ v. Reisinger*, was argued under the Free Exercise Clause, as the federal RFRA does not apply to

Nancy Petty. Courtesy of Campaign for Southern Equality.

"North Carolina's ban on marriage equality has placed a burden on my ability to minister to all of my congregants as equals. It violates my belief that all people are created equal and that God blesses all of our faithful relationships."

~Rev. Nancy Petty, *United Church of Christ v. Reisinger* claimant

state law and North Carolina has not passed a state RFRA. *Obergefell* was decided before the case could be fully litigated.

In a recent law review article, "The Case of the Religious Gay Blood Donor," Professor Brian Soucek argues that RFRA could be used to challenge the U.S. Food and Drug Administration's prohibition on blood donations from sexually active men who have sex with men. Such a case could be initiated by a man who is religiously obligated to donate blood, but is prohibited from doing so. He posits that such a case "would either produce a major victory for gay rights or, as likely, would force courts to clarify and curtail some of the most controversial aspects of recent, mostly conservative, religious freedom efforts."[116]

Interestingly, the inclusion of protections for LGBTQ-affirming faith practitioners helped to prevent the enactment of a broad religious exemption bill originally intended to benefit religious conservatives. The First Amendment Defense Act was first proposed in Congress in 2015, and its original text explicitly protected only the religious beliefs that marriage is "the union of one man and one woman," and that sex should only take place within such a marriage. Possibly out of concern that this could violate the Establishment Clause by advancing a particular religious belief about marriage, a later version of the bill added protections for the belief that marriage is "the union of one man and one woman, or two individuals as recognized under Federal law." In response to this change, some religious right groups pulled their support for the bill.[117]

Economic Justice

Providing food and shelter to the poor has long been a way for many faith practitioners and religious institutions to act out their religious beliefs. In fact, almost every faith tradition has providing aid to the poor or needy as one of its central tenets.[118] In the face of health, zoning, and other laws and policies that regulate such forms of charity, faith leaders and churches have relied extensively on religious liberty laws to defend their faith-based practices on behalf of people who are poor, hungry, and/or homeless.[119] Several of these claims have succeeded under the Free Exercise Clause of the federal and state constitutions as well as the federal and state RFRAs.

In 1983, prior to the passage of RFRA, a Lutheran church in Hoboken, New Jersey successfully relied on the federal Free Exercise Clause to prevent the municipality from shuttering the church's homeless shelter under its zoning laws. In ruling in the church's favor, a county judge held that "[i]n view of the centuries old church tradition of sanctuary for those in need of shelter and aid, St. John's

and its parishioners in sheltering the homeless are engaging in the free exercise of religion."[120] It then held that Hoboken could not use its zoning authority to prohibit that religious exercise.[121]

In 1994, a federal district court found a Presbyterian church's food distribution program to be protected religious exercise, calling it "a form of worship akin to prayer" and noting that "the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions."[122] The court further held that a zoning board decision which would prevent the church from creating such a program at their new location substantially burdened its right to free exercise of religion in violation of the First Amendment and RFRA.

Other successful religious liberty claims brought by faith-based institutions in support of their efforts to feed the hungry or shelter the homeless include a Richmond, Virginia parish that won the right to run a "Meal Ministry" under RFRA;[123] a New Orleans church that defended its soup kitchen from closure using religious liberty protections in the federal and Louisiana constitutions;[124] a Fort Lauderdale homelessness advocate who convinced a trial judge that the Florida RFRA required the city to provide him with an alternative site for his food distribution program;[125] a New York City church that relied on the Free Exercise Clause to obtain a permanent injunction preventing the City from dispersing homeless persons sleeping on the Church's property;[126] a Washington State church that forced the city of Woodinville to consider its permit request to host a tent city under the state constitution;[127] ministries in Dallas that won exemptions from food safety regulations under the Texas RFRA to serve food to the homeless;[128] Philadelphia churches that won an injunction under the Pennsylvania RFRA preventing the

Joan Cheever. Photograph by/courtesy of David Martin Davies.

"You are taught at an early age to take care of your neighbor and be a good Samaritan and help those in need."

~ Joan Cheever, Founder of The Chow Train in San Antonio

city from enforcing its ban on food distribution in public parks;[129] and a woman in Texas—Joan Cheever—who used the threat of a state RFRA suit to pressure the city of San Antonio into allowing her to serve free food from a non-permitted vehicle called the "Chow Train."[130]

Not all claims have succeeded, however.[131] In 2010, for example, the Eleventh Circuit found that a local regulation that placed limits on a religious organization's food distribution program did not violate the Florida RFRA.[132] Specifically, it held that the regulation did not impose a burden on the organization's free exercise of religion, because it did "not forbid the Church and its members from engaging in their religious exercise; at most, the Ordinance imposes some inconvenience by requiring relocation outside the District."[133] While the court acknowledged that moving a food distribution program outside the downtown park district "might result in some extra transit time for the Church's members," it determined that "needing to travel some extra distance is insufficient to establish a substantial burden."[134]

While not universally successful, reliance on religious liberty laws to protect soup kitchens, homeless shelters, and similar programs has been one of the most effective uses of these laws outside of the Christian right context.

Religious Drug Use

From the ceremonial consumption of wine by Catholics and Jews to the use of peyote during Native American religious ceremonies, the use of psychoactive substances within spiritual practice is common to many faith traditions, notwithstanding laws that regulate or prohibit their ingestion. Yet despite the fact that RFRA was enacted in response to the Supreme Court's 1990 decision in *Employment Division v. Smith*—a case involving the religious use of an otherwise illegal substance—requests for RFRA exemptions from criminal drug laws have been almost universally unsuccessful.

The notable exception to this trend is *Gonzales v. O Centro Espírita Beneficente União do Vegetal*,[135] an early RFRA case in which the Supreme Court granted a religious exemption from the Controlled Substances Act to a church that engaged in ritual use of hoasca, a hallucinogenic tea. The Court held that exempting the small number of church members from the law criminalizing hoasca would not undermine the government's overall interest in preventing the sale of illegal drugs.[136] Notably, the Court ruled that the government could not rely on a "slippery slope" argument in denying a RFRA exemption. It explained, "[t]he Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have

Hoasca brewing. Photograph by Apollo via flickr.

"The communion with Hoasca creates an enhanced state of consciousness, capable of amplifying one's perception of his/her essentially spiritual nature, bringing about positive development in the moral and intellectual aspects of a human being."

~Statement of Centro Espírita Beneficente União do Vegetal

to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'"[137]

The Court's holding in *O Centro*, however, has not appeared to help other religious practitioners gain exemptions from criminal drug laws. Claimants ranging from Rastafarians to practitioners of Native American religions to new religious groups like the "First Church of Cannabis" have been denied RFRA exemptions from laws criminalizing the possession and distribution of marijuana on a variety of grounds. In a few cases, claimants were judged

to be insincere, or motivated by money rather than religious faith.[138] In other cases, judges found no substantial burden on a claimant's religious belief, arguing that marijuana use or distribution is not actually required by the claimant's religion[139] (notably, in *Hobby Lobby*, the Supreme Court deferred almost entirely to the plaintiffs on the question of whether requiring contraceptive coverage in their employee health plans imposed a substantial burden on the business's religious beliefs).[140] Still other judges have ruled that, even if there is a substantial burden on the claimant's sincere exercise of religion, prosecuting even a single individual's personal marijuana use is narrowly tailored to advancing a compelling government interest.[141] This determination is somewhat absurd in light of the holding of *Gonzales v. O Centro Espírita,* which found that exempting an entire religious group from the prohibition of a hallucinogenic drug (albeit a drug far less popular than marijuana) would not undermine any compelling government interest. These cases have all been decided by lower courts; should another RFRA claim involving drug use be taken up by the Supreme Court, it is not obvious how the Court would rule.

Harm Reduction Services

In addition to faith practitioners who use controlled substances, other people of faith feel called upon to minister and provide services to people who use drugs. In 2018, a group of people in Philadelphia, including the president of a seminary and a church evangelist, founded an organization called Safehouse whose mission "is to save lives by providing a range of overdose

Ronda Goldfein, Vice President of the Board of Directors of Safehouse.
Photograph by Natalie Piserchio.

"At the core of our faith is the principle that preservation of human life overrides any other considerations. As witnesses to great losses of life in our community, we are compelled by our religious beliefs to take action to save lives."

~ Letter from Safehouse directors to a federal prosecutor

prevention services."[142] The group has been engaged in efforts to open a safe injection site, where drug users would be able to bring in controlled substances purchased elsewhere to use under the supervision of trained staff, who could provide them with medical assistance if necessary as well as referrals for drug treatment. The organization's website states that the "leaders and organizers of Safehouse are motivated by the Judeo-Christian beliefs ingrained in us from our religious schooling, our devout families and our practices of worship. At the core of our faith is the principle that preservation of human life overrides any other considerations."[143]

In February 2019, the federal government filed a civil suit against Safehouse seeking a judicial declaration that its attempt to open a safe injection site violated the Controlled Substances Act (CSA).[144] Safehouse's board members responded by arguing that the lawsuit violated their religious liberty under RFRA. They explained that their "religious beliefs obligate them to take action to save lives in the current overdose crisis, and thus to establish and run Safehouse in accordance with these tenets."[145] Specifically, they "believe that the provision of overdose prevention services effectuates their religious obligation to preserve life, provide shelter to our neighbors, and to do everything possible to care for the sick."[146] By pressuring the board to cease its efforts to open a safe injection site, the government's suit, Safehouse argued, burdens their religious exercise and is not necessary to any compelling government interest. The Department of Justice has aggressively disputed Safehouse's claim, arguing that the founders' "true motivation is socio-political or philosophical—not religious—and thus not protected by RFRA."[147] In October 2019, the district court ruled, without considering the organization's RFRA claim, that "there is no support for the view that Congress meant to criminalize projects such as that proposed by Safehouse."[148] The government has promised to appeal.[149]

Similarly, Jesse Harvey, a peer addiction recovery coach in Maine, founded the Church of Safe Injection in October 2018. The Church of Safe Injection is a non-denominational, interfaith religious organization whose mission, according to its website, is "to spread the gospel of harm reduction, to serve the least among us, and to support the well-being of marginalized communities."[150] The church holds the "sincere religious belief that People Who Use Drugs (PWUD) should not die preventable deaths," and its members consider it their moral obligation to minister to and serve this population.[151] To that end, church members act on their faith by distributing Naloxone (an overdose reversal medication), sterile needles, sterile water, rubber tourniquets, alcohol swabs, fentanyl testing strips, food, hand warmers, and other materials to people who use drugs, as a means of reducing overdose deaths and the transmission of HIV/AIDS and other illnesses. Harvey has stated publicly that the church will be applying for an exemption from federal drug statutes under RFRA so that it can open a safe injection site.[152]

Jesse Harvey. Photograph by/courtesy of Yoon S. Byun.

"If syringes had been around in Jesus' day, He would have supported safe injection, and He would have made sure that the people He hung out with had access to sterile supplies."

~ Jesse Harvey, Founder of the Church of Safe Injection

Government Surveillance, Profiling, & Discrimination

RFRA and the Free Exercise Clause have occasionally been deployed as a means of challenging government surveillance and profiling of Muslims. Rather than revolving around a specific religious practice, these claims share the common theme of using religious liberty arguments to challenge government laws, policies, and practices—particularly within the criminal justice, counter-terrorism, and immigration contexts—that target Muslims. For example, *Tanvir v. Tanzin*[153] involves a claim by several Muslim men who refused to become FBI informants because doing so would have contradicted their religious beliefs. In response to their refusal, the federal government retaliated against them by having their names placed on the government's "No Fly List"—a list created by the FBI's Terrorist Screening Center that severely limits people's ability to leave or return to the U.S. The men argued that this constituted government punishment for acting

Litigants Awais Sajjad, Jameel Algibhah, and Naveed Shinwari from Tanvir v. Tanzin. Photograph by Ibraham Qatabi/courtesy of the Center for Constitutional Rights.

on their religious beliefs, and therefore violated RFRA. In May 2018, the Second Circuit allowed the case to proceed, though this procedural decision has been appealed to the Supreme Court and no substantive RFRA decision has yet been made.[154]

In *Hassan v. City of New York*,[155] a group of Muslim people and organizations brought a lawsuit arguing that a secret police program that monitored Muslims in and around New York City violated their religious liberty under the First Amendment. The program included the placement of cameras outside mosques and undercover officers that infiltrated—without any indication of criminal activity—Muslim houses of worship, student organizations, and businesses. The plaintiffs argued that this intense surveillance violated their constitutional right to free exercise of religion by chilling their religious activity. They explained, for example, that mosques had noted a decline in attendance during the police program as "their congregants can no longer worship freely knowing that law-enforcement agents or informants are likely in their midst."[156] Another organization stated it had "changed its religious and educational programming to avoid controversial topics likely to…attract additional NYPD attention."[157] The parties eventually settled outside of court.[158]

Other lawsuits in this vein, all of which have been unsuccessful, include religious liberty challenges to: the government's practice of extensively questioning Muslim Americans about their religious beliefs as they enter the country;[159] government border stops of everyone who had attended an Islamic conference in Canada in 2004;[160] and the detention of two Muslim men following trips to Saudi Arabia and Morocco.[161] A Free Exercise Clause and RFRA challenge to an FBI surveillance program targeting Muslims in California is ongoing.[162] In addition, following the enactment of President Trump's Executive Order barring immigration from certain Muslim-majority countries (the "travel ban" or "Muslim ban"), several people and groups brought lawsuits challenging the ban on a number of grounds, including RFRA.[163] However, the Supreme Court did not address these RFRA claims when it upheld the ban in *Trump v. Hawaii* in 2018.[164]

Environmental Justice

While some sacred spaces take the form of a church, temple, or other building, natural structures such as rivers, mountains, or forests are also considered holy by some faith traditions. In particular, holy sites are an important part of many Native American religions.[165] As these spaces have faced rapidly increasing public and private development, pollution, and other threats over the past several decades, faith communities have repeatedly sought to protect them through the use of religious liberty litigation.

