2017

Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases

Luke W. Goodrich
S.J. Quinney College of Law, University of Utah

Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases

Luke W. Goodrich* & Rachel N. Busick**

Draft of November 7, 2017

Abstract

This Article presents one of the first empirical studies of federal religious freedom cases since the Supreme Court's landmark decision in *Hobby Lobby*. Critics of *Hobby Lobby* predicted that it would open the floodgates to a host of novel claims, transforming "religious freedom" from a shield for protecting religious minorities into a sword for imposing Christian values in the areas of abortion, contraception, and gay rights.

Our study finds that this prediction is unsupported. Instead, we find that religious freedom cases remain scarce. Successful cases are even scarcer. Religious minorities remain significantly overrepresented in religious freedom cases; Christians remain significantly underrepresented. And while there was an uptick of litigation over the Affordable Care Act's contraception mandate—culminating in *Hobby Lobby* and *Little Sisters of the Poor*—those cases have subsided, and no similar cases have materialized. Courts continue to weed out weak or insincere religious freedom claims; if anything, religious freedom protections are underenforced.

Our study also highlights three important doctrinal developments in religious freedom jurisprudence. The first is a new circuit split over the Religious Freedom Restoration Act. The second is confusion over the relationship between the Free Exercise and Establishment Clauses that is currently plaguing litigation over President Trump's travel ban. The third is a new path forward for the Supreme Court's muddled Establishment Clause jurisprudence.

---

* Luke Goodrich is adjunct professor at the University of Utah S. J. Quinney College of Law and Deputy General Counsel at the Becket Fund for Religious Liberty. He was co-counsel for the winning party in four of the recent Supreme Court religious freedom cases discussed in this Article: Zubik v. Burwell, 136 S. Ct. 1557 (2016); Holt v. Hobbs, 135 S. Ct. 853 (2015); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); and Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

** Rachel Busick is a Constitutional Law Fellow at the Becket Fund for Religious Liberty. The authors thank Stephanie Barclay, Eric Baxter, Samuel Bray, Michael Heise, Nathan Jack, Douglas Laycock, Christopher Lund, Michael McConnell, James Phillips, Eric Rassbach, Mark Rienzi, and Gregory Sisk for helpful comments. The views expressed in this article do not necessarily reflect the view of Becket or its clients.

TABLE OF CONTENTS

INTRODUCTION

In the old days, religious liberty was mainly about protecting religious minorities—Jews, Jehovah's Witnesses, the Amish, Native Americans, and others who were overlooked by an insensitive majority. Today, religious liberty is mainly about sex—especially Christians who object to abortion, contraception, and gay rights. Laws like the Religious Freedom Restoration Act (RFRA) and cases like *Hobby Lobby*[1] and the *Little Sisters of the Poor*[2] have emboldened the Christian majority to wield "religious liberty" as a sword to take away other people's rights, rather than a shield to protect religious minorities. And the courts are now being flooded with cases involving Christians who object to selling flowers, cakes, or photography services for same-sex weddings.

At least this is a common narrative in the media and some corners of academia.[3] But is it accurate?

We wanted to answer this question empirically. So we chose the home of *Hobby Lobby* and *Little Sisters of the Poor*—the Tenth Circuit—and, beginning with a database of over 10,000 decisions, examined every religious freedom decision within that Circuit over the last five (and in some cases ten) years. We first presented our findings to over 100 federal judges at the Tenth Circuit Judicial Conference in May 2017. We now expand on those findings in this article—one of the first empirical studies of the federal "religious liberty docket" since *Hobby Lobby* and *Little Sisters of the Poor*.[4]

---

[1] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[2] Zubik v. Burwell, 136 S. Ct. 1557 (2016) ("Little Sisters of the Poor").

[3] *See, e.g.*, Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate but Equal*, 65 DEPAUL L. REV. 907, 929–30 (2016) (*Hobby Lobby* "redesigned the terrain for free exercise claims" and "opened the door for increased demands from private entities for [religious] exemptions . . . with little regard to the problems of attenuation and harm to third parties."); Marci A. Hamilton, *Hobby Lobby Has Opened a Minefield of Extreme Religious Liberty*, N.Y. TIMES (July 1, 2015, 1:24 PM), https://nyti.ms/2vKAjuA (arguing that RFRA is "unconstitutional, unprincipled[,] and a sword believers gladly wield against nonbelievers"); Louise Melling, *ACLU: Why We Can No Longer Support the Federal 'Religious Freedom' Law*, WASH. POST (June 25, 2015), http://wapo.st/1e6WIWI?tid=ss_tw&utm_term=.c81f54e607e5 ("While the RFRA may serve as a shield to protect [religious minorities], it is now often used as a sword to discriminate against women, gay and transgender people and others.").

[4] Several groundbreaking empirical studies predate *Hobby Lobby* and *Little Sisters of the Poor* and focus on the religious affiliation of judges or claimants. *See* Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004) [hereinafter Sisk, Heise & Morriss, *Searching for the Soul of Judicial Decisionmaking*]; Gregory C. Sisk, *How Traditional and Minority Religious Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021 (2005) [hereinafter Sisk, *How*

What we found upends the common narrative. Contrary to predictions that *Hobby Lobby* would open the floodgates of religious liberty litigation, these cases remain scarce, making up only 0.6% of the federal docket. And contrary to predictions that religious people would be able to wield *Hobby Lobby* as a trump card, successful cases are even scarcer: there have been only five winning issues within the Tenth Circuit in five years (sharia, polygamy, eagle feathers, contraception, and Ten Commandments). Moreover, despite claims that Christians would be the prime beneficiaries of *Hobby Lobby*, religious minorities are significantly overrepresented in the cases relative to their population, while Christians are significantly underrepresented. And while there was an uptick of RFRA claims challenging the contraception mandate—culminating in *Hobby Lobby* and *Little Sisters of the Poor*—those cases have subsided, and no similar cases have materialized. Courts have had no problem weeding out weak or insincere RFRA claims. If anything, RFRA has been underenforced. There were no cases involving a clash between gay rights and religious liberty.[5] But there were interesting

Traditional and Minority Religions Fair in the Courts]; Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 Cornell L. Rev. 873 (2008); Michael Heise & Gregory C. Sisk, *Religion, Schools, and Judicial Decision Making: An Empirical Perspective*, 76 U. CHI. L. REV. 185 (2012); Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201 (2012) [hereinafter Sisk & Heise, *Ideology "All the Way Down"?*]; Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371 (2013); Michael Heise & Gregory C. Sisk, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231 (2012) [hereinafter Heise & Sisk, *Muslims and Religious Liberty*].

Others have examined the success rates of free exercise or RFRA claims before *Hobby Lobby*. *See* Amy Adamczyk, John Wibraniec, & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA*, 46 J. CHURCH & STATE 237 (2004); Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010).

Three empirical studies postdate *Hobby Lobby*. One examines the application of strict scrutiny in free exercise cases from 1990 to 2015. *See* Caleb C. Wolanek & Heidi Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 Mont. L. Rev. 275 (2017). Another examines the effect of judges' religious affiliation in religious liberty cases. *See* Sepehr Shahshahani & Lawrence J. Liu, *Religion and Judging on the Federal Courts of Appeals*, 14 J. EMPIRICAL LEGAL STUD. (forthcoming Dec. 2017), *available at* https://ssrn.com/abstract=2971472. The third examines religious exemption requests after *Hobby Lobby* and compares them with speech claims. *See* Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. (forthcoming Apr. 2018), *available at* SSRN.

[5] In other jurisdictions, there have been religious liberty cases involving the application of antidiscrimination laws to individuals who religiously object to participating in a wedding ceremony or similarly expressive events. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v.*

doctrinal developments under RFRA, the Free Exercise Clause, and the Establishment Clause that foreshadow potentially significant changes in religious liberty jurisprudence.

We explore these findings in three parts. After summarizing our methodology (Part I), we first examine the overall number and type of religious liberty decisions—the "religious liberty docket," so to speak (Part II). We find that religious liberty decisions are scarce, that half of all decisions involve prisoners or asylum seekers, and that the contraception mandate produced an anomalous spike in RFRA cases that has now subsided.

Next we examine the religious makeup of religious liberty claimants—the "religious liberty demographic" (Part III). We find that religious minorities bring a disproportionate share of claims, and that Christians remain statistically underrepresented despite the unusual spike in contraception mandate cases.

Finally, we examine the success and failure of various types of religious liberty claims (Part IV). We find that successful religious liberty claims are very rare, that courts have no trouble weeding out weak religious liberty claims (and may well be underenforcing religious liberty protections), and that religious liberty cases are almost ten times more likely than other cases to provoke a dissent. We also highlight several doctrinal developments in the most interesting cases—such as a new circuit split over Native American use of eagle feathers; confusion over the relationship between the Free Exercise and Establishment Clauses that is currently infecting the litigation over President Trump's travel ban; and a new path forward for the Supreme Court's muddled Establishment Clause jurisprudence.

Ultimately, this study shows that the state of religious liberty in the federal courts is far more interesting and nuanced than the conventional narrative would suggest. Religious liberty cases are scarce and often difficult. But they remain crucial for navigating the difficult boundary between church and state.

I. DATA AND METHODOLOGY

Our data set consists of all religious liberty decisions within the Tenth

---

Colorado Civil Rights Commission, No. 16-111 (S. Ct.) (oral argument scheduled Dec. 5, 2017); *Arlene's Flowers, Inc. v. Washington*, No. 17-108 (S. Ct.) (cert petition pending); *Elane Photography, LLC v. Willock*, No. 13-585 (S. Ct.) (cert denied); *Lexington Fayette Urban Cty. Human Rights Comm'n v. Hands on Originals, Inc.*, No. 2015-CA-000745-MR, 2017 WL 2211381 (Ky. Ct. App. May 12, 2017). But those cases have typically been brought in state court under state or local antidiscrimination laws. There were no similar cases in any federal court within the Tenth Circuit during our five-year time period.

Circuit over the last five years (2012-2017).[6] We chose the Tenth Circuit in part because it has been the leading edge of the conflict over the contraception mandate—including the locus of the *Hobby Lobby* and *Little Sisters of the Poor* cases—and in part because one of us was asked to address religious freedom for an audience of Tenth Circuit federal judges. Although the Tenth Circuit may not be perfectly representative of the federal courts,[7] its docket provides a broad cross section of cases, and the narrower data set allows us to take a deeper dive into some of the most difficult and interesting cases. To weed out frivolous claims and non-precedential orders, we excluded unreported district court decisions, as other scholars have done in similar studies.[8] But we included all reported district court decisions and all Tenth Circuit decisions (both reported and unreported).

---

[6] The exact dates are from February 25, 2012, to February 24, 2017, inclusive. As discussed in Section II.D, *infra*, an additional five years of research was conducted for RFRA claims, providing a data set for RFRA claims from February 25, 2007, to February 24, 2017, inclusive.

[7] Several features make the Tenth Circuit an attractive circuit to study. First, during the relevant timeframe, the Tenth Circuit was closely balanced politically—with 47.4% of active judges appointed by Republican presidents and 52.6% of active judges appointed by Democratic presidents. (We calculated this by tallying the total number of months served by active Republican appointees during our timeframe (314) versus the total number of months served by active Democratic appointees (349).) We do not assume that political ideology plays a role in religious freedom cases, but some empirical studies have found that the party of the appointing judge is a statistically significant variable in some religious freedom cases. *See, e.g.*, Sisk & Heise, *Ideology "All the Way Down"?*, *supra* note 4. Examining a circuit with an even balance of Republican and Democratic appointees would reduce any such effect.

Second, during the relevant timeframe, the Tenth Circuit had a fairly typical reversal rate in the U.S. Supreme Court of 64.7%. (We calculated this by examining all reversals for October Terms 2012–2016 as tallied by SCOTUSblog. http://www.scotusblog.com/reference/stat-pack/.) The highest reversal rate was the Third Circuit, at 87.5%; the lowest was the First Circuit, at 50%; the average over all circuits was 71.6%. Of course, the reversal rate for all cases does not tell us anything specific about religious freedom cases, but it is one indicator that the Tenth Circuit is average in its jurisprudence as a whole.

Third, the Tenth Circuit's religious demographic is similar to the religious demographic of the nation as a whole—with a breakdown of 72% Christian, 3% other religions, and 23% unaffiliated in the Tenth Circuit, compared with 71% Christian, 2% other religions, and 23% unaffiliated in the nation as a whole. *See infra* Table 8.

One difference between the Tenth Circuit and the nation as a whole is that the Tenth Circuit has a higher proportion of Native Americans and members of the Church of Jesus Christ of Latter-day Saints (Mormons) than does the nation as a whole. Thus, we consider those demographic groups in greater detail in our findings below.

[8] *See* Shahshahani & Liu, *supra* note 4, at 6 & n.7 (discussing reasons for excluding unreported decisions); Sisk, Heise & Morriss, *Searching for the Soul of Judicial Decisionmaking*, *supra* note 4, at 534–39 (same).

To compile this data set, we ran the following searches in Westlaw's Tenth Circuit Federal Cases database:

1. adv: "relig!" & DA(aft 02-24-2012 & bef 02-25-2017), filtered to include all reported decisions in the district courts and Tenth Circuit.
2. adv: "relig!" & DA(aft 02-24-2012 & bef 02-25-2017), filtered to include all unreported decisions in the Tenth Circuit.

This search yielded 378 results—213 reported decisions and 165 unreported decisions. We reviewed each decision to determine whether it involved at least one of the following types of religious liberty claims: Establishment Clause, Free Exercise Clause, Free Speech Clause, Equal Protection Clause, RFRA, Religious Land Use and Institutionalized Persons Act (RLUIPA), Title VII, the ministerial exception, religious association, autonomy, and asylum.

Of the original 378 decisions, 118 decisions—80 appellate court decisions and 38 district court decisions—involved at least one live religious liberty claim.[9] We considered a religious liberty claim live if it had not already been resolved at an earlier stage of the case. Thus, a decision that mentioned that a religious liberty claim had already been resolved earlier in the case was not included, but a decision that mentioned that the religious claim had not yet been resolved, even if the court ultimately ruled on a procedural issue or on the merits of another claim, was included. These 118 decisions compose our data set of religious liberty decisions.[10]

We coded each decision separately, regardless of whether there were multiple decisions in the same case. The reasons for this are twofold. First, it allowed us to observe the relative frequency that various religious claims and religious claimants came before the federal courts, providing a more complete picture of litigation. Second, it eliminated subjective judgment calls about how to code a case when there were multiple decisions over the life of a case (such as a decision on a request for preliminary injunction, an interlocutory appeal, and a subsequent ruling on remand) or when the same court issued more than one decision addressing different parts of the case or addressing the case in different procedural postures.[11]

---

[9] Of the 372 cases, 54 cases touched on religion-related issues, but did not include a religious claim, and 199 cases only mentioned "religion" or "religious" (or, as one mentioned, "relight").

[10] We analyze this data set, as well as various subsets of it, throughout this Article.

[11] An alternative approach would be to code only one decision from each "stage" of the litigation. *Cf.* Sisk, Heise & Morriss, *Searching for the Soul of Judicial Decisionmaking*, supra note 4, at 552–53. But this approach is not without its drawbacks. Take, for example, a case where a court grants one group of plaintiffs a preliminary injunction against a regulation, Catholic Benefits Ass'n LCA v. Sebelius, 24 F. Supp. 3d 1094 (W.D. Okla.

