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RFRA Shields Religious Humanitarian Act at the U.S.-Mexico Border From Criminal Prosecution and Upholds Religious Objection to the Construction of the Border Wall

Secilia Flores

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**RFRA SHIELDS RELIGIOUS HUMANITARIAN ACTS AT THE U.S.-MEXICO
BORDER FROM CRIMINAL PROSECUTION AND UPHOLDS RELIGIOUS
OBJECTION TO THE CONSTRUCTION OF THE BORDER WALL**

I. INTRODUCTION

The United Nations has characterized the U.S.-Mexico border “as one of the deadliest for migrants.”¹ Since 2014, approximately 2,403 migrants have died trying to cross the U.S. southern border.² In 2019 alone, the Missing Migrants Project (“MMP”) recorded 497 deaths³. Religious activists have tried to alleviate some of the suffering occurring at the border by providing legal assistance, shelter, and basic supplies such as food and clothing.⁴ Because of their humanitarian actions, some religious figures have been criminally prosecuted.⁵

But criminalization of religious humanitarian acts has not been the only subject of debate at the U.S.-Mexico border. On June 16, 2015, while announcing his presidential campaign, Donald J. Trump touted the idea of building a wall along the southern border and affirmed that Mexico would pay for it.⁶ Throughout his presidential campaign, Trump continued advocating for the construction of the border wall, and this promise soon became one of the highlights of his campaign.⁷ On January 20, 2017, Trump became the forty-fifth U.S. President.⁸ Five days after his

¹ UNICEF/Balam-ha Carrillo, *2019: A deadly year for migrants crossing the Americas*, UN NEWS (Jan. 20, 2020), <https://news.un.org/en/story/2020/01/1056202>.

² *Id.*

³ *Id.*

⁴ Catholic Extension, *5 Catholic Ministries Helping Migrants at the Border*, CATHOLIC EXTENSION (June 27, 2019), <https://www.catholicextension.org/stories/5-catholic-ministries-helping-migrants-border/>.

⁵ Katherine Franke, *Professor Katherine Franke Comments on Federal Court Conviction of Four Migrants' Rights Activists for Leaving Water and Food in the Arizona Desert*, COLUM. LAW SCHOOL LAW, RIGHTS, AND RELIGION PROJECT (Jan. 19, 2019), <https://lawrightsreligion.law.columbia.edu/news/professor-katherine-franke-comments-federal-court-conviction-four-migrants-rights-activists>.

⁶ Anu Joshi, *Donald Trump's Border Wall—An Annotated Timeline*, HUFFINGTON POST (Feb. 28, 2017), https://www.huffpost.com/entry/donald-trumps-border-wall-an-annotated-timeline_b_58b5f363e4b02f3f81e44d7b.

⁷ *Id.*

⁸ Stephen Collison, *Trump becomes 45th President of the United States*, CNN (Jan. 21, 2017), <https://www.cnn.com/2017/01/20/politics/donald-trump-inauguration-highlights/index.html>.

inauguration, Trump signed the Border Security and Immigration Enforcement Improvements Executive Order, which authorized “the immediate construction of a physical wall.”⁹ Trump’s Executive Order defined the wall as “. . . a continuous, physical wall or other similarly secure contiguous, and impassable physical barrier.”¹⁰ It also ordered the federal government to “. . . take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border . . .”¹¹

Through eminent domain, the Federal Government began taking private property for the construction of the border wall.¹² Churches were among those affected, including La Lomita Chapel, a 120-year-old Catholic church in Mission Texas that sits in the path of Trump’s border wall.¹³ When the Federal Government sought to use the church’s property to begin preparations for the border wall, La Lomita Chapel objected on religious grounds.¹⁴

Churches as well as religious activists at the U.S.-Mexico border are involved in efforts to sustain transborder faith communities and to alleviate the growing humanitarian crisis. Recently, these efforts have become the subject of religious freedom litigation under federal law. Section I establishes an introductory overview of the U.S.-Mexico border humanitarian crisis. Section II will discuss the Religious Freedom Restoration Act (“RFRA”) and the main Supreme Court cases interpreting such. Section III will present two district court cases in which courts have applied RFRA to humanitarian acts at the U.S.-Mexico border. Section IV will explore the construction of

⁹ *Executive Order: Border Security and Immigration Enforcement Improvements* (Jan. 15, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/>.

¹⁰ *Id.*

¹¹ *Id.*

¹² John Burnett, *Acquiring Private Land is Slowing Trump’s Border Wall*, NPR (Dec. 20, 2019), <https://www.npr.org/2019/12/20/789725311/acquiring-private-land-is-slowing-trumps-border-wall>.

¹³ Lulu-Garcia-Navarro, *The Historic Chapel At The Heart Of A Legal Fight Over The Border Wall*, NPR (Feb. 10, 2019), <https://www.npr.org/2019/02/10/693115073/the-historic-chapel-at-the-heart-of-a-legal-fight-over-the-border-wall>.

¹⁴ *Id.*

the southern border wall and its effect on religious entities. Section V will conclude that criminalizing humanitarian acts at the U.S-Mexico border and taking churches' property for the construction of the border wall violates RFRA. Because RFRA grants immense protection to religious liberty, this statute has and will continue to protect religious humanitarian acts at the U.S-Mexico border and religious objection to the construction of the border wall.

II. RFRA'S BECOMING

Subsection A will present a brief introduction to the creation of RFRA. Subsection B will discuss the Supreme Court's interpretation of RFRA concluding that RFRA's protection is extensive and permissive when properly applied.

A. RFRA's Language and History

In 1963, the Supreme Court held in *Sherbert v. Verner* that a law restricting an individual's free exercise right must further a compelling government interest.¹⁵ *Sherbert* involved a Seventh Day Adventist whose religion prevented her from working on Saturdays.¹⁶ Because of Sherbert's unavailability to work on Saturdays, her employer fired her.¹⁷ Sherbert eventually filed for unemployment benefits but her application was denied.¹⁸ The Employment Security Commission found that Sherbert's unavailability to work on Saturdays disqualified her from unemployment benefits because she failed, without good cause, to accept suitable work when offered.¹⁹

On appeal, the Supreme Court conducted a two-step inquiry to determine whether the denial of unemployment benefits to Sherbert was constitutional.²⁰ The Court first inquired ". . . whether the disqualification for benefits impose[d] any burden on the free exercise of [Sherbert's]

¹⁵ *Sherbert v. Verner*, 374 U.S. 398, 403, 406 (1963).