In the 1988 case *Lyng v. Northwest Indian Cemetery Protective Association,*[166] three tribes in California—the Yurok, Karok, and Tolowa—challenged the federal government's plan to construct a road through the Six Rivers National Forest, a holy site essential to their religious practice. The Court held that while the government's action undoubtedly burdened the tribes' free exercise of religion, it did not constitute the type of burden prohibited by the Free Exercise Clause, because it did not place any legal demands or prohibitions on the tribes' own religious actions or activities. The Court stated that while the road "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," it would not coerce the tribes "into violating their religious beliefs; nor would [it] penalize religious activity."[167]

Despite the fact that *Lyng* and other pre-RFRA environmental Free Exercise claims were unsuccessful, Native American individuals and tribes and other religious practitioners have continued to use religious exemption claims in an effort to protect sacred or holy land,[168] or fend off environmental degradation. The Supreme Court has yet to explicitly adopt the holding of *Lyng*—limiting a "substantial burden" to instances when the government coerces religious practitioners to change their own behavior—in the RFRA context, though several lower courts have done so, limiting tribes' ability to use RFRA to protect sacred sites.[169]

Protest of the proposed G-O road through the Six Rivers National Forest. Courtesy of Northcoast Environmental Center.

For example, in *Navajo Nation v. U.S. Forest Service*,[170] the Navajo Nation, Hopi Tribe, and numerous other tribes and nonprofit

Criticism of *Lyng*

The reasoning of *Lyng* has been criticized by many scholars and advocates. For example, Michael McNally, author of several books on Native American religious practice, has argued that the court's reference to individual "spiritual fulfillment" was rooted in a lack of understanding and respect for the tribes' religious beliefs, and the "romanticized view that Native Americans, particularly when it comes to sacred land, are spiritual, not religious."[247]

Similarly, Alex Tallchief Skibine, a law professor and member of the Osage Tribe, said the opinion "seem[ed] to equate Indians' religious exercises at sacred sites with Western yoga-like practices…portray[ing] Native religious activities at sacred sites as only about spiritual peace of mind."[248] In fact, he explains, the "importance of sacred sites to Indian tribes and Native practitioners is less about individual spiritual development and more about the continuing existence of Indians as a tribal people."[249]

In his dissent, Justice William J. Brennan decried the "cruelly surreal" result of the opinion, that "governmental action that will virtually destroy a religion is nevertheless deemed not to 'burden' that religion."[250]

organizations brought a lawsuit arguing, among other things, that the Forest Service's decision to authorize the use of recycled wastewater to make artificial snow for a commercial ski resort located in a national park considered sacred by the tribes violated their rights under RFRA. The Ninth Circuit, relying on *Lyng*, disagreed, ruling that the Forest Service's actions did not impose a "substantial burden" on the tribes: "[l]ike the Indians in *Lyng*," the court explained, "the Plaintiffs here challenge a government-sanctioned project, conducted on the government's own land, on the basis that the project will diminish their spiritual fulfillment." It held that RFRA cannot be interpreted to require the government to change its own activities so as to advance or protect particular religious practices. In 2009, the Supreme Court declined to hear an appeal.[171]

Religious freedom was also an integral part of the multiyear fight over the construction of the Dakota Access Pipeline (DAPL) in the Standing Rock Indian Reservation. In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*,[172] Native American tribes filed a RFRA motion to stop the flow of oil through the pipeline, which ran under the bed of Lake Oahe. They argued that the presence of oil would render water in the lake unsuitable for use in religious practices, as some of the plaintiffs believed that the oil was "the fulfillment of a Lakota prophecy of a Black Snake that would be coiled in the Tribe's homeland and which would harm … [and] devour the people."[173] The D.C. District Court denied the claim, finding that the tribe had waited too long to bring it.[174] The court additionally found that *Lyng* applied, and the tribes could not use RFRA to protect holy land.[175] The plaintiff's appeal was dismissed by the circuit court in 2017.[176]

While many of the most significant religious liberty claims in the environmental justice context have been brought by Native American claimants, a few have been brought by Christian practitioners. In *Adorers of the Blood of Christ v. Federal Energy Regulatory Commission*,[177] a group of Catholic nuns challenged a government agency's order granting a

Photograph by/courtesy of Robert Wilson.

"Clean, pure water is an essential part of the Lakota way of life that Creator has taught us. Clean, pure water is necessary for the rites and sacraments that comprise our religion."

~ Steven Vance, Cheyenne River Sioux Tribal Historic Preservation Officer

private company an easement to construct a natural gas pipeline through the nuns' property. The nuns explained that their "religious practice includes protecting and preserving creation, which they believe is a revelation of God."[178] For example, their complaint noted that they "exercise their religious beliefs by, *inter alia*, caring for and protecting the land they own as well as actively educating and engaging on issues related to the environment, including the current and future impact on the Earth caused by global warming as the result of the use of fossil fuels."[179] Thus, forcing the Adorers to use their land to accommodate a fossil fuel pipeline "places a substantial burden on [their] exercise of religion" in violation of RFRA. [180] The nuns lost on procedural grounds, and in 2019 the Supreme Court declined to hear their appeal.[181]

Members of the Adorers of the Blood of Christ and their supporters. Photograph by/ courtesy of Dave Parry, Outside the Image.

"As religious women of the Catholic Church, our faith impels us to stand up when the principles we hold sacred are compromised on the very land that is ours…This is not a political statement but a spiritual stand as people of faith."

~ Sister Janet McCann, Adorers of the Blood of Christ (wearing a red scarf)

In *Gelburd v. Christiansen,*[182] a Christian doctor filed a complaint against the U.S. Forest Service after he was prevented from providing medical assistance to a woman protesting the construction of a pipeline through a national forest in Virginia. The protester was occupying a small pod atop a pole in the forest, and the Forest Service was seeking to flush her out by cutting off her access to food, water, communication, and medical care. After hearing about the protester, Dr. Gelburd "attempted to reach her and conduct a medical examination of her to determine whether she…require[d] attention and treatment," but was stopped by Forest Service employees.[183] As he explained in his legal complaint, Dr. Gelburd's actions were motivated by his religious beliefs, which "compel him to use his knowledge and skills as a physician to assist persons in need of medical assistance, particularly the poor and disadvantaged."[184] In preventing

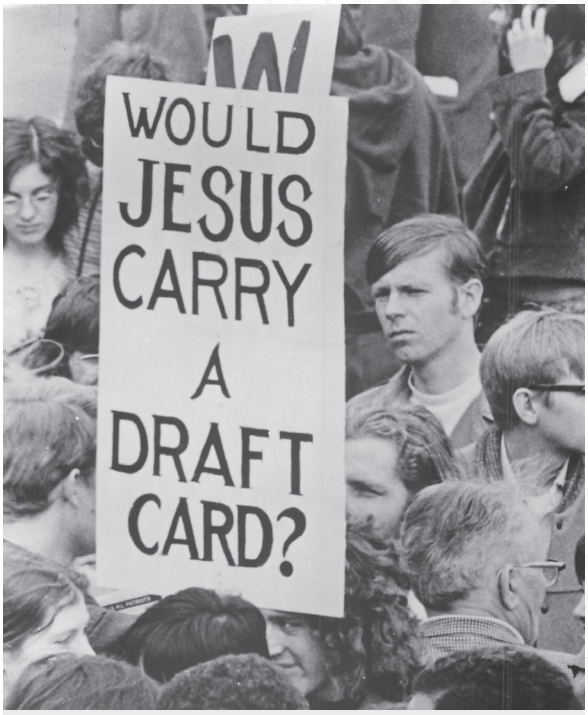
him from administering care, Dr. Gelburd argued that the government was burdening his religious exercise in violation of RFRA and the Free Exercise Clause. He withdrew the lawsuit after the woman ended her protest.[185]

While rarely successful, religious liberty claims have consistently been used as a legal tool, both before and after the passage of RFRA, to challenge environmental destruction, including the destruction of holy sites.

Conscientious Objection & Anti-War Activism

Many religious practitioners, most prominently Quakers, have religious objections to participation in violence and war. As mentioned in the religious liberty timeline above, laws exempting conscientious objectors (those who oppose serving in the armed forces for religious or conscience-based reasons) from military service are some of the most longstanding religious exemption laws in the U.S.[186] The current Selective Service requirements mandate that conscientious objectors who are drafted perform some alternative form of public service—unlike exemptions that permit religious objectors to disregard a law or policy entirely.[187]

Not all people of faith are covered by existing conscientious objector laws, however. In 1971, the Supreme Court held that those who had religious objections to serving in the Vietnam War—but not all wars—were not entitled to an exemption from military service under the Military Selective Service Act.[188] Further, the Court held that the Free Exercise Clause did not mandate that such objectors be exempted from service. In rejecting a constitutional exemption for those opposed specifically to the Vietnam War, the Court held that there existed "governmental interests of a kind and weight sufficient to justify under the Free Exercise Clause the impact of the conscription laws on those who object to particular wars."[189] Specifically, the Court pointed to "the Government's interest in procuring the manpower necessary for military purposes."[190]



Courtesy of Religion News Service.

Two other important cases of the Vietnam era were more favorable to religious objectors. In *United States v. Seeger*[191] and *Welsh v. United States*,[192] the Supreme Court ruled that persons with nontraditional religious beliefs—including those who did not even describe their beliefs as "religious"—could be entitled to a religious exemption under the Selective Service Act. The Court noted that this construction of the Act "embraces the ever-broadening understanding of the modern religious community."[193]

Some conscientious objectors are opposed not only to fighting wars, but to paying taxes that will be used to support the military. Those who object to paying for wars, however, have not succeeded in gaining religious exemptions under the Free Exercise Clause or RFRA. Pacifists who have argued that their religious beliefs permit them to withhold or divert all or part of their tax payments have consistently lost in court.[194] In *Adams v. C.I.R.*,[195] for example, a devout Quaker stated that she "sincerely believes that participation in war is contrary to God's will, and hence, that the payment of taxes to fund the military is against the will of God."[196] She therefore "declared herself exempt from taxation, so no federal income tax would be withheld from her pay."[197] The Third Circuit denied her claim, holding that granting an exemption would be impossible because of the "practical need of the government for uniform administration of taxation, given particularly difficult problems with administration should exceptions on religious grounds be carved out by the courts."[198]

Finally, some religious practitioners' anti-war beliefs require them to do far more than refrain from fighting in, or financially supporting, wars. Some people of faith—members of the historic "Peace Churches" (including Quakers and Mennonites), as well as Catholics, Jews, and many other religious practitioners—have been motivated by their beliefs to engage in anti-war protest and organizing. While there was some anti-war activity during WWI and WWII, the Vietnam War was a particularly active time for such religiously motivated protest.

In the late 1960s and early 70s, those opposed to the Vietnam War, including many priests, reverends, brothers, nuns, and other people of faith, participated in dozens of draft board raids in which participants entered government offices and destroyed Selective Service records.[199] In 1968, for instance, a group of nine Catholics, including six current or former priests, brothers, or nuns, seized several hundred draft records from a Selective Service office in Catonsville, Maryland and burned them with homemade napalm.[200] After burning the records they held hands and recited the Lord's Prayer.[201] Two of the nine were, at the time, on bail after having been arrested the previous year for entering a draft board office in Baltimore, distributing Bibles, and pouring blood on draft records.[202]

The Milwaukee Fourteen burning draft records. Courtesy of Jim Forest.

"It seemed to me one of the tragedies of history that Christians, since the age of Constantine, had rarely put their obedience to Christ ahead of their obedience to the state."