For each decision, we coded the following variables:

- The court;
- The date;
- Whether the decision was reported or unreported;
- Whether the Tenth Circuit decision was heard en banc;
- Whether the Tenth Circuit decision was unanimous;
- Whether the plaintiff was filing pro se;
- Whether the religious claimant was an individual, prisoner, or organization;
- What the religious affiliation of the religious claimant was, if known;
- Whether the decision was an overall win or loss for the religious claimant;
- What types of religious liberty claims were presented;
- Whether each religious liberty claim was a win or loss; and
- Whether each win or loss was based on the merits of the claim or on other grounds.

We further explain our coding methodology at appropriate places in the analysis of our findings below.

II. NUMBER AND TYPE OF RELIGIOUS LIBERTY CLAIMS

A. Religious liberty cases are relatively scarce.

We first wanted to determine how often religious liberty cases arise as a percentage of the federal courts' docket. To do this, we searched within our target dates for all cases of any kind (all Tenth Circuit decisions, and all reported district court decisions)—yielding a total of 10,025 cases.[12] This

2014), but later in the same case grants (or denies) another preliminary injunction to a broader group of plaintiffs against a different version of the regulation, Catholic Benefits Ass'n LCA v. Burwell, 81 F. Supp. 3d 126 (W.D. Okla. 2014). It is not at all clear why either decision should be ignored when both decisions required the court to address the merits of slightly different religious freedom claims. Thus, coding only one decision from each level of the litigation risks ignoring valuable information. It also tends to downplay the extent to which certain types of claims consume more judicial resources (in the form of more decisions). And it also leaves room for subjective judgments about which of multiple decisions to code. In our data set, there were approximately five decisions (depending on one's definition of a "stage") that would be eliminated by coding only one decision per "stage."

[12] We searched all Tenth Circuit decisions for adv: DA(aft 02-24-2012 & bef 02-25-2017), yielding 6,131 cases. We then searched each federal district court within the Tenth Circuit for adv: DA(aft 02-24-2012 & bef 02-25-2017), filtered to include only reported

means that the 118 religious liberty decisions during that time period constitute 1.2% of all decisions. That figure is higher for the Tenth Circuit (1.3%) than for the district courts (1.0%). This could suggest that religious liberty decisions are more likely than average to be appealed. Alternatively, because our data set excludes unpublished district court decisions, it could mean that district courts resolve religious liberty cases more often using unpublished opinions. More on this later. Either way, the 1.2% of decisions involving any type of religious liberty claim suggests that religious liberty cases are a fairly small portion of the courts' docket.[13]

The paucity of religious liberty decisions is even more apparent when we consider the prevalence of decisions involving prisoners or asylum seekers. Of the 118 religious liberty decisions in our data set, 39 (33%) involve cases brought by prisoners and 20 (17%) involve cases brought by individuals seeking asylum. In other words, half of all religious liberty decisions involved prisoners or asylum seekers.

The vast majority of these cases were unsuccessful. Of the 39 prisoner cases, 87% were pro se, 87% were unpublished, and 82% were unsuccessful.[14] Prisoners tend to bring a high percentage of meritless claims, and the resolution of those claims often tells us little about federal religious liberty jurisprudence. Thus, for the remainder of our analysis, we exclude prisoner cases unless otherwise noted.[15]

The 20 asylum cases were also largely unsuccessful. All of these cases were heard by the Tenth Circuit on direct appeals from the Board of Immigration Appeals (BIA) under a very deferential standard of review. Only

---

cases, yielding 3,894 cases—949 Colorado district court cases, 649 Kansas district court cases, 785 New Mexico district court cases, 561 Oklahoma district court cases, 556 Utah district court cases, and 394 Wyoming district court cases.

[13] Religious liberty cases are also scarce in comparison with other types of cases. For example, one study of all federal cases during the three years post *Hobby Lobby* compared the volume of speech and expression cases to religious exercise cases, finding that speech and expression cases outnumber religious claims at a ratio of about 3:1. *See* Barclay & Rienzi, *supra* note 4, at Tables 3; *cf. id.* at Table 1 (Between 1946–2016, the United States Supreme Court has heard 344 speech and association cases compared to only 29 religious exercise cases.).

[14] There were 7 prisoner decisions that included at least one successful religious claim: Robertson v. Biby, 647 F. App'x 893 (10th Cir. 2016) (free exercise); Williams v. Wilkinson, 645 F. App'x 692 (10th Cir. 2016) (RLUIPA, free exercise, and equal protection); Woodstock v. Shaffer, 169 F. Supp. 3d 1169 (D. Colo. 2016) (RLUIPA and free exercise); Marshall v. Wyoming Dep't of Corrections, 592 F. App'x 713 (10th Cir. 2014) (free exercise); Tennyson v. Carpenter, 558 F. App'x 813 (10th Cir. 2014) (RLUIPA); Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014) (RLUIPA); McKinley v. Maddox, 493 F. App'x 928 (10th Cir. 2012) (RLUIPA). *See infra* Section IV.H.

[15] For a fuller discussion of religious demographics in prisoner cases, *see infra* Part II.C. For a fuller discussion of success rates in prisoner cases, *see infra* Part IV.H.

one case resulted in a remand to the BIA—meaning that 95% were unsuccessful. Thus, for similar reasons, we exclude these cases from our analysis unless otherwise noted.[16]

Excluding the 59 decisions involving prisoners and asylum seekers leaves us with a revised data set of 59 religious liberty decisions—23 from the Tenth Circuit, and 36 from district courts.[17] Obviously, these decisions make up an even smaller portion of the courts' overall docket: 0.6% of all cases.[18] But now, percentages for the Tenth Circuit and district courts are reversed: religious liberty decisions make up 0.4% of the Tenth Circuit's docket and 0.9% of the district courts' docket. This suggests that, once we control for prisoner and asylum cases, religious freedom cases are *not* more likely to be appealed than other cases. In fact, they may be less so.

This also means that Tenth Circuit judges hear and decide religious liberty cases infrequently. If we spread the 23 Tenth Circuit decisions across 5 years, 12 active judges, and 7 senior judges, that would mean that a Tenth Circuit judge, on average, would sit on a panel producing a religious liberty decision once every 13 months and would author a religious liberty decision once every 40 months.[19]

---

[16] For a fuller discussion of religious demographics in asylum cases, *see infra* Part II.D. For a fuller discussion of success rates in asylum cases, *see infra* Part IV.H.

[17] Note that 57 out of the 59 decisions we are excluding came from the Tenth Circuit; only 2 came from the district courts. The breakdown of the remaining district court decisions is as follows: 16 from the District of Colorado (43%); 5 from the Western District of Oklahoma (14%); 4 from the District of Kansas (11%); 4 from the District of New Mexico (11%); 4 from the District of Utah (11%); 3 from the District of Wyoming (8%); and 1 from the Northern District of Oklahoma (3%).

[18] Excluding 59 prisoner and asylum decisions leaves us with 9,966 total decisions. 59 / 9,966 = .006.

[19] As of early 2017, there were 12 active judges and 7 senior judges on the Tenth Circuit. *Judges of the Tenth Circuit Court of Appeals*, THE 10TH CIRCUIT COURT OF APPEALS, https://www.ca10.uscourts.gov/judges. Assuming a senior judge carries one-half of an active case load, we get the following: 23 decisions * 3 judges per panel / 5 years / 15.5 judges = 0.890 religious liberty panels per judge per year, or 1 panel every 13.5 months (12/0.890). Assuming a judge authors a decision in one third of her panels yields 1 decision every 40.4 months. We have not accounted for separate opinions (like concurrences or dissents) or en banc proceedings, which would alter the numbers very slightly toward greater frequency. During the five years we analyzed, there was one en banc decision and two decisions involving dissents from denial of rehearing en banc. *See* Felix v. City of Bloomfield, 847 F.3d 1214 (10th Cir. 2017) (dissent from denial of rehearing en banc); Little Sisters of the Poor Home for the Aged v. Burwell, 799 F.3d 1315 (10th Cir. 2015) (dissent from denial of rehearing en banc); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (en banc).

Justice Neil M. Gorsuch sat on the Tenth Circuit for over ten years, including the entire time covered by our data set. Judge Neil M. Gorsuch's U.S. Senate Committee of the Judiciary Questionnaire for Nominee to the Supreme Court at 2,

B. The most common claims are RFRA, free exercise, establishment, and Title VII.

When the courts do eventually decide a religious liberty case, what types of claims do they resolve? As noted above, half of all religious liberty decisions involve prisoners or asylum seekers. Prisoners typically raise claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Free Exercise Clause, and the Equal Protection Clause. Asylum seekers invoke the Immigration and Nationality Act (INA).

But what about the other half of decisions? Table 1 displays a breakdown of the types of claims raised in the remaining 59 decisions. (Because most decisions involve more than one type of claim, the numbers and percentages add up to more than 59 and 100%, respectively.)[20]

Table 1. Types of Religious Liberty Claims

Type of Claim	No.	Percentage
RFRA	23	39%
Free Exercise Clause	22	37%
Establishment Clause	19	32%
Title VII	17	29%
Free Speech Clause	12	20%
Equal Protection Clause	7	12%
Religious Association	4	7%
RLUIPA	1	2%
Autonomy	0	0%
Ministerial Exception	0	0%

RFRA and free exercise claims are the most common. RFRA claims are

---

https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJQ%20(Public).pdf. During his tenure, he heard over 2,700 cases, of which 40 (1.5%) touched on religious liberty. *Id.* at 25, 30–32; *Hearing on the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong., 1st Sess. (2017) (written testimony of Hannah C. Smith, Senior Counsel, Becket). Of those 40, there were 11 opinions that involved the same religious claims we looked at and did not involve prisoners or asylum seekers—*i.e.*, 0.4% of his docket as a whole. This is the same percentage we found during our time period for the Tenth Circuit as a whole. It means that Judge Gorsuch participated in roughly one religious liberty decision per year.

[20] All percentages are rounded to the nearest full percent. Tables that include decimals use up to two significant digits.

examined in detail in the next section. RFRA and free exercise are followed closely by claims under the Establishment Clause and Title VII, and then more distantly by free speech. There are only a few claims involving equal protection, religious association, or RLUIPA.

Interestingly, there are no decisions involving land-use claims under RLUIPA. That does not mean these claims never arise, only that they arise infrequently and not recently.[21] Some commentators have criticized RLUIPA, arguing that it gives religious organizations a "blank check" to challenge local zoning laws and makes it virtually impossible for local zoning authorities to defend themselves.[22] Others (including one of us) have argued that RLUIPA is modest and underenforced.[23] The absence of any RLUIPA land-use decisions in the last five years would seem to support the latter.

Also interesting is that there have been no ministerial exception cases in the last five years. The ministerial exception is a constitutional doctrine that has long barred certain types of employees (those performing important religious functions) from suing their religious employer on certain types of claims (those that would entangle the courts in religious questions or impose an unwanted leader on a religious organization). In 2012, at the beginning of our data set, the Supreme Court decided its first ministerial exception case, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[24] At the time, the federal government argued that ruling in favor of the church would create a slippery slope allowing churches to assert a ministerial exception defense to all sorts of claims in all sorts of circumstances.[25] After the Court ruled unanimously for the church, some commentators criticized the decision on similar grounds.[26] But that slippery slope has not

---

[21] There have only been a few RLUIPA land-use cases in the Tenth Circuit. *See, e.g.*, Rocky Mountain Christian Church v. Bd. of Cty. Comm'rs, 613 F.3d 1229 (10th Cir. 2010); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006); Grace Church of Roaring Fork Valley v. Bd. of Cty. Comm'rs of Pitkin Cty., Colo., 742 F. Supp. 2d 1156 (D. Colo. 2010).

[22] *See, e.g.*, Marci Hamilton, *The Circus that Is RLUIPA: How the Land-Use Law that Favors Religious Landowners Is Introducing Chaos into the Local Land Use Process*, FINDLAW (Nov. 30, 2006), http:// writ.news.findlaw.com/hamilton/20061130.html.

[23] *See, e.g.*, Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021 (2012).

[24] 132 S. Ct. 694 (2012). Co-author Goodrich was co-counsel for the church in *Hosanna-Tabor*.

[25] Brief for the Federal Respondent at 44–46, *Hosanna-Tabor*, 132 S. Ct. 694 (2012) (No. 10-553).

[26] *See generally* Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 106 NW. U. L. REV. 951 (2012); Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981 (2013); Mark Strasser, *Making the Anomalous Even More Anomalous: On* Hosanna-Tabor*, the Ministerial Exception, and the Constitu-*

materialized in the Tenth Circuit. Although courts within the Tenth Circuit issued four ministerial exception decisions in the ten years before *Hosanna-Tabor*,[27] they have decided none in the five years since.

C. There was a spike in RFRA claims against the contraception mandate.

Because the most common type of religious liberty claim was based on RFRA, a closer look at RFRA decisions is warranted. Of the 59 decisions not involving prisoners or asylum seekers, 23 involved a RFRA claim.[28] Of these, 18 (78%) involved the contraception mandate—a federal regulation requiring employers to cover contraception in their health insurance plan.[29] Three (13%) involved Native American access to eagle feathers.[30] One (4%) involved a pro se challenge to the classification of marijuana as a Schedule I drug.[31] And one (4%) involved an attempt to use RFRA as a defense to a prosecution for sending a threatening letter to a doctor training to provide abortions.[32] Table 2 shows this breakdown of the four categories of RFRA claims.

---

tion, 19 VA. J. SOC. POL'Y & L. 400 (2012).

[27] A search for lower court decisions in the Tenth Circuit that mention "ministerial exception," excluding unreported district court decisions, reveals four ministerial exception decisions in the ten years preceding *Hosanna-Tabor*: Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238 (10th Cir. 2010); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002); Braun v. St. Pius X Par., 827 F. Supp. 2d 1312 (N.D. Okla. 2011); Dolquist v. Heartland Presbytery, 342 F. Supp. 2d 996 (D. Kan. 2004).

[28] None of the 39 decisions in prisoner cases or 20 decisions in asylum cases involved a RFRA claim.

[29] *See* 42 U.S.C. § 300gg-13(a)(4) (requiring all group health plans and health insurance issuers that offer non-grandfathered health coverage to provide coverage for certain preventive services without cost-sharing, including, "[for] women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration").

[30] U.S. v. Aguilar, 527 F. App'x 808 (10th Cir. 2013) (RFRA defense to killing an eagle and possessing eagle parts); Griffith v. Caney Valley Pub. Sch, 157 F. Supp. 3d 1159 (N.D. Okla. 2016) (state RFRA claim seeking permission to wear eagle feather at graduation); N. Arapaho Tribe v. Ashe, 925 F. Supp. 2d 1206 (D. Wyo. 2012) (RFRA challenge to government refusal to permit eagle take).

[31] Krumm v. Holder, 594 F. App'x 497 (10th Cir. 2014).

[32] U.S. v. Dillard, 884 F. Supp. 2d 1177 (D. Kan. 2012).

Table 2. RFRA Claims 2012-2017

Type of Claim	No.	Percentage
Contraception Mandate	18	78%
Native American	3	13%
Drugs	1	4%
Other	1	4%
All	23	100%

We suspected that the large number of contraception mandate cases in 2012-17 was an anomaly. So we conducted a search of all RFRA decisions over the previous five years: 2007-12.[33] That search returned 24 decisions (10 Tenth Circuit and 14 district court decisions), of which 8 decisions (6 Tenth Circuit and 2 district court decisions) involved a federal or state RFRA claim.