¹⁶ *Id.* at 399.

¹⁷ *Id.*

¹⁸ *Id.* at 400-01.

¹⁹ *Id.* at 401.

²⁰ *Id.* at 403, 406.

religion.”²¹ The Court concluded that the disqualification of benefits imposed a burden on Sherbert’s religion because her “. . . declared ineligibility for benefits derive[d] solely from the practice of her religion . . .”²² Sherbert was essentially forced to decide between “. . . following the precepts of her religion and forfeiting benefits. . . [or]. . . abandoning one of the precepts of her religion in order to accept work. . .”²³ This condition on the availability of unemployment benefits effectively penalized her free exercise of religion.²⁴

The Court then considered whether a compelling government interest justified the substantial burden imposed on Sherbert’s free exercise right.²⁵ The Court found the State did not advance a compelling government interest that would justify the substantial burden imposed on Sherbert’s free exercise of religion.²⁶

Nine years after *Sherbert*, the Supreme Court decided *Yoder v. Wisconsin* where it held that a law restricting an individual’s free exercise right was unconstitutional.²⁷ *Yoder* implicated a Wisconsin statute that required school attendance until the age of 16.²⁸ Members of the Old Order Amish religion and of the Conservative Amish Mennonite Church refused to send their children to school after eighth grade, an action for which they were fined five dollars each.²⁹ The Amish believers argued “. . . that their children’s attendance at high school, public or private, was contrary to the Amish religion and way of life.”³⁰ The State stipulated this was a sincerely held religious belief.³¹

²¹ *Id.* at 405.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 406.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Yoder v. Wisconsin*, 406 U.S. 205, 234 (1972).

²⁸ *Id.* at 207.

²⁹ *Id.* at 207-08.

³⁰ *Id.* at 209.

³¹ *Id.*

In evaluating the Amish members' free exercise claim, the Supreme Court found that sending children to school beyond the eighth grade . . . contravene[d] the basic religious tenets and practice of the Amish faith . . .”³² Similar to *Sherbert*, the Court concluded that the Wisconsin law compelled the Amish believers, “. . . under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.”³³ The Court then rejected the difference between actions and beliefs as a ground for finding against the Amish believers.³⁴ The Court further explained that a facially neutral regulation could discriminate against the free exercise of religion based on its application.³⁵

When analyzing whether the State had a compelling government interest in two more years of compulsory education after the eighth grade, the Court determined that the State needed to show “a more particularized showing . . . to justify the severe interference with religious freedom . . .”³⁶ The Court reasoned that the Amish community provided their children with suitable vocational education and the requirement for compulsory education after the eighth grade was a relatively recent development in our nation’s history.³⁷ The Court also noted that “[a] way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.”³⁸ Therefore, the First Amendment protected the Amish from being compelled to send their children to school after the eighth grade in contravention to their religious beliefs.³⁹

Sherbert and *Yoder* established a strict scrutiny standard of review for government-imposed burdens on religious exercise. However, the strict scrutiny standard came to a halt in

³² *Id.* at 218.

³³ *Id.*

³⁴ *Id.* at 220.

³⁵ *Id.*

³⁶ *Id.* at 227.

³⁷ *Id.* at 224-27.

³⁸ *Id.* at 224.

³⁹ *Id.* at 234.

1990, when the Supreme Court held in *Employment Division v. Smith* that a law of general applicability is to be reviewed under rational basis review.⁴⁰ In *Smith*, the plaintiffs consumed peyote as part of a sacramental ceremony of the Native American Church.⁴¹ Because Oregon law criminalized the use of peyote regardless of the purpose for consumption, the Oregon Employment Division denied plaintiffs unemployment benefits.⁴²

In reviewing the plaintiff's free exercise claim, the Supreme Court first acknowledged that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."⁴³ The Court then explained that a textual reading of the Free Exercise Clause did not mean that the plaintiffs were excluded from a ". . . generally applicable law that requires (or forbids) the performance of an act that [their] religious belief forbids (or requires)."⁴⁴ The Court emphasized that it had never previously held that ". . . an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."⁴⁵ To hold otherwise, the Court reasoned, would ". . . be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."⁴⁶

However, the Court recognized an exception.⁴⁷ Rational basis review does not apply in hybrid situations where a law of general applicability burdens an individual's Free Exercise right in conjunction with other constitutional rights such as Freedom of Speech or Freedom of the Press.⁴⁸ An example is *Yoder* where the Amish parents' Free Exercise right and parental rights

⁴⁰ *Employment Division v. Smith*, 494 U.S. 872, 884-85 (1990).

⁴¹ *Id.* at 874.

⁴² *Id.*

⁴³ *Id.* at 877.

⁴⁴ *Id.* at 878.

⁴⁵ *Id.* at 878-79.

⁴⁶ *Id.* at 879.

⁴⁷ *Id.* at 881.

⁴⁸ *Id.*

were at issue.⁴⁹ There the Court applied strict scrutiny rather than rational basis review.⁵⁰ *Smith*, however, did not involve “such a hybrid situation[.]” and therefore the Court applied rational basis review.⁵¹ The *Smith* Court further clarified that strict scrutiny would continue to apply in cases such as *Sherbert*.⁵² Where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of “religious hardship” without compelling reason.⁵³ Because *Smith* involved a law of generally applicability with no system of individual exemptions, this further supported application of rational basis review.⁵⁴ Applying the most deferential standard of constitutional review, the Court held that the denial of unemployment benefits to plaintiffs was constitutional.⁵⁵

Shortly after *Smith*, then Representative Chuck Schumer introduced the Religious Freedom Restoration Act (“RFRA”) bill to reject the Supreme Court’s holding in *Smith*.⁵⁶ The House of Representatives passed the bill unanimously and the Senate approved it 97-3.⁵⁷ RFRA states in pertinent part:

- (a) In general.** Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
- (b) Exception.** Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—
 - (1)** is in furtherance of a compelling governmental interest; and

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 882.