~Jim Forest, member of the Milwaukee Fourteen (fourth from left)

Other draft board raid participants during this period included the "Milwaukee Fourteen" (including six Catholic clergymembers and a minister of the Church of Scientology), who held a religious service and recited from the Gospels of John and Luke while burning draft records;[203] the "D.C. Nine" (including five priests and two nuns), who broke into and poured blood on office files at the Dow Chemical Company, a weapons manufacturer;[204] the "Camden Twenty-eight" (including four Catholic priests, a Lutheran minister, and 23 Catholic laypeople);[205] the "Chicago Fifteen" (including two priests);[206] the "New York Eight" (including three priests);[207] and the "Boston Eight" (including two priests and a nun).[208]

A number of these raids resulted in high-profile trials. While the draft board raiders do not appear to have raised a legal defense explicitly based on the Free Exercise Clause, they defended their actions in several cases by explaining that they had acted out of sincere religious conviction, and in accordance with God's higher law. This argument was soundly and repeatedly rejected. The trial judge in the D.C. Nine case, for example, "emphatically denied the existence of a 'legal defense' based on 'sincere religious motives' or a belief that action was justified by 'some higher law.'"[209] An opinion in the Catonsville Nine trial, while it admitted that the sincerity of the protestors was "beyond question," explained that "the exercise of a moral judgment based upon individual standards does not carry with it legal justification or immunity from punishment for breach of the law."[210] The opinion in a Baltimore draft raid case quoted a 1943 religious liberty case brought by a draft refuser: "[o]ne is criminally responsible who does an act which is prohibited by a valid criminal statute, though the one who does this act may do it under a deep and sincere religious belief that the doing of the act was not only his right but also his duty."[211] It further explained that "[n]o civilized nation can endure where a citizen can select what law he would obey because of his moral or religious belief."[212]

Another wave of religious anti-war protests began in the 1980s, with the birth of the Plowshares movement, a Christian pacifist movement that takes its name from the vision expressed in the Book of Isaiah: "Nations shall beat their swords into plowshares and their spears into pruning hooks; one nation shall not raise the sword against another, nor shall they train for war again."[213] The Plowshares movement advocates active resistance to war and originated with a 1980 protest in which eight Christians, including several priests and a nun, entered a General Electric facility, hammered on missile components, and poured blood on security documents.[214] For the past four decades, its members have engaged in nonviolent, often symbolic forms of protest at military and weapon manufacturing facilities. While typically relying on secular legal defenses, on occasion Plowshares members have harnessed their religious beliefs as a defense to prosecution—albeit with little success.

For example, three Plowshares members who were prosecuted in 2013 for a protest at a nuclear facility in Tennessee argued in federal court that they "must be able to present evidence on their religious, moral, and political beliefs because that evidence is needed to" demonstrate that they did not act with an illegal intent to harm the U.S.[215] The court held that their religious motives were "irrelevant."[216]

More pointedly, in 2018, a group of seven Catholic Plowshares members broke into and staged a protest at a U.S. nuclear submarine naval base in Georgia. Using spray paint and

containers of their own blood, they "symbolically disarmed the building and its surroundings."[217] As they later explained, the protesters considered this to be a "prophetic action to raise the consciousness of society about the immorality" of nuclear weapons.[218] The action was motivated by their religious commitment "to practice peaceful activism to carry forth the prophet Isaiah's command to 'beat swords into plowshares' in its effort to promote peace and prevent nuclear war."[219] Many of those arrested were affiliated with the Catholic Worker movement—a decentralized religious group, unaffiliated with the official Catholic Church, whose members seek to "serve the poor, and resist war and social injustice."[220]

The "Kings Bay Plowshares Seven," as they came to be known, were arrested and charged with conspiracy, trespass, destruction of property, and "depredation" of property.[221]

Members of the Kings Bay Plowshares and supporters outside a federal courthouse. Courtesy of Kings Bay Plowshares.

"The idolatry of these nuclear weapons and the government which protects their massive destructive power, leave me no choice, I must follow my conscience and my faith."

~ Elizabeth McAlister, Plowshares protester

In response, they sought to have the charges dismissed under RFRA. Among other defenses, the Seven argued that their protest was a form of sincere religious exercise, and that prosecuting them was not necessary to achieve any compelling government interest.[222]

In August 2019, the district court judge held that the charges against the Seven should not be dismissed.[223] The judge found the defendants to be both religious and sincere[224] —despite the federal government's claim that their protest "reflect[ed] an effort to propagandize and obtain secular public policy revisions tinged with post-hoc religious justification."[225] While the judge found that there was a substantial burden on the protestors' religious exercise, she held that application of the criminal laws to the defendants was the least restrictive means of furthering the government's "compelling interests in the safety of those on Kings Bay Naval Submarine Base, the security of the assets housed there, and the smooth operation of the base."[226] In October 2019, the protesters were found guilty of all charges.

Capital Punishment

People of faith from a range of different traditions oppose capital punishment on religious grounds. This has led some to engage in protest against the practice or to refuse to participate in death penalty trials as a judge, juror, or witness. In 2017, for example, Wendell Griffen, an Arkansas state judge as well as an ordained Baptist minister, participated in an anti-death penalty rally and prayer vigil on Good Friday outside of the Governor's mansion.[227] In response, the Arkansas Supreme Court and its judges barred him from presiding over death penalty cases. Judge Griffen then brought a complaint against the Court, arguing that the bar violated

"Premeditated and deliberate killing of defenseless persons—including defenseless persons who have been convicted of murder—is not morally justifiable."

~Judge Wendell Griffen

Photograph by/courtesy of Brandon Markin.

the Arkansas RFRA and chilled his religious exercise in violation of the Free Exercise Clause of the First Amendment.

The Eighth Circuit found against Judge Griffen, and upheld the bar on his participation in death penalty cases. Addressing the Free Exercise claim, it held that the order "does not prohibit Judge Griffen's free exercise of religion…Rather, the order reflects neutral principles applicable to all judges who exhibit potential for bias."[228] Regarding the state RFRA claim, the court held that even if the order did burden the judge's exercise of religion, "Arkansas has compelling interests in the impartiality of the judiciary and in public perception of an impartial judiciary" and Judge Griffen "does not allege any less restrictive means of furthering this compelling interest."[229] In September 2019, the Arkansas Supreme Court refused to restore Judge Griffen's ability to hear capital cases.[230]

Religious Exemptions & Government Employees

The reasoning of the Eighth Circuit's decision against Judge Griffen—that the state has a compelling interest in ensuring that certain state actors are perceived as impartial—could prove useful to advocacy groups fighting religious exemption requests brought by anti-LGBTQ government employees such as Kim Davis, the Kentucky county clerk who refused to issue marriage licenses to same-sex couples in the wake of *Obergefell v. Hodges*.[251]

On the other hand, it seems intuitively unfair and disingenuous to prevent judges who oppose the death penalty for religious reasons, but not those who support the death penalty for religious reasons, from hearing capital cases. Moreover, as Judge Griffen himself has noted, there are many other instances in which judges who hold particular religious beliefs are permitted to hear cases that pose a risk of bias, or the appearance of bias—such as judges with a history of anti-choice religious activism who are nevertheless permitted to hear disputes involving abortion.[252]

Another recent case that made the news involved Greta Lindecrantz, a Mennonite woman who was held in contempt of court and imprisoned after she refused to testify in a Colorado death penalty case because of her religious opposition to capital punishment.[231] Lindecrantz, who had worked as an investigator on the defense team of the man facing the death penalty, agreed to testify only after the criminal defense attorneys in the case "said her stance was adversely affecting [the defendant's] legal position."[232]

Atheists' Rights & Church-State Separation

Finally, religious liberty laws have been used by people of faith, Humanists, and atheists[233] to fight for the rights of nonbelievers and for church-state separation. While traditionally the Establishment Clause has been the vehicle for such challenges, litigants have increasingly turned to Free Exercise and religious exemption-based claims.

For example, some groups—in particular The Satanic Temple (TST)—have openly attempted to use religious freedom demands by their members as a kind of poison pill to limit the scope of government religious activities and exemptions. TST has relied on a "nuclear option for church/state separation"[234] that one commentator has deemed "Lucien's Law" after TST co-founder Lucien Greaves. The "law" states that "governments will either (1) close open forums when The Satanic Temple asks to speak, or (2) censor The Satanic Temple, thereby opening itself to legal liability."[235]

In some circumstances this tactic has proven quite effective. When the state of Oklahoma placed a statute of the Ten Commandments outside of its state capitol, TST announced its intention to donate a statue to "complement" it: a representation of Baphomet, a goat-headed deity that has been adopted by occult and satanic groups.[236] The Oklahoma Supreme Court later held that the Ten Commandments statute violated the Oklahoma Constitution. Similarly, TST has requested to give Satanic invocations before state legislatures that open meetings with prayer,[237] started "After School Satan" clubs in public schools that permit religious afterschool programs, and distributed Satanic coloring books in public schools that allow the distribution of religious literature.[238]

In addition, atheists and others have brought claims arguing that government acts that embrace or promote religious precepts violate their religious beliefs (or lack thereof). In *New Doe*

Statue of Baphomet in front of the Arkansas state capitol building for the Satanic Temple's Rally for the First Amendment in 2018. Courtesy of Magnolia Pictures.

Child #1 v. Congress of United States, a group of atheist, Humanist, and Jewish claimants argued that laws requiring the inscription of the national motto "In God We Trust" on currency violated their RFRA rights. They argued that the inclusion of this religious message on government-issued money "cause[d] them to bear, affirm, and proselytize an objectionable message in a way that, for the Atheist and Humanist Plaintiffs, violates their core religious beliefs, and, for the Jewish Plaintiff, renders him complicit in the sins of superfluously printing God's name and destroying God's printed name."[239] The Sixth Circuit found no substantial burden on their beliefs, as the plaintiffs were not legally required to use cash and RFRA "does not require the Government to permit Plaintiffs to use their preferred means of payment."[240]

In *Barker v. Conroy*, Evangelical-preacher-turned-atheist-activist Dan Barker sued the U.S. House of Representatives after he was denied the opportunity to be a guest chaplain and deliver a secular invocation to legislators in lieu of an opening prayer.[241] He claimed that, in addition to violating the Establishment Clause, the government was infringing on his rights under RFRA by forcing him to choose between receipt of a government benefit—serving as the guest chaplain—and following his religious beliefs by giving secular remarks.[242] For context, the Supreme Court had previously held that legislative prayer programs, if neutral, do not violate the Establishment Clause.[243] The district court of D.C. rejected Barker's claim in part because it found that "the opportunity to serve as a guest chaplain is not the type of benefit covered by RFRA."[244] While the case was appealed, the D.C. Circuit Court ruled only on Barker's Establishment Clause, not his RFRA claim.[245]

Dan Barker. Photograph by Sam via flickr.

"I cannot invoke a spirit or supernatural agency before this esteemed body. But I can invoke the 'spirit'… of Thomas Jefferson, [a] nonChristian deist, who stated that our Constitution 'erects a wall of separation between church and state.'"

~Dan Barker's proposed secular invocation to Congress

The cases outlined above represent a wide sampling of the religious liberty claims that have—or could be—brought outside of the "culture war" context. There are countless additional religious liberty claims that could be used to gain exemptions in the public health, criminal justice, voting rights, economic justice, gun control, animal welfare, and other areas. Examples might include:

* * *

An oncologist requests an exemption under the federal RFRA from the Controlled Substances Act. She argues that the Act prevents her from acting on her religious obligation to sell or administer marijuana to patients who would benefit from the drug.

An employee of the federal government who is responsible for enrolling people in public benefit programs is fired for enrolling all applicants that she believes need financial assistance into the programs, regardless of whether or not they are eligible under the law. She brings a RFRA claim, arguing that she was acting on her religious belief that denying benefits to people in need is immoral.

An Immigration and Customs Enforcement agent affirmatively sues the Department of Homeland Security seeking an exemption from any job duties that would require his participation in separating families, which would violate his religious beliefs.

A resident of public housing requests an exemption under a state RFRA from a state rule barring persons with felony convictions from public housing. He argues that this rule coerces him into violating his religious obligation to care for family members in need, including those with felony convictions.

A person with a felony conviction requests an exemption under a state RFRA from a state law barring persons with felony convictions from voting. She argues that this rule prevents her from fulfilling her religious obligation to vote.

A professor at a public university is disciplined for prohibiting her students from carrying firearms into her classroom or office, despite a state "campus carry" law allowing guns on public university campuses. The professor brings a state RFRA claim, arguing that teaching in a classroom with guns would violate her religious beliefs.

An animal rights activist requests an exemption under a state RFRA from a state "ag-gag" bill, which limits the ability of whistleblowers to expose health, safety, and animal

rights violations in the agriculture industry. The objector argues that this rule prevents him from fulfilling his religious obligation to expose animal abuse.

