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COMPELLING THE COURTS TO QUESTION *GONZALES V. O CENTRO*: A PUBLIC HARMS APPROACH TO FREE EXERCISE ANALYSIS

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INTRODUCTION

The Supreme Court's decision in *Gonzales v. O Centro*[1] created a stronger free exercise argument for religious exemptions by elevating the level of scrutiny courts use to evaluate whether the government's interest is "compelling."[2] In *O Centro*, the Court created an exemption for 130 religious users of a hallucinogenic, Schedule I drug by rejecting the government's three compelling interests in preventing its use for the greater good of society.[3] To arrive at this conclusion, the Court fashioned a new compelling interest test: The government must show that its interest is compelling as applied to the religious user—"to the person"—whose sincere exercise of religion is at stake.[4] By elevating the individual ramifications over an exemption's societal impact, the Court magnified the free exercise safe harbor for illegal, dangerous, and burdensome activity

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1. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).
2. Aaron D. Bieber, *Constitutional Law: The Supreme Court Can't Have it Both Ways Under RFRA: The Tale of Two Compelling Interest Tests*. Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, *126 S. CT. 1211 (2006)*, 7 WYO. L. REV. 225, 227 (2007).
3. *O Centro*, 546 U.S. at 418-19.
4. *Id.* at 420.

under not only The Religious Freedom Restoration Act (RFRA) (at issue in *O Centro*) but also under the Religious Land Use and Institutionalized Persons Act (RLUIPA).[5]

Based on a survey of the 130 "compelling interest" cases decided by the federal courts of appeal before[6] and after[7] *O Centro*, this Article examines how the Supreme Court's 2006 decision has impacted the "compelling interest" inquiry in lower courts. The raw data suggests that the government had a 17.4% chance of losing its compelling interest argument before *O Centro* and a 35.7% chance of losing after *O Centro*.[8] Therefore, despite notions that *O Centro* is easily avoidable by courts who want to find a compelling interest,[9] the Supreme Court's holding in *O Centro* creates a greater chance that lower courts will reject the government's compelling interest argument and create exemptions in the RFRA and RLUIPA contexts, subjecting society to potentially dangerous and burdensome practices.

Part I will set forth the analytical framework established by the Supreme Court in the RFRA and RLUIPA contexts before *O Centro*.[10] This Part will provide a brief background to RFRA and RLUIPA and set forth the definition of "compelling interest" before *O Centro*. Part II will focus on the decision in *O Centro*; specifically, how the Supreme Court's redefinition of "compelling interest" significantly elevates the government's burden. Part III will compare the government's chance of winning on a "compelling interest" argument before *O Centro*[11] with the chance of winning in its wake. This Part will discuss the merits, flaws, and

5. *See, e.g.*, Westchester Day Sch. v. Vill. of Mamaroneck, (*Mamaroneck I)*, 504 F.3d 338 (2d Cir. 2007) (following *O Centro* to permit a religious school to expand despite violating town ordinances in the RLUIPA context).

6. The pre-*O Centro* cases considered in this survey span from the Supreme Court's 1963 decision in *Sherbert v. Verner*, 374 U.S. 398 (1963) (introducing the compelling interest test in the free exercise context) through the Court's 2007 decision in *O Centro*. Part III *infra* discusses the methodology of this survey.

7. The survey is current through March 3, 2010.

8. The merits, flaws, methodology, and analysis related to this study are discussed in Part III *supra*.

9. Matthew Nicholson, *Is* O Centro *a Sign of Hope for RFRA Claimants*, 95 VA. L. REV. 1281, 1282 (2009).

10. A court's analysis under the language of RFRA and RLUIPA is substantially similar because the critical language Congress used in both statutes—"substantial burden" and "compelling interest"—derives from existing jurisprudence under the Free Exercise Clause. *See infra* Part IV. A-B; *see also* Roman P. Storzer, *The Perspective of the Religious Land Use Applicant*, *in* RLUIPA READER: RELIGIOUS LAND USES, ZONING, AND THE COURTS 46 (Michael S. Giaimo & Lora A. Lucero eds, 2009) (discussing the "struggle between Congress and the Supreme Court" that resulted in the passage of RFRA and RLUIPA, which were meant to reinstate strict scrutiny analysis).

11. *Id.*

methodology of the case survey at the core of this Article, and will conclude that outside the prison context the government has little chance of satisfying its burden. Finally, this Article will propose that courts should use the fact-specific, person-specific inquiry used in *O Centro* in conjunction with the more general, public-protecting compelling interest test used in *United States v. Lee*,[12] *Hernandez v. Commissioner of Internal Revenue*,[13] and *Braunfield v. Brown*.[14]

I. LEGAL BACKGROUND: THE FREE EXERCISE FRAMEWORK

A. Reaching the "Compelling Interest" Inquiry in the RFRA and RLUIPA Contexts

The Free Exercise Clause forbids laws "prohibiting the free exercise" of religion.[15] Under this prohibition, the government may not burden one's ability to engage in religious practices.[16] Where a court finds the government has "substantially burdened" an individual's ability to practice his or her religion,[17] the burdens of proof and persuasion shift to the government to justify its rationale for creating the law.[18] Depending on the context of the plaintiff's initial claim, the court will accept or reject the government's rationale, finding for the government or the individual, respectively. Three key factors determine the context of the claim: (1) whether the plaintiff's claim is based on the federal Constitution or a state's constitution; (2) whether the claim is under a state statute (state RFRA) or a federal one (RFRA or RLUIPA); and (3) whether the defendant is the

12. United States v. Lee, 455 U.S. 252, 258 (1981) (accepting the government's compelling interest argument that a religious exception to the obligation to pay into the Social Security system jeopardized its ability to help the public).
13. Hernandez v. Commissioner of internal Revenue, 490 U.S. 680, 689-700 (1989) (following *Lee*, 455 U.S. at 252).
14. Braunfield v. Brown, 366 U.S. 599, 609 (1961) (accepting the government's compelling interest argument that a religious exception to the Sunday closing laws would put claimants at an unfair economic advantage over business that had to close).
15. U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").
16. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963) (setting forth the strict scrutiny test in the free exercise context).
17. "The plaintiff bears the burden of persuading the court that a 'substantial burden' exists." Michael S. Giaimo, *RLUIPA in the Courts*, *in* RLUIPA READER: RELIGIOUS LAND USES, ZONING, AND THE COURTS 89 (Michael S. Giaimo & Lora A. Lucero eds., 2009).
18. *Id.* ("[S]ome courts seem to have blurred the line between the 'substantial burden' inquiry and the analytically separate question of whether a 'substantial burden,' once found, can be justified as furthering a compelling governmental interest by the least restrictive means.").

federal or a local government. This Article will focus on RFRA claims against the federal government and RLUIPA claims against the federal and local governments.

Where the federal government creates the substantial burden, and the plaintiff makes a RFRA claim, the court reviews the law with strict scrutiny,[19] which can only be overcome if the government provides sufficient evidence that the burdensome law is the least restrictive means of achieving a "compelling interest."[20] Notably, this framework does not apply to laws drafted by state and local governments, unless there is a state RFRA.[21]

Where the federal, state, or local government creates a substantial burden on one's free exercise of religion in the land use or prison context, the Plaintiff may also bring a claim under RLUIPA.[22] In this context, where the plaintiff demonstrates a substantial burden, the burden (as in the RFRA context) shifts to the government to demonstrate that the burdensome law was "the least restrictive means of furthering [the] compelling governmental interest."[23]

This Article's central focus is on comparing the results of compelling interest tests before and after the Supreme Court's decision in *O Centro*. Before *O Centro*, the Supreme Court suggested a compelling interest was an interest of the highest order.[24] The question after *O Centro* is whether the highest order is insurmountable in practice.