The RFRA claims in these 8 decisions fall into the same categories we have previously identified. There were no contraception mandate claims, because the mandate was not imposed until January 20, 2012.[34] But there were five decisions (63%) involving Native Americans (four involving access to eagle feathers, and one involving objections to an autopsy)[35] and three decisions (38%), in one case, involving the use of drugs.[36] Table 3 shows this breakdown of the various categories of RFRA claims for the previous five years.

[33] We searched adv: "religious freedom restoration act" RFRA & DA(aft 02-24-2007 & bef 02-25-2012)—first filtered to include all Tenth Circuit decisions, then filtered to include all reported district court decisions in the Tenth Circuit.

[34] News Release, A statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius, U.S. Dep't of Health & Hum Servs. (Jan. 20, 2012). The first lawsuit challenging the mandate was brought on November 10, 2011. *See* Complaint, *Belmont Abby College v. Sebelius*, 878 F. Supp. 2d 25 (D.D.C. 2012) (No. 11-1989).

[35] United States v. Wilgus, 638 F.3d 1274 (10th Cir. 2011) (eagle feathers); Ross v. Bd. of Regents of The Univ. of N.M., 599 F.3d 1114 (10th Cir. 2010) (autopsy); United States v. Friday, 525 F.3d 938 (10th Cir. 2008) (eagle feathers); United States v. Hardman, 622 F. Supp. 2d 1129 (D. Utah 2009) (eagle feathers); United States v. Wilgus, 606 F. Supp. 2d 1308 (D. Utah 2009) (eagle feathers), *rev'd*, 638 F.3d 1274 (10th Cir. 2011).

[36] United States v. Quaintance, 608 F.3d 717 (10th Cir. 2010); United States v. Quaintance, 315 F. App'x 711 (10th Cir. 2009); United States v. Quaintance, 523 F.3d 1144 (10th Cir. 2008).

Table 3. RFRA Claims 2007-2012

Type of Claim	No.	Percentage
Contraception Mandate	0	0%
Native American	5	63%
Drugs	3	38%
Other	0	0%
All	8	100%

Combining these 8 RFRA decisions from 2007-2012 with the 23 RFRA decisions from 2012-2017 provides a new data set comprised of 31 RFRA decisions.[37] This data is summarized in Table 4.

Table 4. RFRA Claims 2007-2017

Type of Claim	2007-12	2012-17	Total	Tot. Percent
Contraception Mandate	0	18	18	58%
Native American	5	3	8	26%
Drugs	3	1	4	13%
Other	0	1	1	3%
All	8	23	31	100%

This table suggests that the contraception mandate cases were an anomaly. Not including the contraception mandate cases, there were only 13 RFRA decisions in 10 years (8 decisions from 2007-2012, and 5 decisions from 2012-2017). But the contraception mandate cases added another 18 RFRA decisions in 5 years—more than doubling the rate of all other RFRA decisions combined.

This dynamic must be kept in mind when considering the other aspects of this study. For example, the five-year surge in contraception mandate cases significantly affected the overall frequency of religious liberty decisions. With those cases included in the data set, religious liberty decisions (excluding prisoner and asylum claims) constituted 0.6% of the courts' docket.[38] Without those cases, religious liberty decisions constituted only 0.4% of the courts' docket.[39] The contraception mandate cases also affect the demographics of religious liberty claimants and the overall success rates of religious liberty claims, as we explain below.

---

[37] Two decisions involve state RFRAs, both in cases brought by Native Americans. *See Ross*, 599 F.3d 1114; Griffith v. Caney Valley Pub. Sch., 157 F. Supp. 3d 1159 (N.D. Okla. 2016).

[38] 59/9,966=0.006.

[39] 41/9,948=0.004.

But the RFRA numbers are also interesting in several other respects. First, aside from contraception mandate cases, the *number* of RFRA cases is quite small—only 13 decisions in 10 years. By way of comparison, over the same 10-year period, there are 109 Tenth Circuit and reported district court decisions mentioning the National Environmental Policy Act (NEPA)[40]—a statute that receives far less national attention.

Second, the *range* of RFRA cases is quite narrow. Of the 13 non-contraception decisions, 8 involved Native Americans (7 seeking access to eagle parts, 1 challenging an autopsy); 4 involved drugs; and 1 was an odd case involving a threatening letter. This indicates that there is not a wide range of groups invoking RFRA for a wide range of purposes.

Third, the share of RFRA decisions involving Native Americans is surprisingly high—62% of the non-contraception mandate cases. These decisions present an interesting parallel with the contraception mandate cases. Specifically, both involve federal laws that directly conflict with widespread practices among specific religious groups—namely, opposition to facilitating contraception and abortion among Catholics and Protestants, and the desire to use eagle feathers and eagle parts among Native Americans. Thus far, the Native American cases within the Tenth Circuit have been largely unsuccessful. But the Fifth Circuit recently ruled in favor of Native Americans in an eagle feathers case, expressly relying on the Supreme Court's decision in *Hobby Lobby*, a contraception mandate case.[41] That may prompt additional challenges in the Tenth Circuit until the law is changed or the legal questions are definitively resolved.

Finally, the success rate of RFRA claims is sharply divided. Of the 18 RFRA decisions involving the contraception mandate, 10 were successful—*i.e.*, resolved in favor of the religious claimant. But of the remaining 13 RFRA cases, only 2 were successful and one of those was later reversed by a Tenth Circuit panel decision.[42] We discuss these success rates in more detail in Part IV, *infra*.

III. DEMOGRAPHICS OF RELIGIOUS LIBERTY CLAIMANTS

In addition to the frequency and type of religious liberty claims, we con-

[40] We searched adv: "national environmental policy act" & DA(aft 02-24-2007 & bef 02-25-2017)—first filtered to include all Tenth Circuit decisions, then filtered to include all reported district court decisions in the Tenth Circuit. This returned 54 Tenth Circuit decisions and 55 reported district court decisions.

[41] McAllen Grace Brethren Church v. Salazar, 764 F.3d 465 (5th Cir. 2014).

[42] United States v. Wilgus, 606 F. Supp. 2d 1308 (D. Utah 2009), *rev'd,* 638 F.3d 1274 (10th Cir. 2011); United States v. Hardman, 622 F. Supp. 2d 1129 (D. Utah 2009).

sidered the *identity* of religious liberty claimants. In particular, what religious groups are bringing claims? And are they being brought by individuals or groups? Our results show that a disproportionate share of claims are brought by individual non-Christians. And this finding becomes even more significant when we control for the contraception mandate cases, which were brought exclusively by Christians.

A. Methodology

Consistent with prior research, we relied upon the religious self-identification of each claimant.[43] In our data set, religious claimants can be grouped into four broad categories.

- "**Christian**": This group consists of all claimants who self-identify as Christian—including Catholics, Protestants,[44] members of the Church of Jesus Christ of Latter-day Saints (Mormons),[45] and Fundamentalist Mormons.[46] Those who identified as Catholic, Protestant, or generically as "Christian" are further grouped together under the subcategory "Catholic/Protestant."[47]

---

[43] Heise & Sisk, *Muslims and Religious Liberty*, *supra* note 4, at 247 (citing Pew Research Center's and Gallup, Inc.'s practice of relying upon self-identification by individuals).

[44] Protestants include evangelical, mainline, and historical black protestant groups.

[45] The Church of Jesus Christ of Latter-day Saints typically refers to its members as "Latter-day Saints" or "LDS." Scott Taylor, *LDS or Mormon? It depends*, DESERET NEWS (April 2, 2011), https://www.deseretnews.com/article/700123737/LDS-or-Mormon-It-depends.html. But the term "Mormon" is more common and is increasingly accepted by members of the church itself. *Id.* This Article uses the more common term.

[46] We use the term "Fundamentalist Mormon" to include groups that broke with the Church of Jesus Christ of Latter-day Saints over the issue of polygamy, including the Fundamental Church of Jesus Christ of the Latter-day Saints (FLDS) and the Apostolic United Brethren Church (AUB).

[47] We recognize the labels "Christian" and "Catholic/Protestant" create some difficulties. *See* Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L. Q. 919, 967 (2004) (acknowledging that "the label of 'Christian' is often too simplistic to reflect the reality of American religion"). Because several cases involved a combination of Catholics and Protestants, and others referred to the religious claimants generically as "Christian," we have grouped these in a single subcategory labeled "Catholic/Protestant." This eliminates the need to choose between coding a case as either Catholic or Protestant when both groups were involved, or to create a separate but almost certainly overlapping category of generic "Christians."

Other groups also identify as Christian but are not Catholic or Protestant—*e.g.*, LDS/Mormons and Jehovah's Witnesses, among others. Of those groups, only Mormons were involved in decisions in our data set. The "Catholic/Protestant" subgrouping also allows us to consider Mormons separately from Catholics and Protestants, which is valuable because Mormons make up less than 1.6% of the population nationally, Pew Research Cen-

- "**Other religions**": This group consists of members of all other faith traditions—including Muslims, Jews, Hindus, Sikhs, Native Americans, and other smaller groups.[48]
- "**Non-religious**": This group consists of non-religious claimants who brought religious liberty claims to challenge the expression of religion by others, including claims under the Establishment Clause.
- "**Unknown**": This group consists of claimants whose religious affiliation was not disclosed.

B. Religious minorities bring a disproportionate share of claims.

We first consider the 59 religious liberty decisions that did not involve prisoners or asylum seekers. Table 5 shows the religious demographics of the claimants in these decisions.[49]

---

ter, *Religious Landscape Study: Religions* (2014), http://www.pewforum.org/religious-landscape-study/, but a significantly larger percentage of the population in the Tenth Circuit, including 55% of the population in Utah, Pew Research Center, *Religious Landscape Study: Adults in Utah* (2014), http://www.pewforum.org/religious-landscape-study/state/utah/, and 9% in Wyoming, Pew Research Center, *Religious Landscape Study: Adults in Wyoming* (2014), http://www.pewforum.org/religious-landscape-study/state/wyoming/.

[48] These include Rastafarian, Odinism, Paganism, Nations of Gods and Earth (Black Muslim Movement), Christian Identity and Christian Separatism, Ever Increasing Faith, Maharaj Ashutosh, and Moorish Science Temple of America.

[49] Again, the numbers add up to more than 59 and more than 100% because some decisions involved multiple claimants from different religious groups.

Table 5. Religious Claimant Demographics Per Decision

Religious Affiliation		No.	Percentage
Christian			
	Catholic/Protestant	25	42%
	Fundamentalist Mormon	3	5%
	Mormon	1	2%
	Total	29	49%
Other Religions			
	Muslim	7	12%
	Native American	4	7%
	Hindu	2	3%
	Total	13	29%
Non-Religious		10	17%
Unknown		7	12%

A few points stand out. First, Catholics and Protestants are the largest group, with 25 decisions; but they still account for fewer than half of all decisions (42%). The second largest group is the non-religious claimants, with 10 decisions (17%), 7 of which were Establishment Clause challenges.[50] The third largest group is Muslims, with 7 decisions (12%), all of which came in Title VII cases alleging religious employment discrimination.[51] The fourth largest is Native Americans, with 4 decisions (7%), all involving eagle feathers.[52] Next are Fundamentalist Mormons, with 3 decisions (7%), 2

[50] *See* Felix v. City of Bloomfield, 847 F.3d 1214, 1215-21 (10th Cir. 2017) (dissent from denial of rehearing en banc); Felix v. City of Bloomfield, 841 F. 3d 848 (10th Cir. 2016); Fields v. City of Tulsa, 753 F.3d 1000 (10th Cir. 2014); Am. Humanist Ass'n, Inc. v. Douglas County Sch. Dist. Re-1, 158 F. Supp. 3d 1123 (D. Colo. 2016); Medina v. Catholic Health Initiatives, 147 F. Supp. 3d 1190 (D. Colo. 2015); Felix v. City of Bloomfield, 36 F. Supp. 3d 1233 (D.N.M. 2014); United States v. Goxcon-Chagal, 885 F. Supp. 2d 1118 (D.N.M. 2012). The other cases included two Title VII cases where the plaintiff was suing based on someone else's religious actions and one RFRA challenge to the drug classification of marijuana. *See* Krumm v. Holder, 594 Fed. Appx. 497 (10th Cir. 2014) (RFRA); Canfield v. Office of the Sec'y of State for Kan., 2016 WL 4528065 (D. Kan. 2016) (Title VII); Didier v. Abbott Labs., 21 F. Supp. 3d 1152 (D. Kan. 2014) (Title VII).

[51] *See* Chawla v. Lockheed Martin Corp., 69 F. Supp. 3d 1107 (D. Colo. 2014) (Muslim employee Title VII claim); E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106 (10th Cir. 2013) (same); Kaiser v. Colo. Dep't of Corrections, 504 Fed. Appx. 739 (10th Cir. 2012) (same); EEOC Comm'n v. JBS USA, LLC, 115 F. Supp. 3d 1203 (D. Colo. 2015) (same); E.E.O.C. v. 704 HTL Operating, LLC, 979 F. Supp. 2d 1220 (D.N.M. 2013) (same); EEOC v. Jetstream Ground Servs., Inc., 134 F. Supp. 3d 1298 (D. Colo. 2015) (same).

[52] U.S. v. Aguilar, 527 Fed. Appx. 808 (10th Cir. 2013) (Native American eagle feather case); Griffith v. Caney Valley Pub. Sch., 157 F. Supp. 3d 1159 (N.D. Okla. 2016)

involving a challenge to Utah's polygamy law, and 1 involving a church trust dispute.[53] There are 2 cases involving Hindus (5%), both in Title VII employment disputes.[54] And there is 1 case involving Mormons (2%), who brought Title VII employment and equal protection claims.[55]

As noted above, however, we are studying an anomalous time period involving a spate of 18 contraception mandate cases. What if those cases were excluded? Those results are shown in Table 6.

Table 6. Religious Claimant Demographics
Excluding Contraception Mandate Decisions

Religious Affiliation		**No.**	**Percentage**
Christian			
	Catholic/Protestant	7	17%
	Fundamentalist Mormon	3	7%
	Mormon	1	2%
	Total	11	27%
Other Religions			
	Muslim	7	17%
	Native American	4	10%
	Hindu	2	5%
	Total	13	32%
Non-Religious		10	24%
Unknown		7	17%

Excluding the contraception mandate cases, the largest single group of claimants in the religious liberty decisions are the non-religious, at 24%. Catholics and Protestants are tied for second with Muslims at 17%, despite the fact that Muslims make up less than 1% of the population.[56] Other reli-

(same); N. Arapaho Tribe v. Ashe, 92 F. Supp. 3d 1160 (D. Wyo. 2015) (same); N. Arapaho Tribe v. Ashe, 925 F. Supp. 2d 1206 (D. Wyo. 2012) (same).

[53] Brown v. Buhman, 822 F.3d 1151 (10th Cir. 2016) (polygamy law challenge); Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne, 698 F.3d 1295 (10th Cir. 2012) (church trust dispute); Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013) (polygamy law challenge).

[54] Desai v. Panguitch Main St., Inc., 527 Fed. Appx. 689 (10th Cir. 2013); Aluru v. Anesthesia Consultants, 176 F. Supp. 3d 1116 (D. Colo. 2016).

[55] Hunt v. Cent. Consol. Sch. Dist., 951 F. Supp. 2d 1136 (D.N.M. 2013).