⁵² *Id.* at 884.

⁵³ *Id.* (citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

⁵⁴ *Id.* at 890.

⁵⁵ *Id.* Congress eventually recognized that “. . . peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church.” 21 C.F.R. § 1307.31.

⁵⁶ Zeke J Miller, *Democrats Caught Up in Controversial Indiana Religious-Freedom Law*, (Mar. 29, 2015 6:37 PM), <https://time.com/3762708/indiana-gay-religious-pence-clinton/>.

⁵⁷ Brian Miller, *The Age of RFRA* (Nov. 16, 2018 03:46 PM), <https://www.forbes.com/sites/briankmiller/2018/11/16/the-age-of-rfra/?sh=4dc5323e77ba>.

(2) is the least restrictive means of furthering that compelling government interest.⁵⁸

By enacting RFRA, Congress intended to adopt the strict scrutiny test as set forth in *Sherbert and Yoder*.⁵⁹ Four years after Congress enacted RFRA, the Supreme Court held in *City of Boerne v. Flores* that RFRA does not apply to the States.⁶⁰

B. Supreme Court's Interpretation of RFRA

Gonzales v. O Centro Espirita Beneficente União do Vegetal was the first Supreme Court decision to apply RFRA to a free exercise claim.⁶¹ *Gonzales* concerned the sacramental use of hoasca, a hallucinogen regulated by the Federal Government under the Controlled Substances Act, by a Brazilian Christian Spiritist sect of approximately 130 members.⁶² When the O Centro Espirita Beneficente União do Vegetal (UDV) tried to import three drums of hoasca into the United States, the Federal Government intercepted the hoasca shipment and threatened to prosecute the UDV.⁶³ In the district court, the Government conceded that “. . . application of the Controlled Substances Act would substantially burden a sincere exercise of religion by the UDV.”⁶⁴ Nonetheless, the Government argued that application of the Controlled Substances Act was the least restrictive means of furthering three compelling government interests.⁶⁵

In evaluating the UDV's Free Exercise claim, the Court first concluded that at the preliminary injunction stage, Congress intended RFRA challenges to be adjudicated in the same

⁵⁸ 42 U.S.C. § 200bb-1.

⁵⁹ *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006).

⁶⁰ *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Nowadays, approximately 21 States have enacted their own version of RFRA. National Conference of State Legislatures, *State Religious Freedom Restoration Acts* (May 04, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

⁶¹ *Gonzales*, 546 U.S. at 430.

⁶² *Id.* at 423, 425.

⁶³ *Id.* at 425.

⁶⁴ *Id.* at 426.

⁶⁵ *Id.*

manner as any other applications of the compelling government interest test.⁶⁶ This means that at a preliminary injunction hearing, the Government has the burden of proving a compelling government interest.⁶⁷ The Court then noted that RFRA requires a specific rather than a general application of the compelling government interest.⁶⁸ The Government must demonstrate that application of the law at issue is the least restrictive means of furthering a compelling government interest as applied to the claimant whose religion is substantially burdened by the law.⁶⁹

Applying strict scrutiny to the UDV's free exercise claim, the Court reasoned that listing hoasca under Schedule I of the Controlled Substances Act did not provide a clear answer in favor of the Government, particularly because the Act allowed an exemption for religious use.⁷⁰ Notably, the Court emphasized that RFRA vested courts with the power to recognize religious exemptions to a law of general applicability.⁷¹ The Court then rejected the Government's arguments that a ruling in favor of the UDV would undermine the effectiveness of the Controlled Substances Act, and that making an exemption for the UDV would require that the Government makes an exemption for everyone else.⁷² The Court reasoned that RFRA's intent was to mandate religious exemptions to laws of general applicability where the Government did not meet the compelling government interest test.⁷³ The Court further explicated that the Government had not offered any evidence to substantiate its arguments.⁷⁴ Congress, by enacting RFRA, required courts to strike a "sensible balance" through application of the compelling government interest test.⁷⁵ Here, the

⁶⁶ *Id.* at 430.

⁶⁷ *Id.* at 429.

⁶⁸ *Id.* at 430-31.

⁶⁹ *Id.*

⁷⁰ *Id.* at 432-33.

⁷¹ *Id.* at 434.

⁷² *Id.* at 434-36.

⁷³ *Id.* at 436.

⁷⁴ *Id.* at 437-38.

⁷⁵ *Id.* at 439.

Government did not meet its burden of proving that a compelling government interest justified prohibiting the UDV's sacramental use of hoasca.⁷⁶ *Gonzalez* represents a broad and permissive case-by-case basis application of RFRA.

The Supreme Court's next RFRA case was also exceedingly protective of religious exercise. In 2014 in *Burwell v. Hobby Lobby*, the Supreme Court applied RFRA to a free exercise claim of three closely held, for-profit corporations.⁷⁷ *Hobby Lobby* involved the Patient Protection and Affordable Care Act, which required employers with fifty full-time employees or more to offer minimum health insurance coverage.⁷⁸ Otherwise, they would incur a monetary penalty.⁷⁹ The agencies in charge of interpreting the Act required employers to provide all FDA-approved contraceptives in their health insurance coverage.⁸⁰

Four of the FDA-approved contraceptives, commonly known as abortifacients, had the effect of preventing a fertilized egg from attaching to the uterus.⁸¹ The owners of the for-profit corporations argued that the abortifacients effectively cause an abortion, which was against their religious beliefs.⁸² The Government provided a religious exemption to nonprofit corporations that considered themselves a religious organization and opposed any of the contraceptives required by the contraceptive mandate.⁸³ The three corporations, however, did not qualify for this accommodation given their for-profit nature.⁸⁴

In addressing the plaintiffs' free exercise claim, the Court first noted that "RFRA was designed to provide very broad protection for religious liberty," and concluded that for-profit,

⁷⁶ *Id.*

⁷⁷ *Burwell v. Hobby Lobby*, 573 U.S. 682, 688 (2014) (plurality opinion).

