

# The Religious Freedom Restoration Act at 25: A Quantitative Analysis of the Interpretive Case Law

Lucien J. Dhooge

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# THE RELIGIOUS FREEDOM RESTORATION ACT AT 25: A QUANTITATIVE ANALYSIS OF THE INTERPRETIVE CASE LAW

Lucien J. Dhooge\*

The [Religious Freedom Restoration Act] creates no new rights for any religious practice or for any potential litigant. Not every free exercise claim will prevail.<sup>1</sup>

While not its original intent, the Religious Freedom Restoration Act has become a vehicle for those seeking to impose their beliefs on others or claim that the tenets of their faith justify discrimination.<sup>2</sup>

## INTRODUCTION

On November 16, 1993, President Bill Clinton signed the Religious Freedom Restoration Act (RFRA) into law.<sup>3</sup> RFRA was largely a reaction to the U.S. Supreme Court's opinion in *Employment Division v. Smith*,<sup>4</sup> in which the Court refused to excuse individuals from compliance with neutral laws of general applicability on religious grounds.<sup>5</sup> The result in *Smith* was reaffirmed in subsequent opinions, in which the Court concluded that the government need satisfy the compelling interest test only when reviewing laws targeting specific religious practices.<sup>6</sup>

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\* Sue and John Staton Professor of Law and Ethics, Scheller College of Business, Georgia Institute of Technology. The author thanks Rachel Cook, Michelle Ellis, and Utena Yang for their time and effort devoted to this Article.

<sup>1</sup> *Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102nd Cong. 2 (1992) (opening statement of Sen. Edward M. Kennedy, Member, S. Comm. on Judiciary).

<sup>2</sup> Press Release, Off. of Rep. Bobby Scott, Scott, Kennedy Introduce Amendment to Religious Freedom Restoration Act (May 18, 2016) (statement of Rep. Joseph P. Kennedy III (D-Mass.)) (on file with author).

<sup>3</sup> 42 U.S.C. §§ 2000bb to 2000bb-4 (2018).

<sup>4</sup> 494 U.S. 872 (1990). *See also infra* notes 8, 12 and accompanying text.

<sup>5</sup> *See Smith*, 494 U.S. at 879.

<sup>6</sup> *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537–39 (1993) (holding that application of ordinances prohibiting animal cruelty to ritual animal sacrifice was intended to single out the practices of a discrete religious group for condemnation, was not compelled by the government's interests in protecting public health and preventing cruelty to animals, and could have been tailored more narrowly to address specific issues concerning disposal of organic waste).

The holding in *Smith* changed the established standard for resolving conflicts between secular statutes and religiously motivated conduct.<sup>7</sup> The explicit purpose of RFRA was to reinstate the previous standard and “restore the compelling interest test as set forth in *Sherbert . . .* and . . . *Yoder . . .* and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . .”<sup>8</sup> RFRA thus provided that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except . . . in furtherance of a compelling governmental interest; and . . . [if the law] is the least restrictive means of furthering that compelling governmental interest.”<sup>9</sup>

The necessity of RFRA was and remains controversial.<sup>10</sup> The central assumption of its proponents still is that there are credible threats to religious liberty which must be addressed through the adoption of enhanced protections.<sup>11</sup> Such protections are especially important to religious minorities and populations whose free exercise rights

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<sup>7</sup> See *Sherbert v. Verner*, 374 U.S. 398, 404–07 (1963) (holding that the religious practices of a member of the Seventh-day Adventist Church, who lost her job due to her refusal to work on Saturdays and was consequently denied unemployment compensation, were unconstitutionally burdened because the asserted state interests in deterring the filing of fraudulent claims and the effect of such filings upon the state’s unemployment fund and employers were not compelling); see also *Wisconsin v. Yoder*, 406 U.S. 205, 222–29, 234 (1972) (overturning a state compulsory education statute on the basis that the state’s purported interests in preparing students for participation in the political system and protecting them from ignorance and exploitation by prospective employers were not compelling with respect to Amish children).

<sup>8</sup> 42 U.S.C. § 2000bb(b)(1). See also Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 743, 749 (1996) (characterizing *Smith* as placing “an insuperable burden” on free exercise and encouraging governments to “run roughshod over religious conviction”). But see Marci A. Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act is Bad Public Policy*, 9 HARV. L. & POL’Y REV. 129, 135–37 (2015) (contending that the result in *Smith* was “unfairly maligned and mischaracterized by academics and religious lobbyists alike” who sought in RFRA not to restore the standards established in *Sherbert* and *Yoder* but rather to “institute a new doctrine: a single super-strict scrutiny standard to be applied across the board to all laws, which they had been unable to secure from the Court”). According to Hamilton, the labeling of the Act as a “restoration” was “false and deeply disrespectful” of the Court’s free exercise jurisprudence and “pulled the wool over the eyes of legislators and the public.” *Id.* at 138, 141.

<sup>9</sup> 42 U.S.C. § 2000bb-1(a)–(b).

<sup>10</sup> See, e.g., Robin-Vergeer, *supra* note 8, at 612.

<sup>11</sup> See, e.g., *id.* at 742, 746 (contending that RFRA prevents the “cloaking [of] intentional religious hostility under the guise of general, facially neutral laws” which have historically served as “instruments of religious persecution”); Jeremy W. Peters, *Fighting Gay Rights and Abortion With the First Amendment*, N.Y. TIMES, Nov. 22, 2017 (quoting U.S. Att’y Gen. Jefferson B. Sessions as stating that “[m]any Americans have felt that their freedom to practice their faith has been under attack . . . . The challenges our nation faces today concerning our historic First Amendment right to the ‘free exercise’ of our faith have become acute.”).

have been historically discounted, such as incarcerated individuals.<sup>12</sup> Additionally, the expansion of protected classes, and especially the inclusion of the LGBTQ+ community, in areas such as public accommodations, employment, and housing, have created “an environment of potentially widespread First Amendment violations.”<sup>13</sup> This expansion, without concomitant religious protections, forces some members of faith communities to choose between upholding religious principles at a societal cost or compromising their beliefs.<sup>14</sup> Such choices fail to recognize the privileged position occupied by religion in the United States, and the broad latitude to which it is entitled.<sup>15</sup>

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<sup>12</sup> See generally Christopher C. Lund, *RFRA, State RFRA, and Religious Minorities*, 53 SAN DIEGO L. REV. 163 (2016) (discussing the value of RFRA and state RFRA for religious minorities, including cases brought by incarcerated individuals). See also T.W. Brown, *Ensuring the Application of RFRA and RLUIPA in Pro Se Prisoner Litigation*, 41 OHIO N. U. L. REV. 29, 59 (2014) (describing the expansion of constitutional rights for incarcerated individuals as “one of the most stirring legal developments of the Twentieth Century”); Jason Gubi, *The Religious Freedom Restoration Act and Protection of Native American Religious Practices*, 4 MOD. AM. 73, 78 (2008) (advocating for equal levels of accommodation for Native American and mainstream religious practices pursuant to RFRA). In the view of these commentators, RFRA fulfills the purpose of the Free Exercise Clause by protecting religious minorities from discrimination resulting when:

[L]awmakers in a majoritarian system of government, most of whom adhere to mainstream religions, take care to ensure that laws of general applicability do not burden their own faiths, but are indifferent to, or ignorant of, the burdens such laws may place on faiths that are unknown or strange to them.

Scott D. Pollock, *Immigration Law vs. Religious Freedom: Using the Religious Freedom Restoration Act to Challenge Restrictive Immigration Laws and Practices*, 12 RUTGERS J. L. & RELIGION 295, 303–04 (2011). But see Hamilton, *supra* note 8, at 142 (listing minority religious and quasi-religious groups who could seek protection under RFRA as including groups advocating polygamy, terrorism, racism, and child abuse).

<sup>13</sup> Susan Nabet, Note, *For Sale: The Threat of State Public Accommodations Law to the First Amendment Rights of Artistic Businesses*, 78 BROOK. L. REV. 1515, 1515–16 (2012) (listing sexual orientation, marital status, personal appearance, medical condition, and genetic information as examples of expanded protected classes). See also J. Brady Brammer, Comment, *Religious Groups and the Gay Rights Movement: Recognizing Common Ground*, 2006 BYU L. REV. 995, 1004 (2006) (arguing that changing social attitudes towards the LGBT community will have the effect of placing the free exercise of religion in the “societal closet”).

