THE *BRAIDWOOD* EXPLOIT: ON THE RFRA DECLARATORY JUDGMENT CLASS ACTION AND TITLE VII EMPLOYER LIABILITY

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ABSTRACT

This Article identifies a distinctive legal strategy for using the Religious Freedom Restoration Act ("RFRA") to obtain an exemption for for-profit businesses to Title VII liability for their religiously motivated discrimination against gay and transgender employees and job applicants. The litigation strategy involves a declaratory judgment class action against the Equal Employment Opportunity Commission under RFRA. We primarily show how this strategy tries to exploit a key ambiguity in the compelling interest inquiry in RFRA and pre-1990 Free Exercise Clause doctrine, i.e., how to specify the size of the set of persons other than the RFRA claimant who would likely qualify for the exemption that the RFRA claimant wants if the RFRA claimant prevails—what we call the "putative RFRA exempted set." We also show how well this litigation strategy may extend to exempt religiously motivated employers from liability under state employment discrimination law. In so doing, this Article contributes to the ongoing debate about the scope of exemptions for religiously motivated businesses.

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INTRODUCTION

Thanks to the Religious Freedom Restoration Act ("RFRA"), courts in the United States must assign, on a case-by-case basis, exemptions to any person for whom the government, in applying federal law, substantially burdens their religiously motivated conduct, unless the government passes a "compelling interest"-"least restrictive means" test for justifying that burden. For the compelling interest inquiry, judges often consider who *else* would likely qualify for the exemption that the RFRA claimant seeks if the RFRA claimant prevails—what we call the "putative RFRA exempted set." As this set increases in size, so does the expected cost of that exemption on those who would otherwise benefit from the challenged federal law. In RFRA litigation and in the pre-1990 Free Exercise Clause doctrine that RFRA sought to restore, however, it is often unclear what a judge should take as the size of this putative RFRA exempted set.

This Article identifies one lawsuit's distinctive legal strategy for exploiting this ambiguity in RFRA litigation to defeat the employer Title VII liability that the Supreme Court of the United States recognized in *Bostock v. Clayton County*.[1] After *Bostock*, Title VII of the Civil Rights of Act of 1964's ban on employer "sex" discrimination protects gay and transgender employees and job applicants. But the *Bostock* Court majority noted in passing that because RFRA "displac[es] the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."[2] The Court did not clarify what kinds of cases counted as "appropriate" for exempting employers otherwise subject to Title VII liability.

This Article identifies the strategy behind a lawsuit spearheaded by conservative Christian activists and nominally brought by a church and some for-profit businesses. The lawsuit was a declaratory judgment class action lawsuit against the Equal Employment Opportunity Commission ("EEOC"), the government agency charged as Title VII's primary enforcer.[3] The lawsuit aimed to get the court to declare a RFRA defense from any Title VII lawsuit brought by the EEOC against any employer in the U.S. who religiously opposes gay and transgender employees (the certified

1. 140 S. Ct. 1731 (2020).

2. *Id.* at 1754.

3. Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 585 (N.D. Tex. 2021), *aff'd in part, rev'd in part sub nom.* Braidwood Mgmt. v. EEOC, 70 F. 4th 914 (5th Cir. 2023).

class).[4] If a RFRA defense applies to Title VII lawsuits with only private parties, as some argue,[5] then this legal strategy could establish a RFRA exemption for all Title VII lawsuits in a single stroke.

This Article shows how this legal strategy—which prevailed in a district court but not on appeal—tried to exploit the ambiguity about the putative RFRA exempted set as applied to Title VII suits, i.e., what a court should take as the set of other sincere religiously motivated employers who would also likely be eligible for the kind of exemption the particular RFRA claimant seeks. Put simply, the exploit is this: To defeat the government's compelling interest justification, argue that the putative RFRA exempted set should consist *only* of the for-profit business RFRA claimants that filed the lawsuit. At the same time, have that RFRA claimant represent a Rule 23 class of all business employers in the U.S. opposed to gay and transgender employees for religious reasons. The RFRA claimant's role as class representative is not supposed to affect the merits of its RFRA claim—including the compelling interest issue—because procedural rules like Rule 23 cannot change "any substantive right."[6] But if the RFRA claimant prevails, the *real* RFRA exempted set is not only the RFRA claimant. Rather, it is at least as large as the number of businesses in the certified nationwide class, because if the RFRA claimant prevails, that judgment has binding effect for the parallel RFRA claims of everyone in the class.

In identifying this ambiguity about RFRA and the legal strategy to exploit it, this Article contributes to ongoing debates over the appropriate scope of religious-freedom rights of businesses and

4. *Id.* at 585–86.

5. *See, e.g.*, Shruti Chaganti, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343, 347 (2013); Brief of Christian Legal Soc'y & Am. Bible Soc'y et al. as Amici Curiae Supporting Hobby Lobby and Conestoga Wood et al. at 47–48, Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014) (Nos. 13-354 & 13-356) (counsel of record Douglas Laycock); Brief of Christian Legal Soc'y as Amicus Curiae in Support of Defendants-Appellees at 6, Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931 (7th Cir. 2022) (No. 21-2524) (counsel Thomas Berg); Billard v. Charlotte Cath. High Sch., No. 3:17-CV-00011, 2021 WL 4037431, at *15–22 (W.D.N.C. Sept. 3, 2021) (USDJ Max O. Cogburn Jr.); Brief of Christian Legal Soc'y & Crista Ministries as Amicus Curiae in Support of Defendants-Appellants at 7, Billard v. Charlotte Cath. High Sch., No. 22-1140 (4th Cir., filed Sept. 29, 2022) (counsel Thomas Berg); Hammons v. Univ. of Maryland Med. Sys. Corp., 649 F. Supp. 3d 104, 123–27 (D. Md. 2023) (USDJ Deborah Chasanow).

6. 28 U.S.C. § 2072(b).

other non-human juridical entities in the U.S.[7] It also adds to prior work on RFRA litigation and judicial opinions,[8] including the religious exemption law that employers might use to escape Title VII liability under *Bostock* in particular.[9]

We proceed as follows. Part I describes the background law, the lawsuit's legal strategy, and the district court decision affirming class certification and summary judgment for the plaintiffs in that lawsuit. Part II examines not only why this strategy has an Article III standing problem, but also how it exploits a key ambiguity about the size of the putative RFRA exempted set for purposes of RFRA's compelling interest standard as applied to Title VII suits. Part III identifies the states in which this litigation strategy might plausibly extend to *Bostock*-type liability for employers under state employment discrimination law, i.e., states that have their own version of RFRA either in state statute or because their courts have read their state constitutions to impose a similar legal standard.

I. THE STRATEGY

A. *Legal Background*

Title VII of the Civil Rights Act prohibits employers from discriminating against an employee or job applicant "because of such individual's race, color, religion, sex, or national origin."[10] Title VII exempts liability for religious organizations "with respect to the employment of individuals of a particular religion to perform work connected with" that organization's activities.[11] If an employer qualifies as a religious organization, this exemption is broad,

7. *See, e.g.*, THE RISE OF CORPORATE RELIGIOUS LIBERTY (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

8. *See, e.g.*, Robert R. Martin, *Compelling Interests and Substantial Burdens: The Adjudication of Religious Free Exercise Claims in U.S. State Appellate Courts*, SAGE OPEN, Apr.–June 2019, at 1; Meredith Abrams, *Empirical Analysis of Religious Freedom Restoration Act Cases in the Federal District Courts Since* Hobby Lobby, 4 COLUM. HUM. RTS. L. REV. ONLINE 1 (2019). For cases, see Mary L. Topliff, Annotation, *Validity, Construction, and Application of Religious Freedom Restoration Act, 42 U.S.C.A. §§ 2000bb et. seq.*, 135 A.L.R. Fed. 121 (1996 & Supp. 2023).

9. 2 W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 23:26 (2d ed. 2017 & Supp. 2022); Sachin S. Pandya & Marcia McCormick, *'Sex' and Religion After* Bostock, *in* AM. CONST. SOC'Y SUPREME COURT REV. 2019–2020, 45, 58 (Steven D. Schwinn ed., 4th ed. 2021).

10. 42 U.S.C. § 2000e-2(a)(1)–(2).

11. *Id.* § 2000e-1(a). A similar Title VII exemption applies to religiously affiliated schools. *Id.* § 2000e-2(e)(2).

because Title VII defines "religion" to include "all aspects of religious observance and practice, as well as belief," even if the employee performed only secular activities.[12] Most courts have read this religious-organizations exemption to exclude for-profit businesses.[13]

Until 1990, employers subject to Title VII also had a defense under the Free Exercise Clause of the U.S. Constitution.[14] When the government sued to enforce Title VII, the defendant-employer could defeat liability by proving that Title VII imposed a "substantial" burden on the employer's religiously motivated conduct, and the government could not prove that Title VII, as applied, was narrowly tailored to advance a compelling governmental interest.[15]

For example, when a publishing business fired an employee who had sued it under Title VII for unequally paying women employees, the EEOC sued that business for Title VII retaliation.[16] In response, the business raised a Free Exercise Clause defense: the business was affiliated with the Seventh-Day Adventist Church, and the fired employee had violated "church doctrines which prohibit lawsuits by members against the church."[17] The Ninth Circuit agreed that "there is a substantial impact on the exercise of religious beliefs because EEOC's jurisdiction to prosecute the retaliatory action taken against [the employee] potentially will impose liability on [the employer] for disciplinary actions based on religious doctrine."[18] The court then applied the compelling interest test, explaining that the burden was justified by "the government's compelling interest in assuring equal employment opportunities."[19] If the Free Exercise Clause precluded Title VII retaliation liability here, "[t]he effect would be to withdraw Title VII's protections from

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12. *Id.* § 2000e(j).

13. Darian B. Taylor, Annotation, *Validity, Construction, and Application of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e-1(a), 2000e-2(e)(2)) Exempting Activities of Religious Organizations from Operation of Title VII Equal Employment Opportunity Provisions*, 6 A.L.R. Fed. 3d Art. 6 (2015 & Supp. 2022); *see* 2 DURHAM & SMITH, *supra* note 9, § 15:15–15:16. Title VII also permits any employer, religious organization or not, to discriminate on the basis of religion "in those certain instances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1); 2 DURHAM & SMITH, *supra* note 9, § 15:20.

14. *See* Emp. Div. v. Smith, 494 U.S. 872, 883 (1990).

15. *See id.*

16. EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1275 (9th Cir. 1982).

17. *Id.* at 1280.

18. *Id.*

19. *Id.*

employees at the hundreds of diverse organizations affiliated with the Adventist Church, including businesses which process food, sell insurance, invest in stocks and bonds, and run schools, hospitals, laboratories, rest homes and sanitariums."[20] In other words, because exempting the church-affiliated business in this case would cause any business affiliated with the Adventist Church to be exempt from Title VII liability, it therefore mattered that there were "hundreds" of them.[21]

In *Employment Division v. Smith* (1990), the Supreme Court ruled that the Free Exercise Clause allows generally-applicable laws to burden religious exercise, so long as application of the law was rationally related to a legitimate governmental purpose.[22] In 1993, Congress enacted RFRA with the stated purpose of restoring pre-*Smith* Free Exercise Clause doctrine.[23] Indeed, Congress wrote in RFRA itself that its purpose was "to *restore* the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened."[24]

As amended, RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government proves that applying "the burden to the person" furthers "a compelling governmental interest" and is the "least restrictive means" to further that interest.[25] Any "person" burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government," provided that person satisfies the "general rules of standing under article III of the Constitution."[26] In *Burwell v. Hobby Lobby Stores, Inc.* (2014), the Court read the term "person" in RFRA to include

20. *Id.*

21. *Id.* The district court judge reasoned similarly. EEOC v. Pac. Press Pub'g Ass'n, 482 F. Supp. 1291, 1309 (N.D. Cal. 1979).