[56] *See* Pew Research Center, *Religious Landscape Study: Adults in Colorado* (2014), http://www.pewforum.org/religious-landscape-study/state/colorado/ (<1% in Colorado); Pew Research Center, *Religious Landscape Study: Adults in Kansas* (2014), http://www.pewforum.org/religious-landscape-study/state/kansas/ (1% in Kansas); Pew Research Center, *Religious Landscape Study: Adults in New Mexico* (2014),

gions outnumber Catholics and Protestants by almost 2:1 (32% to 17%).

But none of this means very much if we do not know the religious demographics of the Tenth Circuit as a whole. Although the U.S. Census does not ask about religious affiliation,[57] the Pew Research Center conducted a comprehensive study of the nation's religious landscape in 2014, the middle year of our five-year timeframe.[58] The results of that study, broken out by the states of the Tenth Circuit and nationally, is shown in Table 7.

---

http://www.pewforum.org/religious-landscape-study/state/new-mexico/ (<1% in New Mexico); Pew Research Center, *Religious Landscape Study: Adults in Oklahoma* (2014), http://www.pewforum.org/religious-landscape-study/state/oklahoma/ (<1% in Oklahoma); Pew Research Center, *Religious Landscape Study: Adults in Utah* (2014), http://www.pewforum.org/religious-landscape-study/state/utah/ (1% in Utah); Pew Research Center, *Religious Landscape Study: Adults in Wyoming* (2014), http://www.pewforum.org/religious-landscape-study/state/wyoming/ (<1% in Wyoming); Pew Research Center, *Religious Landscape Study* (2014), http://www.pewforum.org/religious-landscape-study/ (0.9% in the United States).

[57] *See* Anne Farris Rosen, *A Brief History of Religion and the U.S. Census*, PEW RESEARCH CENTER (Jan. 26, 2010), http://www.pewforum.org/2010/01/26/a-brief-history-of-religion-and-the-u-s-census/ (explaining the history of religion on the U.S. Census).

[58] *Religious Landscape Study: About the Religious Landscape Study*, PEW RESEARCH CTR. (2014), http://www.pewforum.org/about-the-religious-landscape-study/ (conducting a U.S. Religious Landscape Study based on telephone interviews with more than 35,000 Americans in all 50 states).

Table 7. Religious Demographics in the Tenth Circuit States and Nationally[59]

Religious Affiliation	**CO**	**KS**	**NM**	**OK**	**UT**	**WY**	**US**
Christian							
Protestant	43%	57%	38%	69%	14%	44%	46.6%
Catholic	16%	18%	34%	8%	5%	14%	20.8%
Mormon	2%	1%	1%	1%	55%	9%	1.6%
Other Mormon	<1%	<1%	1%	<1%	1%	<1%	<0.3%
Total	64%	76%	75%	79%	73%	71%	70.6%
Other Religions							
Muslim	< 1%	1%	<1%	<1%	1%	<1%	0.9%
Hindu	<1%	<1%	<1%	<1%	<1%	<1%	0.7%
Native American	< 1%	<1%	<1%	<1%	<1%	1%	<0.3%
Unaffiliated (Non-Religious)	29%	20%	21%	18%	22%	26%	22.8%

Not surprisingly, Catholics and Protestants are the largest religious groups in most states. The one exception is Utah, where Mormons are a majority at 55%. The next largest group consists of those who are unaffiliated with a religion (including atheists, agnostics, and "nothing in particular"), who make up 18% to 29%.

Using this data, combined with the estimated population for each state in 2014,[60] we can determine the religious demographics of the Tenth Circuit as a whole.[61] Those calculations are reflected in Table 8.

---

[59] All percentages are drawn from the 2014 Pew U.S. Religious Landscape Study. *See supra* note 56.

[60] The United States Census Bureau estimates state populations per year. For 2014—the same year the PEW study was conducted—the Tenth Circuit state populations were: 5,349,648 (Colorado); 2,899,360 (Kansas); 2,083,024 (New Mexico); 3,877,499 (Oklahoma); 2,941,836 (Utah); and 583,642 (Wyoming). NATIONAL, STATE, AND PUERTO RICO COMMONWEALTH TOTALS DATASETS: POPULATION, POPULATION CHANGE, AND ESTIMATED COMPONENTS OF POPULATION CHANGE: APRIL 1, 2010 TO JULY 1, 2016, U.S. CENSUS BUREAU, *available at*, https://www.census.gov/data/datasets/2016/demo/popest/state-total.html. The total population of the Tenth Circuit states in 2014 was 17,735,009. *See id.*

[61] Multiplying the state population by the percentage of each religious group gave us the population of each religious group in each state. Adding together each state population for each religious group and then dividing by the total population, gave us the percentage each religious group comprised of the total population.

Table 8. Religious Demographics in the Tenth Circuit and Nationally

Religious Affiliation		**US**	**10th Cir.**
Christian			
	Catholic/Protestant	67.4%	60%
	Mormon	1.6%	11%
	Fundamentalist Mormon	<0.3%	1%
	Total	70.6%	72%
Other Religions			
	Hindu	0.9%	1%
	Muslim	0.7%	1%
	Native American	<0.3%	1%
	Total	1.9%	3%
Unaffiliated		22.8%	23%

In the Tenth Circuit states, Catholics and Protestants comprise about 7.4% less than the national average, while Mormons comprise about 9.4% more than the national average. The percentage of other religions and those who are unaffiliated is on par with the national average.[62]

Using the religious demographics of the Tenth Circuit as a whole, we can now determine whether any particular religious demographic is overrepresented, underrepresented, or accurately represented in their share of religious liberty decisions as a whole. To do this, we use a number called the *representation ratio*.[63] For any given group:

$$\text{representation ratio} = \frac{\%\text{ of decisions involving a religious group}}{\%\text{ of religious group as share of population}}$$

The representation ratio is a nonnegative number that provides a meaningful measure of the religious group's descriptive representation.[64] A representation ratio of 0 indicates that a group is not represented at all. Ratios

[62] The Pew survey listed several religious minorities as "<1%" of the population in the various Tenth Circuit states. *See supra* Table 7. Absent more precise data, we rounded each of these groups up to 1%. This ensures that our representation ratio errs on the side of caution—*i.e.*, understating any degree of overrepresentation of religious minorities (except for Mormons who have greater than or equal to 1% of the population in each Tenth Circuit state).

[63] Shahshahani & Liu, *supra* note 4, at 12 (citing PITKIN, HANNA F., THE CONCEPT OF REPRESENTATION (1967)). Of course, out-of-circuit residents could file religious liberty claims in the Tenth Circuit. But this does not appear to be common.

[64] *See id.*

below 1 indicate that the group is underrepresented in litigation compared with its population. A ratio of 1 means that the group's share of religious liberty decisions perfectly matches its share of the population as a whole. Ratios above 1 show that the group is represented in a disproportionately high share of religious liberty decisions compared with its population.[65]

Table 9 shows the representation ratio of each religious group in all religious liberty decisions in the Tenth Circuit, excluding prisoner and asylum cases.

Table 9. Representation Ratio of Religious Claimants Per Decision

Religious Affiliation	Representation Ratio
Muslim	11.86
Native American	6.78
Fundamentalist Mormon	5.08
Hindu	3.39
Non-Religious	0.74
Catholic/Protestant	0.70
Mormon	0.16

This table shows that, as a portion of the total population, Muslims, Native Americans, Fundamentalist Mormons, and Hindus are all overrepresented as a share of religious freedom decisions. Non-religious and Catholics and Protestants are somewhat underrepresented at 0.74 and 0.70, respectively. And Mormons are significantly underrepresented at 0.16.

When we control for the anomalous spate of contraception mandate cases, the differences are even sharper. Table 10 shows the representation ratio of each religious group when contraception mandate cases (along with prisoner and asylum cases) are excluded.

[65] *Id.*

Table 10. Representation Ratio of Religious Claimants Per Non-Contraception Mandate Decisions

Religious Affiliation	Representation Ratio
Muslim	17.07
Native American	9.76
Fundamentalist Mormon	7.32
Hindu	4.88
Non-Religious	1.06
Catholic/Protestant	0.28
Mormon	0.23

Muslims, Native Americans, Fundamentalist Mormons, and Hindus are even more overrepresented than before. Non-religious claimants are now almost perfectly represented—although we might have expected them to be the least represented group, given that we are considering only religious liberty decisions. The representation ratio of Catholics and Protestants dropped significantly from 0.70 to 0.28. This is not surprising, given that all contraception mandate cases were brought by Catholics or Protestants. Slightly less represented were Mormons, at 0.23.

These numbers contradict the popular narrative that religious freedom cases predominantly involve the large Christian groups. This is not true in absolute terms, as Catholics and Protestants were involved in only 42% of all religious liberty decisions, and only 17% of decisions when the anomalous contraception mandate cases are excluded. But it is particularly untrue when considering the religious demographics of the population as a whole, as Catholics, Protestants, and Mormons are significantly underrepresented, while non-Christian minorities are significantly overrepresented. This suggests that religious liberty jurisprudence is disproportionately important for protecting non-Christian religious minorities.

C. Religious minorities predominate in prisoner cases.

Thus far, we have considered the religious demographics in decisions *not* involving prisoner or asylum claims. But prisoner and asylum cases also have interesting religious demographics of their own. Table 11 shows the religious demographics of claimants in prisoner decisions.

Table 11. Religious Affiliation of Prisoner Decisions

Religious Affiliation		**No.**	**Percentage**
Christian			
	Catholic/Protestant	4	10%
	Mormon	1	3%
	Total	5	13%
Other Religions			
	Jewish	4	10%
	Muslim	4	10%
	Native American	3	8%
	Christian Identity/Christian Separatism	2	5%
	Nations of Gods and Earth	2	5%
	Ever Increasing Faith	1	3%
	Moorish Science Temple of America	1	3%
	Odinism	1	3%
	Paganism	1	3%
	Rastafarian	1	3%
	Satanist	1	3%
	Total	20	51%
Unknown		13	33%

Over half of all prisoner decisions involved non-Christian religious minorities. The most frequently appearing were Muslims, Jews, and Native Americans. Decisions involving Muslims or Jews often involved challenges to the denial of religious diets.[66] Other decisions involved requests for access to religious worship services, such as a Native American sweat lodge.[67]

[66] *See, e.g.*, Chapman v. Lampert, 555 Fed. Appx. 758 (10th Cir. 2014) (Orthodox Jewish prisoner requests religious diet); Woodstock v. Shaffer, 169 F. Supp. 3d 1169 (D. Colo. 2016) (Jewish prisoner requests kosher diet); Williams v. Wilkinson, 645 Fed. Appx. 692 (10th Cir. 2016) (Muslim prisoner requests kosher diet); Miller v. Scott, 592 Fed. Appx. 747 (10th Cir. 2015) (Muslim prisoner requests halal or kosher diet).

[67] *See* Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014) (Native American prisoner requests access to sweat lodge for religious ceremonies). Justice Gorsuch identified *Yellowbear* was one of the ten most significant cases over which he presided when he was a judge on the Tenth Circuit Court of Appeals. *United States S. Comm. on the Judiciary: Questionnaire for Nominee to the Supreme Court*, 115th Cong. 25, 30–31 (2017) (statement of Neil Gorsuch, Circuit J., United States Court of Appeals for the Tenth Circuit), https://www.judiciary.senate.gov/imo/media/doc/Neil%20M.%20Gorsuch%20SJQ%20(Public).pdf. In that case, Yellowbear, a Northern Arapaho Native American prisoner sought use of the prison's sweat lodge for prayer. 741 F.3d at 51-52. The prison denied his request. *Id.* The Tenth Circuit found that under RLUIPA, the denial was a substantial burden on Yellowbear's religious exercise and that the prison failed to establish a compelling interest

Only 10% of prisoner decisions involved Catholics or Protestants—even less than the 17% that involved Catholics or Protestants in non-contraception mandate cases. Unfortunately, we were unable to calculate a representation ratio for these decisions, because data on the religious demographics of Tenth Circuit prisons is unavailable.[68]

D. Christians bring a majority of asylum cases.

Asylum decisions tell a different story. Table 12 shows the religious demographics of claimants in asylum decisions.[69]

---

when it did not quantify the costs associated with granting him access and that denial of access was not the least restrictive means of accommodating its concerns. *Id.* at 62–64. Justice Sonya Sotomayor quoted this opinion in her concurrence in another RLUIPA cases, *Holt v. Hobbs*. 135 S. Ct. 853, 867 (2015) (Sotomayor, J., concurring). In *Holt*, an Arkansas inmate Abdul Muhammad was denied the ability to grow a half-inch beard in accordance with his Muslim faith, even though Arkansas already allowed inmates to grow beards for medical reasons, and Mr. Muhammad's beard would be permissible in 44 state and federal prison systems across the country. *Id.* at 859 (majority opinion); Brief for the Petitioner at 4, Holt v. Hobbs, 135 S. Ct. 853 (2015) (No. 13-6827). The Supreme Court ruled unanimously that Mr. Muhammad had shown a substantial burden on his religious exercise and that Arkansas failed to show a compelling interest in prohibiting the beard. 135 S. Ct. at 859. Co-author Goodrich was co-counsel for the plaintiff in *Holt*.

[68] One article reported federal prisoner religious demographics from 2013. *See* Mona Chalabi, *Are Prisoners Less Likely To Be Atheists?*, FIVETHIRTYEIGHT (Mar. 12, 2015, 6:07 A.M.), https://fivethirtyeight.com/features/are-prisoners-less-likely-to-be-atheists/ (data was obtained through a FOIA request). And a 2012 PEW study conducted a survey of prison chaplains. *See* Pew Research Center, *Religion in Prisons—A 50 State Survey of Prison Chaplains* (Mar. 22, 2012), http://www.pewforum.org/2012/03/22/prison-chaplains-exec/. But neither provides accurate data on the religious demographics of prisoners within the Tenth Circuit as a whole. Interestingly, the PEW survey reported on the likelihood that various types of accommodations would be granted, finding that requests for religious books or texts and meetings with leaders from the inmates' faith are usually approved, requests for special religious diets, items, or clothing are less likely to be approved, and requests for a special hairstyle or grooming are most likely to be denied. *Id*. It will be interesting to see how those numbers change in light of the Supreme Court's first RLUIPA decision, *Holt v. Hobbs*, 135 S. Ct. 853 (2015), which held that a Muslin prisoner must be permitted to grow a half-inch beard.

[69] The percentages add up to more than 100% because one case, Bwika v. Holder, 527 F. App'x 772, 774 (10th Cir. 2013), involved both Christian and Muslim petitioners.