19. 42 U.S.C. § 2000bb(b)(1) (2006) ("The purposes of this chapter are (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . .").
20. § 200bb(a)(1).
21. City of Boerne v. Flores, 521 U.S. 507 (1997).
22. 42 U.S.C. § 2000cc (2006).
23. § 2000cc(1)(a)-(b); *see also* Roman P. Storzer, *The Perspective of the Religious Land Use Applicant*, *in* RLUIPA READER: RELIGIOUS LAND USES, ZONING, AND THE COURTS 46 (Michael S. Giaimo & Lora A. Lucero eds., 2009) ("RLUIPA was meant to be, among other things, a 'visual aid' of existing constitutional protections for churches, municipal officials, and courts, setting out legal rights derived from free exercise, free speech, equal protection, and due process principles.").
24. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

B. The Compelling Interest Inquiry Before *O Centro*: A Public Harms Approach

In a substantial line of pre-RFRA cases, the Supreme Court used a public harms analysis, which considered how much harm a particular religious exemption might have on the non-exempted public. This line of cases reflects the "no-harm principle," which has undergirded the American legal system since its inception. The no-harm principle was articulated by John Locke in the 17th century,[25] was "stamped on [the] political consciousness" of the framing generation in the 18th century,[26] became entrenched in modern law by John Stuart Mill in the 19th century, and remains the dominant justification for criminal, tort, and regulatory laws today.[27]

In this pre-RFRA line of cases, where the potential for public harm was minimal, the challenger's free exercise argument would prevail, and the Court would grant the exemption. Where the potential was great, the government's interest would prevail, and the Court would reject the exemption. The effect of this analysis was to protect religious beliefs, but only to the extent such protection would not disproportionately harm everyone else. The following cases provide examples of how a public harms analysis properly protected religious interests *and* public interests.

In *Braunfield v. Brown* the Supreme Court held that Sunday closing laws in Pennsylvania were constitutional.[28] The Court's rejection was based on the wide range of religious beliefs in the United States, "a cosmopolitan nation made up of people of almost every conceivable religious preference."[29] Granting an exemption to one religious group (Orthodox Jews) would have required the Court to grant exemptions to *all* religious

25. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 260 (2005).

26. *Id.* at 200.

> Obviously, Jefferson and Madison envisioned the potential for great harm to the public good when a religious entity abuses power. For this reason, absolute liberty for religious organizations was never contemplated by them, or their fellow citizens. In fact, the primary assumption at the Constitutional Convention—and it is the most important principle that has contributed to the Constitution's success—was that every individual and every institution holding power was likely to abuse that power and therefore must be checked.

Id. at 261-62.

27. *Id.* at 260.

28. *Braunfield*, 366 U.S. at 609. In this case, Orthodox Jews, who already had to close on Saturdays due to their observance of the Sabbath, argued that Sunday closing laws mandated two days without business. To compete with non-Jewish businesses, Orthodox business owners would have to open on Saturdays, a violation of their free exercise of religion. The Court rejected this argument, suggesting that the general public needed a day of rest, and that eliminating it would have disadvantaged those who had built their businesses around having Sundays off. *Id.*

29. *Id.* at 606.

groups, eroding the state's ability to regulate business activity in the aggregate. In subsequent cases, the Court continued to consider the aggregate effect of exemptions, and in turn, the effect it would have on the state's ability to regulate in the public interest.

In *United States v. Lee*, the Supreme Court held that there was an "overriding governmental interest" in having employers pay into the social security system.[30] The Court rejected an employer's free exercise argument that his Amish beliefs forbade such payments. As in *Braunfield*, the Court framed its rejection of the employer's argument in terms of the harmful collateral effects such exemptions would have on the public: "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the *common good*."[31]

The Court continued to consider a religious exemption's effect on the public in *Hernandez v. Commissioner of Internal Revenue*.[32] Following *United States v. Lee*, the Court reasoned that providing tax deductions to one religious group (Scientologists) would require granting similar deductions to all religious groups.[33] In the end, this would reduce the government's ability to administer a system whose purpose was to increase public good.

The case of *Employment Division v. Smith*[34] provides an even starker example of the Court's interest in protecting the public from collateral harms caused by religious exemptions. In *Smith*, the Court extended its public harms analysis to the criminal context, holding that the government does not have to show a "compelling interest" to justify regulatory laws so long as they are "neutral" and "generally applicable."[35] Specifically, the Court held that the state unemployment office did not violate the Free Exercise Clause when it denied benefits to drug rehabilitation workers who were fired for their religious use of peyote, a "Schedule I controlled

30. *Lee*, 455 U.S. at 258. The Court reasoned:

> [T]he social security system is nationwide, the governmental interest is apparent. The social security system in the United States *serves the public interest* by providing a comprehensive insurance system with a variety of benefits available to all participants . . . . This mandatory participation is indispensable to the fiscal vitality of the social security system.

Id.

31. *Id.* at 259 (emphasis added).

32. *Hernandez*, 490 U.S. at 686.

33. In *Hernandez*, Scientologists claimed that they should be exempt from paying taxes on income based on "auditing" sessions intended to "increase members' spiritual awareness." *Id.* at 692.

34. 494 U.S. 872 (1990).

35. *Id.* at 886, n.3.

substance."[36] The Court echoed this language in *Lukumi v. City of Hialeah*, strengthening "the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[37] *Lukumi*'s significance is that it provides a clear example of how the public-protection rationale in *Smith* and other pre-RFRA cases *also* leaves room for the protection of religious practices.[38]

In 1993 Congress enacted RFRA, overruling *Smith* and explicitly reinstating the requirement that the government demonstrate a "compelling interest...where free exercise of religion is substantially burdened."[39] Despite the Court's subsequent holding that RFRA is unconstitutional as applied to the states,[40] a number of states have enacted state RFRAs reintroducing the compelling interest inquiry. Additionally, RLUIPA (applicable at the federal and the state level) requires a compelling interest where a court finds that the government has substantially burdened the free exercise of religion with prison rules or zoning laws.[41] Finally, in 2006, the Supreme Court confirmed the vitality of the compelling interest inquiry in the post-RFRA era, elevating the requirement to new heights.[42]

II. THE COMPELLING INTEREST INQUIRY AFTER *O CENTRO*

In *Gonzales v. O Centro* 130 members of a Brazilian Christian Spiritist sect raised a Free Exercise defense to a customs agent's seizure of hoasca, a Schedule I hallucinogenic.[43] The religious group (UDV) had made fourteen prior shipments, and argued that the seizure violated RFRA, because members of UDV used hoasca to brew sacramental tea, and the

36. *Id.* at 904. Justice O'Connor explains the importance of a Schedule I classification as follows: "Congress has found that [the substance] has a high potential for abuse, that there is no currently accepted medical use, and that there is a lack of accepted safety for use of the drug under medical supervision." *Id.*

37. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531.

38. *See id.* at 535. In this case, the Court found the city council's reaction to a request to build a Santeria church was unconstitutional. When the city council learned of the Santeria church members' request, it adopted a resolution prohibiting animal sacrifice, the central feature of the Santeria religion. Evaluating the entire record, the Court found that the city council had impermissibly targeted the Santeria faith, unconstitutionally burdening its free exercise of religion. *Id.*

39. 42 U.S.C. § 2000bb(b)(1) (2006).

40. *Flores*, 521 U.S. at 533.

41. 42 U.S.C. § 2000cc-1 (2006).

42. *O Centro*, 546 U.S. 418 (2006).

43. *Id.* at 425.

government's seizure substantially burdened UDV's sincere exercise of religion. Conceding substantial burden, the government advanced three compelling interests justifying the seizure: first, protecting the health and safety of UDV members; second, preventing the diversion of hoasca from UDV members to non-religious users; and third, compliance with the 1971 United Nations Convention on Psychotropic Substances, signed by the United States.[44] The District Court rejected all three of the government's compelling interest arguments and the Tenth Circuit and Supreme Court affirmed, upholding UDV's injunction against the government's seizure of three drums of UDV's illegally imported Schedule I Controlled Substance.