The religious exemption claims that might be brought by people of faith engaged in humanitarian and progressive social movements are nearly endless. As is evident from the examples discussed above, however, religious liberty claims brought by those who engage in social justice work as a form of religious exercise have only rarely succeeded. In contrast, the Christian right has made enormous gains in securing religious exemptions in recent years before the courts, in state legislatures, and especially within the current federal administration.

Endnotes, Section II: Sikhs and Satanists, Sanctuary and Safe Drug Use: Religious Liberty Law Beyond the Christian Right

1 Jeffrey Scheuer, *Origins of the Settlement House Movement,* Virginia Commonwealth U. (last visited Sept. 25, 2019) *available* at https://socialwelfare.library.vcu.edu/settlement-houses/origins-of-the-settlement-house-movement/; Margaret E. Berry, Settlement Movement: 1886-1986, Virginia Commonwealth U. (last visited Sept. 25, 2019) *available* at https://social-welfare.library.vcu.edu/settlement-houses/settlement-movement-1886-1986/; Alice W. Campbell, The Temperance Movement, Virginia Commonwealth U. (last visited Sept. 25, 2019), https://socialwelfare.library.vcu.edu/religious/the-temperance-move-ment/.

2 Taylor Branch, *Globalizing King's Legacy,* N.Y. Times (Jan. 16, 2016), https://www.nytimes.com/2006/01/16/opinion/globalizing-kings-legacy.html.

3 Laura R. Olson, *The Religious Left in Contemporary American Politics*, 12 Pol., Religion & Ideology 271, 287 (2011).

4 Timothy J. Williams, *Evangelical Christians Are on the Left, Too*, Religion News Service (Oct. 18, 2016), https://religionnews.com/2016/10/18/evangelical-christians-are-on-the-left-too/. Williams continued, "What has remained unrecognized is the important role the Christian left has played during the last 50 years." *Id.*

5 Holly Meyer, *You Know the Religious Right. Here's the Religious Left (And It's Fired Up)*, Usa Today (Apr. 15, 2017), https://www.usatoday.com/story/news/nation-now/2017/04/15/tough-times-deeper-faith/100491902/; Michelle Tang, T*he Christian Left—Possibly the Most Interesting Group You've Never Heard Of*, Huffington Post (Dec. 6, 2017), https://www.huffingtonpost.com/michelle-tang/the-christian-leftpossibl_b_8270596.html.

6 Harmeet Kamboj, *The Media's 'Religious Left' Is Erasing Marginalized Communities of Faith*, Sojourners (Feb. 6, 2019), https://sojo.net/articles/media-s-religious-left-erasing-marginalized-communities-faith.

7 Kirby Goidel, Brian Smentkowski, Craig Freeman, *Perceptions of Threat to Religious Liberty*, 49 Pol. Sci. & Pol. 426, 430 (2016).

8 Note that while this section includes litigation brought in the 1960s, 70s, and 80s, the passage of RFRA has created a sea change in religious exemption law; thus, litigation brought prior to its enactment should not be considered controlling authority.

9 *Singh v. McHugh*, 185 F.Supp.3d 201 (D.D.C. 2016).

10 A.A. ex rel. *Betenbaugh v. Needville Indep. School Dist*., 611 F.3d 248 (5th Cir. 2010).

11 *Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009).

12 *Tagore v. United States*, 2014 WL 2880008 (S.D. Tex. 2014); Don Byrd, Federal Government Settles Dispute with Sikh Woman Over Kirpan, Baptist Joint Committee For Religious Liberty (Nov. 7, 2014), https://bjconline.org/federal-government-settles-dispute-with-sikh-woman-over-kirpan-110714/. In addition to claims brought under RFRA, religious minorities continue to occasionally succeed in bringing religious liberty claims under the Free Exercise Clause of the U.S. constitution—for example, where a law or policy is found to be under-inclusive and therefore not "neutral." *See, e.g.*, *Mitchell County v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012).

13 42 U.S.C. § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

14 *E.E.O.C. v. Abercrombie & Fitch Stores*, Inc., 575 U.S. __, 135 S. Ct. 2028, 2037 (2015). Employers need not accommodate the religious beliefs of employees where doing so would cause an undue hardship. *See, e.g.*, *Finnie v. Lee County, Mississippi,* 907 F.supp.2d 750 (N.D. Miss. 2012) (juvenile detention facility was not required to accommodate an officer's religious beliefs requiring her to wear a skirt.).

15 *Holt v. Hobbs*, 574 U.S. __, 135 S. Ct. 853, 867 (2015). *See also Yellowbear v. Lampert*, 741 F.3d 48, (10th Cir. 2014); *Carter v. Myers*, 2017 WL 3498878 (D.S.C. 2017).

16 Lucien J. Dhooge, *The Religious Freedom Restoration Act at 25: A Quantitative Analysis of the Interpretive Case Law*, 27 Wm. & Mary Bill Of Rts. J. 153, 205, 207 (2018). Incarcerated plaintiffs have an especially low rate of success; RLUIPA and RFRA claims brought by people in prison are frequently dismissed for a number of procedural and substantive reasons, including failure to exhaust administrative remedies and failure to demonstrate a substantial burden on their religious beliefs. *See, e.g.*, *Parson v. Pierce,* 2019 WL 1004298 (D. Del. Feb. 28, 2019); *Burke v. N.D. Dep't of Corr. and Rehab*., 620 F.Supp.2d 1035 (D.N.D. 2009) *appeal dismissed,* 371 Fed.Appx. 713 (8th Cir. 2010).

17 *United States v. Vasquez-Ramos*, 531 F.3d 987, 993 (9th Cir. 2008), *cert denied*, 555 U.S. 1172 (2009); *United States v. Wilgus*, 638 F.3d 1274, 1296 (10th Cir. 2011); *Gibson v. Babbitt,* 223 F.3d 1256, 1258-9 (11th Cir. 2000); *United States v. Friday,* 525 F.3d 938, 959 (10th Cir. 2008); *United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001), *but see McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465. 480 (5th Cir. 2014).

18 *Harrell v. Donahue*, 638 F.3d 975, 983-4 (8th Cir. 2011) (the court held that Title VII provided the exclusive remedy for federal employee discrimination claims.).

19 In re Three Children, 24 F.Supp.2d 389 (D.N.J. 1998).

20 *Dunn v. Ray,* 139 S. Ct. 661 (2019).

21 *Id.* at 661.
22 *Murphy v. Collier,* 139 S. Ct. 1111 (2019).
23 22 Bible Verses on Welcoming Immigrants, Sojourners (last visited Sept. 25, 2019), https://sojo.net/22-bible-verses-welcoming-immigrants.
24 8 U.S.C. § 1324.
25 Interview with Alexia Salvatierra, *The Roots and Branch of the Sanctuary Movement,* Christian Century (Feb. 15, 2017), https://www.christiancentury.org/article/roots-and-branches-sanctuary-movement ("More than 500 churches participated over about a ten-year period, sheltering about 500,000 refugees"); Puck Lo, *Inside the New Sanctuary Movement That's Protecting Immigrants From ICE*, The Nation (May 6, 2015), https://www.thenation.com/article/inside-new-sanctuary-movement-thats-protecting-immigrants-ice/ (Today's sanctuary movement is being revived by many of the same communities of faith that in the 1980s transported and sheltered up to 500,000 refugees). Other sources estimate that the number of refugees aided the sanctuary movement was far lower. *See* Clyde Haberman, *Trump and the Batter over Sanctuary in America*, N.Y. Times (Mar. 5, 2017), https://www.nytimes.com/2017/03/05/us/sanctuary-cities-movement-1980s-political-asylum.html ("In all, an estimated 2,000 refuge seekers were aided in that latter-day version of the Underground Railroad.").
26 *United States v. Merkt*, 794 F.2d 950, 953-54 (5th Cir. 1986); *United States v. Aguilar*, 883 F.2d 662, 666 fn.1 (9th Cir. 1988).
27 Notably, some sanctuary activists argued that their activities should not be considered illegal, but were in fact efforts to enforce the law in the face of the U.S. government's violations of both international human rights and the county's own immigration laws. *See* Sanctuary Trial Papers U. Ariz. Special Collections (last visited Sept. 25, 2019), https://speccoll.library.arizona.edu/collections/sanctuary-trial-papers ("Jim Corbett, a Quaker, insisted that what they were doing was not 'civil disobedience.' He argued instead that it was 'civil initiative—they were upholding laws regarding treatment of war refugees that the U.S. government refused to enforce.").
28 *Merkt,* 794 F.2d at 957.
29 *Aguilar,* 883 F.2d at 695.
30 *American Baptist Churches v. Meese,* 712 F. Supp. 756 (N.D. Cal. 1989) (sanctuary activists affirmatively sought an exemption from the federal harboring statute); *Intercmty. Ctr. for Justice and Peace v. I.N.S.*, 910 F.2d 42 (2nd Cir. 1990) (religious organization sought exemption from Immigration Reform and Control Act, stating it was religiously compelled to provide employment to persons in need regardless of their immigrant status); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 941 F.2d 808 (9th Cir. 1991) (same); *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989) (Churches argued that their religious rights were violated when INS agents entered churches and surreptitiously recorded church services).
31 *See, e.g.*, Manny Fernandez, *She Stopped to Help Migrants on a Texas Highway. Moments Later, She Was Arrested*, N.Y. Times (May 10, 2019), https://www.nytimes.com/2019/05/10/us/texas-border-good-samaritan.html; Nate Raymond, Massachusetts Judge Faces Federal Charges for Blocking Immigration Arrest, Reuters (Apr. 25, 2019), https://www.reuters.com/article/us-usa-immigration-judge/massachusetts-judge-faces-federal-charges-for-blocking-immigration-arrest-idUSKCN1S1260.
32 *United States v. Warren*, No. 4:18-cr-00223-RCC-BPV (D. Ariz. Feb 14, 2018); *United States v. Deighan*, No. 4:17-mj-00340-N/A-BGM (D. Ariz. Dec. 6, 2017); *United States v. Hoffman*, No. 4:17-mj-00339-N/A-BGM (D. Ariz. Dec. 6, 2017).
33 Transcript of Motion Hearing at 45, *United States v. Warren*, No. CR-18-223-TUC-RCC (D. Ariz. May 11, 2018).
34 Defendant's Amended Motion to Dismiss Counts 2 and 3 at 12, *United States v. Warren*, No. 4:18-cr-00223-RCC-BPV (D. Ariz. Feb 14, 2018).
35 *See, e.g.*, Aysha Khan, *Pastor Surveilled After Ministering to Migrants Sues US Government,* Religion News Serv. (July 9, 2019), https://religionnews.com/2019/07/09/pastor-surveilled-after-ministering-to-migrants-sues-us-government/; Anita Snow, Arizona Clergy Call Activists to Support Migrants on Border, Religion News Serv. (Aug. 4, 2018), https://religionnews.com/2018/08/04/arizona-clergy-call-activists-to-support-migrants-on-border/. For a list of news articles that fail to mention Dr. Warren and others' RFRA claims, *see infra* Section IV note 11
36 Samuel Smith, *Religious Freedom Concerns Raised as Trial Over Aid to Illegal Immigrants Ends in Hung Jury*, Christian Post (June 13, 2019), https://www.christianpost.com/news/religious-freedom-concerns-raised-as-trial-over-aid-to-illegal-immigrants-ends-in-hung-jury.html.
37 Bob Ortega, *Prosecutors to Retry Volunteer Worker Who Aided Migrants*, Cnn (July 2, 2019), https://www.cnn.com/2019/07/02/us/scott-warren-migrant-humanitarian-prosecution-invs/index.html; Government's Motion to Dismiss Count 1 of the Indictment, *United States v. Warren*, 18-CR-00223-RCC (DTF) (D. Ariz. July 2, 2019).
38 Verdict, *United States v. Hoffman*, NO. M 17-00339-N/A(BPV) at *2 (D. Ariz. Jan. 18, 2019).
39 Brief for Professors of Religious Liberty as Amici Curiae in Support of Neither Party on Defendants' Motion to Dismiss Under the Religious Liberty Restoration Act, *United States v. Hoffman*, No. 4:19-CR-00693-RM (D. Ariz. Apr. 22, 2019).
40 Rafael Carranza, *Border Aid Volunteers Sentenced to 15 Months of Probation, Must Pay Fines*, Azcentral.com (Mar. 1, 2019), https://www.azcentral.com/story/news/2019/03/01/border-aid-volunteers-sentenced-15-months-probation-must-pay-fines/3006562002/.
41 Defendants' Opening Memorandum in Support of Reversal of Magistrate Judge's Judgment of Conviction, *United States v. Hoffman*, No. 4:19-CR-00693-RM (D. Ariz. Mar. 14, 2014).
42 Order, *United States v. Deighan*, No. M 17-00340-N/A(BPV) (D. Ariz. Mar. 5, 2019).
43 *United States v. Good*, 386 F.Supp.3d 1073, 1090 (D. Neb. 2019) (internal quotations omitted).