⁷⁸ *Id.* at 696.

⁷⁹ *Id.* at 697.

⁸⁰ *Id.*

⁸¹ *Id.* at 698.

⁸² *Id.* at 700-05.

⁸³ *Id.* at 698.

⁸⁴ *Id.*

closely held corporations are protected under RFRA.⁸⁵ The Court then proceeded to evaluate whether the contraceptive mandate burdened the owners sincerely held religious beliefs.⁸⁶ Because noncompliance with the contraceptive mandate resulted in monetary penalties, the Court determined that the owners' defiance of the contraceptive mandate burdened the owners free exercise of religion.⁸⁷ Next, the Court assumed without deciding that "guaranteeing cost-free access to four challenged contraceptives" was a compelling government interest.⁸⁸ Applying strict scrutiny, the Court concluded that the Department of Health and Human Services ("HHS") regulations were not the least restrictive means of furthering a compelling government interest.⁸⁹ Given that the Government made an accommodation for nonprofit religious corporations opposed to the mandate, the Government had to accommodate for-profit corporations' religious opposition to the contraceptive mandate as well.⁹⁰ *Hobby Lobby* reinforced the notion that where the government makes an individual exemption, it may not refuse to exempt religious opposition to the same law.

The Supreme Court further provided an especially protective approach toward religious freedom when interpreting RFRA's sister statute in *Holt v. Hobbs*. There, the Supreme Court evaluated whether a prison policy prohibiting a Muslim prisoner from growing a beard violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).⁹¹ Although growing a beard was forbidden, the prison allowed an exception for dermatological reasons.⁹² However,

⁸⁵ *Id.* at 706, 719.

⁸⁶ *Id.* at 719.

⁸⁷ *Id.* at 720.

⁸⁸ *Id.* at 728.

⁸⁹ *Id.* at 730.

⁹⁰ *Id.* at 736.

⁹¹ *Holt v. Hobbs*, 574 U.S. 352 (2015).

⁹² *Id.* at 356.

when Holt sought permission to grow a beard, the prison guard refused permission stating that Holt would face the consequences if he grew a beard.⁹³

The Court evaluated Holt’s free exercise claim under RLUIPA, which allows prisoners “to seek religious accommodations pursuant to the same standard as set forth in RFRA.”⁹⁴ The Prison did not challenge the sincerity of Holt’s religious beliefs.⁹⁵ In addition, the Prison recognized that Holt was forced to decide between growing a beard and facing serious disciplinary actions or cutting his beard in violation of his religious beliefs.⁹⁶ This predicament represented a government-imposed burden on Holt’s free exercise of religion.⁹⁷ The *Hobbs* Court reiterated that RFRA requires “application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened[,]” rather than a generalized application.⁹⁸

The Court rejected the Prison’s argument that it had a compelling government interest in preventing inmates from growing facial hair.⁹⁹ The Court noted that the Department did not require “shaved heads or short crew cuts.”¹⁰⁰ Therefore, the Court could not understand why inmates would hide contraband in their beards but not in their hair.¹⁰¹ The least restrictive means test required the Prison to show that it “. . . lack[ed] other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].”¹⁰² Here, the Prison failed to show that it lacked other means of ensuring prison security.¹⁰³ The Court also found unpersuasive the Prison’s failure to explain why the grooming policy was underinclusive in

⁹³ *Id.* at 359.

⁹⁴ *Id.* at 358.

⁹⁵ *Id.* at 361.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 363 (citing *Hobby Lobby*, 573 U.S. at 726).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 364.

¹⁰¹ *Id.*

¹⁰² *Id.* at 364-35.

¹⁰³ *Id.* at 365.

that it allowed exceptions for medical reasons but not for religious purposes.¹⁰⁴ The Court further rejected the Prison's argument that allowing inmates to grow their beard would prevent prison guards from quickly identifying inmates.¹⁰⁵ The Department did not present any evidence demonstrating that its prison system was different from other departments that allowed facial hair growth without affecting the prison's security and quick identification of inmates.¹⁰⁶ In an unanimous decision, the Court held the grooming policy invalid.¹⁰⁷

Based on the Supreme Court's jurisprudence on RFRA, the following test is to be used when a court evaluates a free exercise claim:

- (1) Does claimant have a sincerely held religious belief?
- (2) Does the law at issue burden claimant's sincerely held religious beliefs?
- (3) If so, is the law the least restrictive means (4) of furthering a compelling government interest?

If a law burdens an individual's sincerely held religious beliefs, it will be held invalid unless the Government demonstrates that it is the least restrictive means to advance a compelling government interest. When evaluating an individual's free exercise claim, courts should apply RFRA on a case specific basis, rather than making a generalized application. Courts should also consider whether the Government has presented any evidence to substantiate its arguments and whether the Government affords exceptions to the law but refuses to make a religious exemption. As seen in *Gonzales*, *Hobby Lobby*, and *Holt*, the Court's statutory interpretation of RFRA places a heavy burden on the government to show that its law is indeed the least restrictive means to advance a compelling interest.

¹⁰⁴ *Id.* at 367.

¹⁰⁵ *Id.* at 366-67.

¹⁰⁶ *Id.* at 367.

¹⁰⁷ *Id.* at 369-70.

III. RFRA PROTECTS HUMANITARIAN ACTS AT THE BORDER FROM CRIMINAL PROSECUTION

Subsection A will describe a case in which a court mistakenly dismissed a claimant's free exercise claim. Subsection B will introduce a successful RFRA claim.