<sup>14</sup> See, e.g., Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 134 (2006) (noting that compromise in free exercise disputes is unlikely as “religious mandates are absolute . . . [and] [n]othing short of literal obedience is acceptable”); Andrew Koppelman, *You Can’t Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 134 (2006) (contending that “[a]nti-gay discrimination is now sufficiently stigmatized that a business that openly discriminates is likely to pay an economic price for doing so”).

<sup>15</sup> See Brownstein, *supra* note 14, at 80, 89–96 (describing religion as “privileged” given that it provides “a source of values structurally divorced from government,” fosters spiritual growth “isolated from material concerns . . . [and] the individual’s routine emphasis on material

According to some RFRA proponents, any conflict with newer competing rights must be resolved in favor of an “older set of liberties” such as religious freedom.<sup>16</sup>

Some RFRA opponents contend that the threat to religious liberty has been exaggerated, and that free exercise is not suppressed on a frequent or substantial basis.<sup>17</sup> They assert that conflicts between religious liberty and secular laws have been limited and fact-specific.<sup>18</sup> According to some opponents, RFRA remains less about eliminating widespread restraints upon religious liberty, and becomes more of a political statement objecting to secularized society, including the increased acceptance of the LGBTQ+ community.<sup>19</sup> This political statement equates personal offense with religious freedom and impermissibly attempts to foist religious beliefs upon those in the “secular sphere of life.”<sup>20</sup> It also provides some objectors with a means by which to legitimize discrimination, especially against the LGBTQ+ community.<sup>21</sup> The possibilities

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self-interest,” provides participants with a “communal dimension,” and preserves continuity of beliefs and practices through tradition).

<sup>16</sup> Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 840 (contending that “[t]he rise of one set of liberties threatens the decline of another, older set of liberties”).

<sup>17</sup> See, e.g., Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 566 (1999); Claire McCusker, *When Church and State Collide: Averting Democratic Disaffection in a Post-Smith World*, 25 YALE L. & POL’Y REV. 391, 396 (2007) (arguing that conflicts between secular laws and mainstream religious practices are infrequent since laws of general applicability “were constructed with those religions as part of their lawmakers’ worldviews, whether as their own religions or as religions shared by those around them”).

<sup>18</sup> See Lupu, *supra* note 17, at 566.

<sup>19</sup> See, e.g., Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 UMKC L. REV. 749, 785 (2016) (contending that efforts to secure religious exemptions are due, in part, to “[c]onservative or traditional religious views hav[ing] been marginalized due to evolving legal and social views in a number of areas, including reproductive health, sex education, divorce, premarital sex, gender roles, and gender identity”); McCusker, *supra* note 17, at 398 (noting that “traditionally religious individuals are more likely to find their religious practices in conflict with facially neutral laws than they would have a century ago when traditional religious moral notions were more widespread”). *But see* Lund, *supra* note 12, at 164 (noting that the majority of RFRA cases “have little to do with discrimination or sexual morality or the culture wars”).

<sup>20</sup> Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate But Equal*, 65 DEPAUL L. REV. 907, 912 (2016). See also Patrick J. McNulty & Adam D. Zenor, *Corporate Free Exercise of Religion and the Interpretation of Congressional Intent: Where Will It End?*, 39 S. ILL. U. L.J. 475, 479 (2015) (contending that “[t]he end game for these twenty-first century conscientious objectors . . . is the judicial establishment of . . . religious principle[s]”); Peters, *supra* note 11 (quoting Peter Montgomery, a senior fellow at People for the American Way, as stating that proponents of enhanced religious rights are attempting to “bring a very particular biblical worldview into dominance at all levels of government and society”).

<sup>21</sup> See, e.g., Day & Weatherby, *supra* note 20, at 911 (contending that, “[h]aving lost in the courts, the opponents of same-sex marriage have altered their battle cry. Invoking religious

of discriminatory application are “endless, provided the proponents of the exemption can gather sufficient political support.”<sup>22</sup> Finally, by turning every believer into a potential “law unto himself,” RFRA becomes “a lawless, sometimes unconstitutional, and pervasively unprincipled charade.”<sup>23</sup> The rule of law in such a scenario is “swallowed by a sea of self-interested yet functionally unreviewable exemption claims,” the limits of which are dependent upon the self-restraint of the believers they benefit.<sup>24</sup>

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freedom, instead of defending their right to discriminate, they now claim to be the victims of discrimination”) (emphasis removed); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 644 (2015) (discussing the utilization of religion to “encourage the formation of new centers of resistance to the gay rights movement”); Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. CIV. RTS. & CIV. LIB. L. REV. 1, 65 (2015) (concluding that religious exemptions “may embolden potential discriminators and discourage litigation by their victims”) (citation omitted); The Editorial Board, *Their Cake Was Not a First Amendment Issue*, N.Y. TIMES, Dec. 1, 2017 (describing support for a right of business owners to refuse service to members of the LGBTQ+ community as a “rear-guard action undertaken by religious objectors who, thwarted in their efforts to prevent gay couples from enjoying the rights and benefits that flow from marriage, are now invoking their own constitutional rights to avoid treating those same couples equally in the marketplace”). For a discussion of the potential harms suffered by the LGBTQ+ community in the event of an adoption of widespread religious exemptions, see Lucien J. Dhooze, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, 21 WM. & MARY J. WOMEN & L. 319, 356–68 (2015) [hereinafter Dhooze, *Public Accommodation Statutes and Sexual Orientation*]; see also Justin Muehlmeier, *Toward a New Age of Consumer Access Rights: Creating Space in the Public Accommodation for the LGBT Community*, 19 CARDOZO J.L. & GENDER 781, 809 (2013).

<sup>22</sup> Knauer, *supra* note 19, at 785. See also Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 380 (1994) (contending that RFRA’s granting of at-will exemptions to neutral laws of general application is akin to placing “the proverbial fox in the henhouse . . . [with] an endless supply of chickens”); Hanna Martin, Note, *Race, Religion, and RFRA: The Implications of Burwell v. Hobby Lobby Stores, Inc. in Employment Discrimination*, 2016 CARDOZO L. REV. DE NOVO 1, 3 (2016) (noting that RFRA, as interpreted by the Supreme Court, has “the potential to provide . . . sweeping exemptions to neutral, generally applicable laws for businesses that object on religious grounds”).

<sup>23</sup> Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 49, 101 (2015). See also Dhooze, *Public Accommodation Statutes and Sexual Orientation*, *supra* note 21, at 361 (describing religious exemptions as “far too vague and capable of abuse to be a serious basis for legislation” (citing Michael Kent Curtis, Essay, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 194 (2012))); Frederick Mark Gedicks, “Substantial” Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. 94, 98 (2017) (arguing that “[i]f judicial review is confined to claimant sincerity and secular costs, the substantiality of a claimed religious burden under RFRA is effectively established by the claimant’s mere say-so”).

<sup>24</sup> Gedicks, *supra* note 23, at 100–01.

There has been no detailed study of RFRA utilizing the best body of evidence indicative of its impact; specifically, federal case law applying its provisions. This Article provides such a study. The Article concludes that RFRA has not been as effective as its supporters may have hoped, nor as pernicious as its critics have contended.

## I. AN ANALYSIS OF RFRA UTILIZING THE INTERPRETIVE CASE LAW

### A. Methodology

This Article seeks to measure the impact of RFRA through an analysis of interpretive federal case law. The Article's hypothesis is that RFRA has been less effective and harmful than its supporters and opponents contend. Rather, RFRA has successfully been utilized in only a limited number of circumstances.

The Article measures RFRA's impact through an analysis of four data points. These data points are: (1) the date of the relevant opinions of the U.S. Supreme Court, federal circuit courts of appeals, and federal district courts; (2) the identity of the parties utilizing RFRA; (3) the subject matter of the claims and whether their utilization was offensive or defensive; and (4) the successful or unsuccessful outcome of each claim. Discussion of each data point is preceded by expected results and concludes with an analysis of the actual results.