22. 494 U.S. 872, 883 (1990).

23. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488; *see also* Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIGION 531 (1993); Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J. F. 416, 428–33 (2016).

24. 42 U.S.C § 2000bb(b)(1) (emphasis added).

25. *Id.* § 2000bb-1(a)–(b).

26. *Id.* § 2000bb-1(c).

at least for-profit "closely held corporations, each owned and controlled by members of a single family."[27]

RFRA expressly "applies to all Federal law, and the implementation of that law, whether statutory or otherwise," regardless of whether such federal law was adopted before or after RFRA's effective date.[28] For federal statutes enacted after RFRA, RFRA declares that such statutes are "subject to this chapter unless such law explicitly excludes such application by reference to this chapter."[29] Title VII, as amended, does not expressly refer to RFRA.[30] Still, in *Hobby Lobby*, the Court, in dicta, assured readers that Title VII would pass strict scrutiny under RFRA, at least for race discrimination claims.[31]

B. *The Lawsuit*

In October 2018, three lawyers filed a declaratory judgment action against the EEOC, its Commissioners, and the U.S. Attorney General on behalf of two named plaintiffs: (1) the U.S. Pastor Council, a Houston-based Texas nonprofit that comprises approximately 1,000 member churches, including six in Fort Worth; and (2) Hotze Health and Wellness Center, a "Christian-owned" Texas corporation with seventy-five employees, founded by Steven F. Hotze, who served as its CEO.[32] The case was filed in the U.S. District Court for the Northern District of Texas, Fort Worth Division and assigned to Judge Reed O'Connor, who had been appointed to that position by President George W. Bush.[33]

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27. 573 U.S. 682, 717 (2014).

28. 42 U.S.C. § 2000bb-3(a).

29. *Id.* § 2000bb-3(b).

30. Several bills to amend RFRA to exclude Title VII claims have not been enacted. *E.g.*, S. 593, 116th Cong. (2019); S. 393, 117th Cong. § 9 (2021); H.R. 1378, 117th Cong. § 3 (2021); H.R. 4023, 117th Cong. § 2 (2021); S. 2752, 117th Cong. § 3 (2021); H.R. 2725, 118th Cong. § 2 (2023); S. 1206, 118th Cong. § 2 (2023).

31. *Hobby Lobby Stores*, 573 U.S. at 733 ("The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.") (citation omitted).

32. Plaintiffs' Class-Action Complaint at para. 4, at 2, paras. 27–28, at 7, Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d. 571 (N.D. Tex. 2021) (No. 4:18-cv-00824-O).

33. Docket Sheet Entry 2 (Oct. 6, 2018), *Bear Creek Bible Church*, 571 F. Supp. 3d. 571 (No. 4:18-cv-00824-O); *O'Connor, Reed Charles*, FED. JUD. CTR., https://www.fjc.gov/history/judges/oconnor-reed-charles [https://perma.cc/7NQ2-BGQB].

By the last amended complaint, the named plaintiffs were: (1) Bear Creek Bible Church, a nondenominational Christian church located in Keller, Texas; and (2) Braidwood Management Inc., a management company based in Katy, Texas, that employed about seventy people who worked at three businesses owned and controlled by Steven F. Hotze.[34] In the lawsuit, the plaintiffs sought a declaratory judgment that enforcement of Title VII against them for discriminating against employees or job applicants because their "homosexual or transgender behavior" would conflict with their religious beliefs, and thus violate their rights under RFRA, the Free Exercise Clause, and their rights to freedom of association also protected by the First Amendment.[35] For this Article, we focus only on aspects of this lawsuit relevant to the RFRA claim.

On May 24, 2021, the plaintiffs moved for class certification under Federal Rule of Civil Procedure 23(b)(2).[36] Rule 23(b)(2) authorizes a class action if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[37] For such declaratory judgment actions, Rule 23(b)(2) authorizes class certification only if the defendant's challenged conduct can be declared illegal "as to all of the class members or as to none of them," not if "each individual class member would be entitled to a different . . . declaratory judgment against the defendant."[38] Unlike a Rule 23(b)(3) class, class members may not opt out of a Rule 23(b)(2) class to pursue their claims individually.[39]

In its motion the plaintiffs sought to represent, with their RFRA claim, a Rule 23(b)(2) class of every employer in the U.S. "that opposes homosexual or transgender behavior for sincere religious reasons."[40] In 2021, Judge O'Connor granted class certification

34. Plaintiffs' Fourth Amended Class-Action Complaint at paras. 3–4, at 2, paras. 25, 35, at 8–9, *Bear Creek Bible Church*, 571 F. Supp. 3d 571 (No. 4:18-cv-00824-O).

35. *Id.* at 12–18.

36. Motion for Class Certification at 1, *Bear Creek Bible Church*, 571 F. Supp. 3d 571 (No. 4:18-cv-00824-O).

37. FED. R. CIV. P. 23(b)(2). The word "corresponding" in the phrase "corresponding declaratory relief" limits Rule 23(b)(2)'s coverage only to otherwise authorized declaratory relief that also "as a practical matter . . . affords injunctive relief or serves as a basis for later injunctive relief." FED. R. CIV. P. 23(b)(2) advisory committee's note to 1966 amendment.

38. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011).

39. FED. R. CIV. P. 23(c)(2).

40. Reply Brief in Support of Motion for Class Certification at 7, *Bear Creek Bible Church*, 571 F. Supp. 3d 571 (No. 4:18-cv-0084-O).

and, on cross-motions for summary judgment, ruled largely in the plaintiffs' favor.[41]

First, Judge O'Connor found that the plaintiffs had a justiciable controversy because they had a credible fear that the EEOC would enforce Title VII against them.[42] As proof, he cited (1) the EEOC's decision to file suit in *EEOC v. R.G. & G.R. Harris Funeral Homes* to enforce Title VII to protect a transgender employee fired by an employer (not a party in *Braidwood*); (2) EEOC guidance documents taking the view that an employer violates Title VII by discriminating against gay and transgender individuals; and (3) EEOC counsel's reply in oral argument to a hypothetical posed by Judge O'Connor about what Title VII would not permit.[43]

Second, with respect to the RFRA claim, Judge O'Connor certified a Rule 23(b)(2) class consisting of every "Religious Business-Type" employer in the United States, i.e., "for-profit entities producing a secular product" who oppose employing homosexual or transgender individuals for sincere religious reasons.[44] The court refused to certify a class of churches or religious non-profit employers like Bear Creek Bible Church, holding that this class failed to "satisfy the commonality prong [of FRCP 23(a)] on any claim arising under Title VII" since they would fall within Title VII's own exemption for religious organizations.[45]

Third, Judge O'Connor ruled that RFRA required exempting Braidwood Management from Title VII.[46] The EEOC had not disputed that Braidwood had "sincerely exercise[d] its religious beliefs as embodied in its employment policies."[47] Judge O'Connor reasoned that Title VII substantially burdened Braidwood's exercise of religion, because Braidwood was "required to choose between" complying with Title VII or its religious beliefs against homosexuality.[48] This imposed a substantial burden, because "the penalty for non-compliance would be EEOC enforcement, which

41. *Bear Creek Bible Church*, 571 F. Supp. 3d at 585–86.

42. *Id.* at 594, 596.

43. *Id.* at 595–97.

44. *Id.* at 600.

45. *Id.*

46. *Id.* at 610–11.

47. *Id.* at 610; *see* Defendants' Consolidated Brief in Support of Their Cross-Motion for Summary Judgment and Response in Opposition to Plaintiffs' Motion for Summary Judgment and Permanent Injunction at 16-17, *Bear Creek Bible Church*, 571 F. Supp 3d 571 (No. 4:18-cv-0084-O).

48. *Bear Creek Bible Church*, 571 F. Supp. 3d at 611.

would subject Braidwood to liability for backpay, compensatory damages, and punitive damages."[49]

In turn, Judge O'Connor found that the EEOC had not met its burden of proof under RFRA to justify the substantial burden on religious exercise as the least restrictive means to advance a compelling governmental interest.[50] Although the EEOC argued that it had a compelling interest in "eradicating workplace discrimination," Judge O'Connor responded that the compelling interest inquiry was limited to "the asserted harm of granting specific exemptions to particular religious claimants,"[51] thereby limiting the inquiry here to "whether the government has a compelling interest in denying *employers like Braidwood* a religious exemption," which the EEOC did not prove.[52] The court also reasoned that Title VII was not the "least restrictive means" of advancing even a government interest in "preventing all forms of discrimination" because "[d]efendants are willing to make exceptions to Title VII for secular purposes," citing Title VII's exclusions for employers with less than fifteen employees and for employers on or near Indian reservations.[53]

On appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed in part and reversed in part.[54] A panel of that court agreed with Judge O'Connor that the plaintiffs had Article III standing to sue the EEOC, disagreed with the Rule 23 class certification, and affirmed the merits of Braidwood's own RFRA claim.[55]

Thereafter, in November 2023, the district court entered a final judgment that declared that RFRA "protects the rights of" Braidwood to:

> a. Refuse to employ individuals who engage in homosexual behavior;
> b. Refuse to employ individuals who are engaged in gender non-conforming behavior, including cross-dressing, transvestism, efforts to change or transition one's gender, or asserting a gender identity that departs from one's biological sex;

49. *Id.*
50. *Id.*
51. *Id.* (quoting Fulton v. City of Phila., 141 S. Ct. 1868, 1881 (2021)).
52. *Id.* (emphasis added).
53. *Id.* at 611, n.22.
54. Braidwood Mgmt. Inc. v. EEOC, 70 F.4th 914, 918 (5th Cir. 2023).
55. *Id.* at 923, 933, 937.

> c. Refuse to recognize same-sex marriage or offer benefits to same-sex partners of their employees;
> d. Enforce sex-specific dress and grooming codes; and
> e. Prohibit its employees from entering or using restrooms or other facilities designated for the opposite biological sex,
>
> without encountering retaliation, enforcement action, or any type of adverse or negative action on account of its exercise of these rights from any of the named [EEOC] defendants.[56]

This final judgment also dismissed Braidwood's non-RFRA claims without prejudice.[57]

C. *The Lawyers and the Plaintiffs*

The named plaintiffs were represented by lawyers Jonathan F. Mitchell, H. Dustin Fillmore III, and Charles W. Fillmore.[58] Mitchell is a lawyer based in Austin, Texas, a former Solicitor General for the State of Texas, and principal drafter of the Texas anti-abortion legislation known as SB 8.[59] He opened his own firm in 2018, taking on high-profile, politically-conservative cases.[60] The Fillmores were principals of The Fillmore Law Firm LLP, a law firm based in Fort Worth, Texas.[61]

By the Third Amended Complaint (filed in June 2021), the named plaintiffs' attorneys also included Gene P. Hamilton, general counsel of the America First Legal Foundation, a conservative non-profit organization (formed in April 2021) staffed by former Trump Administration officials (including the Foundation's head, former Trump senior advisor Stephen Miller).[62] Hamilton had

56. Final Judgment at 1–2, Braidwood Mgmt., Inc. v. EEOC, No: 4:18-cv-00824-O (N.D. Tex, Nov. 29, 2023).

57. *Id.* at 2.

