Finding an End to Federally Sanctioned Discrimination: A Call to Rescind the 2007 OLC World Vision Memo

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FINDING AN END TO FEDERALLY SANCTIONED DISCRIMINATION:

A CALL TO RESCIND THE 2007 OLC WORLD VISION MEMO

ROBIN MARIL AND SARAH WARBELOW*

HUMAN RIGHTS CAMPAIGN

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I. INTRODUCTION

A series of high profile decisions by the Supreme Court of the United States, including *Burwell v. Hobby Lobby*¹ and *Obergefell v. Hodges*,² have highlighted the potential reach and impact of religious exemptions from generally applicable laws including the Affordable Care Act and nondiscrimination provisions protecting lesbian, gay, bisexual, and transgender (LGBT) people. The recent debate and controversy surrounding religious exemptions has extended well beyond these landmark Supreme Court cases. It has reverberated through state legislatures and governments and has struck a chord with individual citizens and business owners as the nation struggles to reconcile two core American values—religious liberty and individual civil rights.³ Although recent judicial action has brought this intersection into the homes of many Americans for the first time, the quest to balance these potentially competing rights is not new. The federal government has long been tasked with translating judicial decisions and aspirational values into practical policies. Although these administrative actions rarely garner the same

3. See, e.g., Religious Freedom and Restoration Act of 2015, IND. CODE ANN. § 34-13-9-8 (West 2015) (providing the Indiana state government may not substantially burden a sincerely held religious belief unless there is a compelling government interest and the action is the least restrictive means in achieving that interest); see also Elane Photography, LLC v. Willock, 309 P.3d 53, 77 (N.M. 2013) (holding a photography company discriminated against a customer on the basis of sexual orientation in violation of the New Mexico Human Rights Act when it refused to photograph a same-sex commitment ceremony); see also ABC News, *RFRA: Michigan Business Wouldn't Cater a Gay Wedding*, ABC News (Apr. 1, 2015, 7:37 AM) (reporting a local Indiana pizza shop, if asked, would refuse to cater a same-sex wedding because it conflicted with their religious beliefs).
attention or ire as judicial action, the consequences of misconception federal policies have sweeping repercussions on society at large.

In June 2007, the Department of Justice’s Office of Legal Counsel (OLC) published a memorandum ("the OLC memo") addressing the prohibition of discrimination on the grounds of an individual employee’s religion in the Juvenile Justice and Delinquency Prevention Act of 2002 (JJDPA). The OLC issued this memorandum in response to a claim by a religiously-affiliated aid organization that the Religious Freedom Restoration Act of 1993 (RFRA) should exempt the organization from complying with the general nondiscrimination provision in the JJDPA. In its memorandum, the OLC addressed the prohibition of discrimination on the grounds of an individual employee’s religion in the JJDPA. In writing this memo, the Justice Department heavily relied on the 2006 Supreme Court decision, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal. Applying a narrow and highly deferential interpretation of O Centro, the Justice Department built the foundation of the OLC memo on untested ground. Almost a decade later, the legal understanding regarding RFRA and the development of precedent interpreting O Centro has changed dramatically. The Justice Department’s overly expansive interpretation of RFRA fails to balance the potential burden on religious employers with the government’s compelling interest to prevent discrimination, particularly by federally funded employers. By failing to fully address the compelling government interest, the OLC memo continues to offer religious organizations a blank check to discriminate against prospective employees on the basis of religion without judicial or statutory support.

Although the OLC memo was drafted in response to a discrete inquiry, the federal government has applied this memo broadly as binding policy to other federal grant programs. Specifically, in 2014, the Justice Department issued guidance implementing the Violence Against Women Reauthorization Act of 2013 (VAWA), addressing the nondiscrimination


6. See OLC Memo, supra note 4, at 1.

provisions of the Act to religiously affiliated grantees.\textsuperscript{8} The Department’s guidance directly referenced the OLC memo, providing that religious organizations receiving federal VAWA funding could “prefer co-religionists for employees in programs by covered grants.”\textsuperscript{9} This guidance follows the reasoning of the OLC memo and requires religious organizations to meet certain, subjective criteria including that the organization determines that the nondiscrimination provision would substantially burden its religion.

This article addresses concerns with a 2007 Department of Justice legal interpretation regarding the reach of a statutory nondiscrimination provision in the context of faith-based organizations that receive federal funds. It argues that the Justice Department not only failed to appropriately apply 2007 legal standards to the memo, but that the law has evolved even further from the Department’s reasoning. As a result, we urge the Department to formally rescind this memo and to refrain from continuing to apply this policy going forward.

Part II addresses the passage of RFRA, and traces the development of the “compelling government interest” test under the statute and its role in determining whether government action is appropriate. Part III provides an overview of the OLC memo. Further, Part III analyzes the OLC memo’s application of the RFRA balancing test in context of \textit{O Centro}. Part IV argues that, given the recent developments in case law concerning \textit{O Centro} and \textit{Hobby Lobby v. Burwell}, the Justice Department should formally rescind the OLC memo.