The sample consists of 303 court opinions; specifically, 4 Supreme Court opinions,<sup>25</sup> 94 opinions of courts of appeals,<sup>26</sup> and 205 district court opinions.<sup>27</sup> Opinions of the Supreme Court and federal circuit courts of appeals are addressed together as appellate courts. Opinions applying RFRA to the actions of state and local governments were not included, pursuant to the Supreme Court's exclusion of such governments from the statute's reach.<sup>28</sup> Multiple opinions resulting from challenges to the

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<sup>25</sup> See *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Gonzales v. O Centro Espirita Beneficente União Do Vegetal*, 546 U.S. 418 (2006); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>26</sup> The sample consisted of federal circuit court of appeals opinions from the following circuits: District of Columbia Circuit (eighteen opinions); First Circuit (one opinion); Second Circuit (seven opinions); Third Circuit (ten opinions); Fourth Circuit (four opinions); Fifth Circuit (four opinions); Sixth Circuit (two opinions); Seventh Circuit (five opinions); Eighth Circuit (seven opinions); Ninth Circuit (twenty-three opinions); Tenth Circuit (six opinions); and Eleventh Circuit (seven opinions). See Research Notes, Religious Freedom Restoration Act Case Data (Oct. 11, 2017) [hereinafter RFRA Case Data] (on file with author).

<sup>27</sup> The sample consisted of district court opinions from the following circuits: District of Columbia Circuit (nineteen opinions); First Circuit (six opinions); Second Circuit (seventeen opinions); Third Circuit (twenty-three opinions); Fourth Circuit (twenty-five opinions); Fifth Circuit (twenty-two opinions); Sixth Circuit (thirteen opinions); Seventh Circuit (fifteen opinions); Eighth Circuit (ten opinions); Ninth Circuit (thirty-one opinions); Tenth Circuit (twenty opinions); and Eleventh Circuit (five opinions). See RFRA Case Data, *supra* note 26.

<sup>28</sup> See *Flores*, 521 U.S. at 532–36.

contraceptive mandate contained within the Patient Protection and Affordable Care Act were consolidated into two U.S. Supreme Court opinions addressing the mandate in the context of educational institutions and business organizations.<sup>29</sup> The year 1994 was selected as the starting date, given that the first court opinions were decided in that year.<sup>30</sup> The end of the calendar year 2016 was selected as the conclusory date.

Court opinions announced during this time period were included in the analysis if they addressed RFRA either from a procedural standpoint or on the merits. Cases in which a RFRA claim was asserted, but not addressed, were not included in the sample. The most recent court opinion in which a claim was addressed served as the representative opinion for the particular case in question. Thus, the outcome in a later appellate opinion in which a RFRA claim was addressed served as the representative opinion. However, the outcome in an earlier opinion by a lower court was utilized if an appellate court did not specifically address the RFRA claim in its subsequent opinion.

### *B. Data Point One: Dates of Opinions*

An initial means by which to ascertain RFRA's impact is how often claims are addressed by federal courts. We would expect the number of opinions to increase over time if there was a growing threat to religious liberty. Such an increase would also be expected if RFRA posed the risks claimed by its opponents.

#### 1. Dates of U.S. Appellate Court Opinions

Issuance of appellate opinions began slowly in the 1990s, although commencing in 1995, there was at least one opinion issued every year.<sup>31</sup> The number of opinions increased in 2007, peaked in 2008, and then began to decline in 2009.<sup>32</sup> The number of opinions issued subsequent to 2009 has remained relatively steady with only two deviations in 2013 and 2014.<sup>33</sup> Opinions reached double digits in only two years, 2008 and 2014, in which eleven opinions were issued. Opinions have decreased in ensuing years, with opinions in 2015 and 2016 similar in number to those fifteen years earlier.<sup>34</sup> Opinions issued by the District of Columbia Circuit and the Third and Ninth Circuits

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<sup>29</sup> See *Wheaton Coll.*, 134 S. Ct. at 2807; *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2775–76, 2780–85; see also Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg-(13)(a)(4) (2018); Women's Preventive Services Guidelines, 77 Fed. Reg. 8725 (Feb. 15, 2012). The inclusion of all the opinions addressing challenges to the contraceptive mandate would have been unduly duplicative, skewed the results, and interfered with answering the Article's fundamental question, namely, the overall effectiveness of RFRA.

<sup>30</sup> See RFRA Case Data, *supra* note 26.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

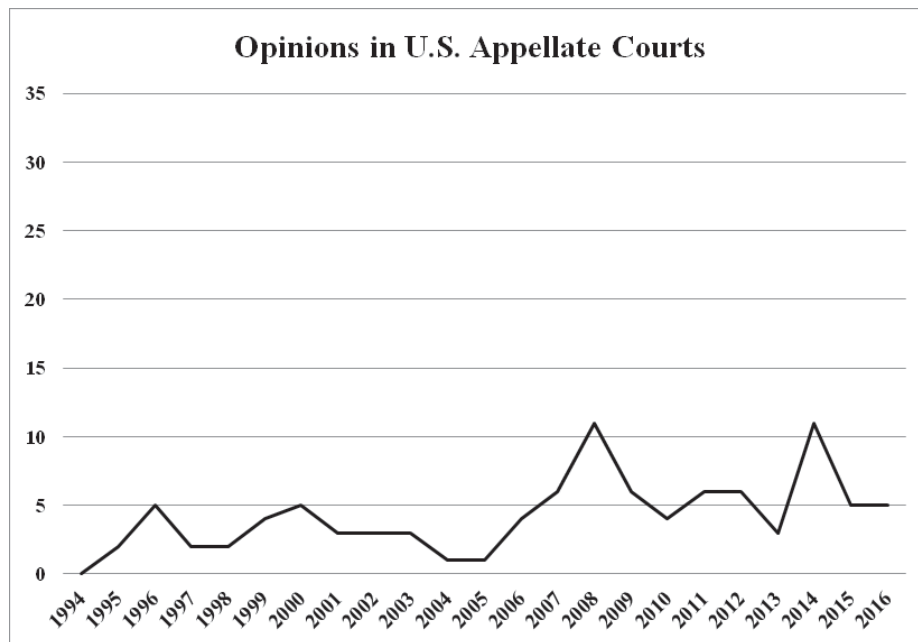


constituted 54.2% of appellate opinions, with the Ninth Circuit responsible for 24.5% of all opinions.<sup>35</sup> The dates of appellate opinions are summarized in Table 1 below.

**Table 1: Dates of Opinions in U.S. Appellate Courts**

YEAR	OPINIONS	YEAR	OPINIONS
1994	0	2006	4
1995	2	2007	6
1996	5	2008	11
1997	2	2009	6
1998	2	2010	4
1999	4	2011	6
2000	5	2012	6
2001	3	2013	3
2002	3	2014	11
2003	3	2015	5
2004	1	2016	5
2005	1	<b>Total</b>	<b>98</b>

**Chart 1**



<sup>35</sup> *See id.*

## 2. Dates of U.S. District Court Opinions

District court opinions followed a different path than their appellate counterparts.<sup>36</sup> The number of district court opinions grew slowly but steadily from 1994 through 2006 before experiencing significant growth starting in 2007 and continuing until 2011.<sup>37</sup> The number of opinions dropped in 2011 and 2012, but, unlike appellate court opinions, resumed growth and reached record levels in 2015 and 2016.<sup>38</sup> This pattern may reflect the larger number of district courts as compared to appellate courts, and consequent increased opportunities to address RFRA-related issues.<sup>39</sup> This pattern may also reflect a growing recognition of RFRA as a means by which to advance religion-related claims and their settlement, thereby eliminating the necessity of appellate review. Opinions in the District of Columbia and Third, Fourth, and Ninth Circuits constituted 47.6% of the district court opinions, with courts within the Ninth Circuit constituting 15.1% of all opinions.<sup>40</sup> The dates of district court opinions are summarized in Table 2 below.