Table 12. Religious Affiliation of Asylum Decisions

Religious Affiliation		**No.**	**Percentage**
Christian			
	Catholic/Protestant	14	70%
	Mormon	2	10%
	Total	16	76%
Other Religions			
	Sikh	2	10%
	Hindu	1	5%
	Maharaj Ashutosh	1	5%
	Muslim	1	5%
	Total	5	24%

The majority of decisions involved Christians (76%). Far fewer involved other religious minorities (24%). But this is not surprising. In the typical asylum case based on religious persecution, the asylum seeker is a religious minority in her country of origin. For example, 10 of the 14 decisions involving Catholics or Protestants were brought by citizens of China[70] where those groups are a minority[71] and where persecution of religious minorities since 2012 has reportedly intensified.[72]

[70] Xue v. Lynch, 846 F.3d 1099 (10th Cir. 2016); Daoi Kai He v. Lynch, 638 Fed. Appx. 717 (10th Cir. 2016); Binbin He v. Lynch, 607 Fed. Appx. 826 (10th Cir. 2015); Zhe Sun v. Holder, 607 Fed. Appx. 801 (10th Cir. 2015); Jin Jian Chen v. Lynch, 630 Fed. Appx. 798 (10th Cir. 2015); Jing Li v. Holder, 607 Fed. Appx. 818 (10th Cir. 2015); Ronghua He v. Holder, 555 Fed. Appx. 786 (10th Cir. 2014); Liying Qiu v. Holder, 576 Fed. Appx. 855 (10th Cir. 2014); Jin Hua Lin v. Holder, 500 Fed. Appx. 782 (10th Cir. 2012); Yuan Shan Wu v. Holder, 501 Fed. Appx. 786 (10th Cir. 2012). The other four asylum decisions involving Catholics or Protestants were brought by citizens of Kenya, Indonesia, Morocco, and Romania. *See* Ballad v. Holder, 554 Fed. Appx. 705 (10th Cir. 2014) (Morocco); Adam v. Holder, 576 Fed. Appx. 804 (10th Cir. 2014) (Indonesia); Ilioi v. Holder, 566 Fed. Appx. 652 (10th Cir. 2014) (Romania); *Bwika*, 527 Fed. Appx. 772 (Kenya).

[71] In China, Chinese Buddhists comprise the largest faith group with an estimated 185–250 million followers. James Griffiths & Matt Rivers, *As Atheist China Warms to the Vatican, Religious Persecution "Intensifies"*, CNN (last updated Mar. 1, 2017, 9:31 AM), http://www.cnn.com/2017/02/28/asia/china-religious-persecution-christianity/index.html. Christianity is the second largest faith group, with only 72–92 million followers. *Id.*

[72] *See, e.g.*, *id.* ("Christians, and other believers, have long faced oppression within China."); SARAH COOK, THE BATTLE FOR CHINA'S SPIRIT: RELIGIOUS REVIVAL, REPRESSION, AND RESISTANCE UNDER XI JINPING (Annie Bovarian et al. eds,, 2017), *available at* https://freedomhouse.org/sites/default/files/FH_ChinasSprit2016_FULL_FINAL_140pages_compressed.pdf (Freedom House report covering religious persecution in China).

IV. SUCCESS AND FAILURE OF RELIGIOUS LIBERTY CLAIMS

In addition to the demographics of religious claimants, we wanted to determine what types of religious liberty claims are succeeding on the merits and what types are failing.

A. Methodology

To analyze success, we first coded each religious liberty decision as either a win or loss. A decision counted as a win if any of the issues in the decision were resolved in favor of the claimant raising the religious claim.[73] It counted as a loss if all of the issues were resolved against the religious claimant. Then, within the wins and losses we coded each decision as having been resolved on purely procedural grounds or on the merits. Purely procedural grounds consist of issues like mootness, lack of standing, or failure to exhaust administrative remedies—issues that prevent a court from opining on the merits of a religious liberty claim. But if a court addressed the merits of a religious liberty claim in any way, it was coded as a resolution on the merits. Finally, it is important to note that not all decisions on the merits are created equally. For example, if a court holds that a plaintiff's claim survives summary judgment because there are disputed issues of fact, that is not as significant as a grant of summary judgment in the plaintiff's favor. So our coding also considered whether a claim was only "partially" successful (because it survived a motion to dismiss or motion for summary judgment) or fully successful (because the court granted the claimant a preliminary injunction or summary judgment). Using the same system, we also coded whether each individual religious claim in a decision won or lost on the merits or on purely procedural grounds.

B. Successful religious liberty claims are rare.

Of the 59 religious liberty decisions excluding prisoners and asylum seekers, 11 (19%) were resolved on procedural grounds (such as mootness[74] or failure to exhaust administrative remedies[75])—leaving 48 decisions that addressed the merits. Of those 48 decisions addressing the merits, there

[73] We treated Establishment Clause claims the same way—that is, we coded a decision as a win if the court resolved any part of the claim in favor of the claimant challenging the government's action under the Establishment Clause. This eliminates any value judgments about how Establishment Clause claims "should" be resolved.

[74] Brown v. Buhman, 822 F.3d 1151 (10th Cir. 2016).

[75] Paige v. Donovan, 511 Fed. Appx. 729 (10th Cir. 2013).

were 20 wins (42%) and 28 losses (58%). As noted above, however, not all "wins" are created equally. Of the 20 wins, 5 decisions were only "partial" victories—*i.e.*, the plaintiffs' claims survived a motion to dismiss or motion for summary judgment.[76] Fifteen decisions were full victories on the merits—either granting the claimant a preliminary injunction or resolving a claim entirely in favor of the religious claimant. Thus, if we include partial victories, religious claimants were successful 42% of the time; if we include only full victories, claimants were successful 31% of the time.

As noted above, however, we are studying a timeframe involving an unusual spate of 18 contraception mandate decisions. Seventeen of those decisions reached the merits—with 10 ruling in favor of the plaintiffs, and 7 against. That means that the contraception mandate decisions tended to be more successful than average, raising the overall success rate in religious liberty decisions. This is due in part to the fact that there were multiple pending cases that all had to be resolved the same way—in favor of the religious claimant—after the Supreme Court's decisions in *Hobby Lobby*[77] and *Little Sisters of the Poor*.[78] If the contraception mandate decisions are excluded, the success rate of plaintiffs is lower: 32% if we include partial victories (10 wins out of 31 decisions) and 16% if we include only full victories (5 wins out of 31 decisions). If we include prisoner and asylum cases, the success rate would be even lower.[79] Other studies have found similarly low success rates on religious liberty claims.[80]

The bottom line is that successful religious liberty claims are rare. As noted in Part II.A, there are not many religious liberty claims to begin with–

---

[76] While such a ruling might eventually lead to a settlement, that is not the same as a final judgment on the merits.

[77] Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014).

[78] Zubik v. Burwell, 136 S. Ct. 1557 (2016).

[79] *See infra* Part IV.H. Prisoners had a success rate of 25% for all victories and 0% for full victories. Asylum seekers had only 1 partially successful decision out of 20 (5%).

[80] For example, Sisk and Heise conducted studies from 1986–1995 and from 1996–2005 on how judges voted in decisions involving religious claims. For free exercise and accommodation claims—which includes the Free Exercise Clause, RFRA, RLUIPA, the Equal Access Act, equal protection, free speech and employment-discrimination claims—religious claimants were successful at a rate of 35.6% of judicial participation from 1986–1995, and at a rate of 35.5% from 1996–2005. Sisk & Heise, *Muslims and Religious Liberty*, *supra* note 4, at 238–39 & n.39; Sisk, *How Traditional and Minority Religious Fare in the Courts*, *supra* note 4, at 1025. For Establishment Clause claims, religious claimants were successful at a rate of 42.3% of judicial participations from 1986–1995, and at a rate of 39.8% from 1996–2005. Sisk & Heise, *Ideology "All the Way Down"?*, *supra* note 4, at 1211 & n.42. But there are differences between Sisk and Heise's studies and ours that make comparison difficult. For example, they included prisoner cases; we (for present purposes) do not. They also counted each vote of each court of appeals judge separately; we counted only the overall decision.

approximately 0.6% of the judicial docket. They are often resolved on purely procedural grounds (19% of the time). When the courts do reach the merits, they decide in favor of the plaintiffs, at most, 42% of the time (including partial victories and the anomalous spate of contraception mandate cases), and as little as 16% of the time (excluding partial victories and contraception mandate cases). Thus, at the end of a five-year period encompassing over 10,000 decisions within the Tenth Circuit, there were only 15 fully successful religious liberty claims (consisting of 10 contraception mandate victories and 5 victories in other cases) on five discrete issues—sharia, polygamy, eagle feathers, contraception, and Ten Commandments.

C. Success rates vary by type of claim.

Given the small number of victories, it is easy to consider them in greater depth. Successful claims fall naturally into the following four categories:

- 10 victories in contraception mandate (RFRA) decisions;[81]
- 3 victories in Establishment Clause decisions;[82]
- 2 victories in free exercise decisions;[83] and
- 5 partial victories in Title VII cases.[84]

We first wanted to consider the success *rates* of each type of claim. To do this, we examined only decisions addressing the merits of a claim (either partially or fully). We then divided the number of successful claims of each

---

[81] Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (en banc); Newland v. Burwell, 83 F. Supp. 3d 1122 (D. Colo. 2015); Armstrong v. Burwell, No. 13-cv-00563, 2014 WL 5317354 (D. Colo. 2014); Dobson v. Sebelius, 38 F. Supp. 3d 1245 (D. Colo. 2014); Colorado Christian Univ. v. Sebelius, 51 F. Supp. 3d 1052 (D. Colo. 2014); Catholic Benefits Ass'n LCA v. Burwell, 81 F. Supp. 3d 1269 (W.D. Okla. 2014); Catholic Benefits Ass'n LCA v. Sebelius, 24 F. Supp. 3d 1094 (W.D. Okla. 2014); Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012); Armstrong v. Sebelius, 531 Fed. Appx. 938 (10th Cir. 2013); Newland v. Sebelius, 542 Fed. Appx. 706 (10th Cir. 2013).

[82] Felix v. City of Bloomfield, 841 F.3d 848 (10th Cir. 2016) (striking down Ten Commandments display); Felix v. City of Bloomfield, 36 F. Supp. 3d 1233 (D.N.M. 2014) (same); Awad v. Ziriax, 966 F. Supp. 2d 1198 (W.D. Okla. 2013) (striking down sharia ban).

[83] N. Arapaho Tribe v. Ashe, 92 F. Supp. 3d 1160 (D. Wyo. 2015) (eagle feathers); Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013) (polygamy).

[84] Canfield v. Office of the Sec'y of State for Kan., 2016 WL 4528065 (D. Kan. 2016) (no religion); EEOC v. Jetstream Ground Servs., Inc., 134 F. Supp. 3d 1298 (D. Colo. 2015) (Muslim); EEOC v. Jetstream Ground Servs., Inc., 134 F. Supp. 3d 1298 (D. Colo. 2015) (Muslim); E.E.O.C. v. 704 HTL Operating, LLC, 979 F. Supp. 2d 1220 (D. New Mexico 2013) (Muslim); Hunt v. Cent. Consol. Sch. Dist., 951 F. Supp. 2d 1136 (D.N.M. 2013) (Mormon).

type by the total number of claims of that type. The results are reflected in Table 13.

Table 13. Success Rate of Each Religious Claim

Religious Claim	Success Rate
RFRA	48%
Title VII	33%
Establishment Clause	29%
Free Exercise Clause	20%

This suggests that RFRA claims are most successful, Title VII and Establishment Clause claims are moderately successful, and free exercise claims are least successful. But given the small sample size and other dynamics, these numbers do not tell the whole story. For example, all 10 RFRA victories came in contraception mandate cases. If contraception mandate cases are excluded, the 4 remaining RFRA decisions on the merits were losses—resulting in a success rate of 0%. Furthermore, all 5 Title VII victories were only partial—*i.e.*, decisions denying a defendants' motion for summary judgment or motion to dismiss. If partial victories are excluded, the 10 remaining Title VII decisions on the merits were all losses—also resulting in a success rate of 0%.

Given the small number of successful religious liberty claims, it is worth examining them in further detail—and, in some cases, contrasting them with unsuccessful claims. Thus, in the following sections, we consider, in turn, each type of successful claim: RFRA, the Free Exercise Clause, the Establishment Clause, and Title VII. We then offer brief thoughts on prisoner and asylum cases, and we conclude by considering what we call "divisive" religious liberty decisions—*i.e.*, those that prompted dissent.

D. RFRA

1. Contraception Mandate ("Sex")

As noted above, there were 10 successful RFRA decisions, all involving the contraception mandate. This seems like a very large number, given that there were only 10 other victories overall (5 partial victories in Title VII cases, and 5 total victories in other cases).

But a few considerations put this number in perspective. First, the 10 successful decisions came in only 6 separate cases. That is because several cases generated multiple decisions. For example, in *Newland v. Sebelius*,

there was a district court decision granting a preliminary injunction,[85] a Tenth Circuit decision affirming the preliminary injunction in light of *Hobby Lobby*,[86] and then another district court decision entering a permanent injunction.[87] Although some non-contraception mandate cases also generated multiple decisions, this happened significantly more often in contraception mandate cases.

Second, 4 of the 10 favorable decisions were simply "clean up" decisions following *Hobby Lobby*—that is, once the Tenth Circuit (or Supreme Court) resolved *Hobby Lobby*, the pending cases presenting the same issue were resolved the same way.[88]

Finally, the 10 favorable decisions in 6 separate contraception mandate cases were also balanced by 7 losses in 5 separate contraception mandate cases.[89] Although these losses were eventually turned into wins (or ultimately will be) by the Supreme Court's decisions in *Hobby Lobby* and *Little Sisters of the Poor*, they show that contraception mandate cases were far from a uniform success before the Supreme Court weighed in.

Perhaps even more interesting than the successful contraception mandate cases are the contraception mandate cases (and other RFRA cases) that were never filed. When the Supreme Court decided *Hobby Lobby*, the government and the dissent predicted "a flood of religious objections regarding a wide variety of medical procedures and drugs,"[90] such as "blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)."[91] They also predicted that corporations would bring a rash of RFRA challenges outside the healthcare context.[92]

---

[85] 881 F. Supp. 2d 1287.

[86] 542 F. App'x 706.

[87] Newland v. Burwell, 83 F. Supp. 3d 1122 (D. Colo. 2015).

[88] Armstrong v. Burwell, 13-cv-00563-RBJ, 2014 WL 5317354 (D. Colo. Sept. 29, 2014); *Newland*, 83 F. Supp. 3d 1122; *Newland*, 542 F. App'x 706; Armstrong v. Sebelius, 531 F. App'x 938 (10th Cir. 2013).

[89] Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151 (10th Cir. 2015) (en banc); Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012); Ass'n of Christian Sch. Int'l v. Burwell, 75 F. Supp. 3d 1284 (D. Colo. 2014); Diocese of Cheyenne v. Sebelius, 21 F. Supp. 3d 1215 (D. Wyo. 2014); Little Sisters of the Poor Home for the Aged v. Sebelius, 6 F. Supp. 3d 1225 (D. Colo. 2013); Briscoe v. Sebelius, 927 F. Supp. 2d 1109 (D. Colo. 2013); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012).

[90] Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2783 (2014).

[91] *Id.* at 2805 (Ginsburg, J., dissenting).

[92] *Id.* at 2804–05.

Several commentators made similar predictions.[93]

But these challenges have not materialized. Our data set extends through February 24, 2017—thirty-two months after the Supreme Court's decision in *Hobby Lobby*.[94] During that time, there have been no RFRA challenges in the Tenth Circuit to any other medical procedures or drugs. Nor have there been any new RFRA challenges by for-profit corporations—or any organization for that matter. In fact, there have been only two new RFRA decisions at all—one involving a pro se individual's attempt to legalize marijuana,[95] and one involving a Native American request to wear an eagle feather at a high school graduation.[96] Both were unsuccessful. By contrast, in the thirty-two months after HHS promulgated the contraception mandate, the courts in the Tenth Circuit had already decided 12 of the 18 contraception mandate decisions in our data set. So there has already been ample time for the "flood" of new religious objections; it simply has not materialized.[97]

2. Drugs

Examining unsuccessful RFRA claims also shows that courts can draw sensible lines when applying RFRA. Two of those cases involved possession of drugs. First, in *United States v. Quaintance*,[98] drug smugglers pled guilty to conspiracy and possession with intent to distribute marijuana, but raised a RFRA defense, alleging that they were the founding members of the "Church of Cognizance," which taught that marijuana is a deity and sacrament. Then-Judge Gorsuch, writing for the Tenth Circuit, rejected the

---

[93] *See, e.g.*, Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 419 (2016) ("[T]here is widespread fear in some quarters—and presumably hope in others—that such claims might become a template for similar claims, pursuant to federal or state RFRAs or analogous state constitutional provisions, for religious exemptions from laws that prohibit discrimination in employment, or in the provision of public accommodations, on the basis of sexual orientation."); Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 98 (2015) ("Might [RFRAs] now be construed to protect religiously motivated employment discrimination based on sexual orientation, or discrimination by wedding vendors, merchants in other contexts, or government officials against same-sex couples?").