II. RFRA: BACKGROUND, PASSAGE, AND ITS RELATIONSHIP TO CIVIL RIGHTS

\textit{A. Birth of the “Religious Freedom Restoration Act”}

In \textit{Employment Division, Department of Human Resources of Oregon v. Smith},\textsuperscript{10} Respondents Alfred Smith and Galen Black, practitioners of a Native American faith, were terminated from their employment as a result of their sacramental use of peyote.\textsuperscript{11} Upon termination, Respondents were denied unemployment benefits due to the State’s categorization of peyote use as work “misconduct.”\textsuperscript{12} Respondents then brought suit alleging that


\textsuperscript{9} See id. at 4.

\textsuperscript{10} See generally 494 U.S. 872 (1990).

\textsuperscript{11} See id. at 874.

\textsuperscript{12} See id.
the State’s denial of unemployment benefits violated their First Amendment rights to freedom of expression and religion. Finding for the State, the Court held that an individual’s right to free exercise of religion does not supersede the individual’s obligation to comply with “valid and neutral laws of general applicability.”

The decision in *Smith* sent shockwaves throughout Congress. Both Democrats and Republicans condemned the Court’s holding, claiming it departed from controlling free exercise law. Public outcry following the *Smith* decision culminated into the passage of the Religious Freedom and Restoration Act of 1993 (RFRA), a law designed to codify the strict scrutiny test, in particular the “compelling interest” prong, for cases involving the free exercise clause as established by the Court in *Sherbert v. Verner*.

Similar to the facts of *Smith* but with a diametrically opposed holding, *Sherbert* involved a member of the Seventh Day Adventists who was fired from her job because she was unable to work on Saturdays for religious reasons. When she sought unemployment benefits, the South Carolina Employment Security Commission denied her application because the Commission viewed her religious reason for declining work, that Saturday was her Sabbath day, as unjustified. The Court rejected the notion that a “showing merely of a rational relationship to some colorable state interest would suffice” and instead adopted a compelling government interest requirement for actions that result in a “substantial infringement of religious liberties.” Thus, the Court found in Sherbert’s favor because South Carolina’s stated interest in preventing fraudulent claims was not backed by evidence; the state did not show that such a problem would be created if it accommodated an alternate Sabbath day.

Believing that *Smith* should have been decided along the same lines as *Sherbert*, Congressman Stephen Solarz introduced the first version of the Religious Freedom and Restoration Act of 1993 (RFRA) only months after the Court released its decision in *Smith*. The 1993 version that would

13. See id.
14. See id. at 879.
16. See id. at 399.
17. Id. at 401.
18. Id. at 406.
19. Id. at 407.
20. Id. at 408-409.
become law was introduced concurrently by then Congressman Charles Schumer in the House of Representatives and Senator Edward Kennedy in the Senate with near universal support.\textsuperscript{22} Garnering endorsements from major religious and civil liberty organizations\textsuperscript{23} and President Clinton,\textsuperscript{24} the bill passed on a voice vote in the House and with only three dissenters in the Senate.\textsuperscript{25}

RFRA prohibits the federal government from “substantially burden[ing]” a person’s religious exercise unless doing so is the least restrictive means of furthering a compelling governmental interest.\textsuperscript{26} Mirroring the balancing test the Court established in Sherbert, the law creates a uniform standard for evaluating all claims of government interference into religious exercise. However, it is a one-size-fits-all test that does not adequately reflect the nuance applied to free exercise jurisprudence between Sherbert and Smith.

\textbf{B. Free Exercise Clause Jurisprudence}

The 1940s marked the modern era of free exercise clause jurisprudence in which the Court recognized that the First Amendment guarantees protection for at least some religiously motivated actions.\textsuperscript{27} \textit{Cantwell v. New Haven} (1942).\textsuperscript{28}
Connecticut marked a significant shift away from the steadfast divide between belief and action established in Reynolds v. United States. In rejecting a state law that required individuals to seek a license to solicit religious or charitable donations, the Court determined that “[t]he essential characteristic of these liberties is that, under their shield, many types of life, character, opinion and belief can develop unmolested and unobstructed.” Simultaneously, the Court clarified that there must be limits on actions, for “[c]onduct remains subject to regulation for the protection of society.”

Sherbert and the subsequent Court decision in Wisconsin v. Yoder set the high-water mark for cases giving deference to religious exercise. Between Sherbert (1963) and Smith (1990), the Court heard seventeen cases involving free exercise claims and ultimately rejected thirteen of those claims. Three of the four claims in which the Court affirmed the strict scrutiny standard and found in favor of the plaintiffs were unemployment benefits cases directly on point with Sherbert.

Starting in the mid-1980s, the Court carved out exemptions to the strict scrutiny standard set forth in Sherbert. Deference was routinely given to

(holding the West Virginia Board of Education’s policy compelling students to salute the American flag violated the free exercise clause of the first amendment).

See generally, 310 U.S. 296, 303 (1940) (holding that a state law that required a license to ask for religious and charitable donations was unconstitutional).

See 98 U.S. 145 (1878).

See Cantwell, 310 U.S. at 310.

See id. at 304.