**Table 2: Dates of Opinions in U.S. District Courts**

YEAR	OPINIONS	YEAR	OPINIONS
1994	5	2006	8
1995	3	2007	13
1996	6	2008	10
1997	6	2009	18
1998	8	2010	15
1999	3	2011	9
2000	4	2012	9
2001	6	2013	14
2002	1	2014	8
2003	0	2015	22
2004	4	2016	27
2005	6	<b>Total</b>	<b>205</b>

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<sup>36</sup> *See id.*

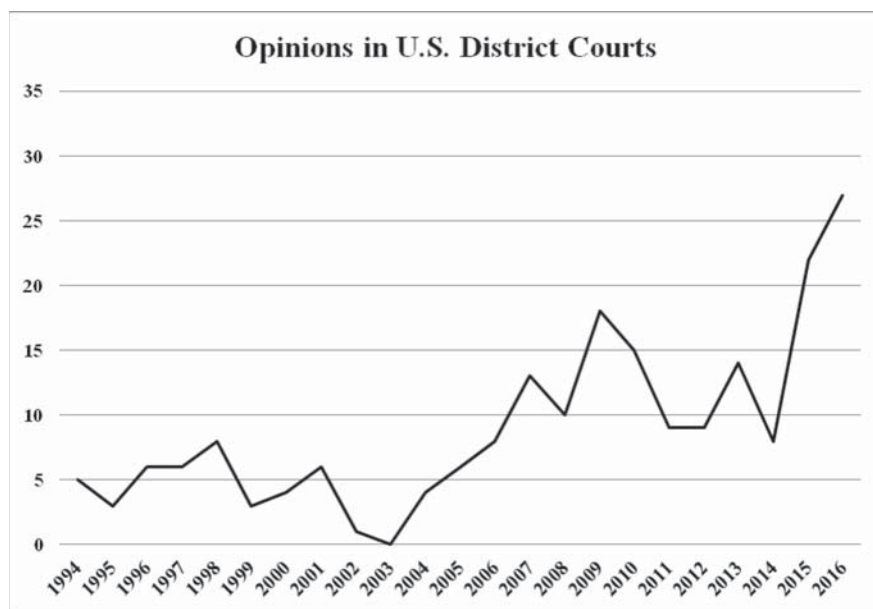
<sup>37</sup> *See id.*

<sup>38</sup> *See id.*

<sup>39</sup> *See id.*

<sup>40</sup> *See id.*; *see also supra* note 27 and accompanying text.

Chart 2



### 3. Composite Dates of Opinions

The composite data reflects the increased number of district court opinions.<sup>41</sup> The number of opinions varied significantly from 1994 through 2005, before increasing to double digits in 2006, where it has remained stable.<sup>42</sup> Although the number of opinions has varied over the ensuing ten years, there has been consistent growth since 2015, and a peak in the last two years of the survey.<sup>43</sup> The number of opinions has grown by more than 2.5 times since 2006 and more than 4.5 times since the last time the number of opinions was in single digits in 2005.<sup>44</sup> The number of opinions has grown by a factor of 6.4 since 1994.<sup>45</sup> Courts in four circuits constitute slightly more than half of the opinions.<sup>46</sup> Composite appellate and district court opinions are summarized in Table 3 below.

<sup>41</sup> See RFRA Case Data, *supra* note 26.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> The four circuits are the Ninth Circuit (fifty-four opinions constituting 17.8% of opinions), the District of Columbia Circuit (thirty-seven opinions constituting 12.2% of opinions), the Third Circuit (thirty-three opinions constituting 10.9% of opinions), and the Fourth Circuit (twenty-eight opinions constituting 9.2% of opinions). See *id.*

**Table 3: Dates of Opinions in All Federal Courts**

YEAR	OPINIONS	YEAR	OPINIONS
1994	5	2006	12
1995	5	2007	19
1996	11	2008	21
1997	8	2009	24
1998	10	2010	19
1999	7	2011	15
2000	9	2012	15
2001	9	2013	17
2002	4	2014	19
2003	3	2015	27
2004	5	2016	32
2005	7	<b>Total</b>	<b>303</b>

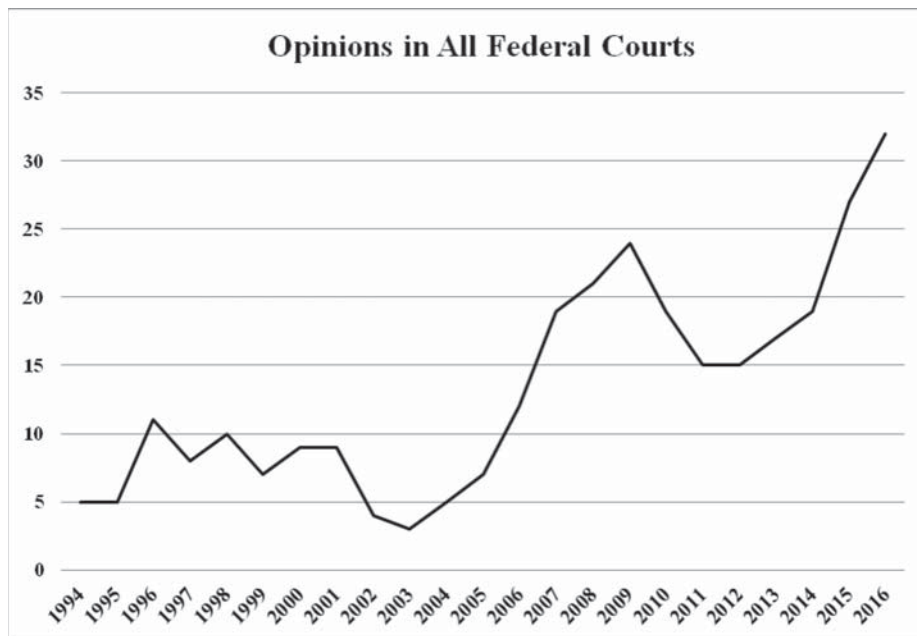
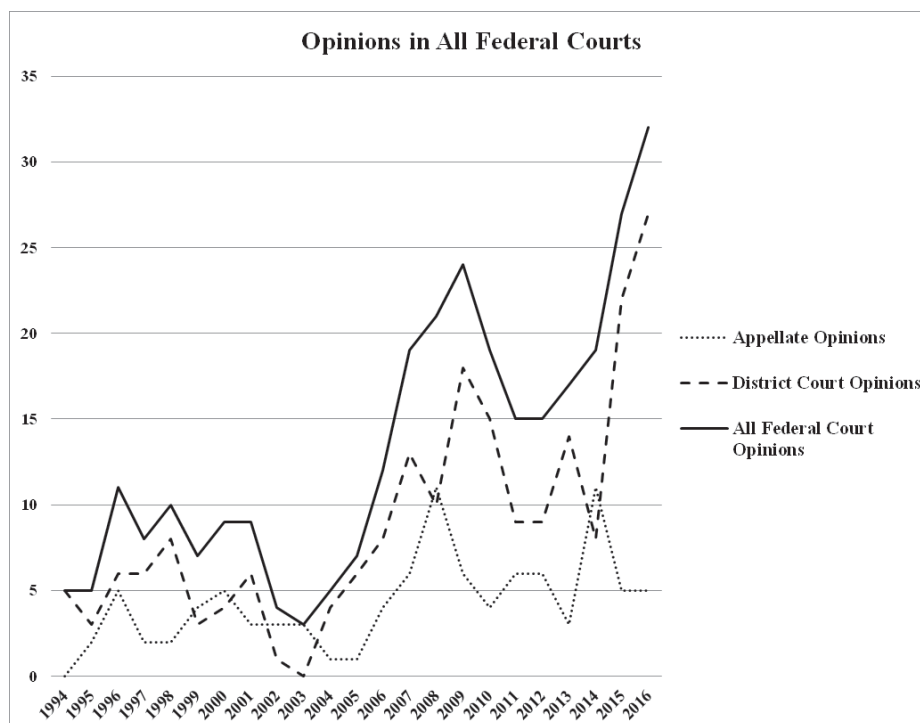
**Chart 3a**

Chart 3b



The increasing number of opinions between 2006 and 2016 may support arguments of RFRA proponents. This conclusion assumes the increase is a direct result of a growing threat to religious liberty. Another equally plausible argument is that parties and their attorneys have discovered or rediscovered RFRA as a potential source of claims. This rediscovery may be due, in part, to the increased prominence of RFRA as a result of highly visible Supreme Court opinions and renewed interest in RFRA's state counterparts.<sup>47</sup> It is also possible that an increasingly diverse and vocal populace

<sup>47</sup> See, e.g., *supra* note 25. Twenty states have adopted RFRA through express constitutional or legislative provisions, with six of these adoptions occurring in the past nine years. See Lucien J. Dhooge, *Public Accommodation Statutes, Sexual Orientation and Religious Liberty: Free Access or Free Exercise?*, 27 FLA. J. L. & PUB. POL'Y 1, 5 nn.12–13, 6 n.16 (2016). For a detailed description of the provisions of state RFRA, see *id.* at 27, 32–33, 50–58. For an analysis of the effectiveness of state RFRA, see Lucien J. Dhooge, *The Impact of State Religious Freedom Restoration Acts: An Analysis of the Interpretive Case Law*, 52 WAKE FOREST L. REV. 585 (2017) [hereinafter Dhooge, *State RFRA*]. See also Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA*, 55 S.D. L.

is more strongly asserting its free exercise rights. This does not necessarily equate with a growing threat to religious liberty, but it may reflect a more activist approach to the assertion of such rights. The increase may also be indicative of a recognition that claims have a greater likelihood of success as RFRA jurisprudence has matured.