58. Plaintiffs' Fourth Amended Class-Action Complaint, *supra* note 34, at 22.

59. *See* Jeannie Suk Gersen, *The Conservative Who Wants to Bring Down the Supreme Court*, NEW YORKER (Jan. 5, 2023), https://www.newyorker.com/news/annals-of-inquiry/the-conservative-who-wants-to-bring-down-the-supreme-court [https://perma.cc/JDE8-4BRZ].

60. *Id.*; Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES, https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html [https://perma.cc/X6B4-8VZW] (Nov. 1, 2021); Noam Scheiber, *Trump Nominee Is Mastermind of Anti-Union Legal Campaign*, N.Y. TIMES (July 18, 2018), https://www.nytimes.com/2018/07/18/business/economy/union-fees-lawyer.html [https://perma.cc/NF3A-XTYG].

61. *Our Team,* FILLMORE LAW FIRM, https://www.fillmorefirm.com [https://perma.cc/CAN2-KZAM].

62. Plaintiffs' Third Amended Class-Action Complaint at 22, Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d. 571 (N.D. Tex. 2021) (No. 4:18-cv-00824-O); *Stephen Miller*, AM.

previously served as a senior attorney in the Trump administration at the Departments of Justice and Homeland Security.[63]

In the original complaint (filed October 6, 2018), the named plaintiffs were the U.S. Pastor Council and Hotze Health and Wellness Center.[64] In the First Amended Complaint (filed March 2019), Hotze Health and Wellness Center was replaced by Braidwood Management Inc., based in Katy, Texas.[65] The Second Amended Complaint (filed Sept. 9, 2020) added a new plaintiff: Bear Creek Bible Church, a nondenominational Christian church located in Tarrant County (Keller, Texas).[66] The Third and Fourth Amended Complaints (both filed in June 2021) named Bear Creek Bible Church and Braidwood as the plaintiffs, dropping the U.S. Pastor Council.[67]

Across the five complaints, the constant is Stephen F. Hotze, the sole trustee and beneficiary of the trust that owned Braidwood, as well as the President, Secretary, Treasurer, and the sole member of the Board of Braidwood.[68] According to the Fourth Amended Complaint, because of his religious beliefs, Mr. Hotze did not let Braidwood employ people "engaged in sexually immoral behavior or gender non-conforming conduct of any sort, including homosexuality, cross-dressing, and transgenderism."[69] Because of his religious beliefs against "homosexual behavior," Mr. Hotze did not let Braidwood "recognize same-sex marriage or extend benefits to an

FIRST LEGAL (Aug. 26, 2022), https://aflegal.org/leadership/stephen-miller/ [https://perma.cc/4K9L-ZFPV].

63. *Gene Hamilton*, AM. FIRST LEGAL (Aug. 26, 2022), https://aflegal.org/leadership/gene-hamilton/ [https://perma.cc/6XVG-SAA4].

64. Plaintiffs' Class-Action Complaint at 1, *Bear Creek Bible Church*, 571 F. Supp. 3d 571 (No. 4:18-cv-00824-O).

65. Plaintiffs' First Amended Class-Action Complaint at 1, *Bear Creek Bible Church*, 571 F. Supp. 3d 571 (No. 4:18-cv-00824-O). Braidwood is a management company that employed about seventy people who worked at three businesses owned and controlled by Steven F. Hotze: the Hotze Health & Wellness Center, Hotze Vitamins, and Physicians Preference Pharmacy International LLC. *Id.* at paras. 27–29, at 7.

66. Plaintiffs' Second Amended Class-Action Complaint at 4, *Bear Creek Bible Church*, 571 F. Supp. 3d 571 (No. 4:18-cv-00824-O). According to this Complaint, Bear Creek Bible Church required its employees "to live according to Biblical teaching on matters of sexuality and gender," and therefore would not consider employing "practicing homosexuals, bisexuals, crossdressers, or transgender or gender nonconforming individuals" for any position. *Id.* at para. 35, at 9.

67. Plaintiffs' Third Amended Class-Action Complaint, *supra* note 62, at 1; Plaintiffs' Fourth Amended Class-Action Complaint, *supra* note 34, at 1.

68. Plaintiffs' Fourth Amended Class-Action Complaint, *supra* note 34, at para. 33, at 9.

69. *Id.* at para. 35, at 10.

employee's same-sex partner."[70] Mr. Hotze also enforced Braidwood's "sex-specific dress-and-grooming code" because he believed "the Bible . . . requires men to dress as men and requires women to dress as women."[71]

Hotze, a Houston-based physician, had long been engaged in political activism in Texas against LGBTQ anti-discrimination rights. In the early 1980s, he created and led an organization, Campaign for Houston, that opposed a proposed ordinance banning discrimination against gay and lesbian people.[72] In 2015, Hotze and Campaign for Houston fought another such proposed ordinance in Houston that covered transgender people (which voters ultimately rejected) in part by arguing that it "would have allowed men, who claim to be women, to enter women's public accommodations, such as bathrooms, showers and locker rooms, violating women's privacy and potentially placing them in harm's way."[73] In 2017, Hotze lobbied the Texas State legislature for a "bathroom bill" that ultimately was not enacted.[74] By 2021, one journalist described Hotze as a powerful figure in Republican Party politics in Harris County because of his regular campaign contributions to local politicians.[75]

Hotze's political activities also included litigation. Between 2013 and 2018, Hotze appeared as a party or amici in several lawsuits. These included a constitutional challenge to the Patient Protection and Affordable Care Act;[76] a lawsuit attendant to an effort to hold

70. *Id.* at para. 36.

71. *Id.* at para. 41, at 11.

72. Wesley G. Phelps, *The Politics of Queer Disidentification and the Limits of Neoliberalism in the Struggle for Gay and Lesbian Equality in Houston*, 84 J. S. HIST. 311, 333 (2018).

73. Steven F. Hotze & Jared Woodfill, *Hotze, Woodfill: Defeating HERO: We Were Defending Our Culture and Protecting Women's Well-Being*, HOUS. CHRON. (Nov. 13, 2015), https://www.chron.com/opinion/outlook/article/Hotze-Woodfill-Defeating-HERO-We-were-6628270.php [https://perma.cc/FV62-8FTF].

74. Patrick Svitek, *"Kill 'em": Houston GOP Powerbroker Steve Hotze Left Greg Abbott a Voicemail Requesting that National Guard "Shoot to Kill" Rioters*, TEX. TRIB., https://www.texastribune.org/2020/07/03/steve-hotze-texas-greg-abbott-rioters/ [https://perma.cc/D45H-KB94] (July 5, 2020).

75. Andrew Schneider, *How Conservative Activist Steven Hotze Became a Harris County Power Broker*, HOUS. PUB. MEDIA, https://www.houstonpublicmedia.org/articles/news/politics/2021/01/28/390247/steve-hotze-gop-republican-activist-houston-harris-county-politics/ [https://perma.cc/A3B4-KAFE] (Jan. 28, 2021, 5:40 PM).

76. Hotze v. Sebelius, 991 F. Supp. 2d 864 (S.D. Tex. 2014), *vacated and remanded sub nom.* Hotze v. Burwell, 784 F.3d 984 (5th Cir. 2015).

a referendum to repeal a Houston anti-discrimination ordinance;[77] and an amicus brief filed in the U.S. Supreme Court arguing that the Fourteenth Amendment of the U.S. Constitution does not require a state to permit same-sex marriage.[78] Later, after the U.S. Supreme Court decided that appeal in favor of same-sex marriage, Hotze joined a press conference of anti-gay-marriage activists where he predicted that because of same-sex marriage, school children, "starting in kindergarten . . . will be encouraged by their teachers to participate in anal sex."[79]

On October 6, 2018, the same day the lawyers filed suit in this case, the same lawyers (Mitchell and the Fillmores) filed another lawsuit in the Fort Worth Division on behalf of named plaintiffs that included Braidwood Management and Hotze Health and Wellness Center.[80] That suit challenged the ACA's contraceptive mandate as violating RFRA.[81] The case was eventually assigned to Judge Reed O'Connor as well.[82]

II. DISCUSSION

Here, we identify two features of the RFRA strategy in *Braidwood*. First, the strategy has an Article III standing problem if deployed before the EEOC threatens any named plaintiff with a lawsuit. We show how that standing problem is real, notwithstanding the Fifth Circuit's conclusion to the contrary.

Second, the strategy exploits a key ambiguity in RFRA's compelling interest test: the set of non-parties assumed to be covered by a RFRA exemption if the court grants relief in the particular case. We show that, in pre-*Smith* Free Exercise cases, that putative set consisted of more than just the claimant, notwithstanding the district court's and the Fifth Circuit's reasoning to the contrary.

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77. Woodfill v. Parker, No. 2014-44974, 2014 Tex. Dist. LEXIS 4624, at *1 (152d D. Ct. Harris Cnty. Aug. 5, 2014).

78. Brief of Amici Curiae Texas Eagle Forum and Steven F. Hotze, M.D. in Support of Respondents, Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14-556).

79. John Wright, *New Coalition Pledges to Fight Gay Marriage*, TEX. OBSERVER (July 14, 2015, 2:22 PM), https://www.texasobserver.org/new-coalition-pledges-to-fight-gay-marriage/ [https://perma.cc/8QEZ-A9B9].

80. *See* Plaintiffs' Class-Action Complaint, DeOtte v. Azar, 393 F. Supp. 3d 490 (N.D. Tex. 2019) (No. 18-cv-00825-O).

81. *See DeOtte*, 393 F. Supp. 3d at 498–99.

82. *See id.* at 495, 515.

Finally, we turn to how this *Braidwood* strategy might fare if deployed by lawyers for religiously motivated employers against state employment discrimination liability.

A. *The Article III Standing Problem*

The *Braidwood* strategy has an Article III standing problem. In past opinions, the Supreme Court has stated that to satisfy Article III's "Cases or Controversies" requirement for federal court jurisdiction, a plaintiff must show that it has suffered an "injury in fact" that is, among other things, an injury that is "actual or imminent, not conjectural or hypothetical."[83] To count as "imminent," the alleged injury must be "certainly impending"; or, there must be a "substantial risk" that the harm will occur or a "credible threat of prosecution."[84] A court apparently cannot find such a "substantial risk" if that conclusion "involves a significant degree of guesswork."[85] Without Article III standing, a federal court lacks subject-matter jurisdiction.[86]

This standing hurdle for RFRA claims exists in state courts as well, regardless of state standing law. The *Braidwood* plaintiffs could not have avoided the Article III hurdle by filing in state court because RFRA itself requires that a RFRA claim or defense meet the "general rules of standing under article III of the Constitution."[87] And in federal court, seeking a declaratory judgment instead of other relief does not change the standing analysis. The Declaratory Judgment Act requires "a case of actual controversy,"[88] a phrase Congress added to that Act's text to incorporate by reference Article III's "Cases or Controversies" requirement.[89]

Here, when the lawsuit was filed in 2018 and thereafter, there was not really a "substantial" risk of a cognizable injury to Braidwood because of the EEOC. To be sure, at the time, the EEOC had

83. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180 (2000).

84. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 n.5 (2013); Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158–59 (2014).

85. Trump v. New York, 141 S. Ct. 530, 535–36 (2020).

86. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

87. 42 U.S.C § 2000bb–1(c).

88. 28 U.S.C. § 2201(a).

89. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239–40 (1937); 10B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE, CIVIL RULES § 2757, at 56–57 (4th ed. Supp. 2023).

a strategic enforcement plan that prioritized "[p]rotecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex."[90] In 2014, in *EEOC v. R.G. & G.R. Harris Funeral Homes* ("*Harris*"), the EEOC had filed a lawsuit against a funeral home business for discriminating against a transgender woman, and it continued to litigate that case after the funeral home raised a RFRA defense.[91]

Nonetheless, at the time, there was negligible risk of an EEOC civil action against Braidwood or the other Hotze-controlled companies. The *Braidwood* lawyers never argued that the EEOC had threatened to sue Braidwood. Moreover, at the time the *Braidwood* lawyers filed suit, the EEOC simply lacked the statutory authority to sue Braidwood. The EEOC cannot file civil action against an employer unless at least four necessary conditions exist. First, an "aggrieved" person or an EEOC Commissioner must have filed a charge with the EEOC alleging that an employer "has engaged in an unlawful employment practice."[92] Second, the EEOC, after investigating, must have found "reasonable cause to believe that the charge is true."[93] Third, the EEOC must have tried to "eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" and have failed to secure from that employer "a conciliation agreement acceptable" to the EEOC.[94] Fourth, the EEOC's authority to file civil actions is limited to civil actions "against any respondent . . . named in the charge."[95] These pre-suit conditions apply to EEOC civil actions under section 706 of Title VII, as well as EEOC "pattern or practice" actions under section 707 of Title VII.[96]

Here, neither any individual nor an EEOC Commissioner had filed, or suggested they imminently would file, a charge with the

90. U.S. EQUAL EMP. OPPORTUNITY COMM'N, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017–2021 § II(C)(3) (2016), https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fiscal-years-2017-2021 [https://perma.cc/2YQX-Q8DR].

91. EEOC v. R.G. & G.R. Harris Funeral Homes, No. 2:14-cv-13710 (filed E.D. Mich., Sept. 25, 2014).

92. 42 U.S.C. § 2000e-5(b).

93. *Id.*

94. *Id.* §§ 2000e-5(b), 2000e-5(f)(1).

95. *Id.* § 2000e-5(f)(1).

96. *Id.* § 2000e-6(e); EEOC v. CVS Pharmacy, Inc., 809 F.3d 335, 336 (7th Cir. 2015); Arizona *ex rel.* Horne v. Geo Grp., Inc., 816 F.3d 1189, 1201 (9th Cir. 2016); EEOC, Commission Opinion Letter: Section 707, EEOC-CVG-2020-2 (Sept. 3, 2020), https://www.eeoc.gov/laws/guidance/commission-opinion-letter-section-707 [https://perma.cc/SRK7-YL4U].

EEOC that alleged that Braidwood had discriminated against any gay or transgender employees or job applicants. Even if there had been a charge, it is not at all clear that any EEOC investigation of that charge would alone have generated a cognizable injury.[97] In contrast, if the EEOC had already found "reasonable cause" to believe that Braidwood had discriminated, Braidwood would have had far less of an Article III standing problem.

In ruling to the contrary, the Fifth Circuit noted, *but never explained why*, Article III standing existed absent these preconditions to any Title VII civil action by the EEOC against Braidwood.[98] In fact, the Fifth Circuit acted as if the EEOC had the same broad discretion as a prosecutor or some other government actor to initiate court proceedings or otherwise take coercive action.[99] That is error. Moreover, on the RFRA claim, the Fifth Circuit repeatedly faulted the EEOC for not granting Braidwood "an exemption" from complying with Title VII, going so far as to suggest that it must create an application process for employers to seek exemptions.[100] But Title VII does not authorize the EEOC to grant individualized exemptions. At best, Braidwood could have, but apparently did not, file a request (as any interested person may) for an EEOC opinion letter (issued at the agency's discretion), for which Title VII affords a defense to liability for any person who shows good-faith reliance on such letter.[101]

Like the district court, the Fifth Circuit primarily stressed the EEOC's 2014 lawsuit in *Harris* as sufficient to show that Braidwood had a "legitimate fear of *prosecution*" by the EEOC, because the *Harris* lawsuit alone (part of the consolidated cases on appeal in *Bostock*) "can be considered a history of enforcement" against employers like Braidwood.[102] The court ignored the fact that the

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97. *Cf.* Ohio Civ. Rts. Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 628 (1986) (stating that the Ohio Civil Rights Commission "violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.").

98. Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 923–24 (5th Cir. 2023).

99. On this point, the court cited Lopez v. Candaele, 630 F.3d 775, 781, 786 (9th Cir. 2010) (involving a community college that could discipline or expel plaintiff, a student, for violating its harassment policy); Steffel v. Thompson, 415 U.S. 452, 455–57, 475 (1974) (involving handbiller threatened with arrest and criminal prosecution by the state police); and Elrod v. Burns, 427 U.S. 347, 373 (1976) (involving state employees discharged or threatened with discharge by their state employer). *See Braidwood Mgmt.*, 70 F.4th at 925–26.

100. *Id.* at 939–40, 940 n.59.

101. *See* 42 U.S.C. § 2000e-12(b)(1); 29 C.F.R. §§ 1601.91–1601.93(a) (2022).

102. *Braidwood*, 70 F.4th at 926–27 (emphasis added).

EEOC's authority to sue in *Harris* depended on Aimee Stephens's first having filed a charge with the EEOC.[103] And the court found it irrelevant that, in *Harris*, the defendant-employer had raised "its religious-liberty concerns" only after the EEOC had filed suit, concluding only that "*Harris* shows that the EEOC will litigate enforcement actions pertaining to Title VII and RFRA."[104] In so reasoning, the court seems to imply that *Harris* would not support Braidwood's Article III standing only if the EEOC in *Harris* had sought to voluntarily dismiss its lawsuit immediately after and because the defendant-employer in *Harris* had pleaded a RFRA defense, regardless of the quality of evidence to prove that defense.

We suspect that this Article III problem arises because of the *Braidwood* lawyers' strategic choice to bring a declaratory judgment action before waiting for the EEOC to actually threaten to sue one of the plaintiffs or for a charge naming Braidwood to be filed with the EEOC. Plaintiffs generally file a declaratory judgment action, rather than waiting to be sued, for two reasons. First, it lets them control the venue in which the lawsuit is filed. This enables venue-shopping and, in some cases, de facto shopping for judges.[105] Second, they can get a legal declaration of their rights without actually engaging in the putative illegal conduct.[106] Once the "interested party" seeking the declaratory judgment gets it, that party can later go back to court to get further relief, such as an injunction, based on the declaration, "after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."[107]

To be sure, had the plaintiffs waited for the EEOC to at least threaten to sue, they, at that moment, could have filed a declaratory judgment action rather than wait for the EEOC to actually file suit. But then, their venue choices for that action (and thus judge-shopping options) would be constrained by who was named in the charge filed with the EEOC and, in turn, who the EEOC chose to threaten to sue. Moreover, because class certification under Rule

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103. *See* 42 U.S.C. § 2000e-5(b); First Amended Complaint and Jury Demand at ¶ 6, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837 (E.D. Mich. 2016) (No. 14CV13710).

104. *Braidwood*, 70 F.4th at 927 n.22.

105. Alex Botoman, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297 (2018); Maxim Sytch & Yong H. Kim, *Quo Vadis? From the Schoolyard to the Courtroom*, 66 ADMIN. SCI. Q. 177 (2021).

106. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128–29 (2007).

107. 28 U.S.C. § 2202.

23(b)(2) required the challenged conduct to be illegal as to all of the class members or as to none of them, the certified class would have to be smaller, i.e., not all employers in the U.S. who oppose gay and transgender employees on religious grounds, but only the subset that the EEOC could have sued and actually threatened to sue.

B. *Exploiting Ambiguity over the Putative RFRA Exempted Set*

The *Braidwood* strategy exploits a durable ambiguity about RFRA and the pre-*Smith* compelling interest test that Congress wanted RFRA to restore. In deciding whether the government has a compelling interest that justifies the burden on the RFRA claimants in the particular case, who besides those RFRA claimants, if granted RFRA relief, would be entitled to the kind of RFRA exemption they seek? The boilerplate answer: the government must prove a compelling interest in applying the challenged law to the particular persons whose religious exercise is burdened.[108]

This boilerplate answer, however, elides what the Supreme Court actually did in its pre-*Smith* Free Exercise cases applying the compelling interest test. In this Section, we show that in those cases, the Court considered the social cost of exempting not *only* the parties in the lawsuit seeking the RFRA exemption, but also the putative size and number of other non-parties who also would, as a result, likely be entitled to such an exemption—what we have been calling the "putative RFRA exempted set." Then, we argue that the *Braidwood* strategy exploits the ambiguity about the proper scope of the putative RFRA exempted set by arguing that it should cover *only* the RFRA claimant, while also arguing that claimant should be taken to represent a Rule 23(b)(2) certified class.

1. Case Law

Suppose a hypothetical law applies to a population of 120 persons but contains a religious exemption that excludes twenty of them. Because of this built-in exemption, the law's net target population is 100 persons. Suppose further this law burdens the religious exercise of person #1 through person #75 in the net target

108. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

population, none of whom the law's own exemption covers. Applying RFRA to exempt person #1 would produce some social cost, which we take as the sum of costs incurred and benefits foregone to the law's intended beneficiaries and others that are caused by exempting person #1. Now, suppose we consider an exemption for each additional person with a religious burden but in sequential order, one at a time. For each person additionally exempted, the total social cost increases, but the exemption's marginal cost might go up or down. For example, while the total social cost of exempting persons #1 through #50 might be high, the marginal social cost of exempting person #51 might be negligible.

Courts, however, might be inclined to assume that what matters is the exemption's expected total social cost, not its marginal cost. That is largely because if a court grants a religious exemption to person #1, then person #2 will invoke that ruling as precedent for receiving the same religious exemption, even if they belong to different churches or religious traditions. Thus, the expected total social cost of a religious exemption is a function the size of the putative exempted set of persons that would, by operation of precedent and otherwise, be entitled to get that exemption as well.

The problem is that courts can vary in how they define that putative exempted set. The minimum size: only the religiously motivated claimant. The maximum size: that claimant and all other possible non-parties who would likely be entitled to the same exemption because they too could show that the challenged law (or other similar laws) similarly burdened them in their religiously motivated conduct. In our hypothetical example above, this theoretical maximum would be the social cost of exempting *all at once* everyone religiously burdened by *this* law, i.e., 75% of the target population (seventy-five out of one hundred) *and* exempting others with equivalent religious objections to other similar laws.

To find out how the Supreme Court took the putative exempted set in pre-*Smith* Free Exercise Clause cases applying the compelling interest test, we proceeded as follows. We first generated a list of the Court's Free Exercise Clause cases from when it decided *Sherbert v. Verner* (1963) up through, but not including, *Employment Division v. Smith* (1990). We used the 2022 Spaeth U.S. Supreme Court database and cross-checked with a secondary source

compilation of Free Exercise Clause Supreme Court cases.[109] From this list (n = 29), we then read each Court opinion to exclude all but the opinions in which the parties disputed, and the Court applied the compelling interest test to resolve the Free Exercise Clause issue.

Table 1: U.S. Supreme Court Free Exercise Cases Applying Compelling Interest Test, 1963–1990

Case Name	Cite	Year
Sherbert v. Verner	374 U.S. 398	1963
Wisconsin v. Yoder	406 U.S. 205	1972
McDaniel v. Paty	435 U.S. 618	1978
Thomas v. Review Board	450 U.S. 707	1981
United States v. Lee	455 U.S. 252	1982
Bob Jones University v. United States	461 U.S. 574	1983
Hernandez v. Commissioner	490 U.S. 680	1989

In Table 1, we list seven Court opinions that met these criteria. We discuss each one below. The exposition is long, but the point is simple: in these pre-*Smith* cases, the Court did *not* limit the putative exempted set only to the claimants in the case before it on appeal. These cases matter, because with RFRA, Congress expressly aimed to restore the compelling interest test applied in pre-*Smith* Free Exercise Clause cases.