In its analysis, the Supreme Court recognized that the hallucinogenic substance in hoasca is "exceptionally dangerous,"[45] yet the government had not satisfied its burden of proving that hoasca would harm the particular people at issue, namely members of UDV using hoasca for religious purposes:

> RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened.... [T]his Court look[s] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[s] the asserted harm of granting specific exemptions to *particular religious claimants*.[46]

Where, as in *O Centro*, the government's evidence of harm is "in equipoise" with evidence demonstrating a lack of harm to religious users, the compelling interest argument fails.[47]

Weighing the evidence presented at trial, the Court focused on the government's first two compelling interest arguments: (1) health risks and (2) the potential for diversion. The government presented evidence that hoasca can cause "psychotic reactions, cardiac irregularities, and adverse drug interactions."[48] UDV cited studies demonstrating the safety of hoasca's *sacramental* use. As for diversion, the government noted a "rise in the illicit use of hallucinogens, and...the illegal use of hoasca in particular."[49] UDV argued that the market for hoasca was small, the church

44. *Id.* at 426.
45. *Id.* at 432.
46. *Id.* at 430-31 (emphasis added).
47. *Id.* at 426.
48. *Id.* at 426.
49. *Id.*

only imported small amounts of the drug, and there had been no problem with diversion in the past. The Supreme Court then affirmed the District Court's decision where the evidence regarding health risks was "in equipoise" and the evidence of diversion was "virtually balanced." Finally, the Supreme Court agreed that "[i]n the face of such an even showing, the...Government had failed to demonstrate a compelling interest"[50]

After *O Centro* a court must determine whether the government has a compelling interest in applying its burdensome law "to the person,"[51] the religious user at issue. This focused analysis constrains courts to look narrowly at the religious user, losing the ability to evaluate the collateral consequences of religious exemptions. In turn, this expands the religious safe harbor for dangerous or illegal activity that burdens the public.

III. WINNING A COMPELLING INTEREST ARGUMENT BEFORE AND AFTER *O CENTRO*

This Part compares the government's ability to win a compelling interest argument before and after *O Centro*.[52] The vehicle for this comparison is an examination of all the "compelling interest" cases[53] decided by the Supreme Court and the federal courts of appeal since the Supreme Court's decision in *Sherbert v. Verner*.[54] For the purposes of drawing a direct comparison, this study draws a line between pre-*O Centro* cases (Appendix I, *infra*) and post-*O Centro* cases (Appendix II, *infra*).[55] The study then

50. *Id.* at 427.
51. *Id.* at 423.
52. Viewed more narrowly, the specific purpose of this study is to determine whether courts citing *O Centro* are more likely to reject the government's compelling interest argument than courts were before the *O Centro* decision.
53. For the purposes of this study, a "compelling interest" case (an "on point" case) is one in which the court either (1) reaches the merits of the government's compelling interest argument, accepting or rejecting it or (2) states explicitly in dicta that the court *would* recognize the government's proffered compelling interest had the government's case not failed for some other reason.
54. 374 U.S. at 403 (holding that under the Free Exercise Clause the government must demonstrate a compelling interest before denying unemployment compensation to an employee fired when her religious beliefs conflicted with her job).
55. This study is current through March, 2010. Its results are based on Lexis and Westlaw searches. To generate the list of pre-O *Centro* cases, the Lexis search terms were as follows: court(supreme or circuit) and "free exercise" and (substant! w/2 burden!) and (compelling w/2 interest) and relig!. Then, the search was restricted to cases decided between June 16, 1963 (the date of the Supreme Court's decision in *Sherbert v. Verner*, 374 U.S. 398 (1963) and Feb. 21, 2006 (the date of the Supreme Court's decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)). The search returned 96 results. The first relevant case,

compares the likelihood of a court's acceptance of the government's compelling interest argument in both groups of cases (Appendix III, *infra*).

Based on a raw percentage of all the compelling interest cases, pre-*O Centro* courts rejected the government's compelling interest 17.4% of the time,[56] while post-*O Centro* courts rejected the government's compelling interest 35.7% of the time.[57] To account for the fact that courts routinely accept the government's compelling interest argument in the prison context, the study generated separate non-prison statistics. Pre-*O Centro* courts rejected the government's compelling interest arguments outside the prison context 25.9% of the time.[58] Post-*O Centro* courts rejected the government's compelling interest arguments outside the prison context 50.0% of the time.[59] While a number of factors call these statistics into question,[60] the numbers provide evidence (indeed, the only evidence

United States v. Dickens, 695 F.2d 765 (3rd Cir. 1982) was decided on Dec. 15, 1982, nineteen years after *Sherbert*. Only these 96 cases were considered as part of this study, and only cases that highlighted the compelling interest issue in some way were included in the calculations. More specifically, Appendix I contains only cases in which the court either reached the merits of the government's compelling interest argument or explicitly accepted or rejected the proffered compelling interest in dicta. Especially in some of the earlier cases, where courts were more likely to blur or combine the compelling interest and least restrictive means inquiries, courts held in dicta that they accepted the interest as compelling, but that the government still failed on its "compelling interest argument" (based on a least restrictive means analysis). *See generally* Jolly v. Coughlin, 76 F.3d 468 (2nd Cir. 1996); Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995). Such cases are marked as "dicta" in Appendix I *infra*. The post-*O Centro* cases were generated by Shepardizing the *O Centro* decision through March 3, 2010. The survey then considered all cases that followed or distinguished *O Centro*, counting only federal decisions (thirty-four cases). Notably, these thirty-four cases also contain decisions from the District Courts. The reason for this inclusion was to get a strong base of comparison. Of course, as the federal appeals courts decide more compelling interest cases, this sample size will increase. Finally, the pre- and post-*O Centro* cases were separated, analyzed, and compared.

56. In this pre-*O Centro* category, there were forty-six on point cases. *See supra* note 55. Eight of the on point cases rejected the government's compelling interest arguments. Thirty-seven cases accepted the argument, and one case found the compelling interest argument neutral.

57. In this post-*O Centro* category, there were fourteen on point cases. Seven cases rejected the government's compelling interest arguments. Eleven accepted the government's compelling interest argument, and one case was neutral.

58. Ten pre-*O Centro* non-prison cases were on point. Courts accepted the government's argument in seven cases and rejected the government's argument in three. *See infra* Appendix I.

59. Thirteen post-*O Centro* non-prison cases were on point. Courts accepted the government's argument in nine cases and rejected the government's argument in five. *See infra* Appendix II.

60. A list of the study's potential flaws is as follows: The sample size was low, especially in the post-*O Centro* cases. This was a realistic limitation, however, based on the sheer number of times *O Centro* has been cited. The study did not account for post-*O Centro* cases accepting or rejecting compelling interest arguments without citing *O Centro*. The reason for this is that the study's goal was to test how *O Centro* has affected courts that are faithful to its precedent. Additionally, the numbers might be skewed because the facts and holding in the *O Centro* case itself might have energized potential religious claimants to engage in risky behavior to test the bounds of this new precedent. The existence of this statistical flaw, however, might actually serve to support the Article's central claim of public harms to the extent the holding in *O Centro* has *directly* caused

available) that the government is less likely to win its compelling interest argument after *O Centro*.

In addition to the raw numbers, this study generated three significant and substantive observations by analyzing trends in the cases themselves. First, *O Centro* has had an insignificant impact on the government's chance of prevailing on its compelling interest argument in the prison context. Second, in a pair of instances where different iterations of the same case were decided before and after *O Centro*, different decisions resulted *on the same facts*. For example, in the cases of *Westchester Day School v. Mamaroneck*[61] and *Navajo Nation v. United States Forest Services*,[62] appellate decisions after *O Centro* rejected the same compelling interest arguments that were accepted before *O Centro*. Third, in Schedule I drug cases, clear instances where public harms are at stake, it is more likely that courts will reject the government's compelling interest argument after *O Centro*.