See Frazee, 489 U.S. at 830-31 (finding that a Christian is denied unemployment benefits because he declined a temporary job which would have required him to work on Sundays); see also Hobbie, 480 U.S. at 138 (1987); see also Thomas, 450 U.S. at 710 (finding that a Jehovah’s Witness is denied unemployment benefits when he quits his job because the company begins exclusively manufacturing weapons).
the government's management of its own affairs. The Court was increasingly disinclined to question a wide range of government actions from military and prison regulations to land use claims and application of welfare benefits, though most of the decisions were far from unanimous.\textsuperscript{35} Though not all of the case outcomes would have necessarily changed if strict scrutiny had been applied, the precedent would have been different going into \textit{Smith}.

Rather than being a surprising break from \textit{Sherbert}, \textit{Smith} was the culmination of a trajectory away from a strict scrutiny test for free exercise claims. Troublingly, the trend towards denying free exercise claims involved placing the ease of government regulation above the needs of religious minorities.\textsuperscript{36} With the passage of RFRA, Congress contemplated the effects of the new standard outlined in \textit{Smith} on individuals who are underrepresented in government decision-making and thus more likely to have their religious exercise burdened without careful consideration.

\textit{C. Original Purpose of RFRA}

Too often, legislation and governmental policies are adopted without sufficient consideration for their potential impact on religious minorities. This is largely due to the fact that congressional and legislative bodies are rarely representative of the rich cultural and religious diversity within the communities they represent. For instance, of the current Congressional members, 92 percent are Christian.\textsuperscript{37} The first Muslim was elected to Congress in 2007, the first Hindu in 2012, and the first Buddhist in 2013.\textsuperscript{38} RFRA came to fruition in large part due to concern regarding the lack of protection for the rights of religious minorities. Contemporaneous with the

\textsuperscript{35} See \textit{Lyng}, 485 U.S. at 441, 453 (1988) (5-3 decision) (deference given to government land use plans resulting in destruction of a Native American religious ceremony grounds); see also \textit{O'Lone} v. Estate of Shabazz, 482 U.S. 342, 343, 350-51 (1987) (5-4 decision) (deference given to prison regulations that required Muslim plaintiffs to work jobs that interfered with prayer services); \textit{Bowen}, 476 U.S. at 694, 710-12 (8-1 decision) (deference given to government with regards to welfare program requirement that participants must use a social security number requiring a Native American parent to utilize a number for his daughter in conflict with his religious beliefs); \textit{Goldman} v. \textit{Weinberg}, 475 U.S. at 503, 509-10 (5-4 decision) (deference given to military regulations that inhibited an orthodox Jew serving as a clinical psychologist from wearing a yarmulke).

\textsuperscript{36} See \textit{Lyng}, 485 U.S. at 422; see also \textit{O'Lone}, 482 U.S. at 343; see also \textit{Bowen}, 476 U.S. at 711-12; see also \textit{Goldman}, 475 U.S. at 505.


passage of RFRA, the Senate issued an accompanying report, highlighting that "[s]tate and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths, an explicit fundamental constitutional right." 39

In 1993, the year that RFRA passed, the Senate heard testimony from a wide variety of voices focused on the concern that neutral laws could result in harm to religious minorities. For example, Senator Orrin Hatch expressed trepidation that the Smith decision could result in a Jewish public school student being required to remove his yarmulke. 40 Statements were delivered by a member of the Hmong community as well as a member the Mormon community, 41 and the Baptist Joint Committee for Religious Liberty jointly testified on behalf of the American Jewish Committee. 42 Testimony from Professor Douglas Laycock centered on the experiences of Americans who practice African religions, Catholicism, Mormonism, and Jehovah's Witnesses. 43 Elder Dallin Oaks, a member of the Quorum of the Twelve Apostles of the Church of Jesus Christ of Latter-day Saints, captured the sentiment of the day by explaining that "[b]y their nature, elected officials are unlikely to pass ordinances, statutes or laws that interfere with large, mainstream religions whose adherents possess significant political power at the ballot box. But political power or impact must not be the measure of which religious practices can be forbidden by law." 44

41. Id. at 14–26 (prepared statement by William Nouyi Yang); 30–32 (Dallin H. Oaks, Quorum of the Twelve Apostles, Church of Jesus Christ and Latter-Day Saints, Salt Lake City, Utah).
42. Id. at 41–43 (Oliver S. Thomas, Baptist Joint Committee for Religious Liberty).
43. See id. at 63–65 (finding that although Catholics are generally considered part of the broader fabric of Christianity today, there has been a long history of discrimination against Catholics in the United States). See, e.g., H.R. Res. 1, 43d Cong., 4 Cong. Rec. 5453 (1876) (amending the U.S. Constitution prohibiting federal funds from going to parochial schools, specifically targeting Catholic schools).
III. PUBLICATION OF THE 2007 OLC WORLD VISION MEMO AND O CENTRO DE VEGETAL

After receiving a federal Department of Justice grant to run an outreach program for at-risk youth, World Vision requested an exemption from the general nondiscrimination provision in the Juvenile Justice and Delinquency Prevention Act of 2002 (JJDPA). This nondiscrimination provision provides that:

No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this chapter.45

Unlike Title VII of the Civil Rights Act of 1964,46 which permits religious organizations to limit employment to members of a certain faith or to give preference in hiring to member of the faith, the JJDPA nondiscrimination provision provides no special accommodations for religious organizations.47

World Vision, a faith-based organization, maintained a policy of hiring only Christian staff members and argued that this hiring policy was necessary to continue their charitable mission.48 In response, the Department of Justice Office of Legal Counsel (OLC) published a memo addressing the reach of the JJDPA statutory nondiscrimination provision in the context of faith-based organizations that receive federal funds.49 Specifically, the memo addresses the prohibition of discrimination on the grounds of an individual employee’s religious affiliation pursuant to the JJDPA.50 OLC determined that to require World Vision to hire non-Christian staff would impose a substantial burden on the organization’s right to free exercise of religion and would, therefore, violate RFRA.51 The memo states that prohibiting religious organizations from hiring only coreligionists would “impose a significant burden on their exercise of religion, even as applied to employees in programs that must, by law,

47. See 42 U.S.C. § 3789d(c)(1).
49. See OLC Memo, supra note 4.
50. See id.
51. See id. at 18.
refrain from specifically religious activities.”52 Under the terms of the grant, World Vision was obligated to provide services such as mentoring, job training, and academic tutoring to at-risk youth regardless of their religious affiliation.53

A. The OLC Memo’s Failure to Fully Engage the RFRA Balancing Test

RFRA specifically provides that “governments should not substantially burden religious exercise without compelling justification.”54 Further, RFRA states that, “the compelling interest test set forth in prior federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”55 Although the OLC memo undertakes a lengthy analysis as to whether conditioning receipt of JJDPAn funded grants on compliance with the general nondiscrimination provision would “substantially burden” World Vision’s exercise of religion, the memo neglects to provide an equally robust analysis of the well-established governmental interest in eradicating discrimination in employment and therefore fails to strike the “sensible balance” mandated by RFRA.56 The OLC memo blatantly dismisses the compelling interest test and fails to adequately engage the well-established compelling government interest in ending employment discrimination. Although the Justice Department itself cites case law that clearly places the burden for proving this interest squarely on the shoulders of the government, the federal government in the OLC memo offers a mere three page discussion of this critical analysis.57

The OLC memo relies on the standard of review refined by Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal58—a Supreme Court case that elevated RFRA’s “to the person” standard for determining whether the government has a compelling interest that outweighs a religious burden to the Controlled Substances Act.59 However, the memo fails to adequately apply this standard of review to the World Vision exemption request. Rather, the memo offers only two main points to dismiss the government’s compelling interest: (1) given that many statutes exempt religious organizations from prohibitions on religious discrimination in employment,
including Title VII, enforcing the provision in the JJDPA would not further a compelling government interest; and (2) World Vision’s lack of animus towards non-Christians lessens the government’s compelling interest in enforcing nondiscrimination protections. The Department summarily dismisses the government’s compelling interest to eradicate employment discrimination, and further dismisses the final RFRA analysis as to whether denial of the exemption is the least restrictive means to further the government’s purpose.

B. “Selective” Enforcement is Still Enforcement

Citing the Bush-era Substance Abuse and Mental Health Services Administration (SAMSHA) Charitable Choice regulations, the OLC memo states that Congress’s “selective” application of religious nondiscrimination requirements in the employment context calls into question the government’s compelling interest in enforcing employment nondiscrimination provisions. The OLC memo erroneously construes the adoption of exemptions, specifically in Title VII, as a dismissal of the government’s interest in enforcing these provisions against employers. The OLC memo mischaracterizes the Title VII religious exemptions and wrongly applies them to the JJDPA and other federal grant programs. Although federal district and circuit courts have liberally construed both the Title VII religious exemptions and the scope of the First Amendment’s Free Exercise Clause in favor of religious employers, they are far from the blank check that the OLC memo contends.

60. See OLC Memo, supra note 4.
62. See OLC Memo, supra note 4.
63. Id.
65. See OLC Memo, supra note 4. The ministerial exception, grounded in the Religious Clauses under the First Amendment, grants religious institutions control over employment practices without fear of court intrusion. See also 42 U.S.C. § 2000e-1 (2014); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012). This exception precludes application of employment nondiscrimination laws, such as Title VII, when an employee’s role is religious in nature. This constitutional exemption differs from Section 702 of Title VII, the statute’s co-religionist exemption that allows for religious institutions, as employers, to prefer co-religionists.
More broadly, the exemptions cited by the OLC memorandum do not swallow the rule. The government maintains a strong compelling interest in ending discrimination in employment. While these exemptions recognize that, in some instances, religious employers should be allowed to discriminate on the basis of religion in hiring, they do not moot entire provisions. Based on the strong case law supporting this compelling government interest, the OLC memorandum’s argument that the government has no interest in ending discrimination by religious employers is disingenuous at best. Although the O Centro Court asserts a similar impact of statutory exemptions on determinations of compelling interest, subsequent cases, including Burwell v. Hobby Lobby, do not adopt this assumption.  