A. *United States v. Warren*

In 2018 in *United States v. Warren*, the United States District Court for the District of Arizona addressed a humanitarian religious claim.¹⁰⁸ Warren was arrested for providing food and water to two undocumented individuals at a property located in Ajo Arizona.¹⁰⁹ Warren believed in animism.¹¹⁰ His religious beliefs included “. . . help[ing] others in distress to the point of being a duty or compulsion.”¹¹¹ Because of Warren's humanitarian acts, he “. . . was arrested for concealing, harboring, or shielding illegal aliens . . .”¹¹²

Warren filed a motion to dismiss the complaint against him.¹¹³ But the court denied Warren's motion on the ground that there were “unresolved questions of fact.”¹¹⁴ More specifically, the court explained that no testimony was presented to the effect that the statutes at issue compelled Warren to act contrary to his religious beliefs.¹¹⁵ Rather than testifying that Warren's religion compelled him to aid undocumented immigrants, Warren simply stated that his religious beliefs required him to help those in immediate need generally.¹¹⁶ Warren, however, was accused of harboring undocumented immigrants “. . . whether or not they [were] in distress.”¹¹⁷ Therefore, it was unclear whether all or some of Warren's conduct conflicted with Federal

¹⁰⁸ *United States v. Warren*, 2018 WL 5257807 (May 31, 2018).

¹⁰⁹ *Id.* at *1-2.

¹¹⁰ *Id.* at *1.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at *2.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

immigration laws.¹¹⁸ The court ultimately concluded that the statutes at issue did not substantially burden Warren’s Free Exercise right and declined to apply strict scrutiny.¹¹⁹

The *Warren* court misunderstood RFRA’s definition of religious. RFRA’s sister statute, RLUIPA, describes religion as “. . . any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”¹²⁰ The same definition applies to RFRA, meaning that RFRA protects mandatory as well as permissive acts. Under this definition, Warren was not required to prove that all of his conduct was compelled by his religious beliefs. As long as Warren proved he helped some immigrants in immediate need because his religious beliefs compelled him to do so, that should have been enough to shield Warren from criminal prosecution. If applied correctly, the Court should not have dismissed Warren’s RFRA claim, finding that RFRA protects any exercise of religion whether permissive, mandatory or central to a system of religious belief.

B. United States v. Hoffman

While the court in *Warren*, dealing with a motion to dismiss, would not accept that religious freedom was implicated, the same court in *United States v. Hoffman* reversed four convictions on RFRA grounds.¹²¹ *Hoffman* implicated four volunteers with “No More Deaths/No Más Muertes,” a religious-based, charitable organization and ministry of the Unitarian Universalist Church of Tucson, Arizona.¹²² No more Deaths was founded in 1999 with the goal of providing food, water, and medical care for immigrants crossing the desert on foot.¹²³ This organization tracked the deaths of immigrants and left supplies where human remains were recovered.¹²⁴

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ 42 U.S.C. § 2000cc-5(7)(A).

¹²¹ *United States v. Hoffman*, 436 F.Supp.3d 1272 (2020).

¹²² *Id.* at 1277.

¹²³ *Id.*

¹²⁴ *Id.*

The humanitarian acts at issue occurred in the Cabeza Prieta National Wildlife Refuge (“CPNWR”), which contains trails immigrants use to cross the desert on foot.¹²⁵ To enter the CPNWR, visitors are required to obtain permits and sign a hold harmless agreement.¹²⁶ This agreement characterizes CPNWR as “one of the most extreme environments in North America” and one that “contains no sources of safe drinking water.”¹²⁷ Shortly before the volunteers at issue entered the CPNWR, the permit application was amended to proscribe “. . . the leaving of ‘water bottles, water containers, food, food items, food containers, blankets, clothing, footwear, [and] medical supplies’ on the CPNWR.”¹²⁸

Without a permit, four volunteers with No More Death drove down a restricted-access road in the CPNWR to leave water and food along the foot trails immigrants use to cross the U.S.-Mexico border.¹²⁹ These humanitarian acts transpired at a time when a large number of immigrants were dying while attempting to cross “. . . the remote desert wilderness of southern Arizona on foot.”¹³⁰ Despite Border Patrol rescue beacons, in 2017 alone, “. . . 32 sets of human remains were recovered from the CPNWR.”¹³¹ Because of their humanitarian acts, which occurred in an area where immigrants often die of dehydration and exposure, the four volunteers were convicted for violating the CPNWR’s regulations.¹³²

The United States District Court for the District of Arizona reversed the volunteers’ convictions.¹³³ The court held that prosecuting the volunteers substantially burdened their sincerely held religious beliefs, and that the Government failed to demonstrate that the volunteers’

¹²⁵ *Id.* at 1276-77.

¹²⁶ *Id.* at 1277.

¹²⁷ *Id.*

¹²⁸ *Id.* at 1278 (alteration in original).

¹²⁹ *Id.* at 1276-77.

¹³⁰ *Id.* at 1277.

¹³¹ *Id.*

¹³² *Id.* at 1276-77.

¹³³ *Id.* at 1289.

convictions was the least restrictive means of furthering a compelling government interest.¹³⁴ The court first described RFRA as a “very broad protection for religious liberty” and stated that RFRA can be used as an affirmative defense to criminal prosecution.¹³⁵ To succeed on a RFRA claim, a claimant must demonstrate that the government action substantially burdens the claimant’s sincere exercise of religion.¹³⁶ Upon this showing, the burden shifts to the Government to prove that the government action is the least restrictive means of furthering a compelling government interest.¹³⁷

In determining whether the acts at issue constitute a sincere exercise of religion, the court cannot impose its “. . . perception of the particular belief or practice in question.”¹³⁸ Under RFRA, religious beliefs . . . “do not need to be ‘acceptable, logical, consistent, or comprehensible to others . . .’”¹³⁹ Instead, the court defined religious beliefs under RFRA as those beliefs that are “sincerely held” and are considered “religious” under the claimant’s own scheme of things.¹⁴⁰

Applying the sincerely held religious beliefs test, the court found that the volunteers’ acts of leaving food and water along foot trails used by immigrants to cross the U.S.-Mexico Border constituted a sincere exercise of religion.¹⁴¹ The court found significant that, upon encountering the Fish and Wildlife (“FWS”) Officer who apprehended them, the volunteers identified themselves as members “from the Church in Tucson.”¹⁴² They also used a Unitarian Universalist Church truck to enter the CPNWR.¹⁴³ The four volunteers further identified themselves with the religious practice of helping those who are in most need and in protecting the sanctity of human

¹³⁴ *Id.* at 1277.