The increasing number of opinions may also support the views of RFRA opponents. However, this conclusion is based upon the assumption that the increase in the number of opinions has been accompanied by an increase in successful outcomes in favor of religious claimants. It must also be assumed that these successful outcomes have resulted in harm. Certainly these assumptions are possibilities. However, the increased utilization of RFRA alone does not support either assumption. This conclusion does not trivialize concerns regarding efforts to employ RFRA as a vehicle for discrimination, nor the potential harm to impacted individuals and groups. Rather, in the same manner as the assumption regarding threats to religious liberty, no convincing conclusion may be drawn exclusively from RFRA's increased presence in federal court jurisprudence. All possibilities on both sides of the RFRA "coin" are plausible, but none are definitive, absent a deeper analysis of the relevant case law.

### *C. Data Point Two: Identity of Claimants*

A second means by which to assess RFRA's impact is through identification of claimants. A significant number of claims, especially by places of worship and religious organizations, would be expected if religious liberty increasingly was threatened in the manner claimed by RFRA proponents. A significant number of claims, especially by business organizations, educational institutions, and individuals, would indicate that RFRA poses the risks claimed by opponents.

Claimants were organized in seven different categories<sup>48</sup>: (1) places of worship, and associated religious officials; (2) religious organizations other than places of worship; (3) non-profit organizations other than places of worship and religious organizations; (4) private (nonincarcerated) individuals;<sup>49</sup> (5) business organizations; (6) educational institutions; and (7) incarcerated individuals.<sup>50</sup> The first-named claimant was utilized in cases in which there were multiple claimants.<sup>51</sup>

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REV. 466 (2010); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35 (2015).

<sup>48</sup> See RFRA Case Data, *supra* note 26.

<sup>49</sup> This Article distinguishes between incarcerated individuals and nonincarcerated individuals because of the differences in restraints placed upon the free exercise of religion between the groups, and the resultant differences in the types of legal claims these groups may assert.

<sup>50</sup> See RFRA Case Data, *supra* note 26.

<sup>51</sup> See *id.*

### 1. Identity of Claimants in U.S. Appellate Courts

Fifty percent of claimants in appellate courts were incarcerated individuals.<sup>52</sup> Cases filed by incarcerated individuals constituted at least half of all claims addressed in seven circuits.<sup>53</sup> Private individuals were most prevalent in three circuits,<sup>54</sup> and places of worship were predominant at the Supreme Court.<sup>55</sup> However, claims by incarcerated individuals were still significant in these circuits, with the exceptions of the Supreme Court and the First Circuit.<sup>56</sup> Places of worship and religious organizations were the distinct minority in every appellate court other than the Supreme Court and the Sixth and Seventh Circuits.<sup>57</sup> Unsurprisingly, given its size, the Ninth Circuit had the most diverse group of claimants, although twenty of the twenty-three claimants were either incarcerated or private individuals.<sup>58</sup> The identity of claimants in appellate courts is summarized in Table 4 below.<sup>59</sup>

**Table 4: Identity of Claimants in U.S. Appellate Courts**

IDENTITY	CLAIMS	PERCENTAGE
Incarcerated individuals	49	50.0%
Private individuals	31	31.6%
Places of worship	11	11.2%
Religious organizations	3	3.1%

<sup>52</sup> *See id.*

<sup>53</sup> These circuits are: Third Circuit (80.0% of ten claims); Fourth Circuit (50.0% of four claims); Fifth Circuit (50.0% of four claims); Seventh Circuit (60.0% of five claims); Eighth Circuit (57.1% of seven claims); Tenth Circuit (100.0% of six claims); and Eleventh Circuit (57.1% of seven claims). *See id.*

<sup>54</sup> Claims by private individuals were predominant in the D.C. Circuit (44.4% of eighteen claims), the First Circuit (100.0% of one claim), and the Second Circuit (71.4% of seven claims). *See id.*

<sup>55</sup> Fifty percent of the claims addressed by the Supreme Court were initiated by places of worship. *See id.*

<sup>56</sup> Claims by incarcerated individuals were 33.3% of eighteen claims in the D.C. Circuit and 28.6% of seven claims in the Second Circuit. *See id.*

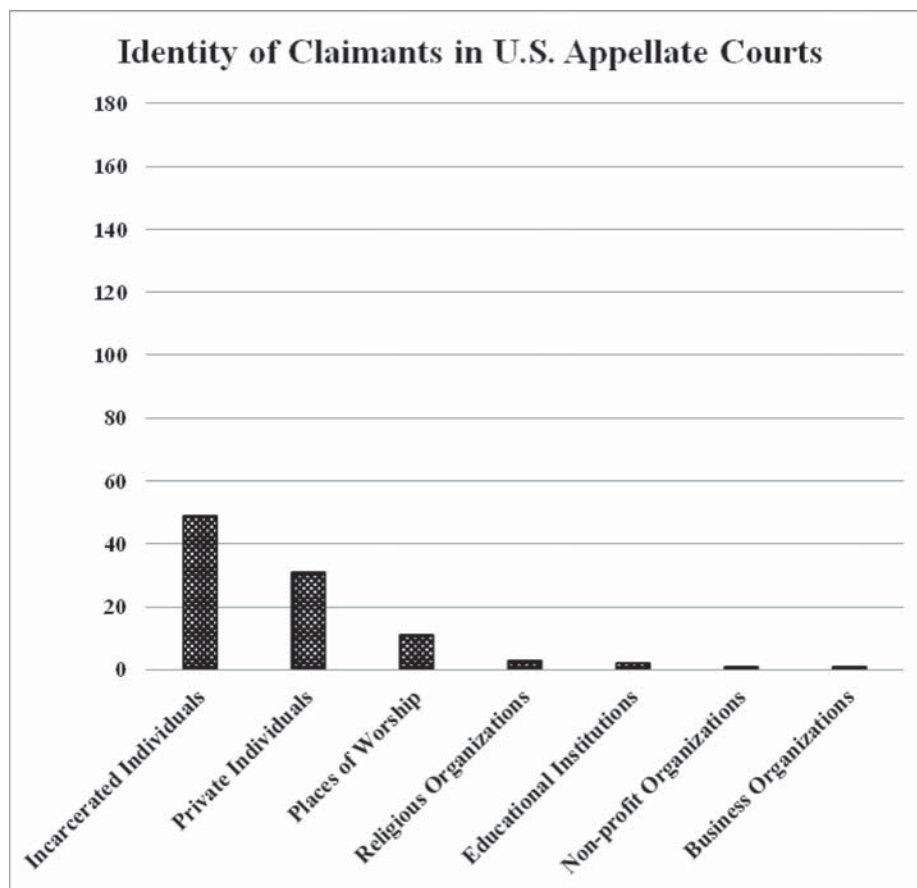
<sup>57</sup> Places of worship and religious organizations constituted the following percentage of claimants in these circuits: D.C. Circuit (22.2% of eighteen claims); Third Circuit (10.0% of ten claims); Fifth Circuit (25.0% of four claims); Eighth Circuit (14.3% of seven claims); and Ninth Circuit (8.7% of twenty-three claims). *See id.* Claims by places of worship and religious organizations constituted 50.0% of four claims in the Supreme Court, 50.0% of two claims in the Sixth Circuit, and 40.0% of five claims in the Seventh Circuit. *See id.*

<sup>58</sup> Incarcerated and private individuals initiated 47.8% and 39.1% of the twenty-three claims addressed by the Ninth Circuit, respectively. *See id.* The remaining three claims were initiated by places of worship, and non-profit and religious organizations. *See id.*

<sup>59</sup> Percentages were calculated to the tenths, and thus totals may not equal one hundred percent of claims in all cases.