[94] The Supreme Court decided *Hobby Lobby* on June 30, 2014. 134 S. Ct. 2751.

[95] Krumm v. Holder, 594 F. App'x 497 (10th Cir. 2014).

[96] Griffith v. Caney Valley Pub. Sch., 157 F. Supp. 3d 1159 (N.D. Okla. 2016) (Oklahoma Religious Freedom Act).

[97] *Cf.* Barclay & Rienzi, *supra* note 4 (finding that a comparison of federal cases involving a RFRA claim pre- and post-*Hobby Lobby* showed no significant drop in government win rates).

[98] 608 F.3d 717 (10th Cir. 2010) (Gorsuch, J.).

claim, finding that the purported religious beliefs were not sincere.[99]

Similarly, in *Krumm v. Holder*,[100] the plaintiff brought a RFRA claim challenging the classification of marijuana as a Schedule I controlled substance, alleging that the classification violated his religious freedom to use cannabis as a holy anointing oil. The court held that the plaintiff had failed to state a valid facial challenge under RFRA, because he failed to allege that the restriction on marijuana was impermissible in all of its applications.[101]

These cases demonstrate that RFRA is not a blank check. Courts do not automatically accept all allegations of religious belief as "sincere," and they can easily weed out frivolous claims.[102]

3. Eagle Feathers

If anything, courts may be underenforcing RFRA for religious minorities.[103] An example from our data set involves Native American use of eagle feathers. Aside from the contraception mandate cases, these are the most common RFRA cases, with 3 decisions in the last 5 years (and 7 in the last 10).[104] In the last five years, every challenge was rejected. In the previous five years, only two challenges were successful, and one of those two was reversed on appeal.[105]

Eagle feathers play an important role in Native American religious practices. But under the Bald and Golden Eagle Protection Act,[106] it is illegal to kill eagles or possess eagle feathers or parts without a permit. Permits are

---

[99] *See id.* at 719.

[100] 594 F. App'x 497.

[101] *Id.* at 501.

[102] *Cf.* Christopher C. Lund, *Keeping Hobby Lobby in Perspective*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 285 (Micah Schwartzman, Chad Flanders, & Zoë Robinson eds., Oxford University Press 2016), https://ssrn.com/abstract=2842680 ("There are still few examples of RFRA and state RFRAs giving controversial exemptions. Of course, religious people sometimes make tendentious claims, particularly prisoners. But those claims do not win. At every turn, the tendency has been toward underenforcement not overenforcement").

[103] *Id.*; *cf.* Barclay & Rienzi, *supra* note 4 (finding support for the proposition that religious exemptions, including RFRA, are underenforced compared to exemptions under other expressive rights in the First Amendment).

[104] *See* Griffith v. Caney Valley Pub. Sch., 157 F. Supp. 3d 1159 (N.D. Okla. 2016); United States v. Aguilar. 527 F. App'x 808 (10th Cir. 2013); N. Arapaho Tribe v. Ashe, 925 F. Supp. 2d 1206 (D. Wyo. 2012); United States v. Wilgus, 606 F. Supp. 2d 1308 (D. Utah 2009), *rev'd*, 638 F.3d 1274 (10th Cir. 2011); United States v. Hardman, 622 F. Supp. 2d 1129 (D. Utah 2009); United States v. Friday, 525 F.3d 938 (10th Cir. 2008).

[105] *Wilgus*, 606 F. Supp. 2d 1308, *rev'd,* 638 F.3d 1274; *Hardman*, 622 F. Supp. 2d 1129.

[106] 16 U.S.C. § 668(a) (2016).

available for museums, scientists, zoos, farmers, and a wide variety of other interests—such as power companies and airports, which kill hundreds of eagles every year.[107] Permits are also available for Native American religious use—but only to members of "federally recognized tribes."[108] Because gaining federal recognition is very difficult,[109] and many tribes never gain it, there are currently thousands of Native Americans who are forever prohibited from possessing even a single eagle feather.

The federal government's restrictions on eagle feathers have led to many conflicts. In the leading Tenth Circuit case, *United States v. Wilgus*,[110] a non-Native American who had practiced a Native American religion for many years was pulled over for speeding, and the officer searched his car for drugs.[111] Although no drugs were found, the officer did find eagle feathers—resulting in criminal charges and a conviction.[112] On appeal, the government conceded that the criminal ban on possession of eagle feathers imposed a "substantial burden" on the defendant's religious exercise.[113] This meant that the government was required to satisfy strict scrutiny. But the Tenth Circuit held that the government satisfied strict scrutiny, because the supply of eagle feathers is limited and the government has a compelling interest in "providing for the religious needs of members of federally-recognized tribes."[114] Since the decision in *Wilgus*, there have been three more RFRA cases involving the use of eagle feathers—all unsuccessful.[115]

But the result in *Wilgus* is questionable. Perhaps due to inadequate briefing, the decision rests on the faulty premise that there is only one legitimate source of eagle feathers—the National Eagle Feather Repository—and that the repository has an extremely limited supply of eagle feathers.[116]

---

[107] McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 469 (5th Cir. 2014) (quoting 16 U.S.C. § 668(a)); Plaintiffs' Motion for Entry of Preliminary Injunction at 17–22, McAllen Grace Brethren Church v. Jewell, No. 7-60 (S.D. Tex. Mar. 10, 2015) http://s3.amazonaws.com/becketpdf/McAllen-PI-Motion-file-stamped.pdf (describing the eagle permits issued for non-religious uses).

[108] 50 C.F.R. § 22.22(a)(5) (Federally Recognized Tribal List Act of 1994) (2017).

[109] *See id.* Part 22; 25 C.F.R. § 83.7 (establishing seven "mandatory criteria" with 34 sub-factors or categories of evidence to gain federal recognition status).

[110] 638 F.3d 1274.

[111] *Id.* at 1280.

[112] *Id.*

[113] *Id*.

[114] *Id.* at 1290.

[115] N. Arapaho Tribe v. Ashe, 925 F. Supp. 2d 1206 (D. Wyo. 2012) (upholding restriction on permit); Griffith v. Caney Valley Pub. Sch., 157 F. Supp. 3d 1159 (N.D. Okla. 2016) (rejecting free speech and free exercise claims); United States v. Aguilar, 527 Fed. App'x 808 (10th Cir. 2013) (rejecting RFRA defense to prosecution).

[116] *Compare* 638 F,3d at 1291 (concluding that there is "no significant untapped

On this view, eagle feathers are a "zero-sum game": every feather obtained by someone who is not a member of a federally recognized tribe is taken away from a member of a federally recognized tribe.[117] But in fact, there are many ways to obtain eagle feathers beyond the repository. There are federal permits to take live eagles;[118] there are permits for operating eagle aviaries, which supply a steady stream of molted feathers;[119] and there are millions of feathers naturally molted every year in zoos and in the wild, which could be picked up and used for religious ceremonies if not for the federal prohibition.[120] Beyond that, the court erred by focusing only on permits for Native American religious use. There are also permits for museums, scientists, zoos, airports, falconers, farmers, power companies, and many others.[121] So the regulation of eagle feathers is not a zero-sum game between two different groups of Native Americans; it is a multi-faceted game that often prefers commercial killing of eagles to the peaceful Native American religious use of feathers. And it is hard to see how the government has a compelling interest in prohibiting a Native American from possessing even a single feather—without ever killing an eagle—when it simultaneously allows power companies to kill hundreds of eagles for nonreligious reasons every year.[122]

Not surprisingly, the Fifth Circuit's recent decision in *McAllen Grace Brethren Church v. Salazar*[123] parts ways with *Wilgus*. In *McAllen*, an undercover federal agent raided a Native American powwow and confiscated feathers from a nationally renowned feather dancer who had used the feathers for many decades.[124] Because the dancer was not a member of a federal-

---

sources of birds not already being sent to the [National Eagle Feather] Repository"), *with McAllen Grace Brethren Church v, Salazar*, 764 F.3d 465, 479 (5th Cir. 2014) (detailing alternative sources to the National Eagle Feather Repository for obtaining eagle feathers, including zoos, and tribal maintained eagle aviaries).

[117] 638 F,3d at 1293.

[118] 16 U.S.C. § 668a; 50 C.F.R. § 22.22 (2016).

[119] *See generally* U.S. FISH & WILDLIFE SERV., U.S. FISH & WILDLIFE SERV. FORM 3–200-78 (2013), *available at* http://www.fws.gov/forms/3-200-78.pdf.

[120] Mem. from the U.S. Attorney General to the Assistant Attorney General, Environment and National Resources Division, All U.S. Attorneys, and Director, Executive Office for U.S. Attorneys (Oct. 12 2012), *available at* http://www.justice.gov/sites/default/files/ag/legacy/2012/10/22/ef-policy.pdf (discussing the possession or use of eagle feathers or other parts for tribal, cultural, and religious purposes).

[121] Plaintiffs' Motion for Entry of Preliminary Injunction at 17–22, McAllen Grace Brethren Church v. Jewell, No. 7-60 (S.D. Tex. Mar. 10, 2015) http://s3.amazonaws.com/becketpdf/McAllen-PI-Motion-file-stamped.pdf (describing the eagle permits issued for non-religious uses).

[122] *Id.* at 20–22.

[123] 764 F.3d 465 (5th Cir. 2014).

[124] *McAllen Grace Brethren Church v. Jewell*, BECKET (Aug. 8, 2017),

ly recognized tribe, he was in violation of the Bald and Golden Eagle Protection Act. But the Fifth Circuit, citing *Hobby Lobby*, held that the government failed to satisfy strict scrutiny under RFRA. The court reasoned that the limited supply of feathers at the repository was a problem "of the government's own making," because the government ran an "inefficient" system.[125] And the court held that the government had failed to show that "other avenues" of obtaining feathers were infeasible.[126] In the wake of *McAllen*, the federal government entered a historic settlement agreement with the plaintiff and over 400 other Native Americans who are not members of federally recognized tribes, guaranteeing their right to possess feathers and access the repository.[127] This settlement makes the result in *Wilgus* even harder to defend and may prompt additional litigation in the Tenth Circuit.

E. Free Exercise

When a RFRA claim is unavailable, litigants must often rely on the Free Exercise Clause. There were two successful free exercise decisions. One involved a challenge to Utah's bigamy statute by a polygamist family featured on the reality show "Sister Wives."[128] The district court held that the statute, as applied to religious cohabitation, was not neutral toward religion and was not narrowly tailored to advance a compelling state interest.[129] But the Tenth Circuit vacated that decision and ordered the case to be dismissed as moot, because the government adopted a new enforcement policy eliminating any credible threat of prosecution.[130]

The other successful free exercise decision involved a novel dispute between two Native American tribes over a request to kill bald eagles.[131] The Northern Arapaho Tribe applied to the U.S. Fish and Wildlife Service to

---

http://www.becketlaw.org/case/mcallen-grace-brethren-church-v-jewell/#caseDetail.

[125] 764 F.3d at 479.

[126] *Id.*

[127] Press Release, The Becket Fund for Religious Liberty Native Americans Win, Feds Flee Feather Fight: Government Surrenders Sacred Feathers Admits Undercover Powwow Raid Was Illegal (June 14, 2016), http://www.becketlaw.org/media/native-americans-win-feds-flee-feather-fight/; Settlement Agreement, McAllen Grace Brethren Church v. Jewell, No. 7:07-cv-060 (S.D. Tex. June 13, 2016), *available at* http://s3.amazonaws.com/becketpdf/Exhibit-1-Settlement-Agreement-file-stamped.pdf. Co-author Goodrich was counsel for the plaintiffs in *McAllen*.

[128] Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013), *vacated as moot*, 822 F.3d 1151 (10th Cir. 2016).

[129] 947 F. Supp. 2d. at 1209–22.

[130] 822 F.3d 1151.

[131] N. Arapaho Tribe v. Ashe, 92 F. Supp. 3d 1160 (D. Wyo. 2015).

take two bald eagles for religious purposes from the Wind River Reservation, where the tribe has lived for many years.[132] But the Eastern Shoshone Tribe also lives on the Wind River Reservation, and they claimed that "[a]llowing an enemy tribe the right to kill [thei]r sacred eagles" would violate *their* religious beliefs.[133] The federal government tried to reach a compromise that would satisfy the religious beliefs of both tribes: it granted a permit allowing the Northern Arapaho Tribe to take two bald eagles *outside* the reservation.[134] But the Northern Arapaho Tribe sued under RFRA and the Free Exercise Clause, claiming that their religious beliefs required them to take the eagles from *within* the reservation.[135]

The district court rejected the RFRA claim at an early stage of the case, relying on the Tenth Circuit's decision in *Wilgus*.[136] But then, in a highly unusual twist, it ruled in the tribe's favor under the Free Exercise Clause, citing the Supreme Court's intervening decisions in *Hobby Lobby* and *Holt*, and the Fifth Circuit's decision in *McAllen*.[137] The court held that the government's action was "facially discriminatory because [it] burdened the Northern Arapaho Tribe's culture and religion based on the cultural or religious objection of the Eastern Shoshone Tribe."[138] And it held that the action failed strict scrutiny, because "[t]he asserted harm to the culture and religion of the Eastern Shoshone Tribe . . . is miniscule."[139] The court did not explain why it chose to resolve the case on free exercise grounds, rather than revisiting its RFRA decision in light of intervening precedent. That makes this one of the very rare cases to rule against a RFRA claim on the merits but in favor of a free exercise claim based on the same facts.[140]

This decision is likely best understood as a RFRA decision in free exercise clothing. Although the court said it was avoiding RFRA's "substantial burden" inquiry,[141] it based its decision primarily on *Hobby Lobby* and *Holt*, which are RFRA and RLUIPA cases, respectively—not free exercise cases. And the court's free exercise analysis focused on the fact that the govern-

---

[132] *Id.* at 1164.

[133] *Id.* at 1166.

[134] *Id.* at 1164.

[135] *Id.* at 1167.

[136] N. Arapaho Tribe v. Ashe, 925 F. Supp. 2d 1206, 1216–18 (D. Wyo. 2012) (discussing *Wilgus*).

[137] 92 F. Supp. 3d at 1180–90.

[138] *Id.* at 1179.

[139] *Id.* at 1187.

[140] The only similar cases we are aware of are Rader v. Johnston, 924 F. Supp. 1540, 1543 n.2 (D. Neb. 1996) and Brown v. Borough of Mahaffey, Pa., 35 F.3d 846, 849-50 (3d Cir. 1994).

[141] 92 F. Supp. 3d at 1182 ("[The Court] need not consider whether Defendants' final agency action placed a substantial burden on Plaintiffs' free exercise of religion.")

ment had "*burdened* the Northern Arapaho Tribe's culture and religion"[142]—which sounds more like an analysis of a RFRA claim than a free exercise claim.