A. The Prison Context

As the Supreme Court noted in *Cutter v. Wilkinson*, in a compelling interest analysis, "context matters."[63] In the prison context, courts before and after *O Centro* routinely accept the government's compelling interest arguments related to the health and safety of prison guards and inmates. Justice Ginsburg, writing for a unanimous court in *Cutter*, explained that

prison authorities typically act on compelling interests and that courts entertaining RLUIPA claims should accord "due deference to the experience and expertise of prison and jail administrators."[64]

parties seeking religious exemptions to test how much they can get away with. Finally, the pre-*O Centro* cases did not include district court cases, but the post-*O Centro* cases did. This was based on logistical necessity and to get a better sense of the actual percentages. This survey leaves open the potential for two additional avenues of exploration: (1) surveying the numerous cases in the district courts before *O Centro* and (2) surveying the thousands of state court cases before and after *O Centro*.

61. Westchester Day Sch. v. Vill. of Mamaroneck, (*Mamaroneck II*), 504 F.3d 338, 353 (2d Cir. 2007).

62. Navajo Nation v. United States Forest Serv., 408 F. Supp. 2d 866, 900 (D. Ariz. 2006).

63. Cutter v. Wilkinson, 544 U.S. 709, 722-23 (2005).

64. *Id.* at 717 (quoting 146 CONG. REC. 16698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA)). The Senators comments included:

> Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions . . . . They anticipated that courts would apply the [RLUIPA] standard with "due deference to the experience and expertise of prison

This survey revealed that lower courts have faithfully employed the deferential dictates of *Cutter*. In fact, this survey revealed nearly unanimous results in the nineteen pre-*O Centro* prison cases where courts accepted that prison safety was a compelling interest.[65] Additionally, courts in four of the five post-*O Centro* prison cases accepted the government's compelling interest arguments.[66] In the relatively rare cases where the government lost in the prison context, courts typically *did* accept the compelling interest argument, but they held that the prison could have achieved its compelling interest in a manner less restrictive of the prisoner's free exercise of religion.[67] In one pre-*O Centro* case, for example, a court found that the warden could have achieved prison safety in a manner less restrictive of a Native American inmate's free exercise rights than by enacting an outright prohibition against the possession of prayer feathers.[68]

This case demonstrates that where courts find the government has violated a person's free exercise rights, the court can accept the government's compelling interest argument and still hold for the religious party. Indeed, the less restrictive means prong of the analysis is a sharper and narrower tool than the compelling interest prong. The less restrictive means prong allows the court to create a narrow holding based on the facts at hand. In contrast, where a court—especially the Supreme Court—rejects a compelling interest argument, it does so categorically, eliminating the argument in all subsequent cases, paving the way for public harms.

The next cases demonstrate that *O Centro* has caused some courts to re-evaluate the same facts, creating categorical rejections of compelling interest arguments accepted before *O Centro*.

and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline . . . ."

Id. at 723 (quoting 139 CONG. REC. 26190 (1993) (statement of Sen. Hatch)).

65. In eighteen of the nineteen pre-*O Centro* prison cases courts accepted the government's compelling interest arguments. *See infra* Appendix I.

66. *Id.*

67. This "least restrictive means" prong of the strict scrutiny analysis is outside the scope of this Article. However, for a pre-*O Centro* example, see *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005) (finding prison safety is "clearly" a compelling interest). For a post-*O Centro* example, see *Borzych v. Frank*, 439 F.3d 388, 390-91 (7th Cir. 2006) and *Ragland v. Angelone*, 420 F. Supp. 2d 507, 515-17 (D. Va. 2006).

68. Wolfe v. Ferguson, No. 04-5177, 2005 U.S. Dist. LEXIS 40978 (W.D. Ark. Sept. 8, 2005).

B. Different Determinations on the Same Facts

In *Navajo Nation v. United States Forest Services* a pre-*O Centro* district court found compelling the government's interest in public safety on government land.[69] Then, the members of the post-*O Centro* appellate court who reached the government's compelling interest argument (albeit, the dissenters) followed *O Centro*, and rejected the government's argument as a mere general interest in public safety.

More specifically, in *Navajo Nation* the District of Arizona held that the government had a compelling interest in improving the safety of a public skiing facility by preventing overcrowding. The Forest Service's method of alleviating this risk was to blow man-made snow containing small amounts of human waste onto state-owned peaks worshipped by Native Americans. Despite the substantial burden this placed on the free exercise rights of Native Americans who worshipped the mountains, the court held, "the Forest Service has a compelling interest in authorizing upgrades at Snowbowl to ensure that users of the National Forest ski area have a safe experience."[70] Plaintiffs then appealed, and the case reached the Ninth Circuit shortly after the Supreme Court's decision in *O Centro*.

Notably, the majority held *for* the government on the grounds that the safety measures failed to substantially burden the Native Americans' free exercise rights.[71] As such, the majority failed to reach the compelling interest inquiry. However, the dissent provides a window into the Ninth Circuit's post-*O Centro* treatment of a public harms rationale. Citing *O Centro*, Judges Fletcher, Pregerson, and Fisher stated that they would have held that none of the government's interests in public safety were compelling. Echoing *O Centro*'s rejection of "broadly formulated interests," the judges rejected the government's "general interest in ensuring public safety."[72]

To be sure, the significance of this observation is questionable because the appellate judge's job is to scrutinize the legal analysis of the court below; further, the post-*O Centro* 'about face' only involved three

69. *Navajo Nation*, 408 F. Supp. 2d at 873.
70. *Id.* at 906.
71. Navajo Nation v. United States Forest Serv., 535 F.3d 1058, 1069 (9th Cir. 2008) (en banc) ("Of course, the 'compelling interest test' . . . applies only if there is a substantial burden on the free exercise of religion. . . . [T]he government is not required to prove a compelling interest for its action . . . unless the plaintiff first proves the government action substantially burdens his exercise of religion."). The majority went on to find there was no substantial burden. *Id.* at 1078.
72. *Id.* at 1107 (Fletcher, J., dissenting).

dissenting members of the court. Still, an explicit rejection of the public harms rationale in the wake of *O Centro* by members of the Ninth Circuit suggests that *O Centro*'s effect is not merely conjectural. Indeed in the following case, *O Centro* caused a court to change its minds on a second determination of the same facts.

In the pre-*O Centro* version of *Westchester Day School. v. Village of Mamaroneck*,[73] the Second Circuit expressly held open the possibility of accepting the government's compelling interest argument.[74] After *O Centro*, the Second Circuit explicitly rejected the government's compelling interest, holding for the religious entity.[75] Underlying both determinations was a village board's denial of a Jewish day school's application to renovate old buildings and build new ones.[76] The denial was based on the board's determination that the new buildings would increase traffic and reduce the town's ability to ensure safe streets.

Pre-*O Centro*, the Second Circuit reserved judgment on the government's compelling interest determination, suggesting, "[w]e know of no controlling authority, either in the Supreme Court or any circuit holding that traffic problems are incapable of being deemed compelling."[77] Additionally, the court stated, "[w]hile it is true that there are no authoritative cases holding that a traffic concern satisfies the 'compelling interest' test, nor are there authoritative cases holding that a traffic concern cannot satisfy the test."[78] Based on insufficient findings in the record, the Second Circuit remanded the case to the trial court.[79]

In the second appeal, which occurred after *O Centro*, the Second Circuit reached the merits of the state's compelling interest argument and rejected it, holding for the religious entity.[80] It is of course significant that on remand the trial court questioned the sufficiency of the evidence supporting the state's traffic safety argument and found instead that the board had

73. *Mamaroneck II*, 504 F.3d at 353 (citing *O Centro* and holding that traffic safety is not a compelling government interest). *But see Mamaroneck I*, 386 F.3d at 191.
74. *Mamaroneck I*, 386 F.3d at 191.
75. *Mamaroneck II*, 504 F.3d at 353.
76. *Mamaroneck I*, 386 F.3d at 185.
77. *Id.*
78. *Id.*
79. *Id.* at 192.
80. *Mamaroneck II*, 504 F.3d at 353 ("The district court's findings reveal the ZBA's stated reasons for denying the application were not substantiated by evidence in the record before it. The court stated the application was denied not because of a compelling governmental interest that would adversely impact public health, safety, or welfare, but was denied because of undue deference to the opposition of a small group of neighbors.").

simply deferred to the complaints of a small group of town residents.[81] This might lead to the conclusion that the Second Circuit would have accepted the state's compelling interest argument had the evidence of traffic danger been more compelling. Additionally, this observation might lead to the conclusion that the Second Circuit ultimately did not reject the government's compelling interest at all; the court merely affirmed the trial court's determination that the record contained insufficient evidence that traffic safety was a compelling problem.[82]

However, this reading of the case sequence would undercut *O Centro*'s constraining influence and its compulsion toward finding for the religious entity. Here, the Second Circuit, cited *O Centro* for the proposition that the government "must show a compelling interest in imposing the burden on religious exercise *in the particular case at hand*, not a compelling interest in general."[83] Under this logic, the Second Circuit would reject the town's compelling interest argument even where *every* religious entity in Mamaroneck built new assembly halls at the same time, clogging every street in town. In such a case, the town could not argue that it had an interest in constraining any *particular* religious entity, and it would be powerless to police what certainly would be an affront to public safety and town order.