C. Lack of Animus is Inconsequential in Determining a Substantial Burden or a Compelling Interest

The OLC memo asserts that World Vision’s lack of animus and lengthy history of hiring only co-religionists makes its request for an exemption less harmful to non-Christians or neutralizes the government’s interest in preventing such discrimination. The memo goes on to provide that if a religious employer requested an exemption based on animus, then the government may have a compelling interest in enforcing the exemption. Unlike the rest of the opinion, this section lacks citation or case law support. The mindset or drive behind discriminatory behavior is not taken into account when enforcing federal nondiscrimination provisions. The impact of these exemptions on the parties discriminated against is the same—regardless of motive. Therefore, the discussion of animus to dismiss a compelling government interest is both unsupported and historically ignorant.

D. Misapplication of O Centro to World Vision’s Exemption Request

The Justice Department bolsters its blanket dismissal of the government’s compelling interest in enforcing the nondiscrimination provision in the JJDPA by broadly interpreting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal. The Court in O Centro determined that a general interest in preventing drug abuse was not enough to justify denial of an exemption from the Controlled Substances Act for sacramental consumption of hoasca—a Schedule I hallucinogen. The Justice

67. See OLC Memo, supra note 4.
68. See id.
69. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S.
Department cites the *O Centro* Court’s conclusion stating, “RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” In granting the World Vision exemption, the Justice Department engaged in a near myopic reliance on the *O Centro* decision. However, at the time the OLC memo was published, *O Centro* had not been cited by any other court—giving the Justice Department unprecedented flexibility in its application.

The *O Centro* test requires a very fact-specific analysis of the complainant and the government action. However, World Vision’s request and the impact of its exemption are very distinct from the fact pattern in *O Centro* and subsequent cases discussed below. It is clear that, despite the Justice Department’s confident reliance on this case, the OLC memo fails to adequately apply the focused strict scrutiny test it requires. Applying the “to the person” standard to the church in *O Centro*, the Supreme Court determined that preventing access to hoasca to the 130-member church did not further the government’s compelling interest to stop the war on drugs. In *O Centro*, the exemption was from compliance with a law that had broad public health and safety ramifications. There was no clear third party—beyond the general public—that would be harmed or impacted by granting an exemption. World Vision’s request to be exempt from a general nondiscrimination provision as a grantee is far from analogous to this case.

Unlike the Controlled Substances Act at question in *O Centro*, the nondiscrimination provision in the JJDPA is designed to explicitly protect the rights of individuals from real, immediate harm. Unlike the 130-person church in *O Centro*, World Vision is an organization that receives millions of dollars in federal funding and has a budget of almost $1 billion annually. In 2012 alone, World Vision employed over 1,300 workers and


70. See OLC Memo, supra note 4 (quoting *O Centro*, 546 U.S. at 429-30) (citing 42 U.S.C. § 20001(b)).

71. See Gonzales, 546 U.S. at 431 (O’Connor, J., concurring in judgment) (stating that strict scrutiny “at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim”).

72. See id. at 438.

73. See id.

87,923 volunteers.\textsuperscript{75} The 2007 exemption deprives each of these employees of their civil rights protections under federal law and will continue to impact thousands of future employees. Unlike the use of sacramental hoasca by a small church population, the burden, the exemption, and the impact of the OLC memo are not discrete. Therefore, a genuine application of the "to the person" standard to World Vision's request should ultimately result in the denial of an exemption.

While \textit{O Centro} requires the government to prove a compelling interest beyond promoting uniformity or a categorical good, Chief Justice Roberts does not dismiss the notion that the categorical standard could still be used in some cases.\textsuperscript{76} He writes that, "there may be instances where a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA."\textsuperscript{77} Although the "to the person" standard should apply to World Vision, we also argue that the World Vision case—and nondiscrimination provisions binding federal grantees generally—should fall under the category of instances where the need for uniformity requires generally applicable laws to be enforced in spite of RFRA. The impact of exemptions from federal nondiscrimination protections goes beyond the complainant and impacts the very populations Congress intended to protect. Given the scope of these laws, and the potential far-reaching harm of the exemptions, the government maintains a compelling interest in eradicating employment discrimination by federal grantees despite the burden it may place on a grantee's religious exercise.

IV. A REVIEW OF \textit{O CENTRO} A DECADE LATER AND THE IMPACT OF \textit{BURWELL v. HOBBY LOBBY}

When decided in 2006, \textit{O Centro} had the potential to be a forceful change agent, reinforcing the promised vigor of RFRA. This potential was undoubtedly reflected by the Bush administration's interpretation and application to the World Vision exemption request. However, over the past decade, the \textit{O Centro} potential for providing additional plaintiff protection has fallen far short of this expectation. The Court's strong plaintiff decision in \textit{O Centro} has become an anomalous outlier in RFRA case law, and as a result, so has the reasoning behind the OLC memo. The 2014 decision in \textit{Burwell v. Hobby Lobby} provided a similarly aggressive restatement supporting RFRA implementation, but in practice, scholars speculate that the impact of the decision, particularly on nondiscrimination