<b>IDENTITY</b>	<b>CLAIMS</b>	<b>PERCENTAGE</b>
Educational institutions	2	2.0%
Non-profit organizations	1	1.0%
Business organizations	1	1.0%
<b>Total</b>	<b>98</b>	<b>99.9%</b>

Chart 4



An additional observation relates to the claimants' religious affiliations. Claimants in appellate courts reflect the wide diversity of religions in the United States.<sup>60</sup>

<sup>60</sup> Religious identities of claimants were derived from the text of the surveyed opinions. The most specific description in a given opinion was utilized for purposes of identification. Thus, faiths within the Christian tradition are separately designated when such faiths were



There were twenty-eight different identified faiths in the appellate sample.<sup>61</sup> The most religiously diverse claimants were incarcerated individuals who alleged violations of the beliefs and practices of fifteen different religions.<sup>62</sup> Other categories of claimants were somewhat less diverse.<sup>63</sup> Islam, Native American practices, and Christianity were most prevalent among appellate court claimants.<sup>64</sup>

## 2. Identity of Claimants in U.S. District Courts

Incarcerated individuals were responsible for 61.9% of claims filed in district courts.<sup>65</sup> Incarcerated individuals were claimants in at least half of all opinions in eight circuits.<sup>66</sup> These opinions were the majority in two of the four circuits where

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specifically identified in an opinion. The classification of “Christianity” was utilized only when an opinion did not identify a specific Christian-based faith. *See* RFRA Case Data, *supra* note 26.

<sup>61</sup> The religious affiliations of claimants in appellate courts were Atheism, Baptist, Buddhism, Cannabis Sacrament Ministry, Christianity, Church of Cognizance, Church of Marijuana, Church of Reality, Episcopal Church, Ethiopian Coptic Church, Evangelical Free Church, Hawaii Cannabis Ministry, Islam, Judaism, Missionary Church of Christ, Moorish, Mormonism, Native American, Optic, Protestantism, Rastafarianism, Roman Catholicism, Santería, Secular Humanism, Seventh-day Adventist, Society of Friends (Quaker), Yahweh, and Yoruba. *See id.*

<sup>62</sup> The religious affiliations of incarcerated individuals included Islam (fourteen claims), Native American (eight claims), Rastafarianism (seven claims), Judaism (four claims), Roman Catholicism (two claims), and Buddhism, Cannabis Sacrament Ministry, Christianity, Church of Cognizance, Church of Marijuana, Hawaii Cannabis Ministry, Moorish, Santería, Yahweh, and Yoruba (one claim each). *See id.* The religious affiliation of four incarcerated individuals were unspecified. *See id.*

<sup>63</sup> The religious affiliations of private individuals included Christianity (five claims), Roman Catholicism, Islam, and Native American (three claims each), Society of Friends (Quaker) (two claims), and Atheism, Church of Reality, Episcopal Church, Ethiopian Coptic Church, Mormonism, Protestantism, Secular Humanism, and Seventh-day Adventist (one claim each). *See id.* The religious affiliations of seven individuals were unspecified. *See id.* The religious affiliation of places of worship included Roman Catholicism and Christianity (three claims each), Native American (two claims), and Baptist, Evangelical Free Church, and Judaism (one claim each). *See id.* The religious affiliations of religious organizations included Islam, Missionary Church of Christ, and Rastafarianism (one claim each). *See id.* Both educational institutions were affiliated with Christianity. *See id.* The sole non-profit organization identified as Native American, and the sole business organization identified as Christian. *See id.*

<sup>64</sup> Claims based upon Islam were 18.7% of all claims, followed by Native American practices (14.3%), and Christianity (12.2%). *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> These circuits are: First Circuit (50.0% of six claims); Third Circuit (73.9% of twenty-three claims); Fourth Circuit (70.8% of twenty-five claims); Fifth Circuit (81.8% of twenty-two claims); Sixth Circuit (61.5% of thirteen claims); Seventh Circuit (86.7% of fifteen claims); Tenth Circuit (65% of twenty claims); and Eleventh Circuit (80% of five claims). *See id.*

they did not exceed 50%,<sup>67</sup> and were at least 40% in the two circuits in which incarcerated individuals were not the largest claimant.<sup>68</sup>

Private individuals were the second largest claimant in every circuit, with the exception of the Eighth and Ninth Circuits in which they were the largest claimant.<sup>69</sup> Places of worship and religious organizations were the minority in every circuit and were completely absent from the D.C., First, Fifth, and Eleventh Circuits.<sup>70</sup> Business organizations appeared only twice as claimants in the Third and Sixth Circuits.<sup>71</sup> Unsurprisingly, the Ninth Circuit had the most diverse group of claimants, although twenty-seven of the thirty-one claimants were either incarcerated or private individuals.<sup>72</sup> The identity of claimants in district courts is summarized in Table 5 below.

**Table 5: Identity of Claimants in U.S. District Courts**

IDENTITY	CLAIMS	PERCENTAGE
Incarcerated individuals	127	61.9%
Private individuals	54	26.3%
Places of worship	8	3.9%
Non-profit organizations	6	2.9%
Religious organizations	5	2.4%
Educational institutions	3	1.5%
Business organizations	2	1.0%
<b>Total</b>	<b>205</b>	<b>99.9%</b>

<sup>67</sup> Incarcerated individuals constituted 47.4% of the nineteen claimants in the D.C. Circuit, followed by private individuals (31.6%), non-profit organizations (15.8%), and educational institutions (5.3%). *See id.* Incarcerated individuals were 47.0% of the seventeen claimants in the Second Circuit, followed by claims by private individuals (35.3%), religious organizations (11.8%), and places of worship (5.9%). *See id.*

<sup>68</sup> Incarcerated individuals constituted 40.0% of the ten claimants in the Eighth Circuit. *See id.* Fifty percent of claimants in the Eighth Circuit were private individuals. *See id.* Incarcerated individuals constituted 41.9% of the thirty-one claimants in the Ninth Circuit. *See id.* Private individuals were 45.2% of claimants in the Ninth Circuit. *See id.*

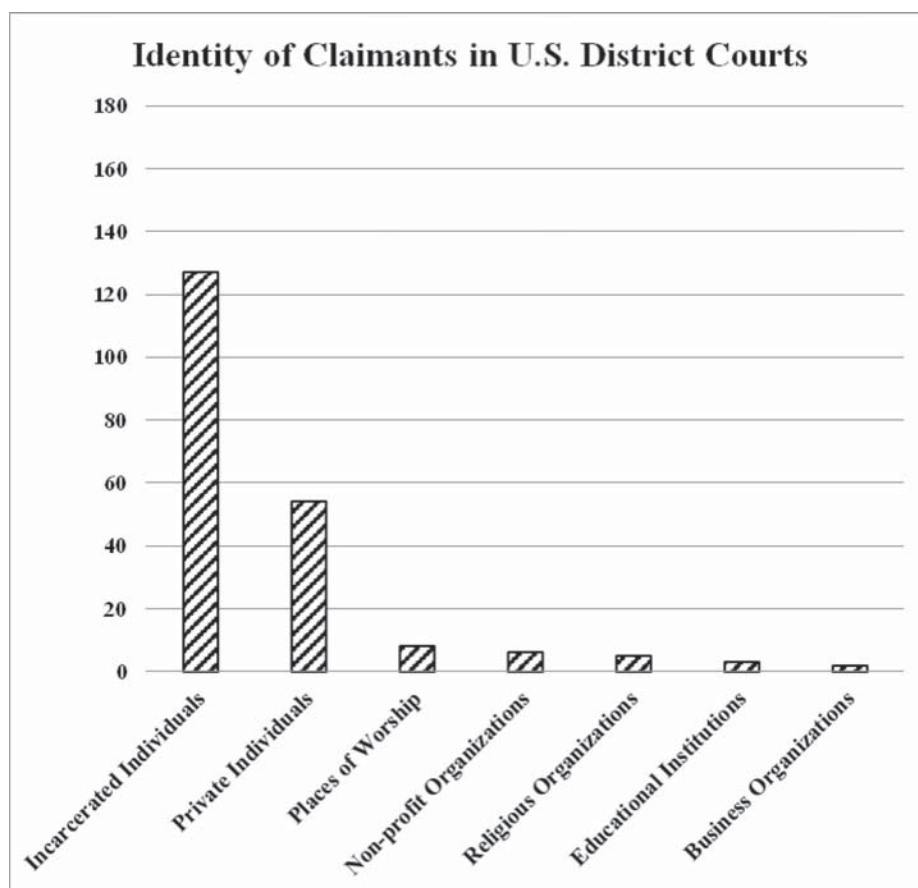
<sup>69</sup> Private individuals constituted the following percentages of claimants in these circuits: First Circuit (33.3% of six claimants); Third Circuit (13% of twenty-three claimants); Fourth Circuit (20.8% of twenty-five claimants); Fifth Circuit (18.2% of twenty-two claimants); Sixth Circuit (23.1% of thirteen claimants); Seventh Circuit (6.7% of fifteen claimants); Tenth Circuit (20.0% of twenty claimants); and Eleventh Circuit (20.0% of five claimants). *See id.*; *see also supra* note 68 and accompanying text.