The observations in the *Navajo Nation* and *Mamaroneck* cases demonstrate the constraining influence of *O Centro* even on courts dealing with the same facts before and after the Supreme Court's decision. After *O Centro*, a court is nearly powerless to accept an argument that posits the harmful effect of religious activity in the aggregate.

81. On remand, the trial court found that the project did have an "incremental impact" on traffic, but that the town could have alleviated such impact in a means less restrictive than denying the school's building permit. Westchester Day Sch. v. Vill. of Mamaroneck, 417 F. Supp. 2d 477, 553 (S.D.N.Y. 2007). Additionally, one trial expert suggested, "I don't believe that traffic volume in and of itself represents a threat to safety," and further findings suggested that "despite community complaints about existing traffic . . . as well as the . . . existing congestion . . . there is no evidence that the Town has sought to mitigate this concern at any time during the period of almost three years since the Application was denied." *Id.* at 533, 552.

82. Indeed, the Second Circuit stated: "The district court's findings reveal the . . . stated reasons for denying the application were not substantiated by evidence in the record before it." *Mamaroneck II*, 504 F.3d at 353.

83. *Id.* at 353 (emphasis added).

C. Drug Cases: Different Determinations on Analogous Facts

A comparison between pre- and post-*O Centro* cases involving Schedule I substances provides direct evidence that *O Centro* has made it more difficult for the government to police the use, importation, and distribution of substances that can harm the public.

The following cases are examples of the courts' general acceptance of compelling interest arguments related to Schedule I substances before *O Centro*. Significantly, both cases were decided in the post-RFRA era, marked by a high level of deference to religion. Still, in both cases, the courts suggested that where drugs are concerned, it goes without saying that the government has a compelling interest in protecting the public.

In *United States v. Israel*, the Seventh Circuit held, "[w]hether the government has a compelling interest in preventing drug abuse can hardly be disputed."[84] The court rejected a Rastafarian's RFRA challenge to the revocation of his supervised release for smoking marijuana "all day every day,"[85] reasoning that the government had a compelling interest in "the uniform enforcement of drug laws to prevent harm to the public health and safety."[86] The court found that drug use was a serious threat to that interest.[87] Similarly, in *Loop v. United States*, the District of Minnesota held that "the government has a compelling interest in the uniform enforcement of drug laws to prevent harm to the public health and safety," rejecting the plaintiff's challenge to the seizure of a "one hitter" marijuana pipe as he entered a public courthouse.[88]

Then in *O Centro* in 2006, the Supreme Court took this obvious, longstanding, and intuitively compelling interest off the table, forcing courts to do one of two things: Maneuver around *O Centro* to achieve intuitive results consistent with long-standing precedent, or follow *O Centro* to illogical outcomes. Two post-*O Centro* Schedule I cases exemplify these two approaches.

United States v. Lepp, decided shortly after *O Centro*, provides an example of the former approach.[89] In *Lepp*, the Northern District of California rejected a Rastafarian's RFRA challenge to the search warrant

84. United States v. Israel, 317 F.3d 768, 771 (7th Cir. 2003).
85. *Id.* at 772.
86. *Id.* at 771.
87. *Id.* at 772.
88. Loop v. United States, No. 05-575, 2006 WL 1851140 at *7 (D. Minn. June 30, 2006).
89. United States v. Lepp, No. 04-0317, 2007 U.S. Dist. LEXIS 66311 (N.D. Cal. Sept. 6, 2007).

used to seize over 32,000 marijuana plants, holding that the government has a compelling interest in "enforcing drug laws *by executing valid search warrants* in pursuit of that...long-established [aim]."[90] The court distinguished *O Centro* in two ways. First, the court concluded that *O Centro* was a "narrow tailoring" case, diminishing the importance of *O Centro*'s compelling interest reasoning. Second, the district court distinguished peyote and hoasca from marijuana,[91] suggesting the Attorney General has not granted religious exemptions for marijuana. Only by nimbly dodging the language and reasoning in *O Centro* was the district court able to achieve the intuitive result, upholding the conviction of a drug dealer.

Church of the Holy Light of the Queen v. Mukasey provides an example where a district court's adherence to *O Centro* led further down the slippery slope toward public harm; a slippery slope whose existence the Supreme Court has denied.[92] In *Church of the Holy Light*, the District of Oregon awarded members of the Daime Church an exemption for the religious use of Daime tea (containing the same active ingredient DMT at issue in *O Centro*).[93] As in *O Centro*, the district court rejected the government's compelling interest arguments in preventing health risks to religious users, preventing health risks to others who drink Daime tea, preventing diversion of Daime tea to non-religious users, and ensuring the DEA's general ability to regulate pursuant to the Controlled Substances Act.[94] More importantly, the court rejected these arguments despite additional evidence not before the court in *O Centro*.

First, the district court found that federal agents confiscated "an unspecified amount of marijuana" and "a small amount of bufotenine, a hallucinogenic drug derived from animal secretions" at the church leader's home.[95] Second, church leaders were in charge of distributing Daime tea.[96] Third, a small number of church members stated that they occasionally smoked marijuana and were trying to quit.[97] Fourth, the court recognized that there was a "small risk" that Daime tea could cause a "transient psychotic episode" and a "smaller" but still present risk that Daime tea could cause long-term psychosis.[98] Therefore, despite the fact that a man in

90. *Id.* at *9 (emphasis added).
91. *See id.* at *10-11.
92. Church of the Holy Light of the Queen v. Mukasey, 615 F. Supp. 2d 1210 (D. Or. 2009).
93. *Id.* at 1219.
94. *Id.* at 1220.
95. *Id.* at 1213-14 & n.1.
96. *Id.* at 1216.
97. *Id.* at 1214.
98. *Id.* at 1217.

possession of illegal amounts of other Schedule I substances was in charge of administering Daime tea to religious users trying to quit their use of other drugs, and despite the fact that the same man was in charge of safeguarding the public from the diversion of Daime tea to non-religious users, the district court held that *O Centro* was directly on point and found for the religious users.

This line of cases demonstrates not only that *O Centro* compels courts to make counterintuitive decisions that increase the risk harm, but it also demonstrates that the reasoning of *O Centro* has no logical outer limit. Essentially *O Centro* paves a slippery slope whose existence the Supreme Court refuses to admit. The next Part supports this assertion.

D. Another Potential "Slip"

In *O Centro*, the Court roundly rejected the government's "slippery-slope" argument because RFRA operates by mandating that courts evaluate each claimed exception to rules of general applicability,[99] and because courts are more than competent to apply the compelling interest standard properly.[100] The problem, however, is that the *O Centro* opinion *compels* courts to engage in an inherently biased, pro-plaintiff analysis. Instead of allowing courts to engage in a balanced analysis on a case-by-case basis, *O Centro* forces courts to defer to religious exceptions on a case-by-case basis.[101]

Subsequent actions by members of UDV add real world facts to the government's theoretical slippery slope argument in *O Centro*. Since the Court's decision, members of UDV have presented Arroyo Hondo, New Mexico with plans to build an 11,000 square foot, 2.5 acre temple, including an 800-square-foot greenhouse for growing hoasca, and a fifty-

99. *O Centro*, 546 U.S. at 435-36 ("The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'").
100. *Id.* at 436 ("We reaffirmed just last Term the feasibility of case-by-case consideration of religious exemptions to generally applicable rules. . . . We had 'no cause to believe' that the compelling interest test 'would not be applied in an appropriately balanced way' to specific claims for exemptions as they arose.").
101. *Id.*

one space parking area enabling congregants to drive to and from the temple.[102] Currently, the case is not before the courts, but if it were, it would test the limits of *O Centro*'s logic.