\textsuperscript{75} See id.
\textsuperscript{76} See Gonzales, 546 U.S. at 421.
\textsuperscript{77} See id.
provisions, will be similarly weak.78

A. O Centro at 10

The Court in O Centro provided a strong pro-religious liberty interpretation of RFRA, finding that the need for uniformity does not amount to a compelling interest, but rather, the government must meet the "to the person" standard.79 The Court also determined that the existence of other exemptions within the statutory regime in question undermines any government argument of a compelling interest.80 Echoes of both of these points reverberate in the OLC memo as previously discussed. However, such staunch reliance on a nascent and untested standard has proven to be a fatal flaw in the OLC memo. To put it bluntly, it has not aged well. As has been the case in the recent history of RFRA case law development, lower courts have been timid to apply the new, vigorously pro-plaintiff O Centro decision.81 As a result, over the past decade case law has shifted progressively further and further from the strong reformative call to plaintiff protection established in O Centro.

Appeals courts have clung to a pre-O Centro standard of review, refusing to apply an altered methodology for weighing compelling interest following that decision.82 For the purposes of this Article, we will focus most acutely on decisions in which courts have retained the categorical approach to weighing compelling government interest dismissed by the O Centro Court. For example, in United States v. Vasquez-Ramos, the Second Circuit concluded that a religious objector did not have a valid RFRA claim to avoid paying a portion of taxes to the U.S. Department of Defense.83 The court relied on pre-O Centro case law concluding that "voluntary compliance is the least restrictive means by which the Internal Revenue Service (IRS) furthers the compelling governmental interest in uniform, mandatory participation in the federal income tax system."84 In another case, the Ninth Circuit denied a plaintiff's reliance on the O Centro standard outright, providing that, although "defendants argue that the Supreme Court's decision in [O Centro] constitutes a significant shift in the

78. See, e.g., Lupu, supra note 66, at 64.
80. See id. at 433.
81. See, e.g., Olsen v. Mukasey, 541 F.3d 827, 832-33 (8th Cir. 2008); United States v. Vasquez-Ramos, 531 F.3d 987, 990-91 (9th Cir. 2008); Jenkins v. Comm'r of Internal Revenue, 483 F.3d 90, 92 (2d Cir. 2007).
82. See, e.g., Mukasey, 541 F.3d at 832-33; Vasquez-Ramos, 531 F.3d at 990-91; Jenkins, 483 F.3d at 92.
83. See Vasquez-Ramos, 531 F.3d at 992.
84. See Browne v. United States, 176 F.3d 25, 26 (2d Cir. 1999).
legal terrain surrounding the appropriate application of . . . RFRA . . . [the court] disagree[s].”

In fact, only four plaintiffs raising RFRA claims outside of the prison context have been successful. These cases are easily distinguishable from the World Vision claim, including a case with a significantly similar factual claim to the Church in O Centro and a second case in which the government lacked evidence to support its restriction. Most recently, in the prison case Holt v. Hobbs, the Supreme Court determined that a federal inmate should be allowed to keep a beard longer than the traditional protocol for religious reasons. The Court determined that in this instance a single prisoner should not bear the brunt of the compelling government interest to keep contraband out of prisons nationwide. The Court concluded that removal of the beard was far from the least restrictive means available to further the government’s interest, suggesting that available alternatives could include combing or routine examination by guards. While these five cases are deferential to the O Centro decision and apply a faithful implementation of the standards it represents, as Professor Ira C. Lupu aptly concluded in 2015, the majority of courts analyzing RFRA claims prior to Burwell v. Hobby Lobby have decided in favor of the government, dismissing the O Centro decision’s purported shift nearly completely.

B. Burwell v. Hobby Lobby and Religious Exemptions from Nondiscrimination Provisions

Many articles preceding this piece have provided extensive analysis and dissection of Hobby Lobby and its dangerous impact on access to contraceptives and reproductive health care. This Article refrains from directly addressing questions as to the strength or accuracy of the Hobby Lobby decision, —and instead focuses on the impact of the decision on the 2007 World Vision memo and more broadly places it in context of nondiscrimination provisions.

85. See Vasquez-Ramos, 531 F.3d at 992.
87. See Church of the Holy Light of the Queen v. Holder, 443 Fed. Appx. 302 (9th Cir. 2011).
89. 135 S. Ct. 853 (2015).
90. See id. at 862.
91. See id. at 864.
92. See id.
93. See Lupu, supra note 66, at 64-65.
In *Hobby Lobby*, the Supreme Court considered whether the U.S. Department of Health and Human Services’ (HHS) contraceptive mandate substantially burdened the sincerely held religious beliefs of a for-profit corporation, Hobby Lobby, Inc.\(^{94}\) To answer this question, the Court first determined that a "person" under RFRA includes for-profit corporations. Thus, its protections would be afforded to Hobby Lobby, Inc.\(^{95}\) The Court ultimately held that the HHS contraceptive mandate, requiring that an employer’s group health insurance provide employees with insurance that covers various methods of contraception, substantially burdened Hobby Lobby’s sincerely held religious beliefs.\(^{96}\)