¹³⁵ *Id.* at 1279.

¹³⁶ *Id.* at 1280.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* (citing *United States v. Ballard*, 322 U.S. 78, 86-87 (1944)).

¹⁴⁰ *Id.* at 1281.

¹⁴¹ *Id.* at 1285.

¹⁴² *Id.* at 1281.

¹⁴³ *Id.*

life.¹⁴⁴ The court reasoned that not professing beliefs of an established religion did not bar the volunteers' affirmative RFRA defense.¹⁴⁵ The court also rejected the Government's argument that the volunteers' religious beliefs were described in the "the broadest terms."¹⁴⁶ The court also disagreed that a RFRA claim deserves less protection because of an overlap with "political or other secular beliefs."¹⁴⁷ The court considered that the "areas of overlap [are] presumably protected."¹⁴⁸ Moreover, the court did not find that the four volunteers sought to perpetrate fraud on the court.¹⁴⁹

The court next concluded that prosecuting the volunteers substantially burdened their sincerely held religious beliefs.¹⁵⁰ The Government action essentially forced the volunteers to decide between practicing their religion or obeying the CPNWR's regulations.¹⁵¹ The Government also failed to prove a compelling government interest that would justify the volunteers' convictions.¹⁵² Even assuming that the Government had a compelling government interest, the Government did not demonstrate that criminal prosecution against the volunteers was the least restrictive means of furthering a compelling government interest.¹⁵³ As such, the court reversed the volunteers' convictions.¹⁵⁴

Unlike *Warren*, *Hoffman* correctly applied RFRA to the facts at issue. First, the *Hoffman* court accurately concluded that a religious belief under RFRA does not need to be an established religious belief, and more importantly, the court may not substitute its judgment for the claimant's self-described religious beliefs. For example, in *Yoder* the Supreme Court emphasized that "[a]

¹⁴⁴ *Id.* at 1281-82.

¹⁴⁵ *Id.* at 1283.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1284.

¹⁴⁸ *Id.* (citing *Callaham v. Woods*, 658 F.2d 679, 684 (9th Cir. 1981)).

¹⁴⁹ *Id.* at 1284.

¹⁵⁰ *Id.* at 1285-86.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1289.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

way of life that is odds or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.”¹⁵⁵ The *Hoffman* court understood and applied this concept to the facts at issue.

Second, relying on *Hobby Lobby* the court properly recognized that “[t]he substantial burden inquiry must not stray into a judgment as to whether a claimant’s beliefs are reasonable.”¹⁵⁶ The court further acknowledged that RFRA’s existence is meant to provide exemptions to laws of general applicability where appropriate.¹⁵⁷ Unlike *Warren*, the *Hoffman* court rightly concluded that “Defendants do not need to show that their beliefs ‘required’ them to conduct their religious motivated activities on the CPNWR in order to succeed on their RFRA claim.”¹⁵⁸ Given that Defendants’ religious beliefs required them to save lives and that there was a growing number of deaths in the CPNWR, providing food and water was key to the exercise of Defendants’ religion. Thus, the Government’s prohibition on the leaving of water and food on the CPNWR substantially burdened the Defendants’ free exercise right.

Third, the *Hoffman* court citing *Gonzales* correctly described RFRA’s compelling government interest standard as looking beyond “broadly formulated interests” and instead analyzing the specific harms involved.¹⁵⁹ Because the Government did not prove that granting a specific exemption would frustrate the Government’s goal of preserving the CPNWR’s pristine nature, and the Government had granted a number of other exemptions, the Government’s stated compelling interests did not justify the burden imposed on the Defendants’ free exercise right.

¹⁵⁵ *Yoder*, 406 U.S. at 237.

¹⁵⁶ *Hoffman*, 436 F.Supp.3d at 1285.

¹⁵⁷ *Id.* at 1286.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1287.

Fourth, relying on *Hobby Lobby* again, the court noted that the least restrictive alternative test is extremely demanding.¹⁶⁰ To satisfy the test, there must be no other alternative to accomplish the Government's compelling interest.¹⁶¹ In *Hoffman* the Government failed to explain why a number of other alternatives would not work such as asking the volunteers to remove their trash. Similar to *Hobby Lobby* where the Government exempted nonprofit corporations from complying with the contraceptive mandate, but refuse to extend the same exemption to for-profit corporations or *Hobbs* where the Prison failed to explain why other prisons could securely allow prisoners to grow their beards but the Prison could not, in *Hoffman* the Government failed to prove that there was no other possible alternative of advancing its compelling government interests apart from convicting the volunteers. *Hoffman* represents a correct application of RFRA.

IV. RFRA SUSTAINS RELIGIOUS OBJECTION TO THE BORDER WALL

Subsection A will describe litigation that concerns the use of a church's property to make preparations for the border wall. Subsection B will explore the political implications of taking religious property to construct a border wall.

A. Bishop Flores

In 2016, then presidential candidate Donald J. Trump promised to build a border wall along the U.S.-Mexico Border.¹⁶² To fulfill this campaign promise, the Trump Administration utilized the Federal Government's eminent domain powers to take private property.¹⁶³ The Federal Government has the right to take private property for Government use as long as the Government meets a number of requirements, including paying the private property owner "just

¹⁶⁰ *Id.* at 1289.

¹⁶¹ *Id.*

¹⁶² Nick Miroff, *Trump administration in an all-out push to build border wall before election*, WASH. POST (Sep. 29, 2020), https://www.washingtonpost.com/immigration/trump-border-wall-push/2020/09/29/689bc740-f8f5-11ea-a510-f57d8ce76e11_story.html.