Members of UDV would argue that Arroyo Hondo's determination substantially burdened their free exercise rights, shifting the burden to the government to argue a compelling interest. The government's main arguments would be that an 800-square-foot greenhouse would have the capacity to produce more hoasca than church members would need for sacramental purposes, thereby increasing the risk of ingesting more hoasca than they would need to perform the ritual and increasing the risk of diversion. Next, the government would suggest that a fifty-five car parking garage would increase the risk that UDV members on sacramental hallucinogens would get into car accidents, harming themselves as well as non-church members in the surrounding community.

To begin its analysis, the court would determine whether the potential harms in this case pose a greater risk to the religious users than in *O Centro* and *Church of the Holy Light of the Queen v. Mukasey*. UDV would analogize the cases, suggesting that the evidence here is also "in equipoise." Religious leaders would safeguard the homegrown hoasca from the greenhouse with lock and key preventing overuse, and ceremonial leaders would prevent religious users from driving until the hallucinogenic effects wore off. Therefore, UDV members would argue this case poses no greater harm to religious users, the focal point of the *O Centro* analysis.

Under a faithful reading of *O Centro*, collateral harms to the public are not the court's primary concern. Under *O Centro* and *Church of the Holy Light*, the distinguishing factors of the Arroyo Hondo case—the greenhouse and the parking garage—would not be sufficiently compelling for a court faithful to *O Centro*'s rationale. In *O Centro* and in *Church of the Holy Light*, the courts took judicial notice that there is only a small market for diverted hoasca in the United States, and that religious users avoid overuse because it violates the sacrament. Additionally, with ceremonial monitors, dangers related to hallucinogenic driving are reduced to mere traffic concerns, questionable as a compelling interest under *Westchester Day School v. Village of Mamaroneck*. Therefore, as in the other Schedule I cases, a court in Arroyo Hondo would either have to follow *O Centro* to its

102. Tom Sharpe, *Hoasca-Drinking Group Seeks to Build Temple in Arroyo Hondo*, THE NEW MEXICAN (Aug. 27, 2009), *available at* http://www.santafenewmexican.com/Local%20News/Hoasca-drinking-group-seeks-to-build-temple-in-Arroyo-Hondo.

counterintuitive conclusions or engage in judicial gymnastics to generate the intuitive result. In either case, *O Centro* is in the way, creating a real risk of public harm.

CONCLUSION AND SOLUTION

This case survey and its observations and analysis demonstrate that the Court's holding in *O Centro* does, in fact, make the government's burden unrealistically difficult to satisfy even in the most obvious situations. This is problematic given the august history of the no-harm principle, which predates the nation's founding. Therefore, the Supreme Court should clarify its holding in *O Centro* and return to the long-established no-harm precedent in *United States v. Lee*, *Hernandez v. Commissioner of Internal Revenue*, and *Braunfield v. Brown*. The following proposal demonstrates how the Court could return to these principles *and* faithfully apply *O Centro*, making it unnecessary to overrule precedent—new or old.

This Article's proposal is a two-part, either-or compelling interest test, where a lower court would accept the government's compelling interest argument if the activity poses a substantial risk of harm to *either* the religious user *or* to the public. In this way, courts would meaningfully accommodate religious freedom *and* public safety.

Under part one of this new test, a court would ask whether the activity in question—hoasca use, a zoning variance, or non-payment of taxes, to name a few—is likely to harm the religious user. *O Centro*'s harm-to-the-user inquiry would govern this first part of the test. If the court were to find that the activity is likely to harm the religious user, the court, following *O Centro*, would accept the government's compelling interest in regulating the activity. If the religious user were able to demonstrate that the activity is not likely to cause him harm, then the court would move to the second part of the either-or test. Under part two, a court would ask whether the religious user's activity is likely to harm the public. *United States v. Lee*, *Hernandez v. Commissioner of Internal Revenue*, and *Braunfield v. Brown* would guide the court in this second inquiry. If the court were to find that the activity is unlikely to harm the public, then it would reject the government's compelling interest argument and prohibit regulation, awarding an exemption to the religious user. If, on the other hand, the court were to find that the activity is likely to harm the public, then the court would accept the government's compelling interest argument, and allow the government to regulate in the area.

This either-or compelling interest inquiry would not only follow modern precedent, but it would also accord proper faith to the no-harm rule, which should remain part of the bedrock of our legal system.

APPENDIX I: COMPELLING INTEREST CASES FROM *SHERBERT* TO *O CENTRO*[103]

SUPREME COURT		
Cutter v. Wilkinson, 544 U.S. 709, 723 n.11 (2005)	Prisoners survive dismissal of free exercise claim. Dicta suggesting, Courts...may be expected to recognize the government's countervailing compelling interest in not facilitating inflammatory racist activity that could imperil prison security and order."	Accepted Not facilitating inflammatory racist activity in prisons
Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 529-30(1993)	Santeria religious group's animal sacrifice	Rejected (1) Health risk to participants and public (2) Emotional injury to children witnessing the sacrifice of animals (3) Protection of animals from cruel, unnecessary killing (4) Restricting slaughter or sacrifice of animals to areas zoned for slaughterhouse use
Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 876 (1990)	Religious use of peyote	Accepted Enforcement of state controlled substances act with no exception for sacramental use
Tex. Monthly, Inc. v. Bullock, 489 U.S.	Sales tax exemption for religious publications	Rejected Avoiding violations of the

103. The primary source for the results contained in this chart was a Lexis search (Westlaw returned the same number of results). Its methodology is described *supra* notes 52-53 and 55.

1, 5 (1989)		Free Exercise and Establishment Clauses
CIRCUIT COURTS		
Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 664 (10th Cir. 2006)	Permit denied for operation of religious daycare. Holding on other grounds, but admitting a letter into evidence signed by the religious group that that since the venture was for business not religion, the government was justified in denying the permit due to "its compelling interest of limiting traffic, noise and congestion in a residential neighborhood."	Accepted (Dicta) Limiting traffic, noise, and congestion
Warsoldier v. Woodford, 418 F.3d 989, 998 (9th Cir. 2005)	Native American prisoner's challenge of hair grooming policy succeeds due to failure on the least restrictive means prong	Accepted Prison security is "clearly" a compelling governmental interest
Konikov v. Orange County, 410 F.3d 1317, 1326 (11th Cir. 2005)	Jewish rabbi's RLUIPA challenge to state ordinance preventing him from performing religious ceremonies in his home	Rejected State's ability to treat family day care homes differently from other groups based on the fundamental right to freedom of personal choice in family life
Benning v. Georgia, 391 F.3d 1299, 1313 (11th Cir. 2004)	Failed challenge to RLUIPA's constitutionality	Accepted (Dicta) Prison safety
Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 190-91 (2d Cir. 2004)	See discussion in Part III, *supra*	Neutral** Deliberately avoiding the question of whether traffic concerns were a compelling interest, but holding open the possibility that they might be ** Notably, the same court *rejected* traffic concerns as a compelling interest in a subsequent decision in the same case (*infra*).
Murphy v. Mo. Dep't of Corrections, 372 F.3d 979, 983 (8th Cir. 2004) (overruled on other grounds)	White supremacist challenged prison rules	Accepted Prison safety