44 *Id.* at 1091-92.
45 Matthew Renda, *Pastor Claims Government Targeted Her for Ministering to Immigrants*, Courthouse News Serv. (July 8, 2019), https://www.courthousenews.com/pastor-claims-government-targeted-her-for-ministering-to-immigrants/.
46 Complaint at 7, *Dousa v. United States Dep't of Homeland Sec*., No. 3:19-CV-01255-LAB-KSC, 2019 WL 2994633 (S.D. Cal. July 8, 2019), https://www.courthousenews.com/wp-content/uploads/2019/07/Kaji.pdf.
47 *Id.* at 2.
48 *Id.* at 3.
49 *Id.* at 22-23.
50 *Id.* at 34, 36-38. *See also* Plaintiff's Motion for a Preliminary Injunction, *Dousa v. United States Dep't of Homeland Sec*., No. 3:19-CV-01255-LAB-KSC, 2019 WL 2994633 (S.D. Cal. July 25, 2019).
51 Brief of Seventeen Interfaith Clergy and Religious Leaders as Amici Curiae Supporting Respondents' Opposition to Motion for Preliminary Injunction, *Texas HHS Comm'n v. United States,* (N.D. Tex. 2016), 2016 WL 944289.
52 *Id.*
53 *Texas HHS Comm'n v. United States*, 193 F. Supp. 3d 733 (N.D. Tex. 2016), appeal dismissed 5th Cir. 16-11241 (Oct. 11, 2016).
54 Defendant's Supplemental Brief in Opposition to Plaintiff's Motion for Immediate Possession, *United States v. 65.791 Acres of Land,* No. 7:18-cv-00329 (S.D. Tex. Dec. 31, 2018).
55 *Id.* at 10. Interestingly, like in *Rodriguez v. Sessions* discussed below, the diocese' brief made several passing references to abortion in its brief. It mentioned the Catholic belief that "the lives of the immigrant poor are as sacred as the lives of the unborn" and that the Church's opposition to abortion derived from "[t]he foundation of Catholic social teaching is that all human life is sacred and that the dignity of the human person is the moral foundation for society." *Id.* at 7-8.
56 *Id.* at 11.
57 *Id.* at 8, 10.
58 *Id.* at 7, 8.
59 *Id.* at 8.
60 Order on Plaintiff's Opposed Motion for Immediate Possession, *United States v. 65.791 Acres of Land*, No. 7:18-cv-00329 (S.D. Tex. Feb. 22, 2019).
61 Press Release, Office of Congressman Henry Cuellar, *Rep. Cuellar Secures Key Appropriations Language Protecting Sensitive Areas and Requiring Local Communities and DHS to Reach Mutual Agreements on Barriers* (Feb. 14, 2019), https://cuellar.house.gov/news/documentsingle.aspx?DocumentID=403064.
62 Christine Rousselle, *Emergency Declaration Raises New Questions About Texas Border Chapel*, Catholic News Agency (Feb. 18, 2019), https://www.catholicnewsagency.com/news/emergency-declaration-raises-new-questions-about-texas-border-chapel-71429.
63 Brief of 75 Religious Organizations as Amici Curiae Supporting Petitioners, *State of California, et al v. Donald Trump, et al*., Docket No. 19-16336 (9th Cir. Aug. 22, 2019).
64 *Rodriguez et. al. v. Sessions*, Civ. Act. No. 4:17-cv- 1854 (S.D. Texas, June 19, 2017).
65 It's worth noting that the complaint filed by the family's attorneys in this case repeatedly referred to the Rodriguez family as a "close and wholesome Christian American family," and explicitly contrasted them with the "bad hombres" that, impliedly, could or should be deported. Verified Complaint for Declaratory Judgement and Injunctive Relief, *Rodriguez et. al. v. Sessions,* No. 4:17-cv-1854 at 7-8, 14, 15 (S.D. Tex. June 19, 2017). The brief also, for no clear reason, contained a passing reference to *Roe v. Wade* as a case that "found that the life of an unborn child could be terminated." *Id.* at 15.
66 Olivia P. Tallet, *Immigrant Father in Houston 'Out of Time' Case Given a Reprieve*, Houston Chronicle (Jan. 10, 2018), https://www.chron.com/news/article/Out-of-Time-case-is-given-a-reprive-12487766.php.
67 *Odei v. DHS*, No. 18-3105 (7th Cir. Sept. 10, 2019).
68 Brief for Petitioner-Appellant at 11, *Odei v. DHS*, No. 18-3105 (7th Cir. Oct. 1, 2018).
69 Court Opinion, *Odei v. DHS*, No. 18-3105, 2019 BL 338187 (7th Cir. Sept. 10, 2019). *See also Ashby v. Dep't of State,* No. 1:18CV614, 2019 BL 349755 at 29 (M.D.N.C. Sept. 17, 2019) (finding that a RFRA claim challenging the denial of a visa—brought by a Columbian man seeking religious training in the U.S. and a U.S. citizen who wished to provide that training—was "barred by consular non-reviewability.").
70 *In re Chukwuezue Henry Nworu*, 2005 WL 1104255 (B.I.A. 2005), full case history available at http://www.lexisnexis.com/practiceareas/immigration/pdfs/web789.pdf.
71 *Id.*
72 *Doe v. United States*, No. 4:18-cv-00162-TWP-DML (S.D. Ind. Sept. 5, 2018); Rick Callahan, *Amish Couple Sues 2 Agencies Over Photos Their Faith Forbids*, Associated Press (Sept. 5, 2018), https://www.usnews.com/news/best-states/indiana/articles/2018-09-05/amish-couple-sues-2-agencies-over-photos-their-faith-forbids.
73 *Id.* Notably, the complaint explains that the Does "do not intend to harm anyone for any reason and do not seek to punish anyone for their actions." *Id.* at 4. Their complaint also alleges a violation of, among other things, the couple's right to free speech, free exercise of religion, and freedom of association under the First Amendment.
74 Stipulated Dismissal with Prejudice, *Doe v. United States*, No. 4:18-cv-00162-TWP-DML (S.D. Ind. July 17, 2019).
75 Complaint for Emergency Relief and Petition for Mandamus, *Sabra v. Pompeo*, No. 1:19-cv-02090 (D.D.C. Jul 15, 2019).

76 One other case is worth mentioning, though it also does not involve a religious liberty claim. In *Ragbir v. Homan,* immigration activist Ravi Ragbir, as well as several immigrants' rights organizations, are arguing that Ragbir and other undocumented people have been unjustly targeted for deportation because of their political and speech activities, in violation of the First Amendment's guarantee of free speech. Complaint, *Ragbir v. Homan*, No. 18-CV-1159 (S.D.N.Y. 2018). The complaint seeks a court order restraining the government from deporting and otherwise targeting immigrants' rights activists based on their protected political speech. In November, the Second Circuit issued an order granting a stay of removal to Ravi until the case is litigated. Order of Stay of Removal, *Ragbir v. Homan*, No. 18-1597 (2nd Cir. Nov. 1, 2018). On April 25th, the Second Circuit ruled that Ragbir had made a plausible first amendment retaliation claim. *Ragbir v Homan*, 923 F.3d 53 (2nd Cir. 2019). The case is ongoing. Should any undocumented people be targeted for removal because of their religious beliefs, a similar claim could be brought under the Free Exercise Clause.

77 *Statement on Reproductive Freedom*, Rabbinical Assembly (May 15, 2019), https://www.rabbinicalassembly.org/story/statement-reproductive-freedom.

78 *A Social Statement on Abortion*, Evangelical Lutheran Church In America (Sept. 1991), http://download.elca.org/ELCA%20Resource%20Repository/AbortionSS.pdf.

79 *Report of the Special Committee on Problem Pregnancies and Abortion*, Presbyterian Church (U.S.A.) Off. Of The Gen. Assembly 11 (1992), http://www.pcusa.org/site_media/media/uploads/oga/pdf/problem-pregnancies.pdf ("We do not wish to see laws enacted that would attach criminal penalties to those who seek abortions or to appropriately qualified and licensed persons who perform abortions in medically approved facilities.").

80 *Resolution Adopted by the CCAR On Abortion and the Hyde Amendment*, Cent. Conf. Of Am. Rabbis (June 1984), https://www.ccarnet.org/ccar-resolutions/abortion-1984/ (stating that "the Central Conference of American Rabbis has gone on record in 1967, 1975, and 1980 in affirming the right of a woman or individual family to terminate a pregnancy."); *Reproductive Rights*, Union For Reform Judaism (last visited Mar. 13, 2018), https://urj.org/what-we-believe/resolutions/reproductive-rights.

81 *Resolution on Reproductive Freedom*, The Rabbinical Assembly (Feb. 2007), https://www.rabbinicalassembly.org/resolution-reproductive-freedom ("the Rabbinical Assembly urges its members to support full access for all women to the entire spectrum of reproductive healthcare, and to oppose all efforts by federal, state, local or private entities or individuals to limit such access.").

82 *General Synod Statements and Resolutions Regarding Freedom of Choice*, United Church Of Christ (last visited Mar. 13, 2018), http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-Freedon-of-Choice.pdf?1418425637 ("for 20 years, Synods of the United Church of Christ have affirmed a woman's right to choose with respect to abortion.").

83 *Right to Choose 1987 General Resolution*, Unitarian Universalist Ass'n (1987), https://www.uua.org/action/statements/right-choose ("the 1987 General Assembly of the Unitarian Universalist Association reaffirms its historic position, supporting the right to choose contraception and abortion as legitimate aspects of the right to privacy.").

84 *A Social Statement on Abortion*, Evangelical Lutheran Church In America, *supra* section II note 78. (opposing "legislation that would outlaw abortion in all circumstances" or "prevent access to information about all options available to women faced with unintended pregnancies.").

85 *The United Methodist Church and the Complex Topic of Abortion*, United Methodist Church (Nov. 3, 2015), http://www.umc.org/what-we-believe/the-united-methodist-church-and-the-complex-topic-of-abortion (expressing a "reluctance to affirm absolute perspectives either supporting or opposing abortion which do not account for the individual woman's sacred worth and agency.").

86 While the Episcopal Church has stated that abortion should be "used only in extreme situations," it has opposed certain legal efforts to restrict abortion rights, such as parental notification laws. *See Oppose Legislation Requiring Parental Consent for Termination of Pregnancy*, The Episcopal Church (1991), https://episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=1991-C037; *see also Religious Leaders Support Maintaining the Status Quo on Abortion in Health Care Reform,* The Episcopal Church (Dec. 4, 2009), https://www.episcopalchurch.org/library/article/religious-leaders-support-maintaining-status-quo-abortion-health-care-reform.

87 *See* Bridgette Dunlap, *How Clergy Set the Standard for Abortion Care*, The Atlantic (May 29, 2016), https://www.theatlantic.com/politics/archive/2016/05/how-the-clergy-innovated-abortion-services/484517/.

88 Doris Andrea Dirks And Patricia A. Relf, To Offer Compassion: A History Of The Clergy Consultations Service On Abortion 82, 98 (Univ. of Wisconsin Press) (2017)..

89 *Id.* at 93

90 *Landreth v. Hopkins*, 331 F. Supp. 920 (N.D. Fla. 1971).

91 *Id.*

92 W*atkins v. Mercy Med. Ctr.*, 364 F.Supp. 799, 803 (D. Idaho 1973), aff'd, *Watkins v. Mercy Med. Ctr.*, 520 F.2d 894, 896 (9th Cir. 1975) (finding that while under the Church Amendment a hospital cannot discriminate against providers who would like to perform sterilizations, it "has the right to adhere to its own religious beliefs and not be forced to make its facilities available for services which it finds repugnant to those beliefs.").

93 For information on when and whether RFRA has been interpreted to apply in suits between private parties, *see Sara Lunsford Kohen, Religious Freedom in Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties,* 10 Cardozo Pub. L., Pol. & Ethics J. 43 (2011).