In *Sherbert v. Verner* (1963), Ms. Sherbert undisputedly had a sincere religious motivation for refusing to work on Saturdays and had been disqualified for unemployment insurance ("UI") benefits because state law disqualified UI applicants who refused to accept suitable work.[110] To justify that law's burden on her religious exercise, the government argued that granting her relief would cause "filing of fraudulent claims by unscrupulous claimants feigning

109. Harold J. Spaeth et al., *2022 Supreme Court Database, Version 2022 Release 01*, THE SUPREME COURT DATABASE, https://supremecourtdatabase.org/data.php [https://perma.cc/Z54Z-UJY3]; Fern L. Kletter, *Free Exercise Clause of First Amendment—U.S. Supreme Court Cases*, 37 A. L. R. Fed. 3d 12 (2018). For the Spaeth database, we used issue code 30160.

110. 374 U.S. 398, 399–401 (1963).

religious objections to Saturday work," which in turn "might not only dilute the unemployment compensation fund" but also make it harder for employers to schedule "necessary Saturday work."[111] The Court, however, reasoned that even if the government had properly raised this argument below, the record contained "no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance."[112] The Court appears to have assumed *arguendo* that, had the government enough proof, the putative exempted set would have covered a lot of UI applicants who get benefits despite lying about their religious objections to Saturday work. Ultimately, however, *Sherbert* tells us little, because RFRA's compelling interest test assumes that anyone in the putative RFRA exempted set has *already* shown that their religious motivations are sincere.

In *Wisconsin v. Yoder* (1972), the claimants were three individuals—two parents who were members of the Old Order Amish religion, and a parent who was a member of the Conservative Amish Mennonite Church.[113] They were convicted and fined for violating Wisconsin's law requiring compulsory education to age sixteen because they refused, for religious reasons, "to send their children, ages 14 and 15, to public school after they completed the eighth grade."[114] On appeal, Wisconsin did not dispute the trial court's findings, after a trial, that this law—as applied—burdened these claimants' religious exercise.[115] Instead, Wisconsin argued that the challenged law justified the burden by advancing two interests: preparing students to "participate effectively and intelligently in our open political system" and to be "self-reliant and self-sufficient participants in society."[116] The Court concluded, however, that the record evidence showed that

> an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. Respondents' experts testified at trial, without challenge, that the value of all education

111. *Id.* at 407.

112. *Id.* The Court added that even if there were such proof, it is "highly doubtful" whether such proof would be enough, because the government had to also show "that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.*

113. 406 U.S. 205, 207 (1972).

114. *Id.* at 207.

115. *Id.* at 219.

116. *Id.* at 221.

> must be assessed in terms of its capacity to prepare the child for life.[117]

In so reasoning, the Court took as the putative exempted set not only the three parents in the case whom Wisconsin had convicted, but also all other parents of children under the age of sixteen (non-parties in the case) who acted "in accordance with the tenets of Old Order Amish communities generally."[118]

In *McDaniel v. Paty* (1978), the Court considered the government's interest in a Tennessee law disqualifying ministers for public office, as applied to disqualify a Baptist minister as a delegate to the State's limited constitutional convention.[119] Tennessee argued a state interest in "preventing the establishment of a state religion."[120] The Court stated the "underlying" premise of this view: "if elected to public office they will necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others."[121] Then, the Court rejected that premise, because "the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts."[122] The putative exempted set: all clergy of any faith who would otherwise be disqualified from any public office.

In *Thomas v. Review Board* (1981), Mr. Thomas, a Jehovah's Witness, was denied UI benefits for quitting his job because he religiously opposed building turrets for military tanks.[123] Defending against his Free Exercise Clause challenge, Indiana offered two government interests to justify the burden on Mr. Thomas. First, exempting him would cause "widespread unemployment" that would burden the State's unemployment insurance fund "if people were permitted to leave jobs for 'personal' reasons."[124] Second, it would cause employers to engage in "a detailed probing . . . into job applicants' religious beliefs."[125] The Court, however, found "no

117. *Id.* at 222.
118. *Id.* at 208.
119. 435 U.S. 618, 620 (1978).
120. *Id.* at 628.
121. *Id.* at 628–29.
122. *Id.* (footnote omitted).
123. 450 U.S. 707, 709 (1981).
124. *Id.* at 718.
125. *Id.* at 719.

evidence in the record" to indicate that there was such a large "number of people" choosing between UI benefits and their religious beliefs as to "seriously affect unemployment."[126] Nor was there record evidence to indicate that employers' inquiries of job applicant beliefs "will occur" in Indiana or had occurred in states that already extended UI benefits "to people in the petitioner's position."[127] Nor did the Court find "any reason to believe that the number of people terminating employment for religious reasons will be so great as to motivate employers to make such inquiries."[128] Again, the putative exempted set included not just Mr. Thomas, but people "in [his] position" of choosing between UI benefits and quitting a job for sincere religious reasons.

In *United States v. Lee* (1982), an Amish farmer and carpenter, faced with employer tax liability for unpaid Social Security taxes, raised a Free Exercise Clause defense to an IRS action to recover the unpaid tax.[129] In rejecting this defense, the Court did not consider only the social cost of exempting Mr. Lee. Rather, it also considered how "difficult" it would be "to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."[130] In so doing, the Court took the putative exempted set to include not just Mr. Lee, nor just the set of Amish employers who shared the same religious objection, but *any* person whose religion would lead them to object to paying Social Security taxes.

Then, the *Lee* Court widened the putative exempted set still further by inferring how granting an exemption to Social Security taxes might affect *other* tax obligations:

> There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax.[131]

126. *Id.*
127. *Id.*
128. *Id.*
129. 455 U.S. 252, 254–55 (1982).
130. *Id.* at 259–60.
131. *Id.* at 260.

Having widened the putative exempted set thusly, the Court concluded that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."[132] In reaching this result, the Court did not treat as relevant that federal tax law expressly exempted social security tax obligations for self-employed individuals under I.R.C. § 1402(g), an exemption that did not cover Mr. Lee.[133]

In *Bob Jones University v. United States* (1983), the Court held, for two consolidated cases, that the federal government had a compelling interest in denying Bob Jones University and Goldsboro Christian Schools tax-exempt status because of their religiously motivated racially discriminatory admissions policies.[134] Bob Jones based that policy on "a genuine belief that the Bible forbids interracial dating and marriage," and the Court assumed the same for Goldsboro Christian Schools.[135] The Court described that compelling governmental interest as an interest in "eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's history" and concluded that this interest "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[136] The putative exempted set appears to have been any religious school seeking federal tax-exempt status and having religious reasons to practice racially discriminatory admissions.

In *Hernandez v. Commissioner* (1989), the Court endorsed the reasoning in *Lee* to reject a Free Exercise Clause challenge to the IRS's refusal to permit a charitable deduction for payments made to the Church of Scientology for auditing and training services.[137] The Court added that the government's compelling interest argument was "more powerful here than in *Lee*," because "petitioners' claimed exemption stems from the contention that an incrementally larger tax burden interferes with their religious activities. This argument knows no limitation."[138] In other words, there was

132. *Id.*
133. *Id.* at 260–61.
134. 461 U.S. 574, 604–05 (1983).
135. *Id.* at 602 n.28.
136. *Id.* at 604.
137. 490 U.S. 680, 699–700 (1989).
138. *Id.* at 700.

no principled way to cabin the putative exempted set only to taxpayers seeking charitable deductions to such payments made to the Church of Scientology.

2. The *O Centro* Case

In one of its first RFRA cases, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006), the Court relied on some of this pre-*Smith* case law to read RFRA.[139]

There, the Court rejected the government's effort to defeat a RFRA exemption to the Controlled Substances Act for a church ("UDV") that sought to import and use two plants containing a hallucinogen for a sacramental tea (hoasca).[140] In particular, after U.S. Customs inspectors threatened to prosecute, the UDV moved on RFRA grounds to preliminarily enjoin the government from enforcing the Controlled Substances Act to preclude the church from importing and using hoasca.[141] The district court agreed and issued a preliminary injunction which allowed the UDV only very circumscribed use of hoasca for sacramental purposes.[142]

On appeal, the Court rejected the government's compelling interest argument—that the injunction necessarily "undercut" the Controlled Substances Act—as "slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law."[143] Instead, it reasoned: "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."[144] Thus, while Schedule I substances were dangerous in general, the government had to show "the harms posed by the particular use at issue here—the

139. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

140. *Id.* at 423.

141. *Id.* at 425–26.

142. *Id.* at 427. The injunction authorized the church "to import the tea pursuant to federal permits, to restrict control over the tea to persons of church authority, and to warn particularly susceptible UDV members of the dangers of *hoasca*." *Id.* The injunction also provided that the government could ask the court to suspend or revoke the church's exemption by showing with evidence that "'*hoasca* has negatively affected the health of church members,' or 'that a shipment of *hoasca* contains particularly dangerous levels of DMT.'" *Id.*

143. *Id.* at 434–36.

144. *Id.* at 430–31 (quoting 42 U.S.C. § 2000bb-1(b)).

circumscribed, sacramental use of *hoasca by the UDV*."[145] The *O Centro* Court thus limited the putative RFRA exempted set only to hoasca use by members of the UDV, i.e., the plaintiff in the case.

This reasoning, however, does not require courts to take the putative RFRA exempted set in any RFRA case as always *only* the RFRA claimants *as a matter of law*, for three reasons.

First, Congress cannot have intended the phrase "application of the burden to the person" in RFRA's text to be read this way.[146] That phrase is part of a sentence that Congress wrote to restore "the compelling interest test *as set forth in* prior Federal court rulings," i.e., the pre-*Smith* law's method of applying that test.[147] As shown above, those prior Supreme Court cases (listed in Table 1) did not categorically limit the putative exempted set to the religiously motivated claimants in those cases. In this context, "application of the burden to the person" just denotes that the religious claimant challenges the law *as applied* to it and that the government bears the burden of showing that such application advances a compelling state interest.

Second, in context, the *O Centro* Court's own reliance on pre-*Smith* cases confirms this. It described *Sherbert* and *Yoder* as cases in which the Court "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants."[148] Then, the *O Centro* Court described *Yoder* as a case in which "we permitted an exemption for *Amish children* from a compulsory school attendance law."[149]

145. *Id.* at 432 (emphasis added).

146. 42 U.S.C. § 2000bb-1(b).

147. *Id.* § 2000bb(a)(5) (emphasis added); H.R. REP. NO. 103-88, at 6–7 (1993) ("It is the Committee's expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance . . . ."); S. REP. NO. 103-111, at 9 (1993). Congress, however, did not intend to codify the actual holdings in pre-*Smith* rulings. *See* H.R. REP. NO. 103-88, at 7 ("[B]y enacting this legislation, the Committee neither approves nor disapproves of the result in any particular court decision involving the free exercise of religion, including those cited in this bill. This bill is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. Therefore, the compelling governmental interest test . . . generally should not be construed more stringently or more leniently than it was prior to *Smith*."); S. REP. NO. 103-111, at 9 (1993); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 714 (2014) (rejecting view that Congress intended RFRA to cover only "the exercise of religion as recognized only by then-existing Supreme Court precedents" or to "tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases").

148. *O Centro*, 546 U.S. at 431.

149. *Id.* (emphasis added).