A final takeaway on free exercise claims is that they are rare and hard to win. Of the 23 Free Exercise claims raised, the courts reached the merits in only 10.[143] Of the 10 decisions where the court addressed the merits, plaintiffs were successful only twice. Even then, one of the two was vacated as moot, and the other is better viewed as a RFRA claim. The paucity of successful free exercise claims is probably explained in part by the fact that RFRA provides a broad statutory remedy that must be decided before any free exercise claim when the federal government is the defendant, in part by the fact that free exercise claims involve difficult threshold questions about when a law is "neutral" or "generally applicable," and in part by the fact that courts remain hesitant to apply the Free Exercise Clause vigorously in the wake of *Employment Division v. Smith*.[144]

F. Establishment Clause

There were three successful Establishment Clause decisions in two different cases—one involving an unusual challenge to a sharia ban,[145] and the other involving a run-of-the-mill challenge to a Ten Commandments display.[146]

The sharia ban was a proposed constitutional amendment in Oklahoma. The amendment would have prohibited Oklahoma courts from relying on "the legal precepts of other nations or cultures," "[s]pecifically, . . . international law or Sharia Law."[147] So, for example, if a private arbitration

---

[142] *Id.* at 1179 (emphasis added).

[143] This is in part because free exercise claims are often brought in conjunction with RFRA claims (10 times in our data set), and if a RFRA claim is successful, the court typically does not reach the free exercise claim. Free exercise claims were also brought in conjunction with claims under the Establishment Clause (11 times), Free Speech Clause (11 times), Equal Protection Clause (6 times), and freedom of association (4 times).

[144] Emp't Div. v. Smith, 494 U.S. 872 (1990). *See, e.g.*, Amy Adamczyk, John Wibraniec, & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA*, 46 J. CHURCH & ST. 237, 250 tbl. 1 (2004) (finding that the success rate of free exercise claims dropped from 39.5% to 28.4% after *Smith*, and that the number of claims dropped from 310 decided in the nine-and-a-quarter years before the decision to 38 in the three-and-a-half years after); *but see* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016).

[145] Awad v. Ziriax, 966 F. Supp. 2d 1198 (W.D. Okla. 2013).

[146] Felix v. City of Bloomfield, 36 F. Supp. 3d 1233 (D.N.M. 2014), *aff'd*, 841 F.3d 848 (10th Cir. 2016).

[147] 966 F. Supp. 2d at 1200–01.

agreement between Muslims incorporated elements of Islamic law, it could not be enforced in court; but if a private arbitration agreement between Christians or Jews incorporated elements of biblical or Jewish law, it could.[148]

The amendment was challenged by several Muslims under both the Free Exercise and Establishment Clauses. Following the Tenth Circuit's reasoning from an earlier decision in the case,[149] the district court resolved the case by applying what it called the "*Larson* test" under the Establishment Clause.[150] Under this test, the amendment was subject to strict scrutiny because it made "'explicit and deliberate distinctions' among religions."[151] And the court held that the amendment failed strict scrutiny because the state failed to identify "any *actual problem* the challenged amendment seeks to solve."[152] Having decided that the amendment violated the Establishment Clause, the court declined to address the merits of the claim under the Free Exercise Clause.[153]

This decision is interesting not for the result—which is likely correct—but for its reliance on the Establishment Clause rather than the Free Exercise Clause. By singling out "Sharia Law," the text of the amendment singled out one religion, Islam, for unfavorable treatment. Such singling out is ordinarily treated as a violation of the Free Exercise Clause.[154] Yet the court relied on the Establishment Clause. Why?

---

[148] *See* Luke W. Goodrich, *Sharia Across the Pond*, THE GUARDIAN (JULY 6, 2009, 5:30 AM), https://www.theguardian.com/commentisfree/belief/2009/jul/06/sharia-courts-us-islam.

[149] Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012).

[150] 966 F. Supp. 2d at 1203.

[151] *Id.*

[152] *Id.* at 1203–04.

[153] *Id.* at 1202 n.1.

[154] *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019, 2024 (2017) ("[T]arget[ing] the religious for special disabilities based on their religious status" is a violation of "the Free Exercise Clause." (internal quotation marks and citation omitted)); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534, 541–42 (1993) (stating that an "attempt to disfavor [a] religion" violates the Free Exercise Clause, while "governmental efforts to benefit religion or particular religions" typically violate the Establishment Clause); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (Souter, J., plurality opinion) (applying Establishment Clause where religious group was vested with civic power but noting that if the group had instead been "denied" "the rights of citizens simply because of [its] religious affiliations," that would be a "free exercise" case); *see also* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1800 (2006) (When "restrictions on minority faiths are [not] part of any effort to establish some other religion, . . . such restrictions are . . . treated as a free exercise issue.").

There are several possible reasons. First, it is currently easier to establish standing to sue under the Establishment Clause than under other provisions of the Constitution.[155] Courts often allow plaintiffs to bring Establishment Clause claims based on nothing more than "offensive contact" with a government policy or symbol with which they disagree.[156] Thus, if there were any doubts about the plaintiffs' standing in *Awad*, that would push the court toward relying on the Establishment Clause.

Second, because the Establishment Clause is a structural restraint on government power, remedies for a violation of the Establishment Clause tend to be broader than for a violation of the Free Exercise Clause.[157] If a government action violates the Establishment Clause, it will often be struck down in its entirety. But if an action violates the Free Exercise Clause, the remedy may be merely an injunction protecting the specific religious claimant.[158]

Third, since the Supreme Court narrowed the application of the Free Exercise Clause in *Smith*,[159] lower courts have been hesitant to invalidate government actions under the Free Exercise Clause.[160] By contrast, the legal standards under the Establishment Clause are notoriously malleable,[161] making the Establishment Clause a more flexible vehicle for resolving contested claims.

Interestingly, this dynamic in *Awad* arose again in litigation over Executive Order No. 13780—commonly known as President Trump's "travel ban"—which suspended entry to the United States by certain foreign nationals from six Muslim-majority countries.[162] In *Trump v. International*

---

[155] *See* Brief Amicus Curiae of The Becket Fund for Religious Liberty in Support of Petitioners, *Salazar v. Buono*, 559 U.S. 700 (2010) (No. 08-472) (arguing that the standing in Establishment Clause cases should be similar to standing in Equal Protection Clause cases).

[156] *See id.* (collecting examples).

[157] *See* Brief *Amicus Curiae* of The Becket Fund for Religious Liberty in Support of Neither Party, *Trump v. Int'l Refugee Assistance Project*, Nos. 16-1436, 16-1540 (U.S. August 17, 2017) [hereinafter Becket *IRAP Amicus* Brief].

[158] *See id.*

[159] Emp't Div. v. Smith, 494 U.S. 872 (1990).

[160] *See supra* note 144.

[161] *See, e.g.*, Doe v. Elmbrook School District, 687 F.3d 840, 869–77 (Easterbook, J. & Posner, C.J., dissenting from en banc decision) (calling *Lemon* and "no endorsement" test "hopelessly open-ended"); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CALIF. L. REV. 5 (1987); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (1986).

[162] Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). The travel ban has since been modified by a Presidential Proclamation, which includes new restrictions on Venezuela, North Korea, and Chad, and eliminates restriction on Sudan. *See* Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry

Refugee Assistance Project ("*IRAP*"), the plaintiffs argued that the Executive Order was in fact a "Muslim ban" that singled out Muslims for disfavored treatment.[163] But the plaintiffs did not bring a claim under the Free Exercise Clause; instead, they relied on the Establishment Clause.[164] This is likely for the same reasons described above: the Establishment Clause may have helped them skirt difficult questions of standing; the Establishment Clause may have allowed them to strike down the Executive Order in its entirety, rather than obtain an injunction limited to the plaintiffs; and some courts may have been more receptive to a claim under the Establishment Clause than under the Free Exercise Clause.

But the plaintiffs in *IRAP* also attempted to go one significant step beyond *Awad*. In *Awad*, the court applied the "*Larson* test," which requires *strict scrutiny* whenever a law discriminates among religions.[165] But in *IRAP*, the plaintiffs invoked the "*Lemon* test," which invalidates a law *automatically* if it has a religious purpose.[166] In other words, the government gets no opportunity to satisfy strict scrutiny. That was particularly important in *IRAP*, because the government claimed that the Executive Order was justified by weighty national security interests. But because the lower courts applied the *Lemon* test, they enjoined the Executive Order without ever weighing the government's alleged interest.[167]

Both *Awad* and *IRAP* were wrong to view the challenged laws exclusively through the lens of the Establishment Clause. That does not mean that they reached the wrong result. But a claim that the government is targeting one religious group for disfavor—rather than giving other religious groups preferential treatment—is most naturally viewed through the lens of the Free Exercise Clause.[168] The Free Exercise Clause allows the courts to consider the concrete harms to the specific plaintiffs.[169] It gives the courts well-established tools to ferret out hostility toward religion, rather than relying on the subjective *Lemon* test.[170] It allows the courts to craft a remedy

---

Into the United States by Terrorists or Other Public-Safety Threats (Sep. 24, 2017).

[163] *See* Brief in Opposition, *Trump v. International Refugee Assistance Project*, No. 16-1436 (U.S. June 12, 2017).

[164] *See id.*

[165] Awad v. Ziriax, 966 F. Supp. 2d 1198, 1203 (W.D. Okla. 2013).

[166] *See id.* (despite invoking the *Lemon* test, plaintiffs never mention or cite *Lemon*).

[167] Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir.), *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted*, 137 S. Ct. 2080 (2017).

[168] *See* Becket *IRAP Amicus* Brief, *supra* note 157.

[169] *See id.* at 28–31.

[170] *See id*. at 21–25 (*Lukumi* offers seven ways that a plaintiff can prove that a law is not neutral or generally applicable with respect to religion: (1) facially targeting religion; (2) resulting in a religious gerrymander in its real operation; (3) failing to apply to analogous secular conduct; (4) giving the government open-ended discretion to make individual-

that addresses specific harms. And it allows the courts to balance competing governmental interests.[171]

The other successful Establishment Clause decision in our data set involved a challenge to a Ten Commandments display. In *Felix*, a city in New Mexico installed a Ten Commandments monument—along with monuments to the Gettysburg Address, Declaration of Independence, and Bill of Rights—on the City Hall Lawn.[172] City residents challenged the Ten Commandments monument as a violation of the Establishment Clause, and the Tenth Circuit agreed.[173] Applying the *Lemon* test, the Tenth Circuit held that the text of the monument (taken from the King James Bible), the location of the monument in front of city hall, the installation of the monument at a religious ceremony, and the fact that the monument immediately prompted litigation all contributed to a finding that the government had "endorsed" religion.[174] This "taint of [government] endorsement" was not cured by the fact that the monument was created and donated by a private party, was accompanied by several secular monuments, and was accompanied by a sign disclaiming any government endorsement of religion.[175]

The result in *Felix* is not uncommon. Lower courts have struggled for years to apply the *Lemon* test in any consistent and objective fashion. That test has been widely criticized by the lower courts,[176] commentators,[177] and

---

ized exemptions; (5) being selectively enforced; (6) having its historical background show that the lawmaker's purpose was to discriminate based on religion; and (7) discriminating between religions).

[171] *See id.* at 25–28. It is also better to understand *Larson* as a case arising under *both* the Free Exercise and Establishment Clauses. The plaintiffs in *Larson* invoked both clauses. Larson v. Valente, 456 U.S. 228, 233 (1982). So did the Supreme Court, stating that "[t]h[e] constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.* at 245. And the Court applied strict scrutiny. *Id*. at 246. Thus, at least one decision in the Tenth Circuit has noted that *Larson* is supported by both clauses. Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1257–58 (10th Cir. 2008) (McConnell, J.) ("[D]iscrimination [among religions] is forbidden by the Free Exercise Clause as well. [citing *Larson*] . . . So while the Establishment Clause frames much of our inquiry, the requirements of the Free Exercise Clause and Equal Protection Clause proceed along similar lines.").

[172] Felix v. City of Bloomfield, 841 F.3d 848 (10th Cir. 2016).

[173] *Id.* at 851.

[174] *Id.* at 857–59.

[175] *Id.* at 860–64.

[176] *See, e.g.*, Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 869–78 (7th Cir. 2012) (Easterbook, J. & Posner, J., dissenting from en banc decision) (calling *Lemon* and "no endorsement" test "hopelessly open-ended"); Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235, 1235 n.1 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing en banc) (noting that "[w]hether *Lemon* . . . and its progeny actually create discernable 'tests,' rather than a mere ad hoc patchwork, is debatable" and describing the "judicial morass re-

Supreme Court Justices alike[178] as largely subjective, allowing courts to reach virtually any result. Thus, it would have been just as easy to write an opinion saying that the Ten Commandments monument did *not* endorse religion because it was donated by a private party, accompanied by secular monuments, and attended by a disclaimer.[179]

The more interesting aspect of *Felix* is the dissent from denial of rehearing en banc by Judges Kelly and Tymkovich, who proposed an alternative method of resolving Establishment Clause cases.[180] They noted that the Supreme Court's two most recent Establishment Clause decisions have moved

---

sulting from the Supreme Court's opinions"); Card v. Everett, 520 F.3d 1009, 1016 (9th Cir. 2008) ("Confounded by the ten individual opinions in [*McCreary* and *Van Orden*] . . . courts have described the current state of the law as both 'Establishment Clause purgatory' and 'Limbo'" (citation omitted)); *id.*, at 1023–1024 (Fernandez, J., concurring) (applauding the majority's "heroic attempt to create a new world of useful principle out of the Supreme Court's dark materials" and lamenting the "still stalking *Lemon* test and the other tests and factors, which have floated to the top of this chaotic ocean from time to time," as "so indefinite and unhelpful that Establishment Clause jurisprudence has not become more fathomable" (footnote omitted)).

[177] *See, e.g.*, Choper, *supra* note 161; McConnell, *supra* note 161.

[178] *See, e.g.*, Elmbrook Sch. Dist. v. Doe, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from denial of certiorari) (calling the endorsement test "antiquated"); Mount Soledad Mem'l Ass'n v. Trunk, 567 U.S. 944, 944 (2012) (Alito, J., dissenting from denial of certiorari) ("Establishment Clause jurisprudence is undoubtedly in need of clarity"); Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12, 13-21 (2011) (Thomas, J., dissenting from denial of certiorari) ("Establishment Clause jurisprudence [is] in shambles," "nebulous," "erratic," "no principled basis," "Establishment Clause purgatory," "impenetrable," "ad hoc patchwork," "limbo," "incapable of consistent application," "our mess," "little more than intuition and a tape measure,"); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (comparing the Lemon test to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried").; Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., joined by White, J. and Thomas, J., dissenting); Allegheny Cty. v. ACLU, 492 U.S. 573, 655–57 (1989) (Kennedy, J. concurring in judgment in part and dissenting in part); Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 346-49 (1987) (O'Connor, J., concurring in judgment); Wallace v. Jaffree, 472 U.S. 38, 107–13 (1985) (Rehnquist, J., dissenting); *id.* at 90–91 (White, J., dissenting).

In recent cases, the Supreme Court has treated the Lemon factors as "no more than helpful signposts," if it has applied them at all. Van Orden v. Perry, 545 U.S. 677, 686 (2005) (plurality); *see also* Town of Greece v. Galloway, 134 S. Ct. 1811 (2014) (not applying Lemon); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (same); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (same).