94 *See supra* Section I note 28.
95 Complaint for Vacatur of Unlawful Agency Rule and Declaratory and Injunctive Relief, *Baltimore v. Azar,* No. 1:19-cv-01103 (D. Md. Apr. 12, 2019).
96 *Id.* at 8.
97 *Id.* at 52-53
98 *Id.* at 53. The suit also alleges that the rule violates the RFRA rights of Baltimore itself: "RFRA protects not only Baltimore's religiously observant physicians and patients, but also Baltimore itself because corporations are 'person[s]' protected by RFRA…Baltimore has plausibly alleged that the Rule interferes with the religious exercise of Baltimore, its patients, and its physicians." *See* Plaintiff's Response in Opposition to Defendants' Motion to Dismiss at 7, *Baltimore v. Azar*, No. 1:19-cv-01103 (D. Md. Aug. 26, 2019). This is a strange assertion given that it would unquestionably be a violation of the Establishment Clause for a city to adopt any formal religious affiliation or practice.
99 Memorandum Order at 15-16, *Baltimore v. Azar*, No. 1:19-cv-01103 (D. Md. Sept. 12, 2019).
100 *Id.*
101 *Doe v. Greitens*, 530 S.W.3d 571 (Mo. Ct. App. 2017); *Satanic Temple v. Parson*, 735 Fed. App'x. 900 (8th Cir. 2018); *Doe v. Greitens et al*., Docket No. 4:18-cv-00339 (E.D. Mo. Feb 28, 2018).
102 *Greitens*, 530 S.W.3d at 577-78; *see also* Mo. Rev. Stat. § 188.027 (2017).
103 *Greitens*, 530 S.W.3d at 577. Mary Doe also brought a claim in federal court, which the Eighth Circuit dismissed on standing grounds. *Satanic Temple v. Parson*, 735 Fed. Appx. 900 (8th Cir. 2018).
104 *Doe v. Parson,* 567 S.W.3d 625, 630 (Mo. 2019).
105 Jack Denton, *Satanists Just Made it a Little Easier to Get an Abortion in Missouri*, Pac. Standard (Jan. 29, 2018), https://psmag.com/social-justice/satanists-just-made-it-a-little-easier-to-get-an-abortion-in-missouri.
106 *Parson*, 567 S.W.3d at 630.
107 *Doe v. Greitens et al*., Docket No. 4:18-cv-00339 (E.D. Mo. Feb 28, 2018).
108 Opinion Memorandum and Order at 11, *Doe v. Parson,* No. 4:18-cv-00339-HEA (E.D. Mo. Feb. 21, 2019).
109 Appeal from an Order of the United States District Court for the Eastern District of Missouri, (Autrey, J.), dismissing Appellant's complaint pursuant to Fed. R. Civ. Pro. 12(b)(6), *Doe v. Parson*, No. 19-01578 (8th Cir. July 8, 2019).
110 Owen Daugherty, *Satanic Temple Cites Religious Beliefs as Immunity from Supreme Court Abortion Ruling on Fetal Remains*, The Hill (May 29, 2019), https://thehill.com/regulation/court-battles/445997-satanic-temple-cites-religious-beliefs-as-immunity-from-supreme-court.
111 Guthrie Graves-Fitzsimmons, *Commentary: Erasing LGBTQ People of Faith Is Fake News*, Nbcnews.com (July 19, 2017), https://www.nbcnews.com/think/nbc-out/commentary-erasing-lgbtq-people-faith-fake-news-ncna784371; Victoria M. Massie, *LGBTQ Religion Activist: It's Time to Talk About America's Faith-based Homophobia Problem*, Vox (June 15, 2016), https://www.vox.com/2016/6/15/11932454/orlando-shooting-LGBTQ-homophobia-religion ("There's almost an intentional push to continue a media dichotomy between LGBT people and religion. There are so many individuals who are both LGBT and religious. And there are so many individuals who are religious and affirming of LGBT individuals."); Zack Abu-Akeel, *For Answers, Turn to Your Resident Experts: LGBTQ People of Faith*, Geo. U. Ctr. For Religion, Peace & World Aff. (June 20, 2018), https://berkleycenter.georgetown.edu/responses/for-answers-turn-to-your-resident-experts-lgbtq-people-of-faith.
112 Debra L. Mason and Cathy Ellen Rosenholtz, *Missing Voices: A Study of Religious Voices in Mainstream Media Reports* About LGBT Equality at 13, U. Missouri Ctr. On Religion & The Prof. 12 (2012), http://www.glaad.org/files/GLAAD_MissingVoices_2012.pdf.
113 *Id.* at 20.
114 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
115 Gen. Synod of the *United Church of Christ v. Reisinger,* 12 F.Supp.3d 790 (W.D.N.C. 2014). *See also* Phelps v. Dunn, 965 F.2d 93 (6th Cir. 1992) (state prisoner argued that "prison officials violated his rights under the Free Exercise Clause…by denying him participation in prison religious services because he is a homosexual.").
116 Brian Soucek, *The Case of the Religious Gay Blood Donor*, 60 Wm. & Mary L. Rev. 1893 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3206854.
117 *Issue Brief: The First Amendment Defense Act Should Not Protect Multiple Views of Marriage*, Fam. Res. Council 1 (July 2016), https://downloads.frc.org/EF/EF16G41.pdf; *Congress's First Amendment Defense Act Loses Supporters*, Liberty Couns. (July 27, 2016), https://www.lc.org/newsroom/details/072716-congresss-first-amendment-defense-act-loses-supporters ("Liberty Counsel can no longer support FADA unless the proposed amendment is abandoned and FADA returns to its original language of marriage being between one man and one woman.").
118 *Why Give? Religious Roots of Charity*, Harv. Divinity Sch., (Nov. 26, 2018), https://hds.harvard.edu/news/2013/12/13/why-give-religious-roots-charity.
119 Kelli Stout, *Tent Cities and RLUIPA: How a New Religious-Land-Use Issue Aggravates RLUIPA*, 41 Seton Hall L. Rev. 465 (2011); Marc-Tizoc González, *Criminalizing Charity: Can First Amendment Free Exercise of Religion, RFRA, and RLUIPA Protect People Who Share Food in Public?*, 7 U.C. Irvine L. Rev. 291 (2017); *A Dream Denied: The Criminalization of Homelessness in U.S. Cities*, Nat'l Coalition For The Homeless (Jan. 2006), https://www.nationalhomeless.org/publications/crimreport/report.pdf.
120 *St. John's Evangelical Lutheran Church v. City of Hoboken*, 195 N.J. Super. 414, 418, 420 (Super. Ct. 1983).

121 *Id.* at 420.

122 W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F.Supp. 538, 547, 544 (D.D.C. 1994).

123 *Stuart Circle Parish v. Bd. of Zoning Appeals*, 946 F. Supp. 1225 (E. D. Va. 1996) (Stuart Circle Parish in Richmond, Virginia successfully challenged under RFRA a city ordinance that places strict limitations on feeding and housing programs for the homeless within churches. *Id.* The Parish argued that their "Meal Ministry," in which church members provided "worship, hospitality, pastoral care, and a healthful meal to the urban poor of Richmond" every Sunday, was a form of religious exercise protected by RFRA (note that this was before the Supreme Court limited RFRA to apply to only federal laws). *Id.* at 1228. The federal district court granted the Parish a temporary restraining order.

124 *Wilkinson v. Lafranz*, 574 So. 2d 403, 404 (La. Ct. App. 1991) (dismissing as untimely an appeal from a trial court ruling which held, among other things, that "the serving of food to the poor is so integrally and intimately related to the operating of a bona fide church as to protect it constitutionally under the Freedom of Religion." The case involved a challenge by a New Orleans church under the religion protections of the U.S. and Louisiana Constitutions to zoning requirement that limited its ability to operate a soup kitchen.).

125 *Abbott v. City of Fort Lauderdale*, 783 So. 2d 1213 (Fla. Dist. Ct. App. 2001).

126 *Fifth Ave. Presbyterian Church v. City of N.Y.*, 2004 WL 2471406 (S.D.N.Y. Oct. 28, 2004), aff'd 177 Fed. App'x. 198 (2d Cir. 2006).

127 *City of Woodinville v. Northshore United Church of Christ*, 166 Wash.2d 633, 644-45 (2009) ("the City's total moratorium [on all land use permit applications] placed a substantial burden on the Church. It prevented the Church from even applying for a permit. It gave the Church no alternatives…The City failed to show that the moratorium was a narrow means for achieving a compelling goal.").

128 *Big Hart Ministries Assoc., Inc. v. City of Dallas*, 2013 WL 12304552 (N.D. Tex. Mar. 25, 2013).

129 *Chosen 300 Ministries, Inc. v. City of Phila.*, 2012 WL 3235317, at *24 (E.D. Pa. Aug. 9, 2012) (holding that "the ban on sharing food free of charge with three or more members of the public in Fairmount Park substantially burdens plaintiffs' free exercise of religion and that defendants have failed to show by a preponderance of the evidence that the ban is the least restrictive means of furthering their objectives of ending homelessness, feeding the homeless indoors, providing social services to the homeless, increasing the dignity of the homeless, or reducing the trash burden along the Parkway."). The city decided not to appeal and the ban was later overturned. Ronnie Polaneczky, *Kenney Overturns Homeless Feeding Ban on Parkway*, Inquirer (July 2, 2016), https://www.philly.com/philly/news/20160706_Kenney_overturns_feeding_ban_on_Parkway.html.

130 Gilbert Garcia, *Cheever Lawsuit Against City Remains a Possibility*, San Antonio Express-News (July 16, 2015), https://www.expressnews.com/news/news_columnists/gilbert_garcia/article/Cheever-lawsuit-against-city-remains-a-possibility.php (San Antonio dismissed a citation against a woman for feeding homeless people from a non-permitted vehicle after her attorneys submitted a draft complaint they planned to file in federal district court arguing that the ordinance violated the Texas Religious Freedom Restoration Act and the First Amendment of the U.S. Constitution.). *See also, Catholic Worker House and ACLU Team Up to Protect First Amendment Rights*, ACLU West Virginia (Nov. 29, 2017), https://www.acluwv.org/en/press-releases/catholic-worker-house-and-aclu-team-protect-first-amendment-rights. For two religion cases that are still being litigated, see *Layman Lessons Church v. Metro Gov't*, 2019 WL 1746512 (M.D. Tenn. Apr. 18, 2019) (RLUIPA claim); Stephen Paulsen, *Citing the Bible, Federal Lawsuit Challenges Houston's Ban on Feeding the Homeless*, Tex. Observer (May 6, 2019), https://www.texasobserver.org/citing-the-bible-federal-lawsuit-challenges-houstons-ban-on-feeding-the-homeless (First Amendment claim).

131 *See, e.g.*, *First Assembly of God v. Collier Cnty.*, 20 F.3d 419, 423 (11th Cir. 1994) (court held that enforcement of zoning regulations to close a homeless shelter did not violate church's Free Exercise rights because "Even if it is assumed for the sake of argument that sheltering the homeless is a central, essential element of the Christian religion, the fact still remains that the Naples ordinances are neutral and of general applicability."); *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554, 1556 (M.D. Fla. 1995) (Denial of permit to church to operate food bank and homeless shelter did not violate church's rights under Federal Constitution or RFRA as provisions were neutral and generally applicable and advanced significant interest of preserving city zoning code and zoning code did not substantially burden church's free exercise rights.); *Family Life Church v. City of Elgin*, 561 F. Supp. 2d 978 (N.D. Ill. 2008) (Permit requirement did not violate homeless shelter's rights under the Free Exercise Clause or Illinois Religious Freedom Restoration Act, as the eight-month application process did not rise to the level of a substantial burden); State ex rel. *Scadden v. Willhite*, 2002 WL 452472 (Ohio App. 10 Dist. 2002) appeal not allowed, (96 Ohio St.3d 1469 (2002)) (no RLUIPA or constitutional analysis necessary where appellants had not yet filed for a certificate of zoning compliance); *Westgate Tabernacle, Inc. v. Palm Beach Cnty.*, 14 So. 3d 1027, 1031-32 (Fla. Dist. Ct. App. 2009), reh'g denied, 22 So.3d 539 (Fla. 2009) (Jury found that permitting requirement did not violate church's rights under the Florida RFRA or RLUIPA as "[t]he mere requirement that one apply for a special exception from an ordinance restricting the use of property is not a substantial burden" and because the church "did not show that running a homeless shelter at its specific location was fundamental to its religious exercise.").

132 *First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274 (11th Cir. 2010), op. reinstated by 638 F.3d 756 (11th Cir. 2011). The court also found that the regulations were content-neutral and satisfied rational basis review, and thereby did not violate the Free Exercise Clause. *Id.*

133 *Id.* at 1292.

134 *Id.* at 1291. In addition to claims brought under statutory and constitutional religious liberty protections, other cases have been brought—sometimes successfully—arguing for a right to serve the homeless under the Free Speech Clause of the

First Amendment. McHenry v. Agnos, 983 F.2d 1076 (9th Cir. 1993) (Co-founder of Food Not Bombs argued that San Francisco ordinances regulating distribution of food violated his First Amendment free expression protections; ordinances were found to be permissible); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006); *Sacco v. City of Las Vegas,* 2007 WL 2429151 (D. Nev. Aug. 20, 2007); *First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274 (11th Cir. 2010); *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018) (finding that organization's outdoor food sharing was expressive conduct protected by First Amendment).

135 *Gonzales*, 546 U.S. at 418.

136 *Id.* at 439 ("The courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV's sacramental use of hoasca.").