Frank v. Charles, No. 04-1674, 2004 U.S. App. LEXIS 11541 (7th Cir. June 3, 2004)	Muslim inmate's challenge to prison's prohibition against wearing prayer beads	Accepted Maintaining security and suppressing gang activity in prison
Madison v. Riter, 355 F.3d 310, 1321 (4th Cir. 2003)	Convict's RLUIPA challenge to not being served kosher meals	Accepted Prison safety and security (dicta)
Charles v. Verhagen, 348 F.3d 601, 611 (7th Cir. 2003)	Religious inmate's failed challenge of the prison's refusal to allow him to possess certain amounts of prayer oil	Accepted Prison safety and security
United States v. Antoine, 318 F.3d 919, 924 (9th Cir. 2003)	Native American's RFRA challenge to his prosecution for violating eagle hunting ordinance	Accepted Eagle protection
United States v. Israel, 317 F.3d 768, 772 (7th Cir. 2003)	Unsuccessful RFRA challenge by Rastafarian parolee on supervised release to his subsequent imprisonment for testing positive for high levels of marijuana; "There is substantial authority to support the conclusion that even under [the] more demanding [compelling interest] standard, courts have properly refused to allow exceptions for marijuana use." "In light of this impressive amount of legislative and judicial reasoning, we conclude that the government has a proper and compelling interest in forbidding the use of marijuana."	Accepted Forbidding the use of marijuana and demanding that a convict on parole abstain from marijuana use
Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 172-73 (3rd Cir. 2002)	Orthodox Jewish community's successful free exercise challenge to the town's prohibition against posting lechis on telephone poles to create eruvs even though the town allowed secular and church postings	Rejected (1) Avoiding violation of the Establishment Clause by preventing religious postings—but not secular ones—on telephones (2) Keeping the town's telephone poles free from posting
United States v. Hardman, 297 F.3d 1116, 1128 (10th Cir. 2002)	Native American's possession of eagle feathers	Accepted Preserving the species of the bald eagle, a national symbol
Davey v. Locke, 299 F.3d 748, 159-60 (9th Cir. 2002)	Denial of student's scholarship once granting organization found out student would major in theology	Rejected Avoiding conflict with state constitutional constraint against applying money to religious instruction
Gibson v.	Denial of Native American's permit	Accepted

Babbitt,223 F.3d 1256, 1258 (11th Cir. 2000)	to capture bald eagles	Adhering to federal government's treaty obligations with federally recognized Indian tribes
Strout v. Albanese,178 F.3d 57, 61 (1st Cir. 1999)	State funding grants only to non-sectarian schools	Accepted (dicta) Avoiding an Establishment Clause violation requires that the statute exclude sectarian schools from the tuition program
In re Grand Jury Empanelling of the Special Grand Jury,171 F.3d 826, 832 (3rd Cir. 1999)	Compelled grand jury testimony of two religious sisters called to testify against their father, a rabbi, being investigated for accused white collar crimes	Accepted Investigating and prosecuting crimes, by taking grand jury testimony of witnesses
Adams v. Comm'r, 170 F.3d 173, 178 (3rd Cir. 1999)	Government mandated that Quaker had to pay into the tax system despite the fact portions of taxes go to war efforts	Accepted Uniform and mandatory participation in the Federal income tax system, irrespective of religious belief
Besh v. Campbell, No. 96-5781, 1997 U.S. App. LEXIS 17417 (6th Cir. 1997)	Prison prohibited Native Americans from participating in religious ceremonies (sweat lodge, burning of sacred herbs)	Accepted Prison security, uniformity of prison procedures, or conservation of scarce prison resources
Diaz v. Collins, 114 F.3d 69, 73 (5th Cir. 1997)	Aztec inmate made to cut his hair	Accepted Prison security; not allowing inmates to hide weapons in their hair
Craddick v. Duckworth, 113 F.3d 83, 85 (7th Cir. 1997)	Native American inmate prohibited from wearing a medicine bag	Rejected Interest in not having medicine bags over a certain size in prison (compelling interest test combined with least restrictive means test into one inquiry)
May v. Baldwin, 109 F.3d 557, 563 (9th Cir. 1997)	Rastafarian prisoner given solitary confinement for not loosening his dreadlocks	Accepted Internal security in prisons
United States v. Hugs, 109 F.3d 1375, 1378 (9th Cir. 1997)	Native Americans convicted of hunting bald eagles	Accepted Protection of bald eagles
Arguello v. Duckworth, No. 95-1222, 1997 U.S. App. LEXIS 445 (7th Cir. Jan. 9, 1997)	Native American prisoners prohibited from carrying religiously significant artifacts	Accepted Prison security
Stefanow v.	Aryan Nation prisoner prohibited	Accepted

McFadden, 103 F.3d 1466, 1472 (9th Cir. 1996)	from having book	Prison security
Small v. Lehman, 98 F.3d 762, 768 (3rd Cir. 1996)	Sunni Muslim inmates forbidden from having separate services	Accepted Operating an efficient and cost-effective penal system
Goehring v. Brophy, 94 F.3d 1294, 1300 (9th Cir. 1996) (overruled post-*O Centro*)	School compelled all students pay into health plan despite the fact that some of the money went to student abortions	Accepted Health and well being of University's students
Sasnett v. Sullivan, 91 F.3d 1018, 1023 (7th Cir. 1996)	Prison prohibited inmates from wearing crucifixes	Accepted (dicta) Prison security
United States v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, 1420 (8th Cir. 1996)	Bankruptcy court compelled members of the Crystal Evangelical Free Church to hand over their tithes as part of a bankruptcy judgment	Rejected Advancing the bankruptcy system
Fawaad v. Jones, 81 F.3d 1084, 1087 (11th Cir. 1996)	Prison compelled Muslim inmates to use given names and Muslim names on their mail	Accepted Efficient identification system in prison
Mack v. O'Leary, 80 F.3d 1175, 1180 (7th Cir. 1996)	Prison prohibited accommodations for a prisoner during Ramadan and for a religious banquet	Accepted (dicta) Prison security
Jolly v. Coughlin, 76 F.3d 468, 479-80 (2nd Cir. 1996)	Rastafarian prisoner's successful challenge to solitary confinement for not submitting to tuberculosis blood test	Accepted (dicta) Keeping prisoners and prison staff free from infection (government failed least restrictive means test)
Hamilton v. Schriro, 74 F.3d 1545, 1557 (8th Cir. 1996)	Prison prohibited Native American inmates from participating in sweat lodge	Accepted Prison safety
Hartmann v. Stone, 68 F.3d 973, 985-86 (6th Cir. 1995)	Army families' successful challenge to day care providers' prohibition against religious practices	Accepted (dicta) Army's interest in preventing entanglement with religion (government lost because its entanglement claim was not legitimate)
Cheema v. Thompson, 67 F.3d 883, 885-86 (9th Cir. 1995)	School district's prohibition against Khalsa Sikh children's wearing a kirpan (religious sword) to school	Accepted (dicta) Campus safety (school district lost based on lack of developing a record as to why the district court's injunction would fail to achieve the school's compelling interest)
American Life League v. Reno, 47	Unsuccessful challenge to the Access Act, which prohibited abortion	Accepted (1) Protecting public health

F.3d 642, 645 (4th Cir. 1995)	protestors from preventing those seeking abortions from accessing clinics	by promoting unobstructed access to reproductive health facilities (2) Protecting public safety by preventing violent activity aimed at patients of reproductive health centers
Church of Scientology Flag Serv. v. City of Clearwater, 2 F.3d 1514, 1544 (11th Cir. 1993)	City ordinance prohibited some of the Church of Scientology Flag Service Organization's fund-raising	Accepted Protecting church members from affirmative, material misrepresentations designed to part them from their money
Grand Jury Proceedings of Doe v. United States, 842 F.2d 244, 247-48 (10th Cir. 1988)	Mormon child held in contempt for refusing to testify against his parents in a criminal investigation	Accepted Investigating offenses against the criminal laws of the United States
Dayton Christian Sch. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 953 (6th Cir. 1985)	Religious school's challenge to plaintiff's employment discrimination suit for not renewing her contract to teach because she was pregnant	Accepted Eliminating discrimination in distributing publicly available goods and services (government failed least restrictive means test)
Callahan v. Woods, 736 F.2d 1269, 1274-75 (9th Cir. 1984)	Government compelled religious plaintiff's child to register for a social security number despite father's belief it was the mark of the beast	Accepted Ensuring the efficient functioning of nationwide social welfare system
United States Jaycees v. McClure, 709 F.2d 1560, 1561 (8th Cir. 1983)	Jaycees refusal to admit women to membership; Jaycees' right to association prevails	Rejected Government's right to rid places of public accommodation of sex discrimination
United States v. Dickens, 695 F.2d 765, 772-73 (3rd Cir. 1982)	District court chose not to question each prospective juror on their opinions of Black Muslims, and chose not to instruct jurors that religion was irrelevant to guilt	Accepted Enforcing its criminal laws, here RICO, and vindicating violations