¹⁶³ David J. Bier, *Building the Wall Using Eminent Domain Hurts Americans*, CATO INSTITUTE (Nov. 06, 2019), <https://www.cato.org/publications/commentary/building-wall-using-eminent-domain-hurts-americans>.

compensation.”¹⁶⁴ Among the private property being taken for the border wall, the Trump Administration has attempted to seize the property of religious organizations.¹⁶⁵ More specifically, the Government has sought two temporary easements from the Roman Catholic Diocese of Brownsville.¹⁶⁶ One easement sought the property of “. . . La Lomita Chapel, a small, historic church that served the Catholic community in the Rio Grande Valley (“the Valley”) for over 100 years.”¹⁶⁷ The purpose of the easements was to “. . . conduct[] surveying, testing, and other investigatory work needed to plan the proposed . . . fencing . . . and related structures designed to help secure the United States-Mexico border within the State of Texas.”¹⁶⁸

Reverend Daniel E. Flores, the bishop of the Roman Catholic Diocese of Brownville, has opposed the Trump Administration’s efforts to take the Church’s property for the construction of the border wall.¹⁶⁹ Bishop Flores refused to allow Government officials enter the Church’s land to make preparations for the border wall.¹⁷⁰ According to Bishop Flores, utilizing the Church’s property to build a border wall . . . “would limit the freedom of the Church to exercise her mission in the Rio Grande Valley, and would in fact be a sign contrary to the Church’s mission.”¹⁷¹ As such, the Federal Government filed a Motion for Immediate Possession in the District Court for the Southern District of Texas.¹⁷²

The Diocese opposed the Government’s motion arguing that “. . . the proposed border wall is fundamentally inconsistent with Catholic values and, if completed, would substantially burden

¹⁶⁴ 40 U.S.C. § 3114(a).

¹⁶⁵ *United States v. 65.791 Acres of Land, et at.*, Case No. 7:18-CV-329 *1-2. (Dec. 31, 2018).

¹⁶⁶ *Id.* at 2.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (alteration in original).

¹⁶⁹ *Id.* at *1.

¹⁷⁰ Joe Diedlecka, *Texas: Bishop refuses to allow border wall on church property*, INDEPENDENT CATHOLIC NEWS (Nov. 02, 2018), https://www.indcatholicnews.com/news/35926?fbclid=IwAR2bDP70EJ1_DyNfp_NgTWWJGSq-iiC4ONqzuEKNS8YFYdiuABCZRrV_bfo.

¹⁷¹ *Id.*

¹⁷² *65.791 Acres of Land*, Case No. 7:18-CV-329 *2.

the free exercise of religion by restricting access to La Lomita Chapel, a sacred site to the Valley's Catholic community."¹⁷³ The Diocese further noted that the Government had not officially confirmed whether La Lomita Chapel would be removed to accommodate the construction of the border wall.¹⁷⁴ But Bishop Flores believed that even if that La Lomita Chapel remained intact, the surrounding area of grass and trees would be destroyed.¹⁷⁵

The Diocese invoked an affirmative defense under RFRA arguing that the temporary easements on the Church's property to make preparations for the border wall would substantially burden the Church's sincerely held religious beliefs.¹⁷⁶ The Diocese advanced two main arguments: first that the border wall "is inconsistent with Catholic teachings on the universality of human solidarity[;]" and second that a wall "is likely to lead to injury or death on land that currently belongs to the Diocese, contrary to the Catholic Church's belief in the sanctity of human life."¹⁷⁷ Although the Diocese recognized that the court could grant the Government's Motion for limited purposes without substantially burdening the Church's sincere exercise of religion, the Diocese refused to participate in "actions that it views as hostile to Catholic teachings and values."¹⁷⁸ The Diocese urged the Government to cease its efforts under eminent domain and to seek ". . . alternative methods of securing the border that will not undermine Catholic values or restrict access to La Lomita Chapel."¹⁷⁹

In February of 2019, the court granted the government's request to survey the Church's property for possible border wall construction on the ground that such Government action would

¹⁷³ *Id.*

¹⁷⁴ *Id.* at *5.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 6.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at *7.

¹⁷⁹ *Id.* at *12.

not necessarily require access to La Lomita Chapel.”¹⁸⁰ The court found that surveying the land did not substantially burden the Diocese’s sincerely held religious beliefs.¹⁸¹

Following the court’s decision, Congress appropriated \$1 billion for construction of the border wall but prohibited construction of a wall on La Lomita Chapel’s property.¹⁸² President Trump opposed this congressional appropriation by declaring a national emergency which would not only allow him to seek more funding but also to circumvent Congressional limitations on Government spending for the border wall.¹⁸³

B. The Political, Not the Judicial Outcome

On January 25, 2017, the Trump Administration issued Executive Order 13767 which proclaimed that the executive branch’s immigration policy is to “. . . secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism.”¹⁸⁴ Since Trump signed Executive Order 13767, Congress has appropriated approximately \$4.5 billion to the Department of Homeland Security for “. . . construction of barriers where they do not currently exist.”¹⁸⁵ Funding for the border wall has been subject of heated debate in Congress, causing a twenty-seven day Government shutdown in

¹⁸⁰ Catholic News Agency, *US Bishops Ask Catholics to Pray for Brownsville Diocese Border Wall Fight* (June 20, 2020), <https://www.thecatholictelegraph.com/us-bishops-ask-catholics-to-pray-for-brownsville-diocese-border-wall-fight/67255>.

¹⁸¹ Dudley Althaus & Kathy Zezima, *As Border Wall Construction Moves Ahead in Texas, Judge Rules Feds Can Survey Church’s Land*, WASH. POST (Feb. 06, 2019), https://www.washingtonpost.com/national/as-border-wall-construction-moves-ahead-in-texas-judge-rules-feds-can-survey-churchs-land/2019/02/06/5de32316-2a39-11e9-984d-9b8fba003e81_story.html.

¹⁸² Catholic News Agency, *US Bishops Ask Catholics to Pray for Brownsville Diocese Border Wall Fight* (June 20, 2020), <https://www.thecatholictelegraph.com/us-bishops-ask-catholics-to-pray-for-brownsville-diocese-border-wall-fight/67255>.

¹⁸³ *Id.*

¹⁸⁴ *Executive Order: Border Security and Immigration Enforcement Improvements* (Jan. 15, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/>.