<sup>70</sup> Places of worship and religious organizations constituted the following percentages of claimants in these circuits: Second Circuit (17.8% of seventeen claimants); Third Circuit (8.7% of twenty-three claimants); Fourth Circuit (4.2% of twenty-four claimants); Sixth Circuit (7.7% of thirteen claimants); Seventh Circuit (6.7% of fifteen claimants); Eighth Circuit (10.0% of ten claimants); Ninth Circuit (6.5% of thirty-one claimants); and Tenth Circuit (15.0% of twenty claimants). *See* RFRA Case Data, *supra* note 26.

<sup>71</sup> *See id.*

<sup>72</sup> *See id.* The remaining four claimants were places of worship (two claims) and non-profit organizations and educational institutions (one claim each). *See id.*

Chart 5



There were forty-six different faiths identified by claimants in district courts.<sup>73</sup> Once again, the most religiously diverse claimants were incarcerated individuals who alleged violations of the beliefs and practices of thirty-four different religions.<sup>74</sup> Other

<sup>73</sup> The religious affiliations of claimants in district courts were Amish, Apostolic, Atheism, Baptist, Buddhism, Christian Identity, Christianity, Church of Greater Faith and Redemption, Church of the Creator, Conscientious Objector, Druidism, Eckankar, Ethiopian Coptic Zion, Faithist, Fundamentalist Latter-Day Saints, Healing Church, Hebrew Messianic Israelite, Humanism, Ifá, Islam, Judaism, Mennonism, Messianic Sabbatarianism, Methodism, Moorish, Mormonism, Nation of Gods, Native American, Objectivism, Odinism, Orthodox Christianity, Our Church, Pentecostalism, Rainbow Family, Rastafarianism, Roman Catholicism, Romani American, Santa Muerte, Santería, Santo Daime, Seventh-day Adventism, Sikhism, Thelema, Tien Tao, Wicca, and Yahweh. *See id.*

<sup>74</sup> The religious affiliations of incarcerated individuals included Islam (thirty-four claims); Judaism (fourteen claims); Rastafarianism (thirteen claims); Native American (twelve claims);

categories of claimants were less diverse.<sup>75</sup> Roman Catholicism, Christianity, and Islam were the most commonly identified faiths.<sup>76</sup>

### 3. Composite Identity of Claimants

One hundred and seventy-six claims, nearly 58.0% of the combined cases, were filed by incarcerated individuals.<sup>77</sup> Private individuals filed eighty-five claims, which constituted 28.0% of combined cases.<sup>78</sup> Combined cases involving places of worship and religious organizations constituted a mere 8.9% of the total.<sup>79</sup> Combined cases involving non-profit and business organizations and educational institutions were within a few percentage points of their appellate and district court totals.<sup>80</sup> The identities of claimants in appellate and district courts are summarized in Table 6 below.

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Christianity (five claims); Santería (three claims), Odinism, Roman Catholicism, and Thelema (two claims each); and Amish, Apostolic, Asatru, Buddhism, Christian Identity, Church of the Creator, Druidism, Eckankar, Ethiopian Coptic Church, Faithism, Fundamentalist Latter-Day Saints, Hebrew Messianic Israelite, Ifá, Mennonism, Moorish, Mormonism, Nations of God, Objectivism, Orthodox Christianity, Our Church, Rainbow Family, Romani American, Santa Muerte, Wicca, and Yahweh (one claim each). The affiliation of fifteen incarcerated individuals were unspecified. *See id.*

<sup>75</sup> The religious affiliations of private individuals included Christianity (eleven claims); Islam (five claims); Native American and Sikhism (four claims each); Society of Friends (Quaker) (three claims); Atheism, Conscientious Objector, and Judaism (two claims each); and Apostolic, Baptist, Church of Greater Faith and Redemption, Healing Church, Humanism, Mormonism, Rainbow Family, Rastafarianism, Roman Catholicism, and Tien Tao (one claim each). *See id.* The religious affiliations of eleven individuals were unspecified. *See id.* The religious affiliations of places of worship included Christianity (two claims); and Baptist, Methodism, Pentecostalism, Roman Catholicism, Santo Daime, and Seventh-day Adventism (one claim each). *See id.* The religious affiliations of non-profit organizations included Christianity (two claims); and Islam and Roman Catholicism (one claim each). *See id.* The religious affiliations of two non-profit organizations were unspecified. *See id.* The affiliations of religious organizations included Pentecostalism (two claims); and Christianity and Society of Friends (Quaker) (one claim each). *See id.* The affiliation of one religious organization was unspecified. *See id.* All three educational institution claimants identified as Roman Catholic. *See id.* The affiliations of the two business organizations were Baptist and Christianity. *See id.*

<sup>76</sup> Claims based upon Islam constituted 19.5% of claims followed by Christianity (10.7%), and Native American practices (7.8%). *See id.*

<sup>77</sup> *See* RFRA Case Data, *supra* note 26.

<sup>78</sup> *See id.*

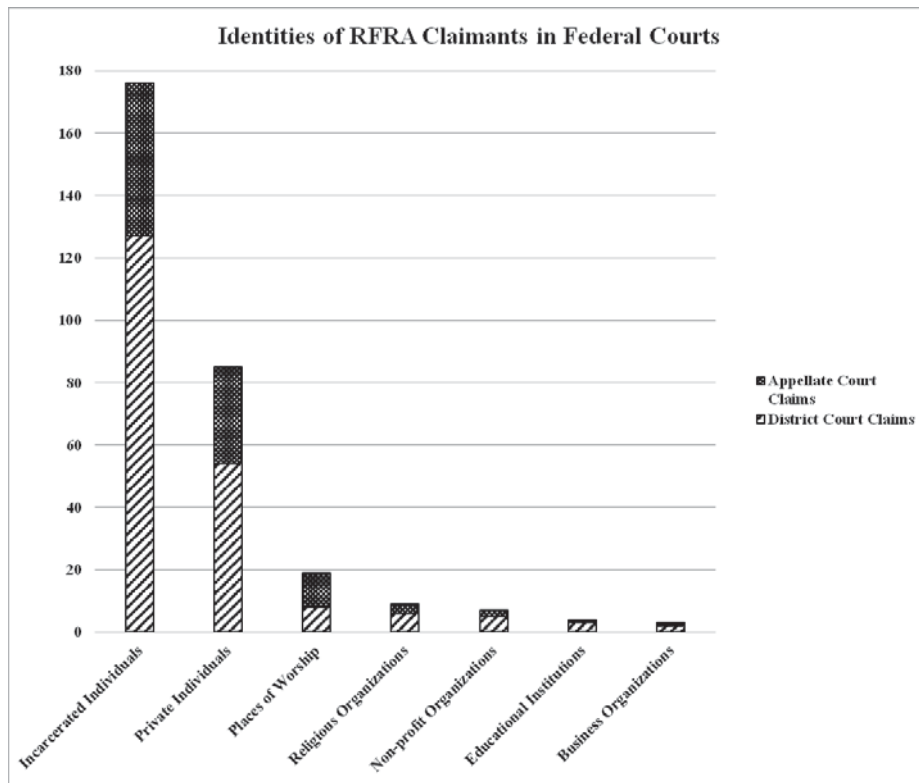
<sup>79</sup> *See id.*

<sup>80</sup> *See id.* Compare *supra* note 26, with *supra* note 27.