APPENDIX II: COMPELLING INTEREST CASES[104] AFTER *O CENTRO*

SECOND CIRCUIT		
Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 353 (2d Cir. 2007)	Jewish private school's successful RLUIPA challenge to town's denial of expansion permit	Rejected** (1) Enforce zoning (2) Safety through traffic regulation ** Notably, the same court *did not* reject (or accept) these compelling interests in its earlier holding (*supra*).
Hankins v. N.Y. Annual Conference of the United Methodist Church, 516 F. Supp. 2d 225, 237 (E.D.N.Y 2007)	Methodist reverend's unsuccessful Age Discrimination in Employment Act (ADEA) challenge to church's policy of mandatory retirement at seventy	Rejected Enforcement of the Age Discrimination in Employment Act (ADEA)
Redhead v. Conference of Seventh-day Adventists, 440 F. Supp. 2d 211, 220-23 (E.D.N.Y. 2006)	Pregnant, non-married teacher at a Seventh-day Adventist school survives summary judgment on her Title VII claim for discriminatory firing	Accepted Enforcement of Title VII as to employment claims that do not implicate the First Amendment
Ragland v. Angelone, 420 F. Supp. 2d 507, 515-17 (D. Va. 2006)	Inmate's unsuccessful RLUIPA challenge to prison's policy, forcing him to cut his long beard and hair, grown for religious reasons	Accepted (1) Penal interests in security, staff safety, inmate identification, and inmate health (2) Uniform enforcement of grooming policy across general prison population
SEVENTH CIRCUIT		
Borzych v. Frank, 439 F.3d 388, 390-91 (7th Cir. 2006)	White Supremacist inmate's unsuccessful RLUIPA challenge to prison's removal	Accepted Interest in curtailing prison violence

104. For the purposes of this Appendix, "compelling interest cases" are cases in which the court reached the merits of the government's compelling interest argument after finding that the plaintiff successfully made out its prima facie case that the government's action placed a substantial burden on the plaintiff's religious freedom. Therefore, the reader will note that a number of cases decided after *O Centro* have cited it, and indeed, followed it, on grounds other than its compelling interest analysis. These cases are outside the scope of this Article.

	of Odinist (secular books promoting racism) Odinist books from the prison library	
EIGHTH CIRCUIT		
United States v. Bertucci, No. 8:09CR84, 2009 U.S. Dist. LEXIS 119230 at *23-25(D. Neb. Nov. 5, 2009)	Native American charged with killing bald eagle	Accepted Preserving the eagle population
NINTH CIRCUIT		
Church of the Holy Light of the Queen v. Mukasey, 615 F. Supp. 2d 1210, 1220-21 (D. Or. 2009)	Santo Daime spiritual leader's successful RFRA challenge to his arrest for importing and drinking Daime tea, made with a Brazilian narcotic, about which there is "no question [that it] could be dangerous if used improperly," and which is prohibited under the Controlled Substance Act	Rejected (1) Health of plaintiffs (2) Health of others who drink Daime tea (3) Preventing diversion of (4) Daime tea to non-religious users (5) Integrity of DEA's ability to regulate the use of controlled substances
United States v. Adeyemo, 624 F. Supp. 2d 1081, 1094 (N.D. Cal. 2008)	Santeria worshipper's unsuccessful RFRA challenge to his conviction for unlawfully importing leopard skins (endangered species) without a permit (distinguishing *O Centro*)	Accepted Conservation of endangered leopards
Walls v. Schriro, No. 05-2259, 2008 U.S. Dist. LEXIS 14539, at *17-18 (D. Ariz. Feb. 25, 2008)	RLUIPA Claim 1 – Diet Hare Krishna inmate survives summary judgment on his RLUIPA claim that the prison's denial of his right to food prepared only by members of his own faith burdened his religious practice RLUIPA Claim 2 – Grooming Inmate survives summary judgment on claim that the prison's grooming policy burdens his religious practice by forcing to cut the long lock of hair at the base of his skull	Rejected (insufficient evidence) (1) Prison's ability to maintain order and security with its available resources (2) Based on availability of resources Rejected (insufficient evidence) (1) Maintaining uniformity among inmates (2) Good order and discipline (3) Improving inmate identification
Navajo Nation v. United States Forest Serv's, 535 F.3d 1058 (9th Cir. 2008)	Native American plaintiffs who worshipped mountain range used for recreational skiing had no RFRA claim because the government's use	Didn't Reach No substantial burden

	of water containing a small percentage of human waste did not substantially burden plaintiff's free exercise of religion	
United States v. Lepp, No. CR 04-0317, 2007 U.S. Dist. LEXIS 66311 at *9-11 (N.D. Cal. Sept. 6, 2007)	Denial of Rastafarian's motion to suppress fruits of search warrant on RFRA grounds	Accepted Enforcing drug laws by executing valid search warrants in pursuit of that aim
TENTH CIRCUIT		
United States v. Friday, 525 F.3d 938, 955-56 (10th Cir. 2008)	Northern Arapaho Tribe member's unsuccessful RFRA challenge to his prosecution for shooting a bald eagle without a permit (the permit system itself, already a religious exemption)	Accepted (Enforcement of pre-existing religious exemption) The permit system allows the government to: (1) Keep track of which eagles have been legally taken and by whom (2) Influence the number of eagles taken (3) Ensure, in the event of a shortage, that no one tribe is getting a disproportionate portion of bald eagles
Rocky Mountain Christian Church v. Bd. of County Comm'rs of Boulder County, Colorado, 612 F. Supp. 2d 1163, 1168-69 (D. Colo. 2009)	Rocky Mountain Christian Church's RLUIPA claim challenging Boulder County's denial of a permit to expand the size of its church	Rejected (1) Lack of harmony with the character of the neighborhood, the surrounding area, and the county's comprehensive plan limiting intensive development (2) Agricultural designation of the surrounding land (3) Depletion of natural resources
D.C. CIRCUIT		
Jefferson v. Lappin, No. 06-5219, 2006 U.S. App. LEXIS 31931, at *3 (D.C. Cir. Dec. 26, 2006)	Muslim inmate's unsuccessful RFRA challenge that the prison's allowance of kufis (tight, rounded caps) after banning turbans was not, in fact, the least restrictive means of achieving the government's compelling interest	Accepted Maintaining prison security
Sample v. Lappin, 479 F. Supp. 2d 120, 124-25	Orthodox Jewish inmate's unsuccessful RFRA challenge	Accepted Maintaining prison security

(Dist. D.C. 2007)	to the prison's policy, forbidding inmates from having wine during the Sabbath	

APPENDIX III: RAW DATA

Total Cases Surveyed	96	34
Accepted Compelling Interest	37	9
Rejected Compelling Interest	8 (one "neutral")	5
Percentage Accepted	80.40%	64.30%
Percentage Rejected	17.40%	35.70%
Accepted Compelling Interest (prison)	18	4
Rejected Compelling Interest (prison)	1	1
Percentage Accepted	94.70%	80%
Percentage Rejected	5.30%	20%
Accepted Compelling Interest (non-prison)	19	4
Rejected Compelling Interest (non-prison)	7 (one "neutral")	4
Percentage Accepted	70.40%	50%
Percentage Rejected	25.90%	50%