137 *Id.* at 436. The Court further held that the government could not rely on a general interest in uniformity in denying a RFRA exemption without explaining why uniformity was necessary: "the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *Id.* at 421.

138 *See, e.g.*, *United States v. Quaintance*, 608 F.3d 717 (10th Cir. 2010).

139 *See, e.g.*, *United States v. Barnes*, 677 F.App'x. 271 (6th Cir. 2017); *United States v. Martines*, 903 F.Supp.2d 1061 (D. Haw. 2012); *Oklevueha Native American Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012 (9th Cir. 2016); *Perkel v. United States DOJ*, 365 F.App'x. 755 (9th Cir. 2010); *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002); *United States v. Bauer*, 84 F.3d 1549 (9th Cir.1996).

140 *Burwell*, 573 U.S. at 725 (2014) ("in these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial.").

141 *See, e.g.*, *United States v. Israel*, 317 F.3d 768 (7th Cir. 2003) (finding no violation of RFRA where the state revoked a Rastafarian man's condition of supervised release because he had tested positive for marijuana); *United States v. Brown*, 72 F.3d 134 (8th Cir. 1995) (unpublished opinion); *United States v. Christie*, 825 F.3d 1048 (9th Cir. 2016) *United States v. Lepp*, 446 F.App'x. 44 (9th Cir. 2011); *United States v. Lafley*, 656 F.3d 936 (9th Cir. 2011).

142 Safehouse, https://www.safehousephilly.org/about (last visited May 9, 2019).

143 *Id.*

144 Complaint for Declaratory Judgment, *United States v. Safehouse*, No. 2:19-cv-00519 (E.D. Pa. Feb. 5, 2019).

145 Defendant's Answer, Affirmative Defenses, Counterclaims to Plaintiff's Complaint, and Third-Party Complaint at 40, *United States v. Safehouse*, No. 2:19-cv-00519 (E.D. Pa. Apr. 3, 2019).

146 *Id.* at 40-41.

147 Motion for Judgment on the Pleadings at 24, *United States v. Safehouse*, No. 2:19-cv-00519 (E.D. Pa. June 11, 2019).

148 *United States v. Safehouse*, No. 19-0519, 2019 WL 4858266 at *1 (E.D. Pa. Oct. 02, 2019).

149 Jeremy Roebuck & Aubrey Whelan, J*udge: Philly Supervised Injection Site Proposal Does Not Violate Federal Law*, Phila. Inquirer (Oct. 2, 2019), https://www.inquirer.com/health/opioid-addiction/safehouse-supervised-injection-site-ruling-philadelphia-mchugh-opioids-20191002.html.

150 *The Church of Safe Injection, About Our Church*, Facebook (last visited Nov. 5, 2015), https://www.facebook.com/safeinjection.

151 *Id.*

152 Jesse Harvey, *Maine Voices: Church of Safe Injection Treats Drug Users As Jesus Would Have Done*, Portland Press Herald (Oct. 18, 2018), https://www.pressherald.com/2018/10/18/maine-voices-church-of-safe-injection-treats-addicts-as-jesus-would-have-done/. There are now several Church of Safe Injection branches in Maine, and the church states that it is "[i]n talks with members of our congregation in Philadelphia, Rhode Island and Nepal to start sister churches there as well." *Id.*

153 *Tanvir v. Tanzin*, 894 F.3d 449 (2d Cir. 2018), rehearing en banc denied, 915 F.3d 898 (2d Cir. 2019).

154 A significant issue in the dispute has been the question of whether RFRA permits claimants to collect money damages from individual federal officers who have violated their rights under the law. In May 2018, the Second circuit ruled in favor of the claimants, holding that they could collect such monetary damages. *Id.* This ruling has been appealed to the Supreme Court. *Tanvir v. Tanzin*, 894 F.3d 449 (2nd Cir. 2018) appeal docketed, No. 19-71 (July 12, 2019).

155 *Hassan v. City of N.Y.*, 804 F.3d 277 (3d Cir. 2015).

156 *Id.* at 288.

157 *Id.*

158 *Hassan v. City of New York*, Ctr. For Const. Rts. (Apr. 5, 2018), https://ccrjustice.org/home/what-we-do/our-cases/hassan-v-city-new-york.

159 *Cherri v. Mueller*, 951 F.Supp.2d 918 (E.D. Mich. 2013). The claimants argued that by detaining them and "asking them intrusive questions about their religious practices and beliefs," the government "deterred them from freely exercising their religious beliefs." *Id.* at 934. The court determined that the claimants had "not established that being queried about their religious practices and beliefs at the border" burdened their religious exercise. *Id.* at 935. The claimants' Establishment Clause argument was also rejected.

160 *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007). The Second Circuit court found that given some intelligence that persons with known terrorist ties would be attending the conference, the inspection policy was narrowly tailored to a compelling government

interest, and therefore did not violate RFRA. *Id.*

161 *Muhammad v. Ahern,* 350 Fed. App'x. 529, 531 (2d Cir. 2009) (dismissing a claim that border stops violated the claimant's free exercise of religion and RFRA rights because they provided only "conclusory allegations to support these claims.").

162 *Fazaga v. FBI*, 916 F.3d 1202 (9th Cir. 2019).

163 *See, e.g.* Third Amended Complaint for Declaratory and Injunctive Relief, *Hawaii v. Trump*, 2017 WL 6547116 (D. Haw. Oct. 15, 2017) (Trial Pleading) (count VII alleges RFRA violation).

164 *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). The ban is currently facing additional legal challenges. Sirine Shebaya, *A New Muslim Ban Challenge Seeks to Answer the Questions the Supreme Court Didn't Settle*, Atlantic (Feb. 11, 2019).

165 Rosalyn R. LaPier, *Why Native Americans Struggle to Protect Their Sacred Places*, Religion News Serv. (Aug. 14, 2018), https://religionnews.com/2018/08/14/why-native-americans-struggle-to-protect-their-sacred-places/.

166 *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

167 *Id.* at 449. Even before *Lyng*, courts were skeptical of religious liberty claims related to the use of public land. For example, in a 1982 opinion affirmed by the Ninth Circuit and denied cert by the Supreme Court, the District Court of Alaska rejected a claim by the Inupiat people of Alaska's north slope that the federal government's lease of the Beaufort and Chukchi Seas to private companies violated their religious rights by threating to deny them access to sacred sites and potentially disrupting "appeasement ceremonies." Inupiat Community of Arctic Slope v. U.S., 548 F.Supp. 182 (D. Alaska 1982). The court held: "the First Amendment may not be asserted to deprive the public of its normal use of an area." *Id.* at 188.

168 For an analysis on "sacred" vs. "holy" land in the context of RFRA cases brought by Native Americans, *See* Michael D. McNally, *From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion*, *see infra* Section II note 247.

169 *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008), *cert denied*, 556 U.S. 1281 (2009); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008); *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 239 F.Supp.3d 77 (D.D.C. 2017); L*a Cuna De Aztlan Sacred Sites Protection Circle Advisory Comm. v. Dep't of Interior*, 2014 WL 12597035 (C.D. Cal. June 20, 2014); *S. Fork Band v. United States DOI*, 643 F. Supp. 2d 1192 (D. Nev. 2009), RFRA claim not appealed in 588 F.3d 718 (9th Cir. 2009); *Slockish v. United States FHA*, 2018 WL 2875896 (D. Or. June 11, 2018). For an unusual RFRA land rights claim involving the construction of a highway on the site where a couple's stillborn child was buried, *see Thiry v. Carlson*, 887 F.Supp. 1407 (D. Kansas 1995). For an analysis of how the Supreme Court's decision in *Hobby Lobby* might impact future religious liberty claims brought by Native American religious groups, *see* Edward K. Olds, *Trespass and Vandalism or Protecting That Which Is Holy? The Missing Piece of Religious Liberty Land Use Claims*, 119 Colum. L. Rev. 18 (2019).

170 *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008).

171 *Navajo Nation v. United States Forest Serv.*, 556 U.S. 1281 (2009). After this RFRA claim failed, the Hopi tribe attempted to stop use of wastewater in the park by bringing a new claim arguing that the use of the wastewater was a public nuisance. This attempt to protect the forest was also rejected when the Supreme Court of Arizona held that "environmental damage to public land with religious, cultural, or emotional significance to the plaintiff is not special injury for public nuisance purposes." *Hopi Tribe v. Ariz. Snowbowl Resort Ltd. P'ship*, 245 Ariz. 397, 399, 430 P.3d 362, 364 (2018).

172 *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 239 F.Supp.3d 77 (D.D.C. 2017).

173 *Id.* at 90 (internal citations omitted). *See also*, *Id.* at 82 ("The Lakota people believe that the pipeline correlates with a terrible Black Snake prophesied to come into the Lakota homeland and cause destruction.... The Lakota believe that the very existence of the Black Snake under their sacred waters in Lake Oahe will unbalance and desecrate the water and render it impossible for the Lakota to use that water in their Inipi ceremony.").

174 *Id.* at 87 ("The Court, accordingly, concludes that Defendants have shown that the Tribe inexcusably delayed in voicing its RFRA objection.").

175 *Id.* at 94 ("Just as the Ninth Circuit and other courts must follow Lyng until the Supreme Court instructs otherwise, this Court must do the same.").

176 *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 2017 WL 4071136 (D.C. Cir. May 15, 2017).

177 *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187 (3d Cir. 2018).

178 Complaint at 1-2, *Adorers of the Blood of Christ v. FERC*, 5:17-cv-03163 (E.D. Pa. July 14, 2017).

179 *Id.* at 5.

180 *Id.* at 2.

181 *Adorers of the Blood of Christ*, 897 F.3d at 190 (finding that the plaintiffs should have raised an administrative objection before the agency instead of bringing suit in federal court); *cert denied*, 139 S. Ct. 1169 (2019).

182 Complaint for Injunctive Relief, *Gelburd v. Christiansen*, 7:18cv215 (W.D. Va. May 16, 2018).

183 *Id.* at 5-6.

184 *Id.* at 5.

185 It is worth noting that while this case does not involve a traditionally "conservative" issue, Dr. Gelburd filed his brief with the right-leaning Rutherford Institute. Previously, the Rutherford Institute filed an amicus brief in support of Hobby Lobby and, despite billing itself as a civil liberties organization, an amicus brief arguing against the decriminalization of sodomy in *Bowers v. Hartwick*. Brief for the Rutherford Institute and the Rutherford Institutes of Alabama, Connecticut, Delaware, Georgia, Minnesota, Montana, Tennessee, Texas, and Virginia as Amici Curiae Supporting Petitioner, *Bowers v. Hardwick*, 478 U.S. 196 (1986), 1985 WL 667943. The Rutherford Institute does not appear to have filed a brief in the later case *Lawrence v. Texas*, which overturned

Bowers and found antisodomy laws to be unconstitutional.

186 Anne M. Yoder, *Conscientious Objection in America: Brief History of Conscientious Objection*, Swarthmore C. Peace Collection (last modified Nov. 2007), https://www.swarthmore.edu/library/peace/conscientiousobjection/co%20website/pages/HistoryNew.htm.

187 *Conscientious Objection and Alternative Service*, Selective Serv. Sys. (last visited Nov. 5, 2015), https://www.sss.gov/consobj ("Two types of service are available to conscientious objectors, and the type assigned is determined by the individual's specific beliefs. The person who is opposed to any form of military service will be assigned to alternative service - described below. The person whose beliefs allow him to serve in the military but in a noncombatant capacity will serve in the Armed Forces but will not be assigned training or duties that include using weapons.").

188 *Gillette v. United States*, 401 U.S. 437 (1971).

189 *Id.* at 461.

190 *Id.* at 462.

191 *United States v. Seeger*, 380 U.S. 163 (1965).

192 Welsh v. United States, 398 U.S. 333 (1970).

193 *Seeger*, 380 U.S. at 180.

194 *See, e.g.*, *Curia v. Commissioner*, 1976 WL 3269, 35 T.C.M. 333 (T.C. Mar. 9, 1976) ("petitioner is not entitled to an 'anti-war tax' credit because of his moral and religious beliefs."); A*utenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), cert. den. 397 U.S. 1036 (1970); *Russell v. Commissioner*, 60 T.C. 942 (1973); *United States v. Malinowski*, 472 F.2d 850 (3rd Cir. 1973), *cert. denied* 411 U.S. 970 (1973); *Browne v. U.S.*, 176 F.3d 25 (2nd Cir. 1999), *cert. denied* 528 U.S. 1116 (2000).

195 *Adams v. Comm'r*, 170 F.3d 173 (3d Cir. 1999).

196 *Id.* at 174.

197 *Id.*

198 *Id.* at 179.