Recall, however, that *Yoder* granted Free Exercise Clause relief to three individual claimants (two parents who were members of the Old Order Amish religion and a parent who was a member of the Conservative Amish Mennonite Church).[150] And in so doing, *Yoder* took the putative exempted set to include not only those actual claimants in that case, but also other non-parties with the same Old Order Amish beliefs. *O Centro* also relied on *Sherbert v. Verner*, even though, as explained above, *Sherbert* allowed for—but did not find—an evidentiary basis to expect a putative exempted set of (sincere and insincere) UI claimants who claim religious reasons for refusing Saturday work.[151] The Court did not assume that the government's burden was to justify the law's burden *only* as it applied to Ms. Sherbert.[152]

Third, the *O Centro* Court added that, had it litigated the case differently, the government could have met its RFRA burden with evidence that, for any particular program, lack of uniform application "would seriously compromise [the government's] ability to administer the program."[153] As illustrative examples, the *O Centro* Court relied on the reasoning in *Lee* and *Hernandez*.[154] Moreover, the *O Centro* Court relied on *Braunfeld v. Brown* (1961), an opinion that pre-dates the *Sherbert* and *Yoder* approach that RFRA sought to restore.[155]

In *Braunfeld*, Orthodox Jewish merchants sued to enjoin a statute that barred retailers from selling certain goods on Sunday, arguing that the law burdened them because they were religiously motivated to observe a day of rest other than Sunday.[156] In rejecting this argument, the Court invoked "reason and experience," not any record evidence, and explained that such an exemption "might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and

150. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

151. 374 U.S. 398, 407 (1963).

152. *See id.* at 407–09.

153. *O Centro*, 546 U.S. at 435.

154. *Id.*

155. *Id.* (citing Braunfeld v. Brown, 366 U.S. 599 (1961)). For commentary on this aspect of *O Centro*, see, e.g., Matthew Nicholson, *Is* O Centro *A Sign of Hope for RFRA Claimants?*, 95 VA. L. REV. 1281, 1308–09 (2009); Ari B. Fontecchio, *Compelling the Courts to Question* Gonzalez v. O Centro*: A Public Harms Approach to Free Exercise Analysis*, 14 RICH. J. L. & PUB. INT. 227 (2010).

156. *Braunfeld*, 366 U.S. at 601.

activity."[157] With "two or more days to police rather than one," it would be harder to observe violations; persons so exempted "might well" gain an economic advantage over those not exempted, which in turn "might cause the Sunday-observers to complain that their religions are being discriminated against."[158] In so reasoning, the Court took the putative exempted set to cover not just the plaintiffs there, nor all Orthodox Jewish merchants like them who the Pennsylvania statute burdened, but anyone with any religious belief who might avail themselves of a religious exemption to any similar Sunday closing law.[159]

Thus, in *Braunfeld*, as in *Lee* and *Hernandez*, the Court did not limit the putative exempted set to the claimants in those cases or even to their co-religionists. If the Court in *Lee*, *Hernandez*, and *Braunfeld* had limited the putative exempted set *only* to the actual Free Exercise claimants in those cases, their compelling interest reasoning for justifying the burden on those particular claimants (as well as the claimants in *McDaniel* and in *Bob Jones University*) would have made no sense.

In contrast, having limited the putative RFRA exempted set to only the UDV, it became easy for the *O Centro* Court to conclude that government had not offered enough evidence to show "that granting the UDV an exemption would cause the kind of administrative harm recognized as a compelling interest in *Lee*, *Hernandez*, and *Braunfeld*."[160] If the *O Centro* Court had intended to limit the putative RFRA exempted set only to the particular RFRA claimants *as a matter of law*, then the government could *never* justify a RFRA compelling interest by offering the kind of proof of harm, that according to the *O Centro* Court, *Lee*, *Hernandez*, and *Braunfeld* recognized as compelling enough to justify the religious burden on the claimants in those cases.[161]

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157. *Id.* at 608.

158. *Id.* at 608–09. A few years later, the Court in *Sherbert* described *Braunfeld* as rejecting the exemption sought there because it "appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable." Sherbert v. Verner, 374 U.S. 398, 408–09 (1963) (footnote omitted).

159. *See* Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 631 (1961) (relying only on *Braunfeld* to reject similar Free Exercise Clause challenge to Massachusetts Sunday closing law).

160. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 437 (2006).

161. *Id.*

More recently, the current Supreme Court invoked *O Centro* in a Free Exercise Clause case. In *Fulton v. City of Philadelphia* (2021), the Court reasoned that a city's interests behind its non-discrimination policy were not compelling enough to justify the burden on Catholic Social Services ("CSS"), a foster care agency that refused for religious reasons to certify same-sex couples as foster parents.[162] Though it refused to overrule *Smith*, the Court, quoting *O Centro*, wrote this about the applicable compelling interest test:

> Rather than rely on "broadly formulated interests," courts must "scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.[163]

Like in *O Centro*, the *Fulton* Court limited the putative exempted set only to the religious claimant in the case.[164] But unlike *O Centro*, the Court did not mention that the government could have tried to prove the kind of administrative harm recognized in *Lee*, *Braunfeld*, and *Hernandez* as compelling.[165] If it had, it would have had to expressly explain why it refused to rely on a putative exempted set that includes other (sincere religiously motivated) non-parties that would likely benefit if the CSS were exempted. Nonetheless, since *Fulton*, lower courts and lawyers have cited *Fulton* and its quotation of *O Centro* to conclude, in RFRA lawsuits, that the government cannot meet its compelling interest burden.[166]

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162. 141 S. Ct. 1868, 1882 (2021).

163. *Id.* at 1881 (quoting *O Centro*, 546 U.S. at 431). For a similar use of *O Centro*, albeit in dicta, see Burwell v. Hobby Lobby Stores, 573 U.S. 682, 727 (2014) ("to look to the marginal interest in enforcing the contraceptive mandate in these cases"); and *id.* at 728 ("We find it unnecessary to adjudicate this issue. We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA . . . .").

164. *Fulton*, 141 S. Ct. at 1881–82.

165. *Compare O Centro*, 546 U.S. at 435, *with Fulton*, 141 S. Ct. at 1881–82.

166. *E.g.*, U.S. Navy Seals 1-26 v. Biden, 27 F.4th 336, 351 (5th Cir. 2022); Singh v. Berger, 56 F.4th 88, 99 (D.C. Cir. 2022); Brief of Christian Legal Society & Crista Minisistries [sic] as Amicus Curiae in Support of Defendants-Appellants at 31, Billard v. Charlotte Cath. High Sch., No. 22-1140 (4th Cir., filed Apr. 21, 2023) (arguing for RFRA exemption to Title VII sex-discrimination liability); *see also* Mast v. Fillmore Cnty., 141 S. Ct. 2430 (2021) (vacating and remanding a RLUIPA judgment in light of *Fulton*); *id.* at 2432 (Gorsuch, J., concurring in the decision to grant, vacate, and remand) (applying the "denying an exception to CSS" passage in *Fulton* to the RLUIPA claim).

3. The Putative RFRA Exempted Set for Title VII Liability

The real problem here is that neither RFRA itself nor pre-*Smith* Supreme Court cases guide how judges, in making the RFRA compelling interest inquiry, are supposed to set the scope of the RFRA putative exempted set. Thus, in any RFRA case, lawyers will likely choose the putative RFRA exempted set that serves their client. We fear that, as a result, judges will take the putative RFRA exempted set in whichever way accords with their policy or ideological preferences. If judges favor the religious claimants in the case (for whatever reason), they will limit the putative RFRA set only to them and strategically cite to one part of the *O Centro* opinion (or its use in *Fulton*) as obliging them to do so. If they disfavor the claimants, or favor the government more, they will increase the size of that putative RFRA set towards its theoretical maximum and then evaluate the government's compelling interest argument accordingly, also strategically citing to another part of the *O Centro* opinion (discussing *Lee*, *Hernandez*, and *Braunfeld*).

In this Section, we discuss the ambiguity over the putative RFRA exempted set for Title VII employer liability. Such ambiguity exists regardless of whether a RFRA claimant seeks only individual relief or also represents a Rule 23 certified class. But, as we show in the next Section, this ambiguity has additional consequences in RFRA declaratory judgment class actions.

To illustrate, recall in *Braidwood* itself how district Judge O'Connor applied RFRA's compelling interest inquiry:

> The relevant question . . . is whether the government has a compelling interest in denying employers like Braidwood a religious exemption. *See Fulton*, 141 S. Ct. at 1881. Braidwood has established Title VII places a substantial burden on its religious exercise, and Defendants fail to meet its burden to show a compelling interest.[167]

Though the putative RFRA exempted set is larger than just Braidwood itself ("employers like Braidwood"), the precise scope is left ambiguous because in the next sentence, the court considers Braidwood alone.

167. Bear Creek Bible Church v. EEOC., 571 F. Supp. 3d 571, 611 (N.D. Tex. 2021).

Similarly, consider how the Fifth Circuit addressed the RFRA compelling interest inquiry:

> [I]n RFRA cases, the courts must "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (alteration in original) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)). Under RFRA, the government cannot rely on generalized interests but, instead, must demonstrate a compelling interest in applying its challenged rule to "the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro Espirita*, 546 U.S. at 430–31. Even if there is a compelling interest as a categorical matter, there may not be a compelling interest in prohibiting all instances of discrimination . . . [The EEOC] does not show a compelling interest in denying Braidwood, individually, an exemption.[168]

Here, relying on *Fulton*'s use of *O Centro*, the court makes the putative RFRA exempted set equal to only Braidwood itself ("Braidwood, individually").

In contrast, for a RFRA challenge to Title VII liability (as in *Braidwood*), we now consider three ways a hypothetical conscientious judge might reason about the scope of the putative RFRA exempted set.

First, the putative RFRA exempted set should consist *only* of the RFRA claimants—the named plaintiffs otherwise subject to Title VII liability by way of an EEOC civil action. If so, the total social cost of such an exemption depends on the typical number of the RFRA claimant's employees (or job applicants) that Title VII would have protected from *that employer's* religiously motivated discrimination, absent any such exemption from Title VII liability. Relevant evidence would include the demographic characteristics of that employer's current employees and the pool of likely applicants for jobs at that employer.

Second, the putative RFRA exempted set should consist of the claimant employers and co-religionists (other employers who belong to the same religious tradition, as in *Lee*, or affiliated with the same church) that are similarly burdened and are subject to Title VII liability. If so, the social cost of such an exemption is a function of the typical number of the RFRA claimant's employees (or job applicants) that Title VII would have protected as well as their co-religionists' employees. This is the approach the Ninth Circuit took

168. Braidwood Mgmt. Inc. v. EEOC, 70 F.4th 914, 939–40 (5th Cir. 2023).

when accepting the EEOC's compelling interest argument for enforcing Title VII's retaliation provision against a publishing business affiliated with the Seventh Day Adventist Church, i.e., the putative exempted set included *any* employer affiliated with the Seventh Day Adventist Church, not just the publishing business the EEOC had sued.[169] For this wider putative exempted set, the relevant evidence now also includes the number and size of business employers in the United States with the same religious motivations as the RFRA claimants.

Table 2: Statistics of U.S. Businesses, 2019

Enterprise Size	Firms	Establishments	Employment
< 5 employees	3,777,085	3,783,930	6,003,770
5–9 employees	1,013,629	1,026,898	6,681,959
10–19 employees	640,827	674,135	8,632,696
20–99 employees	555,046	728,140	21,762,863
100–499 employees	94,957	375,232	18,612,620
500+ employees	20,868	1,370,768	71,295,520

For a sense of scale, Table 2 reports the most recent U.S. Census Bureau estimates of the distribution of private businesses in the United States with paid employees by number of employees.[170] Employer size matters if the social cost of a RFRA exemption to Title VII tends to be higher for businesses with more employees, all else equal. Title VII defines "employer" to have fifteen or more employees.[171] Accordingly we would ignore firms in Table 2 with less than fifteen employees.