[179] *See, e.g.*, Am. Jewish Cong. v. City of Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting) ("When everything matters, when nothing is dispositive, when we must juggle incommensurable factors, a judge can do little but announce his gestalt.").

[180] Felix v. City of Bloomfield, 847 F.3d 1214 (10th Cir. 2017) (dissent from denial of rehearing en banc).

away from the subjective *Lemon* test and have instead embraced a historical approach.[181] Specifically, in *Town of Greece v. Galloway*, which involved a challenge to legislative prayer, the Court held that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'"[182] And in *Van Orden v. Perry*, which involved a Ten Commandments monument, the Supreme Court specifically avoided relying on *Lemon* and instead said that its analysis was "driven both by the nature of the monument and by our Nation's history."[183]

To flesh out this historical approach, Judges Kelly and Tymkovich drew on the scholarship of former Tenth Circuit judge Michael McConnell, who has written that an "establishment" at the time of the founding consisted of several recognized features: "(1) [state] control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church."[184] Because the City's actions in *Felix* "met none of the traditional elements of . . . the original public meaning of 'establishment,'" Judges Kelly and Tymkovich concluded that the City's actions should not be construed as an establishment of religion.[185]

This type of historical analysis seems likely to become the prevailing method of resolving Establishment Clause claims. The *Lemon* test is now on its last legs;[186] it has been criticized by a majority of recent Justices, and the Court has studiously avoided applying it in recent cases.[187] The Court has increasingly relied on a historical approach to interpret the other provisions of the Bill of Rights, including the Second,[188] Fourth,[189] and Sixth[190]

---

[181] *Id.* at 1219.

[182] Town of Greece v. Galloway, 134 S. Ct. 1811, 1819 (2014).

[183] Van Orden v. Perry, 545 U.S. 677, 686 (2005) (plurality opinion); *see also id.* at 699–700 (Breyer, J., concurring); Eric Rassbach, Town of Greece v. Galloway: *The Establishment Clause and the Rediscovery of History*, 2014 CATO SUP. CT. REV. 71 (2014).

[184] 847 F.3d at 1216 (quoting Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003)).

[185] *Id.* at 1221; *see also* Rassbach, *supra* note 183, at 92 (proposing a similar approach).

[186] Rassbach, *supra* note 183, at 90.

[187] *See supra* note 178.

[188] District of Columbia v. Heller, 554 U.S. 570, 576–97 (2008) (examining the meaning of the Second Amendment "[a]t the time of the founding").

[189] United States v. Jones, 132 S. Ct. 945, 950 & n.3 (2012) (examining the "original meaning of the Fourth Amendment," because "we must assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted").

[190] Apprendi v. New Jersey, 530 U.S. 466, 478 (2000) (examining "the practice of

Amendments, as well as the First Amendment itself.[191] Its most recent Establishment Clause case held that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'"[192] Thus, it seems like only a matter of time before the Court makes clear that this sort of historical approach should guide interpretation of the Establishment Clause.

This will be a welcome development. A historical approach will place the interpretation of the Establishment Clause on a far more objective basis than under the *Lemon* test. It will connect the interpretation of the Establishment Clause to the motivating concerns of the founders—namely, coercion and control of religion.[193] And it will reduce unnecessary division over many of the less significant matters of religious expression that have come to fill the courts' Establishment Clause docket.[194]

G. Title VII

In Title VII cases, there were five favorable decisions. All five were "partial" victories—where the plaintiff merely survived a motion to dismiss or motion for summary judgment. Three of the five involved EEOC enforcement actions to protect Muslims.[195] One involved a religious discrimination claim by Mormons—the only case in our data set that was brought by Mormon plaintiffs.[196] The last case involved an employee allegedly fired by the Kansas government for *not* attending church.[197]

It seems noteworthy that three of the five successful Title VII decisions

---

criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding"); Crawford v. Washington, 541 U.S. 36, 43 (2004) (examining "the historical background of the [Confrontation] Clause to understand its meaning").

[191] Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694, 702 (2012) (applying historical analysis to determine the existence and scope of the First Amendment ministerial exception).

[192] Town of Greece v. Galloway, 134 S. Ct. 1811, 1819 (2014).

[193] *See* McConnell, *supra* note 184, at 2131; Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

[194] Am. Jewish Cong. v. City of Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting) (noting that Establishment Clause cases often "require[e] scrutiny more commonly associated with interior decorators than with the judiciary").

[195] EEOC v. 704 HTL Operating, LLC, 979 F. Supp. 2d 1220 (D.N.M 2013); EEOC v. JBS USA, LLC, 115 F. Supp. 3d 1203 (D. Colo. 2015); EEOC v. Jetstream Ground Servs., Inc., 134 F. Supp. 3d 1298 (D. Colo. 2015).

[196] Hunt v. Cent. Consol. Sch. Dist., 951 F. Supp. 2d 1136 (D.N.M. 2013).

[197] Canfield v. Office of the Sec'y of State for Kan., 209 F. Supp. 3d 1219 (D. Kan. 2016). In a later decision in that case, the jury rejected the employee's religious discrimination claim, resulting in a loss for the religious claimant. *See* http://religionclause.blogspot.com/2017/08/fired-employee-loses-religious.html.

involved Muslims, given that Muslims constitute less than 1% of the Tenth Circuit population. Surveying lower federal courts between 1996–2005, Sisk and Heise found that the most common religious liberty claims brought by Muslims, aside from prisoner claims, were employment discrimination cases against the federal government.[198] However, they also found that Muslim claimants were nearly twice as likely to lose than non-Muslim claimants.[199] But unlike Sisk and Heise, our data set includes cases brought against private employers. And all three successful Muslim claims involved EEOC enforcement actions. Thus, our findings may speak less to the overall success rates of Muslim claimants and more to the possibility of increased enforcement of Title VII by EEOC on behalf of Muslims.[200]

H. Prisoner and Asylum Cases

For most of our analysis, we have excluded claims brought by prisoners and asylum seekers. But a few more observations on those claims are in order.

Of the 39 prisoner decisions in our data set, 15 (38%) were decided on purely procedural grounds. This is double the rate of purely procedural decisions in non-prisoner and non-asylum cases (19%). But that is not surprising, given that 87% of prisoner cases were pro se.

Of the 24 decisions that addressed the merits, 6 were successful[201]—

---

[198] Heise & Sisk, *Muslims and Religious Liberty*, *supra* note 4, at 249.

[199] *Id.*

[200] In the wake of 9/11, "the EEOC saw a 250% increase in the number of religion-based discrimination charges involving Muslims," and although the uptick related to 9/11 decreased, the EEOC continues to see an increase in charges involving religious discrimination against Muslims. U.S. EEOC, *What You Should Know about the EEOC and Religious and National Origin Discrimination Involving the Muslim, Sikh, Arab, Middle Eastern and South Asian Communities*, https://www.eeoc.gov//eeoc/newsroom/wysk/religion_national_origin_9-11.cfm (last visited Aug. 21, 2017). The EEOC reports that it has filed "nearly 90 lawsuits alleging religious and national origin discrimination involving the Muslim, Sikh, Arab, Middle Eastern and South Asian communities." *Id.* Specifically, from 2009 until late October 2015, there were 54 cases in which the EEOC brought religious accommodation lawsuits on behalf of employees. Eugene Volokh, *The EEOC, religious accommodation claims, and Muslims*, WASH. POST: VOLOKH CONSPIRACY (June 21, 2016). Of those, 14 (26%) were brought on behalf of Muslim employees, 6 (11%) on behalf of Seventh-day Adventists, 6 (11%) on behalf of Jehovah's Witnesses, and 1 (2%) on behalf of a class including both Muslims and non-Muslims. *Id.* The rest were brought on behalf of members of various other religious groups. *Id.*

[201] *See* Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014) (RLUIPA); Robertson v. Biby, 647 F. App'x 893 (10th Cir. 2016) (RLUIPA); Williams v. Wilkinson, 645 F. App'x 692 (10th Cir. 2016) (RLUIPA and free exercise); Tennyson v. Carpenter, 558 F. App'x

producing a success rate of 25%. Like the Title VII cases, all of the successful decisions involved "partial" success—*i.e.*, rulings that the plaintiff survived summary judgment or a motion to dismiss. The 6 successful decisions involved 5 RLUIPA claims, 3 free exercise claims, and 1 equal protection claim. (There are more successful claims than decisions, because some successful decisions involved multiple successful claims.)

The 25% success rate for prisoner decisions is surprisingly high. It is more than half the success rate of non-prisoner and non-asylum decisions (42%), and it approaches the success rate in those cases when the contraception mandate decisions are excluded (32%). This is especially surprising given that 87% of prisoner decisions involved pro se plaintiffs (including 5 of 6 successful decisions), compared with only 10% of non-prisoner and non-asylum decisions.

But two factors should temper this surprise. First, none of the 6 successful decisions involved complete success; they were merely rulings that the plaintiff survived summary judgment or a motion to dismiss. Second, 37 of the 39 prisoner decisions came from the Tenth Circuit, while only 2 came from district courts.[202] That is because our data set excludes unreported district court decisions, and district courts almost always resolve pro se prisoner cases via unreported decisions. Thus, our data set excludes a substantial number of unsuccessful prisoner decisions, which would significantly reduce the success rate. That said, an interesting line of future research would be to develop a data set that enables comparison of the success rates of prisoner claims compared with other types of religious freedom claims. Particularly since the Supreme Court's decision in *Holt*[203]—ruling unanimously in favor of a Muslim prisoner's RLUIPA claim—the success rates in prisoner cases may rise.

Of the 20 asylum decisions, only 1 resulted in even partial success—a remand to the BIA to consider a claim it had failed to address.[204] This is likely due to the high level of deference given to the BIA.[205]

---

813 (10th Cir. 2014) (RLUIPA, free exercise, and equal protection); Marshall v. Wyo. Dep't of Corrections, 592 F. App'x 713 (10th Cir. 2014) (free exercise); McKinley v. Maddox, 493 F. App'x 928 (10th Cir. 2012) (free exercise).

[202] *See* Woodstock v. Shaffer, 169 F. Supp. 3d 1169 (D. Colo. 2016) (claim survived defendant's motion for summary judgment); Pfeil v. Lampert, 11 F. Supp. 3d 1099 (D. Wyo. 2014) (plaintiff's preliminary injunction denied on RLUIPA and free exercise claims).

[203] Holt v. Hobbs, 135 S. Ct. 853, 867 (2015).

[204] Li v. Holder, 607 F. App'x 818, 825 (10th Cir. 2015) (remanding to the BIA to consider claim based on fear of future religious persecution).

[205] *See* Xue v. Lynch, 846 F.3d 1099, 1104 (10th Cir. 2017) (detailing deferential standard of review).

I. Cases Involving a Dissent

Lastly, in addition to considering successful religious liberty claims, we wanted to explore the decisions that were most divisive—namely, those that generated dissent.

Of the 23 Tenth Circuit decisions in non-prisoner non-asylum cases, 5 (22%) involved at least one dissent.[206] This rate of dissent is almost ten times higher than the rate of dissent in Tenth Circuit cases generally (2.4%)[207]—suggesting that religious liberty claims proved to be difficult. However, this number is also affected by the spate of contraception mandate cases, which generated 3 of the 5 dissents.[208] Absent the contraception mandate cases, the rate of dissent was more modest but still quadruple the average—at 10%.

The five decisions involving dissents came in four cases. Three of these we have already discussed: *Felix* (Ten Commandments),[209] *Hobby Lobby* (contraception mandate),[210] and *Little Sisters of the Poor* (contraception mandate).[211] The fourth was *EEOC v. Abercrombie & Fitch Stores, Inc.*, which involved a Title VII employment discrimination claim brought by a Muslim job applicant.[212]

Notably, three of these four cases (*Little Sisters of the Poor*, *Hobby Lobby*, and *Abercrombie*) were eventually heard on the merits by the Supreme Court.[213] All three were resolved in favor of the religious claimant—

---

[206] Felix v. City of Bloomfield, 847 F.3d 1214 (10th Cir. 2017) (dissent from denial of rehearing en banc); EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106 (10th Cir. 2013); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (en banc); Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151 (10th Cir. 2015) (panel decision); Little Sisters of the Poor Home for the Aged v. Burwell, 799 F.3d 1315 (10th Cir. 2015) (dissent from denial of rehearing en banc).

[207] To calculate this rate, we first searched all Tenth Circuit decisions for adv: DA(aft 02-24-2012 & bef 02-25-2017), yielding 6,131 cases. We then searched all Tenth Circuit decisions for adv: DA(aft 02-24-2012 & bef 02-25-2017) & DIS(dissent!), yielding 148 cases. 148/6,131=0.024 or 2.4%.

[208] *See Hobby Lobby*, 723 F.3d 1114 (en banc); *Little Sisters of the Poor*, 794 F.3d 1151 (panel decision); *Little Sisters of the Poor*, 799 F.3d 1315 (dissent from denial of rehearing en banc).

[209] *Felix*, 847 F.3d 1214 (dissent from denial of rehearing en banc).

[210] *Hobby Lobby*, 723 F.3d 1114 (en banc).

[211] *Little Sisters of the Poor*, 794 F.3d 1151 (panel decision); *Little Sisters of the Poor*, 799 F.3d 1315 (dissent from denial of rehearing en banc).

[212] 731 F.3d 1106 (10th Cir. 2013).

[213] Zubik v. Burwell, 136 S. Ct. 1557 (2016) (Little Sisters of the Poor); Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014); EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015).

with the Tenth Circuit's ruling in *Hobby Lobby* affirmed, its ruling in *Abercrombie* reversed, and its ruling in *Little Sisters of the Poor* vacated.

Ultimately, despite the small sample size, these results suggest that religious liberty cases tend to present some of the more difficult and divisive issues confronting the federal courts.

CONCLUSION

It is no secret that religious liberty can be a divisive issue. Precisely because of that, discussions about the issue should be informed by concrete data. Although it can be tempting to build a narrative about religious liberty based on a small number of high profile cases—such as *Hobby Lobby* and *Little Sisters of the Poor*—those cases are not the whole story. The whole story is more complex—and more interesting. It is a story of prisoners and asylum seekers, employees and Ten Commandments monuments, Muslims and nonbelievers. It is a story of a relatively small number of cases, brought predominantly on behalf of non-Christian religious minorities, meeting limited success.

Our empirical study raises a number of interesting questions. For example, why are there so few cases? Is it because our society already does a good job of protecting religious liberty? Or is it because certain types of religious claims are so difficult to win? Similarly, why are non-Christian religious minorities bringing a disproportionate share of cases? Are they more likely to sue? Or are they more likely to suffer a violation of their religious liberty? And finally, what caused the anomalous spate of cases challenging the contraception mandate? Was it a new kind of litigiousness by Christians? Or was it a new kind of overreach by the federal government?

Our study does not answer these questions. But it does place them in a more informed context. It suggests that *Hobby Lobby*, while important, was not a turning point in religious liberty litigation. It has not prompted a flood of new litigation by Christians or for-profit corporations. If anything, its main effect has been to provide more protection for religious minorities like the Native Americans who won the right to use eagle feathers in *McAllen*, or the Muslim prisoner who won the right to grow a beard in *Holt*. These religious minorities were the main religious liberty claimants before *Hobby Lobby*, and they remain the main religious liberty claimants afterwards. Ironically, then, the main beneficiaries of the win for Christian claimants in *Hobby Lobby* may be non-Christian religious minorities.