¹⁸⁵ Congressional Research Service, *DHS Border Barrier Funding* (Jan. 29, 2020), <https://crsreports.congress.gov/product/pdf/R/R45888>.

2019.¹⁸⁶ In 2019, the Department of Justice also advertised job postings for attorneys to handle border wall litigation in South Texas.¹⁸⁷ As of December 7, 2020, the Federal Government built 423 miles of Border Wall along the Southern Border.¹⁸⁸

The construction of the border wall has not only affected religious entities but has also caused great political debate along party lines, including from Texan Democratic Representative, Filemon Vela.¹⁸⁹ Representative Vela introduced the Preventing the Taking of Americans' Land to Build the Trump's Wall Act, which would essentially prevent the Federal Government from engaging ". . . in quick take actions to build President Trump's wall on the southwest border.¹⁹⁰ Democratic Senator of New York, Charles Schumer, also demanded Homeland Security Secretary, Kirstjen Nielsen, information about the Trump Administration's use of eminent domain to acquire private property to build the border wall.¹⁹¹ Senator Schumer along with fellow Democratic Senator Dick Durbin of Illinois and Senators Tom Udall and Martin Heinrich of New Mexico expressed concerns about the La Lomita Chapel after the Federal Government sought easements to build on the property.¹⁹² More specially, the senators were concerned that a taking for the construction of the border wall would infringe the Diocese's religious liberty.¹⁹³

The American Immigration Council also argued that building a border wall along the southern border was unnecessary, expensive, harmful to Native American land, wildlife and the

¹⁸⁶ Ted Hesson, *DOJ hiring attorneys to handle property seizures for border wall*, POLITICO (Jan. 17, 2019), <https://www.politico.com/story/2019/01/17/doj-property-seizures-border-wall-1093736>.

¹⁸⁷ *Id.*

¹⁸⁸ U.S. Customs and Border Protection, *Border Wall System* (Dec. 07, 2020), <https://www.cbp.gov/border-security/a-long-us-borders/border-wall-system>.

¹⁸⁹ Committee on Homeland Security, *The "Preventing of Taking of Americans' Land to Build Trump's Wall Act" As Introduced by Representative Filemon Vela (D-TX)*, https://homeland.house.gov/imo/media/doc/BSFO_Vela_Cash%20In%20Hand%20FINAL.pdf.

¹⁹⁰ *Id.*

¹⁹¹ Alexander Bolton, *Schumer wants answers from Trump on eminent domain at border*, THE HILL (Jan. 18, 2019), <https://thehill.com/homenews/senate/426011-schumer-wants-answers-from-trump-on-eminent-domain-at-border>.

¹⁹² *Id.*

¹⁹³ *Id.*

environment, and would present many complications due to its location along the Rio Grande River, not to mention that it would cause more deaths.¹⁹⁴

President Trump, on the other hand, described the Border Wall as a “big, beautiful wall.”¹⁹⁵ Some argue that promising to build a border wall handed then candidate Trump the White House.¹⁹⁶ However, this campaign promise did not guarantee a second term for President Trump; and now President-Elect Biden threatens the fulfillment of Trump’s 2016 campaign promise.¹⁹⁷

C. Analysis

A reviewing court would likely rule in favor of La Lomita Chapel. The Catholic church certainly has a sincerely held religious belief in advocating for human solidarity and in preserving human life. Although the usefulness of a border wall is debatable, a court is likely to recognize that the Government has a compelling government interest in border security. However, *Gonzales* requires a specific rather than a general application of the compelling government interest test. As *Gonzales and Hobby Lobby* demonstrate, RFRA requires the Government to prove that application of the law at issue is the least restrictive means of furthering a compelling government interest as applied to the claimant challenging the government action.

Under *Hobby Lobby*, the Government will likely fail to demonstrate that taking or using La Lomita Chapel’s property for construction of the border wall is the only alternative of securing the U.S.-Mexico border. As the Arizona district court recognized in *Hoffman, Hobby Lobby* imposes a very demanding least alternative test in free exercise cases. La Lomita Chapel, for

¹⁹⁴ American Immigration Council, *The High Cost of Diminishing Returns of a Border Wall* (Sep. 06, 2019), <https://www.americanimmigrationcouncil.org/research/cost-of-border-wall>.

¹⁹⁵ Mia Jankowicz, *A timeline of unfulfilled promises Trump made about his border wall, a cornerstone of his 2016 campaign which has faded from view in 2020*, BUSINESS INSIDER (Sep. 06, 2020), <https://www.businessinsider.com/timeline-of-president-trumps-unfulfilled-border-wall-promises-2020-9>.

¹⁹⁶ Nick Miroff, *Trump’s unfinished border wall faces uncertain future after Biden pledges to freeze construction*, WASH. POST (Dec. 02, 2020), <https://www.washingtonpost.com/politics/2020/12/02/biden-border-wall-trump/>.

¹⁹⁷ *Id.*

example, could argue that its property constitutes a miniscule portion of the border wall, and securing this portion of the border could be achieved by using border patrol personnel or electronic surveillance. Moreover, failure to take the Chapel's property for construction of the border wall is unlikely to overcome the construction of a 1,954-mile border wall. The U.S.-Mexico border is situated along unsteady terrain. The Government will likely exempt construction of the border wall in cases where the terrain does not permit for construction. If the Government makes an exception for unsteady terrain, it must also make an exception to permit the exercise of religious freedom.

V. CONCLUSION

RFRA is exceedingly protective of religious liberty. If properly applied, RFRA would protect *Warren's* and Flores's free exercise claims, and a reviewing court would uphold *Hoffman*. The Government cannot criminalize religious humanitarian acts at the border unless it shows that criminalization is the only alternative to further a compelling government interest, which it is unlikely to prove. Similarly, the Federal Government may not take or use churches' property to build or make preparations for the border wall. Doing so would substantially burden the churches' free exercise of religion and the Government is unlikely to demonstrate no alternative to the taking of religious property. Therefore, RFRA has and will continue to protect religious humanitarian acts at the border and uphold religious objection to the construction of the border wall.