The next step would be to subset this population by whether these employers hold the relevant religious beliefs at issue that Title VII allegedly burdens. This is a challenge. While some have pointed to the religious beliefs of those who own or control

169. EEOC v. P. Press Pub. Ass'n, 676 F.2d 1272, 1280 (9th Cir. 1982).

170. U.S. Census Bureau, *2019 SUSB Annual Data Tables by Establishment Industry* (Feb. 2022), https://www2.census.gov/programs-surveys/susb/tables/2019/us_state_6digitnaics_2019.xlsx (U.S. & states, 6-digit NAICS).

171. 42 U.S.C. § 2000e(b).

particular high-profile businesses,[172] there is no systematic data on the religious affiliations of current businesses in the U.S., let alone the characteristics or conduct of their employees that might motivate such businesses to discriminate against them for sincere religious reasons. This does not preclude back-of-the-envelope estimates or expert opinion testimony, but it does make the task harder.[173]

Third, the putative exempted set should cover any employer covered by Title VII who objects based on any religion (not just the RFRA claimant's religion) to Title VII liability for any kind of discrimination that statute covers (not just to *Bostock* liability), i.e., religiously motivated discrimination against any individual "because of such individual's race, color, religion, sex, or national origin."[174]

As in *Lee*, there is no obvious way to limit the scope of that exemption to only Title VII. Examples of other laws include the bar on race discrimination in the making of contracts in 42 U.S.C. § 1981 as applied to employers, which, unlike Title VII, covers even employers with less than fifteen employees.[175] Nor are there obvious countervailing means to limit the RFRA exemption's social cost, like the injunction conditions in *O Centro*, or otherwise ameliorate the exemption's social cost (the adverse economic, emotional, and dignitary effects of discrimination against those individuals that Title VII protects).

4. Exploiting the Ambiguity

The *Braidwood* strategy did not create ambiguity about the putative RFRA exempted set. It just tries to exploit it by how it seeks

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172. *See, e.g.*, Joseph P. Slaughter, *The Virginia Company to Chick-fil-A: Christian Business in America, 1600–2000*, 44 SEATTLE U. L. REV. 421 (2020); Kate Taylor, *9 American Companies with Extremely Religious Roots*, BUS. INSIDER (Oct. 7, 2017, 11:37 AM) https://www.businessinsider.com/religious-american-companies-2017-10 [https://perma.cc/W3YM-ZHQD]; BETHANY MORETON, TO SERVE GOD AND WAL-MART: THE MAKING OF CHRISTIAN FREE ENTERPRISE (2009).

173. We do not consider here the wisdom of various ways to get such information, such as by asking for it (e.g., adding religion questions to surveys of U.S. businesses) or by requiring it, see, e.g., Pub. Act. No. 78-329, § 6, 1978 Conn. Acts 700–702 (amending CONN. GEN. STAT. § 53-303 to remove the condition for a religious-belief exemption to Sunday closing law that the person had filed "written notice of such belief with the prosecuting attorney of the court having jurisdiction").

174. 42 U.S.C. § 2000e-2(a).

175. 42 U.S.C. § 1981(a).

class-wide relief. Suppose, as in *Braidwood*, the plaintiffs seeking RFRA relief seek to represent a Rule 23(b)(2) class of all business employers in the U.S. opposed to gay and transgender employees for religious reasons. If a court declares the RFRA plaintiffs to represent a Rule 23(b)(2) class, that is not supposed to affect how the court decides the RFRA claim's merits because Congress provided that procedural rules like Rule 23 "shall not abridge, enlarge or modify any substantive right."[176]

Nonetheless, suppose a court treats the putative exempted RFRA set as consisting of *only* the RFRA plaintiffs, not the plaintiffs *and* the individual class members they represent, and asks the government to prove the social cost of that exemption. If the government loses on this issue, the judgment now binds the government to exempt the RFRA plaintiffs and every individual class member from EEOC enforcement of Title VII against them, once they show that such EEOC enforcement burdens their sincere religiously motivated conduct.[177] The judgment would have this effect even though the court, in deciding the RFRA's compelling interest inquiry, acts *as if* only the RFRA claimants in the case would be exempted.

Where the certified class covers all employers in the U.S., the declaratory class action judgment stops any case-by-case development of the question by different courts throughout the country by freezing in place the first final judgment on the RFRA claim against the EEOC. Other courts in other parts of the country will never get a chance to decide the RFRA compelling interest test as applied to EEOC Title VII suits, because the EEOC will not bring civil actions against class members. If it does, those class members will invoke the declaratory judgment and seek to enjoin the EEOC on that basis. Thus, the *Braidwood* strategy, by securing a nationwide Rule 23(b)(2) class, tends to accomplish precisely the kind of result that the Court sought to avoid by declaring that, in general, the federal government is not subject to non-mutual collateral estoppel.[178]

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176. 28 U.S.C § 2072 (a)–(b).

177. "[A] judgment in a properly entertained class action is binding on class members in any subsequent litigation." Cooper v. Fed. Rsrv. Bank, 467 U.S. 867, 874 (1984).

178. United States v. Mendoza, 464 U.S. 154, 160 (1984) ("[A]llowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the

To be sure, a declaratory judgment under the Declaratory Judgment Act is discretionary, subject to an abuse-of-discretion standard of review.[179] Thus, to resist the *Braidwood* strategy, government lawyers might argue, among the grounds for declining such discretion,[180] that federal appellate courts should declare it an abuse of discretion to grant a declaratory judgment class action for RFRA claims unless the parties stipulate that the putative RFRA exempted set is no less than the expected size of any Rule 23(b)(2) certified class in the case.

This implies that if RFRA plaintiffs (as in *Braidwood*) want a Rule 23(b)(2) class covering all business employers in the U.S. that oppose employing gay and transgender individuals, the court will exercise discretion to grant declaratory relief on the RFRA claim only if the parties stipulate that, for RFRA compelling interest analysis, the total social cost of granting RFRA relief is a function of a putative exempted set that covers at least everyone in the Rule 23 class otherwise entitled to RFRA relief. To illustrate, suppose again our law that covers one hundred persons. If person #1 sues under RFRA on behalf of a Rule 23(b)(2) class that covers persons #2 through #50, the estimated social cost of granting that RFRA exemption should be taken as a function of exempting not just person #1, but persons #1 through #50. Put another way, the larger the certified Rule 23(b)(2) class, the more non-parties the government, in litigating RFRA's compelling interest test, may take to fall within the putative RFRA exempted class. Absent such a stipulation, the court may decide to decline declaratory relief.

This approach, however, does not resolve the RFRA compelling interest inquiry. The government still bears the burden of persuading a court as to the actual size of the RFRA putative exempted set and the associated total social cost, simply because for RFRA's compelling interest inquiry, the government bears the burden of proof.[181] Assuming the preponderance of the evidence standard of

benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."). On a similar problem with nationwide injunctions, see Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 461–462 (2017). On the limits of this "percolation" value, see Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363 (2021).

179. Wilton v. Seven Falls Co., 515 U.S. 277, 288–89 (1995).

180. *See generally* 10B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2759 (4th ed. 2023).

181. 42 U.S.C. § 2000bb-1(b)(2) (providing that the government may burden person's religious exercise "only if it demonstrates that application of the burden to the person" is "least

proof applies in RFRA suits, where the government has at least presented some relevant evidence of total social cost, a court should be less likely to grant a RFRA claimant's motion for summary judgment on this issue on the ground that the government's evidence did not pertain to *that* claimant alone.

C. *The* Braidwood *Strategy in the States*

As originally enacted, RFRA applied to states, but after the Supreme Court ruled that Congress lacked the authority to do that,[182] Congress expressly amended RFRA in 2000 so that it applies only to the United States government, the District of Columbia, Puerto Rico, and each U.S. territory or possession.[183] This Section identifies the states where lawyers might use the *Braidwood* strategy to try and avoid *state* employment discrimination liability for discriminating against LGBTQ+ employees or job applicants.

We canvassed state law by how it varies in (1) whether its employment discrimination law covers business employer discrimination based on sexual orientation and/or gender identity; and (2) whether the state law independently provides for religious exemptions by way of statutes similar to RFRA or state constitutional provisions interpreted in line with pre-*Smith* Free Exercise Clause doctrine. For the latter, we relied on secondary sources to generate an initial list.[184] Then, for each state, we verified and updated the list by searching that state's statutory codes, state constitution, and state court opinions in the Westlaw (Thomson Reuters) database. We used the string "religious freedom" to search each state's statutory codes. We also searched each state for cases on "religious freedom" applying state law only.

Figure 1 depicts the twelve states with employment discrimination statutes that expressly cover sexual orientation, gender

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restrictive means" of furthering "compelling governmental interest"); *id.* § 2000bb-2(3) ("[T]he term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion.").

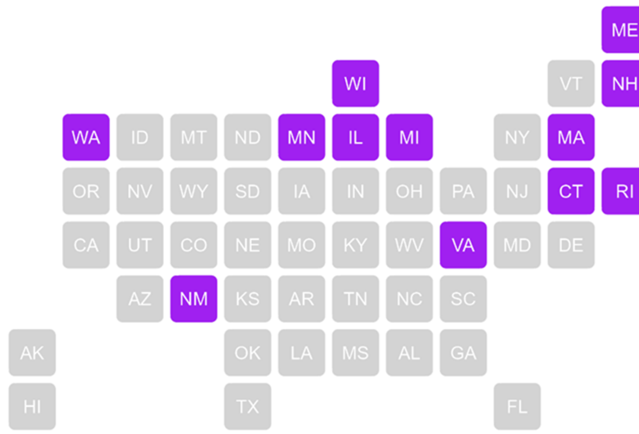
182. City of Boerne v. Flores, 521 U.S. 507 (1997).

183. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 7(a), 114 Stat. 803, 806 (codified at 42 U.S.C § 2000bb-2(1)–(2)).

184. *See generally* 1 DURHAM & SMITH, *supra* note 9, § 3:27; 2 *id.* § 15:23; *Federal & State RFRA Map*, BECKET FUND FOR RELIGIOUS LIBERTY, https://www.becketlaw.org/research-central/rfra-info-central/map/ [https://perma.cc/CRK8-KS83].

identity, or both *and* have either a state RFRA or a state constitutional law variant of pre-*Smith* Free Exercise Clause doctrine.

Figure 1: States with Employment Discrimination Statutes Covering Sexual Orientation and/or Gender Identity and with RFRA statutes or state constitutional law adopting pre-Smith Free Exercise doctrine, 2023



All twelve states authorize their courts of general jurisdiction to issue declaratory judgments.[185] Eleven of these states have class action rules modeled on some version of Federal Rule of Civil Procedure 23, except for Virginia, which has no generally applicable class action rule.[186]

We are uncertain about how the *Braidwood* strategy would fare in these states. These states have relatively little in the way of judicial precedent that might inform how a court tackles the

185. Nine have a version of the Uniform Declaratory Judgments Act. UNIF. DECLARATORY JUDGMENTS ACT REFS & ANNOS (Thomson Reuters 2023) (table of adopting jurisdictions). Connecticut and New Hampshire have their own statutes. CONN. GEN. STAT. § 52-29 (2023); N.H. REV. STAT. § 491:22 (2023). Michigan's declaratory judgment act is contained within its court rules. MICH. CT. R. 2.605.