199 For a discussion of Catholic anti-war activism, including the draft raids, *see* Sharon Erickson Nepstad, *Disruptive Action and the Prophetic Tradition: War Resistance in the Plowshares Movement*, 27 U.S. Cath. Historian 97, 102 (2009), https://www.jstor.org/stable/pdf/40468577.pdf?refreqid=excelsior%3Ada221f0f70dc05e2930b3bd1fff9de5f ("While the exact number is unknown, it is estimated that between 53 and 250 raids occurred between 1967 and 1971."). *See also* Francine du Plessix Gray, *The Ultra-Resistance*, N.Y. Rev. Of Books (Sep. 25, 1969), https://www.nybooks.com/articles/1969/09/25/the-ultra-resistance/; Draft Board Raids, http://hillelarnold.com/draft-board-raids/ (last visited May 8, 2019).

200 Fire And Faith: The Catonsville Nine File, http://c9.digitalmaryland.org/page.php?ID=2 (last visited May 8, 2019). For an interview about the protest with Father Daniel Berrigan, *see* Daniel Berrigan on the Catonsville Nine, POV http://archive.pov.org/disturbingtheuniverse/extended-interviews/ (last visited May 8, 2019).

201 Fire And Faith: The Catonsville Nine File, *supra* Section II note 200.

202 *United States v. Eberhardt*, 417 F.2d 1009 (4th Cir. 1969); Nepstad, *supra* Section II note 199 at 101-02.

203 Gray, *supra* Section II note 199; Chris Foran, *Our Back Pages: When the Milwaukee 14 Made a Fiery Statement*, Milwaukee J. Sentinel (Sept. 20, 2016), https://www.jsonline.com/story/life/green-sheet/2016/09/20/our-back-pages-when-milwaukee-14-made-fiery-statement/90485014/. The protestors defended themselves at trial. Gray, *supra* Section II note 199. They claimed to follow "a moral law higher than that of any nation" and said that they had been bound to act by their religious consciences. *Id.* For a partial trial transcript, *see* Jim Forest, *Milwaukee 14 At Trial*, http://jimandnancyforest.com/wp-content/uploads/2014/10/Milwaukee-14-abridged-trial-transcript-sm.pdf (last visited May 8, 2019).

204 Gray, *supra* Section II note 199; United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).

205 Liz Laribee, *Review: The Camden 28*, Christianity Today (July 27, 2007), https://www.christianitytoday.com/ct/2007/julyweb-only/camden28.html; Donald Janson, 17 of Camden 28 Found Not Guilty, N.Y. Times (May 21, 1973), https://www.nytimes.com/1973/05/21/archives/17-of-camden-28-found-not-guilty-admitted-draftoffice-raidboth.html.

206 Gray, *supra* Section II note 199.

207 *Id.*

208 *'Boston Eight' Surrender in D. C. But FBI Refuses to Arrest Them*, Harv. Crimson (Nov. 17, 1969), https://www.thecrimson.com/article/1969/11/17/boston-eight-surrender-in-d-c/. Several Quakers also participates in the raids, including Suzi Williams (of multiple raids including the "Boston Two") and Water Skinner (of the "Pasadena Three"). *See* Gray, *supra* Section II note 199; Sufferings, 15 Friends J.: Quaker Thought And Life Today 607 (Oct. 15, 1969), https://www.friendsjournal.org/wp-content/uploads/emember/downloads/1969/HC12-50463.pdf.

209 *Dougherty*, 473 F.2d at 1140-41 (Bazelon, C.J., concurring in part).

210 *United States v. Moylan*, 417 F.2d 1002, 1008-09 (4th Cir. 1969). *See also Id.* at 1009 ("To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos.").

211 *United States v. Berrigan*, 283 F.Supp. 336, 338 (D. Md. 1968) (quoting *Baxley v. United States*, 134 F.2d 937, 938 (4th Cir. 1943)).

212 *Id.* at 339.

213 Nepstad, *supra* Section II note 199 at 97.

214 *Id.* at 104-05.

215 *United States v. Walli*, 2013 WL 1838159 at *11 (E.D. Tenn. Apr. 30, 2013).
216 *Id.*
217 Memorandum in Support of Motion to Dismiss at 3, *United States v. McAlister*, No. 2:18-cr-00022-LGW-RSB (S.D. Ga. July 2, 2018).
218 Defendant Elizabeth McAlister Response to the Court's November 28, 2018, Order Directing Supplemental Briefing at 2, *United States v. McAlister*, No. 2:18-cr-00022-LGW-BWC (S.D. Ga. Jan. 16, 1019).
219 *Id.* at 7.
220 *Directory of Catholic Worker Communities*, Cath. Worker Movement, https://www.catholicworker.org/communities/directory-picker.html (last visited Oct. 11, 2019); *Peace Activists Face 25 Years for Action at U.S. Nuclear Submarine Base*, Kings Bay Plowshares 7 (last visited Oct. 1, 2019), https://kingsbayplowshares7.org/.
221 Grand Jury Charges, *United States v. Kelly*, No. 2:18-cr-00022-LGB-RSB (S.D. Ga. May 2, 2018).
222 Memorandum in Support of Motion to Dismiss, *United States v. McAlister*, No. 2:18-cr-00022-LGB-RSB (S.D. Ga. July 2, 2018). Specifically, they claimed that "[s]ince the possession and threatened use of nuclear weapons is illegal it will be impossible for the government to assert it has a compelling governmental interest in that." *Id.* at 24-25.
223 Order, *United States v. Kelly*, 2019 WL 4017424, No. 2:18-cr-00022-LGW-BWC (S.D. Ga. Aug. 26, 2019).
224 *Id.* at *4.
225 *See* Order and Magistrate Judge's Report and Recommendation at 46, *United States v. Kelly*, No. 2:18-cr-00022-LGW-BWC (S.D. Ga. Apr. 26, 2019); Petitioner's Response to the Court's Aug. 15, 2018 Order Directing Supplemental Briefing at 10, *United States v. McAlister*, No. 2:18-cr-00022-LGW-RSB (S.D. Ga. Sept. 5, 2018).
226 *United States v. Kelly*, 2019 WL 4017424 at *6 (S.D. Ga. Aug 26, 2019).
227 *In re Kemp*, 894 F.3d 900 (8th Cir. 2018), *cert denied*, 139 S. Ct. 1176 (2019).
228 *Id.* at 907 (internal citations omitted).
229 *Id.* at 908.
230 Max Brantley, *Supreme Court Again Rebuffs Judge Griffen on Hearing Capital Cases*, Ark. Times (Sept. 19, 2019), https://arktimes.com/arkansas-blog/2019/09/19/supreme-court-again-rebuffs-judge-griffen-on-hearing-capital-cases.
231 Noel Phillips, *Mennonite Investigator to be Released from Jail, Scheduled to Testify Wednesday in Colorado Death Penalty Case*, Denver Post (Mar. 12, 2018), https://www.denverpost.com/2018/03/12/mennonite-investigator-greta-lindecrantz-agreed-testify-remains-jailed/.
232 *Id.*
233 This report capitalizes "Humanist" to denote those who are affiliated with the organized Humanist movement. *See Harvey Lebrun, Humanist with a Capital H*, Amer. Humanist Soc'y (last visited Oct. 1, 2019), https://americanhumanist.org/what-is-humanism/humanism-capital-h/. In contrast, it does not capitalize "atheist," as it denotes those who do not believe in any god(s) but are not affiliated with any formal group or movement.
234 Hemant Mehta, *After Satanists Plan to Give Away Coloring Books, School Board May Change Rules to Block Them*, Friendly Atheist (Nov. 14, 2014), https://friendlyatheist.patheos.com/2014/11/14/after-satanists-plan-to-give-away-coloring-books-school-board-considers-banning-religious-distributions-altogether/.
235 Andrew Seidel, *What I Learned from Fighting Back Against Public School Bible Distributions*, Friendly Atheist (May 5, 2015), https://friendlyatheist.patheos.com/2015/05/05/what-i-learned-from-fighting-back-against-public-school-bible-distributions/.
236 Abby Ohlheiser, *The Satanic Temple's Giant Statue of a Goat-headed God Is Looking for a Home*, Wash. Post (July 1, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/07/01/the-satanic-temples-giant-statue-of-a-goat-headed-god-is-looking-for-a-home/?utm_term=.fa86ebb30a9d. *See also,* Complaint, *Satanic Temple v. City of Belle Plaine, Minnesota*, No. 0:19-cv-01122-WMW-LIB (D. Minn. Apr. 25, 2019) (challenging a city's withdrawal of a permit to display a Satanic Temple monument on government property.).
237 Complaint, *Satanic Temple et al. v. Scottsdale, City of et al*, Docket No. 2:18-cv-00621 (D. Ariz. Feb 26, 2018).
238 Educatin' With Satan, https://afterschoolsatan.com/ (last visited Nov. 6, 2018).
239 *Doe v. Cong*. of the United States, 891 F.3d 578, 583 (6th Cir. 2018), rehearing en banc denied, (Aug. 8, 2018). *See also Newdow v. Peterson*, 753 F.3d 105 (2d Cir. 2014); *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010); *Mayle v. United States*, 891 F.3d 680 (7th Cir. 2018); *Doe v. United States*, 901 F.3d 1015 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 2699 (2019). *See also Freedom From Religion Foundation v. Hanover School Dist.*, 626 F.3d 1 (1st Cir. 2010) *cert. denied*, 564 U.S. 1004 (2011) (Free Exercise Clause challenge to voluntary recitation of the Pledge of Allegiance in public schools).
240 *Cong. of the United States*, 891 F.3d at 591.
241 *Barker v. Conroy*, 282 F.Supp.3d 346 (D.D.C. 2017). *See also Heap v. Carter*, 112 F.Supp.3d 402 (E.D. Va. 2015); *Newdow v. Bush*, 355 F.Supp.2d 265 (D.D.C. 2005).
242 *Barker v. Conroy*, 282 F.Supp.3d at 365.
243 *See Town of Greece v. Galloway*, 572 U.S. 565, 134 S. Ct. 1811 (2014).
244 *Barker v. Conroy*, 282 F.Supp.3d at 365.
245 *Barker v. Conroy*, 921 F.3d 1118 (D.C. Cir. 2019).
246 Comment Letter on Proposed Rule *"Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,"* Public Rights/Private Conscience Project (Mar. 27, 2018), https://www.law.columbia.edu/sites/default/files/microsites/gender-

sexuality/PRPCP/comments_to_hhs.pdf ("Dr. George Tiller, who was murdered by an anti-abortion activist while serving as an usher in his Lutheran Church, referred to his work providing abortion care as a 'ministry.' Two members of Dr. Tiller's staff echoed this view, stating respectively, 'I felt I was doing the Lord's work,' and 'God put me here to do this work.' Dr. LeRory Carhart, an abortion provider and observant Methodist, stated in an interview, 'I think what I'm doing is because of God, not in spite of God.' Dr. Sara Imershein has described providing abortion care as a 'mitzvah' and said that 'No one should be able to step in the way of what I consider to be my moral obligation.' One article on a Jewish website stated that Imershein and four other Jewish abortion providers contacted by the writer all 'described the resonance between their Judaism…and their decision to provide abortion care.' Dr. Curtis Boyd, a Unitarian, first became an abortion provider when he was asked by a minister and member of the Clergy Consultation Service to perform the procedure illegally prior to *Roe v Wade*. Dr. Boyd explained, 'Finally, my work had the larger meaning I'd sought. My religious ideals became immediate and personal.'").

247 *See, e.g.*, Michael D. McNally, *From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion*, 30 J.L. & Religion 36, 53 (2015). *See also* Sarah B. Gordon, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 Yale L.J. 1447 (1985); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 Mont. L. Rev. 13, (1991); Bryan J. Rose, *A Judicial Dilemma: Indian Religion, Indian Land, and the Religion Clauses*, 7 Va. J. Soc. Pol'y & L. 103 (1999).

248 Alex Tallchief Skibine, T*owards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 Mich. J. Race & L. 269, 273 (2012).

249 *Id.*

250 *Lyng*, 485 U.S. at 474 (Brennan, J., dissenting).

251 Alan Blinder and Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. Times (Sept. 1, 2015), https://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html.

252 For example, while Judge Ho of the 5th Circuit has a history of volunteering for the anti-abortion group the First Liberty Institute, he nevertheless participated in a recent case involving a fetal burial rule in Texas. *See* Mark Joseph Stern, *Trump-Appointed Judge Bemoans the "Moral Tragedy" of Abortion, Accuses Lower Court of Anti-Christian Bias*, Slate (July 16, 2018), https://slate.com/news-and-politics/2018/07/judge-james-ho-attacks-abortion-rights-while-accusing-a-lower-court-of-anti-christian-bias.html. *See also*, *THV11, Judge Griffen Speaks on Religious Liberty, Being Barred from Execution Cases*, Youtube (June 9, 2017), https://www.youtube.com/watch?v=fhvk74cu2pM ("There have been Christians who have been judges who have said that abortion is a sin but they weren't sanctioned and they weren't told to get off cases involving abortion.").