As discussed above, traditional RFRA analysis requires the reviewing court to consider whether the provision at issue both (1) furthers a compelling state interest, and (2) is the least restrictive means for furthering that compelling state interest.\(^{97}\) The *Hobby Lobby* Court briefly addressed whether the interests provided by HHS (i.e., “public health” and “gender equality”) were sufficient under the “to the person” standard articulated in *O Centro*.\(^{98}\) However, the *Hobby Lobby* Court, while raising significant questions as to the government’s compelling interest, refrained from providing a full analysis and instead assumed that the mandate was founded on a compelling government interest.\(^{99}\) The Court did so despite its own claim that the given interests failed to meet the *O Centro* standard as well as Hobby Lobby’s position that HHS’s interest, under the Affordable Care Act, does meet the first prong of RFRA.\(^{100}\) Justice Alito, writing for the majority, concluded that the Court would “assume that the interest in guaranteeing cost-free methods is compelling within the meaning of RFRA, and [would] proceed to consider the final prong of the RFRA test . . ."\(^{101}\) The Court then concluded that the government, while having an interest in ensuring access to contraceptives for women, could employ a coverage option that would be less restrictive on an employer’s religion.\(^{102}\) The Court further concluded that the government itself could provide universal contraceptive coverage to every woman whose employer denies

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95. See id. at 2768-69 (citing Gonzales as an example of RFRA protections extending to non-profit organizations).
96. See id. at 2775-76.
97. See id. at 2779.
98. See id.
99. See id. at 2780.
100. See id.
101. See id.
102. See id. at 2781-83.
her coverage claiming a religious exemption.\textsuperscript{103} However politically impractical this "solution" might have been—including the current absence of any such policy—it provided the Justices with a practical cover to uphold the \textit{Hobby Lobby} decision on RFRA claims while retaining the government's compelling interest in promoting women's health care.

Going forward, the impact of this decision on women's access to contraception and full healthcare coverage will undoubtedly be dramatic and long lasting. However, the reach of this decision beyond contraception, specifically into the realm of nondiscrimination provisions, is far less clear and, we argue, less damaging. The \textit{Hobby Lobby} Court found in favor of the plaintiff based on this least-restrictive-means prong, concluding that alternatives existed to further a compelling governmental interest.\textsuperscript{104} In the context of nondiscrimination provisions, no such alternative exists—even one as politically impractical as government-provided universal contraceptive coverage. In fact, Justice Alito specifically limits the reach of \textit{Hobby Lobby} to nondiscrimination provisions, dismissing Justice Ginsburg's dissent, which raises the specter of invidious discrimination in hiring that is "cloaked as religious practice to escape legal sanction."\textsuperscript{105} Justice Alito concluded that "[the Court's] decision . . . provides no such shield. The Government has a compelling interest in providing equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."\textsuperscript{106} While some have argued that Justice Alito's remark cannot be used beyond race, we note that Justice Alito used the words "for example"—language that does not foreclose transferring this standard to other protected groups, including those who are LGBT.

The government has a longstanding and well-established interest in eradicating invidious discrimination. Evidence of this interest has been bolstered over the past decade by recent federal marriage equality decisions both at the Supreme Court and multiple federal district and circuit level courts.\textsuperscript{107} The adoption of state-level nondiscrimination laws across the nation in states traditionally reticent to extend protections to LGBT people,

\textsuperscript{103} See id.

\textsuperscript{104} See id. at 2782.

\textsuperscript{105} See id. at 2782-83.

\textsuperscript{106} See id. at 2782.

including Utah\textsuperscript{108} and Nevada,\textsuperscript{109} illustrate not only the growing acceptance of LGBT people, but a shared belief in the government's role to prohibit discrimination against individuals on the basis of sexual orientation and gender identity by private businesses and landlords.

The Obama administration has also taken many affirmative steps towards ending harmful discrimination with federal funds. Executive Order 11,246, signed by President Obama on July 21, 2014, prohibits discrimination on the basis of sexual orientation and gender identity in employment by any federal contractor governed by the Office of Federal Contract Compliance Programs (OFCCP).\textsuperscript{110} Significantly, despite incredible pressure from religious groups to expand the existing religious exemption, the Executive Order was left unchanged.\textsuperscript{111} This section is identical to the religious exemption found in Title VII of the Civil Rights Act of 1964, arguably retaining only limited exemption for religious employers.

A RFRA claimant challenging a nondiscrimination provision protecting LGBT people would have to prove that serving, hiring, or housing an LGBT person or family substantially burdens their religion. Arguably, in many cases, this proof could be achieved. However, the progress of such a

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\textsuperscript{108} See Utah Code Ann. § 34A-5-106 (2015). This law is imperfect. As it merely adds sexual orientation and gender identity to the list of existing protected characteristics under Utah law, it does not include protections for public accommodations. \textit{Id.} It also includes broad religious exemptions for all protected characteristics that predated the 2015 revisions. \textit{Id.}


\textsuperscript{110} See Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (2014) (amending "[e]xecutive Order 11478. The first sentence of section 1 of Executive Order 11478 of August 8, 1969, as amended, is revised by substituting "sexual orientation, gender identity" for "sexual orientation Executive Order 11,246, issued by President Lyndon B. Johnson, (adding sexual orientation and gender identity to the list of protected categories in the existing Executive Order covering federal contractors.")."