186. AM. BAR ASS'N, SURVEY OF STATE CLASS ACTION LAW 2022 (Elizabeth J. Cabraser & Fabrice N. Vincent eds., 2022).

ambiguity of the proper RFRA exempted set for purposes of compelling interest analysis. Accordingly, we expect that lawyers deploying or resisting the *Braidwood* strategy will strategically file their lawsuits to shop for ideologically sympathetic judges and rely on the same *federal* RFRA and pre-*Smith* Free Exercise Clause case we discussed above.

To illustrate how variation in state law might nonetheless affect a *Braidwood* strategy in these states, consider Virginia, Wisconsin, and Illinois.

1. Virginia

In 2020, the Virginia General Assembly amended its state employment discrimination law to include discrimination because of an individual's "sexual orientation" or "gender identity."[187] That law, like Title VII, only expressly exempts a religious organization's "employment of individuals of a particular religion . . . to perform work associated with its activities."[188]

Since 2007, Virginia has had a RFRA statute that mirrors the federal RFRA's legal standard and authorizes declaratory and injunctive relief, but not monetary relief.[189] Like the Declaratory Judgment Act, Virginia authorizes declaratory judgments in cases of "actual controversy."[190] Unlike the EEOC, the Virginia Attorney General or the state agency that enforces its employment discrimination law can initiate an agency process independent of a charging party and in certain circumstances, can bring an action in state courts.[191] This may obviate the standing hurdle. Virginia law, however, does not generally authorize its state courts to certify class actions. At best, Virginia courts may consolidate "[s]eparate civil actions brought by six or more plaintiffs [that] involve common questions of law or fact and arise out of the same transaction, occurrence or series of transactions or occurrences."[192] Accordingly, the *Braidwood* strategy would not be able to secure a judgment that binds non-parties as in a Rule 23(b)(2) class action.

187. 2020 Va. Acts ch. 1140 (codified at VA. CODE ANN. § 2.2-3905(B) (Cum. Supp. 2023)).

188. VA. CODE ANN. § 2.2-3905(E) (Cum. Supp. 2023).

189. 2007 Va. Laws ch. 889 (codified at VA. CODE ANN. § 57-2.02(B), (D) (2022)).

190. VA. CODE ANN. § 8.01-184 (Cum. Supp. 2023).

191. *See id.* §§ 2.2-3906 to -3908 (2022).

192. VA. CODE ANN. § 8.01-267.1(1) (Cum. Supp. 2023); *e.g.*, Protestant Episcopal Church v. Truro Church, 280 Va. 6, 16, 694 S.E.2d 555, 560–61 (2010).

2. Wisconsin

The Wisconsin Fair Employment Law bars employer discrimination on the basis of sexual orientation,[193] and that law only provides religious exemptions for "employment discrimination because of creed" by religious entities if they are "not organized for private profit."[194] Wisconsin does not have a RFRA-like statute. However, its state constitution bars infringing the "right of every person to worship Almighty God according to the dictates of conscience" and does not permit "any control of, or interference with, the rights of conscience."[195] In turn, the Wisconsin Supreme Court reads these Conscience Clauses to require "the compelling state interest/least restrictive alternative test" from pre-*Smith* Free Exercise Clause doctrine.[196]

In its most recent case applying this law, the Supreme Court of Wisconsin considered a challenge to an August 2020 emergency order that closed all public and private schools for in-person instruction for students in grades 3–12 in Dane County to decrease the spread of COVID-19.[197] The plaintiffs were parents of students enrolled in several religious schools, as well as some religious schools themselves, who claimed that the order burdened their religious exercise of in-person religious instruction in violation of the Conscience Clauses.[198] While the challenged order (undisputedly) advanced a "compelling" state interest, the court concluded that it was not the "least restrictive means" of doing so.[199]

In other respects, lawyers deploying the *Braidwood* strategy asserting Conscience Clauses claims face similar challenges to that strategy for RFRA claims. Wisconsin's declaratory judgment

193. WIS. STAT. §§ 111.31(1)–(3), 111.32(13m) (2023).

194. *Id.* § 111.337(2)(a),(am). In contrast, although courts have read it that way, the text of Title VII's religious-organizations exemption does not expressly exclude for-profit businesses. 42 U.S.C. § 2000e-1(a).

195. WIS. CONST. art. I, § 18.

196. James v. Heinrich, 960 N.W.2d 350, 369 (Wis. 2021); *see* Coulee Catholic Schs v. Lab. & Indus. Rev. Comm'n 768 N.W.2d 868, 886 n. 27 (Wis. 2009); State v. Miller, 549 N.W.2d 235, 241 (Wis. 1996).

197. *James*, 960 N.W.2d at 356–58.

198. *Id.*

199. The order could have slowed COVID-19 in other ways without burdening plaintiffs by closing in-person instruction, including "specifying classroom student limits, mandating the use of masks, and requiring social distancing." *Id.* at 371. For support, the court also pointed to the decision to let in-person instruction continue for grades K–2 and higher education institutions. *Id.* at 369-71.

statute provides that a court may declare a statute's "validity" for "[a]ny person . . . whose rights, status or other legal relations" that statute affects.[200] But like the Article III standing hurdle in *Braidwood* itself, there must be a justiciable controversy, which exists only if the party seeking the declaration has a legally protectable interest that is ripe for judicial determination.[201] Wisconsin's agency structure is significantly different from the EEOC, however, with one agency that acts as investigator and prosecutor, the Department of Workforce Development, and another that acts only as adjudicator of those claims, the Labor and Industry Review Commission.[202] Neither agency can act independently without a charging party, however.[203] Wisconsin's class action rules provide for the functional equivalent of a Rule 23(b)(2) certified class.[204]

3. Illinois

In Illinois, the Human Rights Act declares it state public policy to "secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her . . . sexual orientation . . . in connection with employment."[205] The term "sexual orientation" covers "actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth."[206] Like Title VII, the Act also similarly exempts religious organizations but also "any place of worship" as well as a certain kind of religious-based "non-profit nursing institution."[207]

Since 1998, Illinois also has a RFRA that mirrors the federal RFRA standard,[208] except it requires the burdened person to have been "*substantially* motivated by religious belief."[209] This means

200. WIS. STAT. § 806.04(2) (2023).

201. Fabick v. Evers, 956 N.W.2d 856, 860 (Wis. 2021); *see also* Friends of Black River Forest v. Kohler Co., 977 N.W.2d 342, 350-51 (Wis. 2022) (stating that "Wisconsin has largely embraced federal standing requirements" as a matter of judicial policy and looks to federal case law on standing as "persuasive authority").

202. WIS. STAT. §§ 111.32(2), 111.32(4), 111.375, 111.39 (2023).

203. *See id.* § 111.39.

204. *Id.* § 803.08(2)(b).

205. 775 ILL. COMP. STAT. 5/1-102(A) (2023).

206. *Id.* 5/1-103(O-1).

207. *Id.* 5/2-101(B)(2).

208. *Id.* 35/15.

209. *Id.* 35/5 (emphasis added). The federal RFRA's definition of "exercise of religion" does not expressly require "substantial" religious motivation. 42 U.S.C. § 2000bb-2(4).

exemption-seeking employers subject to the Illinois Human Rights Act may vary in the success of their state RFRA claim depending on *how much* (substantial or not) they are religiously motivated to refuse to employ gay, bisexual, or transgender individuals.

Even if so, we suspect this feature of the Illinois RFRA will have only a negligible effect on lawyers deploying the *Braidwood* strategy. To be sure, unlike Rule 23(b)(2) class actions, all class actions under Illinois law require common questions of fact or law that "predominate over any questions affecting only individual members."[210] But if the compelling interest analysis under the Illinois RFRA is common to all the putative class members, then an Illinois court is likely to judge the "predominate" question in the RFRA claimants' favor.

In other respects, the *Braidwood* strategy faces a familiar standing obstacle. Although the Illinois RFRA statute only refers to "appropriate relief against a government,"[211] the State's declaratory judgment statute authorizes declaratory relief, albeit only "in cases of actual controversy."[212] To satisfy this requirement, the party seeking a declaration as to a statute "must have sustained, or be in immediate danger of sustaining, a direct injury as a result of enforcement of the statute."[213] Illinois's agency structure is like Wisconsin's, with one agency that acts as investigator and prosecutor, the Department of Human Rights, and another that acts only as adjudicator of those claims, the Human Rights Commission.[214] Unlike Wisconsin, however, the Department has independent power to institute an investigation or bring a complaint to the Commission, which makes standing less of a hurdle for *Braidwood*-style plaintiffs.[215]

CONCLUSION

This Article points readers to the *Braidwood* strategy for Title VII liability: bring a declaratory judgment RFRA class action on behalf of religiously motivated employers against the EEOC to

210. 735 ILL. COMP. STAT. 5/2-801. This is also required for class certification under FED. R. CIV. P. 23(b)(3).

211. 775 ILL. COMP. STAT. 35/20.

212. *Id.* 5/2-701(a).

213. Flynn v. Ryan, 771 N.E.2d 414, 437 (Ill. 2002).

214. 775 ILL. COMP. STAT. 5/7A-102; *id.* 5/8-102.

215. 775 ILL. COMP. STAT. 5/7A-102(A).

seek a declaration that under RFRA, such employers are exempt from Title VII liability if they are religiously motivated to discriminate against gay and transgender employees, among others, otherwise protected by Title VII. We explained this strategy's Article III standing hurdle. And we explained how this strategy exploits a key ambiguity in the compelling interest test under RFRA about the scope of the putative RFRA exempted set. Finally, we identified the states in which lawyers may seek to deploy the *Braidwood* strategy to seek exemption from state employment discrimination law.

This Article is limited in scope. We did not address the *Braidwood* strategy for its claims under the Free Exercise Clause and other First Amendment law. We did not consider the consequences of the *Braidwood* RFRA strategy in a jurisdiction that reads RFRA to apply to civil suits between private parties. Nor did we address in detail how well the *Braidwood* strategy fares if extended to challenge liability for discrimination because of race, color, and national origin, or for violating other labor market regulations that burden those employers' sincere religiously motivated treatment of their workers. We leave these issues for future development.

Finally, this Article falls within a genre of scholarship that examines the law as written for clarity and internal coherence while largely setting aside judges' ideological and personal preferences about gender, sexuality, and religion. In fact, as best as can be measured, judge ideology matters to case outcomes, though it is often hard to disentangle how much it matters relative to other motivations or influences,[216] such as ties with wealthy or powerful individuals with stakes in court outcomes or specific political goals.[217] In this Article, we avoided specifically predicting how

216. *See* Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, J. ECON. PERSPS., Winter 2021, at 97 (2021); Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241 (2019).

217. *See, e.g.*, Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/7LDC-97HU]; Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow-2 [https://perma.cc/J9HA-LGV4]; Andy Kroll, Andrew Perez & Aditi Ramaswami, *Conservative Activist Poured Millions into Groups Seeking to Influence Supreme Court on Elections and Discrimination*, PROPUBLICA (Dec. 14, 2022, 12:30 PM), https://www.propublica.org/article/leonard-leo-scotus-elections-nonprofits-discrimination [https://perma.cc/Z24U-M7QM]; Jodi Kantor & Jo Becker, *Former Anti-Abortion Leader Alleges*

various judges, including current U.S. Supreme Court Justices or state supreme court judges, would in fact respond to the *Braidwood* exploit.

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DATA AVAILABILITY STATEMENT

The data used for Tables 1-2 and Figure 1 are available at https://osf.io/zjb7h/.

Another Supreme Court Breach, N.Y. TIMES (Nov. 19, 2022), https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html [https://perma.cc/9WH9-2F9E].