\textsuperscript{111} Exec. Order, 11,246, 30 Fed. Reg. 12,319 § 204(c) (1965), reprinted in 42 U.S.C. § 2000e app., at 10,294 (1970); see 41 C.F.R. § 60-1.5(a)(5) (implementing that "[s]ection 202 of Executive Order 11,246, as amended, shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order").
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claim ends here. Given the clear and compelling interest in ending discrimination that has continued to develop since publication of the OLC memo, a RFRA claimant challenging such a provision would have to show that these laws are not the least restrictive means for furthering this government interest. In Hobby Lobby, Justice Alito concluded that the harm to women was not inevitable if the government steps in.\textsuperscript{112} It was not, in short, a zero-sum game. Nondiscrimination provisions are. Regardless of the burden imposed, if the interests are compelling, RFRA only requires the government to show that the law in question is the least restrictive means to promote said interest. Therefore the government is left with no other means to end discrimination against LGBT people, other than prohibiting discrimination against LGBT people. To decide otherwise shifts the burden from the RFRA claimant directly to the vulnerable population, whom these laws were designed to protect, thereby leaving them with no alternative or recourse.

\textit{C. What Does this Mean for the OLC Memo?}

Viewing the OLC Memo through a modern lens of both the \textit{Hobby Lobby} decision and post-\textit{O Centro} case law development, it is clear that the Justice Department’s argument, which was questionable in 2007, is now squarely on the wrong side of today’s legal interpretation of religious liberty and exemption requests. Just as \textit{O Centro} failed to increase religious liberty protections in 2006, scholars predict that \textit{Hobby Lobby} will become similarly ineffectual and anomalous except in cases that bear dramatic factual similarities.\textsuperscript{113}

The fact pattern underlying World Vision’s exemption request is undoubtedly distinguishable from both \textit{O Centro} and \textit{Hobby},\textsuperscript{114} where the exemptions granted were from laws aimed at preventing broad, perhaps even theoretical harms—drug trafficking and access to contraband in prisons. Applying the “to the person” test to the church in \textit{O Centro} or the prisoner in \textit{Hobby} protects a small pool of individuals’ rights from being restricted for a broad, categorically general good. In both of these applications of the standard, the exemption was from a law with broad public health or safety ramifications.\textsuperscript{115} Granting the exemption in either of these cases does not harm or impact a clear third party. World Vision’s desire to discriminate on the basis of religion is not analogous to the

\textsuperscript{112} See Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2782-83 (2014).
\textsuperscript{113} See Lupu, supra note 66, at 101.
\textsuperscript{115} See Holt, 135 S. Ct. at 859–61.
individual grooming requirements of an inmate, or the need to access sacramental drugs of a small congregation. The impact of World Vision’s request for an exemption is far greater than these narrow examples and should be distinguished from both. Applying the “to the person” standard required by *O Centro*, we argue that the government retains a compelling interest in ending incidents of employment discrimination by World Vision and, given the absence of other alternative means to further this purpose, the exemption should be denied. Nondiscrimination provisions like those found in the JJDPA are, in fact, the least restrictive means of achieving a longstanding and compelling government interest.116

Meanwhile, the *Hobby Lobby* decision further undermines the Department of Justice’s 2007 conclusion that the government lacks a compelling interest to prohibit religious discrimination by grantees.117 As referenced above, the OLC memo dismisses a compelling government interest in prohibiting discrimination by citing so-called selective enforcement of nondiscrimination provisions, as well as the weakness of a uniformity argument.118 However, despite ample opportunity in *Hobby Lobby* to undermine the ACA on these grounds, the Court declines to cite *O Centro* in connection with these standards, concluding that despite some similarities with the *O Centro* case, the government maintains its compelling interest.119 Finally, the standard set by *Hobby Lobby*, while available to RFRA claimants with factually similar claims, cannot be used to support religious liberty claims against nondiscrimination provisions like those made by World Vision in 2007. The interests are compelling, and as elucidated by the Roberts Court, denial of such exemptions is the only means by which to achieve them.120

V. CONCLUSION

When published in 2007, the OLC’s response to World Vision’s exemption request employed an unprecedentedly broad interpretation of RFRA, relying almost exclusively on a Supreme Court case that was decided only fourteen months earlier.121 While in June 2007 the

117. See *Hobby Lobby*, 134 S. Ct. at 2783.
118. See OLC Memo, supra note 4, at 19.
120. See id. at 2783.
121. See OLC Memo, supra note 4, at 8, 17 (citing *O Centro*, 546 U.S. at 426–32).
Department of Justice could argue that the *O Centro* case signaled a strikingly pro-plaintiff shift in religious liberties jurisprudence, today’s Justice Department can make no such claim. Its successors, including *Holt v. Hobbs* and *Hobby Lobby*, do not support the Justice Department’s broad interpretation of RFRA as it applies to nondiscrimination provisions. Ten years later, *O Centro* is a stark outlier in religious liberty jurisprudence, as are the policies that cling to it.