**Table 6: Identities of Claimants in All Federal Courts**

IDENTITY	CLAIMS	PERCENTAGE
Incarcerated individuals	176	58.1%
Private individuals	85	28.0%
Places of worship	19	6.3%
Religious organizations	8	2.6%
Non-profit organizations	7	2.3%
Educational institutions	5	1.7%
Business organizations	3	1.0%
<b>Total</b>	<b>303</b>	<b>100.0%</b>

**Chart 6**



The sizable number of claims asserted by incarcerated individuals was anticipated given a similar pattern in their utilization of state RFRA.<sup>81</sup> Whether federal lawmakers

<sup>81</sup> See Dhooge, *State RFRA*s, *supra* note 47, at 600, tbl.6 (finding that claims filed by

anticipated the dominant pattern of usage of RFRA by incarcerated individuals is uncertain.<sup>82</sup> Federal legislators clearly intended to protect the religious rights of incarcerated individuals in subsequent legislation.<sup>83</sup> Nevertheless, as in the case of state RFRA, the primary claimants have been incarcerated individuals, indicating the uncertainty surrounding the federal RFRA's impact.<sup>84</sup> As previously noted, if RFRA has accomplished anything, it has been in protecting a diverse array of religious beliefs and practices.<sup>85</sup>

The data reflects the dominance of incarcerated individuals as claimants.<sup>86</sup> Incarcerated individuals were the single largest class of claimants in ten of the twelve circuits.<sup>87</sup> The cases also show sustained utilization of RFRA by private individuals.<sup>88</sup> Individuals constituted the second largest category of claimants in nine circuits, and were the largest group of claimants in the Second Circuit.<sup>89</sup>

Places of worship constituted a considerably smaller group of claimants, failed to reach double digits in any circuit, and were completely absent in the First and Eleventh

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incarcerated individuals constituted 43.9% of all claims filed in federal and state courts alleging violations of state RFRA between 1993 and 2015).

<sup>82</sup> *Cf. id.* at 603–04 (suggesting that state lawmakers did not anticipate a dominant pattern of RFRA usage by incarcerated individuals).

<sup>83</sup> *See* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc(a), 2000cc-2(a) (2018) (prohibiting the imposition of a “substantial burden” on the exercise of religion by institutionalized persons unless such burden is “in furtherance of a compelling governmental interest” and is the “least restrictive means of furthering” such interest, and allowing for violations to serve as claims or defenses in judicial proceedings and as the basis for “appropriate relief against a government”). *But see* Brown, *supra* note 12 and accompanying text.

<sup>84</sup> *See* Dhooge, *State RFRA*, *supra* note 47, at 603–04.

<sup>85</sup> *See supra* notes 61–63, 73–75 and accompanying text.

<sup>86</sup> *See supra* note 53, 66 and accompanying text; *see also supra* Tables 4, 5 & 6.

<sup>87</sup> Incarcerated individuals were predominant in the D.C. Circuit (fifteen claims); Third Circuit (twenty-five claims); Fourth Circuit (nineteen claims); Fifth Circuit (twenty claims); Sixth Circuit (nine claims); Seventh Circuit (sixteen claims); Eighth Circuit (eight claims); Ninth Circuit (twenty-four claims); Tenth Circuit (nineteen claims); and Eleventh Circuit (eight claims). *See* RFRA Case Data, *supra* note 26; *see also supra* notes 53, 56, 58, 66–68 and accompanying text; *supra* Tables 4, 5 & 6. Incarcerated individuals were not the largest class of claimants in the First and Second Circuits. *See* RFRA Case Data, *supra* note 26. There were three claims each by incarcerated and private individuals in the First Circuit. *See id.* Private individuals outnumbered incarcerated individuals by eleven to ten in the Second Circuit. *See id.*

<sup>88</sup> *See id.*

<sup>89</sup> Private individuals were the second-largest category of claimants in the D.C. Circuit (fourteen claims); Third Circuit (four claims); Fourth Circuit (six claims); Fifth Circuit (five claims); Sixth Circuit (three claims); Eighth Circuit (seven claims); Ninth Circuit (twenty-three claims); Tenth Circuit (four claims); and Eleventh Circuit (four claims). *See id.* Places of worship outnumbered private individuals by two to one in the Seventh Circuit. *See id.*; *see also supra* notes 55, 57 and accompanying text; *supra* Tables 4, 5, & 6.

Circuits.<sup>90</sup> This dearth of claims perhaps is due to the absence of substantial barriers to worship. If this explanation is correct, the necessity of RFRA is weaker. Nevertheless, individuals or places of worship filed more than one-third of all claims.<sup>91</sup> This number of filings would be expected if religious liberty was under threat, but whether such claims pose the risks noted by opponents cannot definitively be answered without inquiry into the nature of the asserted claims.

Religious and non-profit organizations, and educational institutions, have not been active parties, filing only twenty claims, a mere 6.6% of all claims.<sup>92</sup> Business organizations have filed even fewer, with three claims constituting 1.0% of the entire sample.<sup>93</sup> The religious liberty of these organizations and institutions does not appear to be under sustained attack, given the minuscule number of filings.<sup>94</sup> The small number of claims also does not pose the existential threat asserted by RFRA opponents. An analysis of the subject matter of these claims is necessary to determine their importance.

#### *D. Data Point Three: Subject Matter of Claims*

A third lens through which to analyze RFRA's impact is the subject matter of claims. If RFRA has been effective in protecting religious liberties, a diverse set of claims focusing on religious expression would be expected over time. This diversity could pose a threat to the ability of government to perform necessary functions, including the enforcement of antidiscrimination legislation.

Claims were organized into six different categories: (1) conditions of confinement; (2) religious expression; (3) crime and tort defense; (4) legal processes; (5) land use; and (6) education. The conditions of confinement category includes objections to inmate diet and grooming policies; access to religious items, materials, and facilities;

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<sup>90</sup> Claims by places of worship were: D.C., Ninth, and Tenth Circuits (three claims each), Seventh Circuit (two claims), and Second, Third, Fourth, Fifth, Sixth, and Eighth Circuits (one claim each). *See* RFRA Case Data, *supra* note 26; *see also supra* notes 57, 70 and accompanying text; *supra* Tables 4, 5 & 6.

<sup>91</sup> *See* RFRA Case Data, *supra* note 26.

<sup>92</sup> Claims by religious organizations were split between the Second and Third Circuits (two claims each) and the D.C., Sixth, Seventh, and Ninth Circuits (one claim each). *See id.* Claims by non-profit organizations were split between the D.C. Circuit (three claims), Ninth Circuit (two claims), and the First and Eighth Circuits (one claim each). Claims by educational institutions were split between the Fourth Circuit (two claims) and U.S. Supreme Court and the D.C. and Ninth Circuits (one claim each). *See id.*; *see also supra* note 70 and accompanying text; *supra* Tables 4, 5 & 6.

<sup>93</sup> Business organizations were claimants in three cases in the U.S. Supreme Court, and the Third and Sixth Circuits. *See* RFRA Case Data, *supra* note 26; *see also supra* notes 25, 29 and accompanying text; *supra* Tables 4, 5 & 6.

<sup>94</sup> *See* Dhooze, *State RFRAs*, *supra* note 47, at 602.

mistreatment on the basis of religion; drug testing; and participation in religious ceremonies.<sup>95</sup> Religious expression includes those cases concerning expressive conduct in the workplace and in public and private forums, and possession of items having religious significance.<sup>96</sup> The crime and tort defense category “includes cases in which RFRA was utilized as a defense to the commission of a criminal offense or tort, or as the basis for an objection to criminal procedures.”<sup>97</sup> Legal processes claims include cases in which RFRA was utilized as an objection to government mandates and civil judicial procedures.<sup>98</sup> Land-use claims include disputes concerning zoning; use and building permits; variances; and access to, and use of, federal lands having religious significance.<sup>99</sup> The education category includes cases concerning provision of equal services to religious schools, and curricular issues.<sup>100</sup> The first or primary claim addressed in the surveyed opinions was utilized for identification purposes in cases in which there were multiple claims.

### 1. Subject Matter of Claims in U.S. Appellate Courts

Conditions of confinement, religious expression, and the crime and tort defense, were the predominant claims in appellate courts. Almost one-third of claims arose from conditions of confinement.<sup>101</sup> The remaining claims by incarcerated individuals, an additional 19.4% of appellate claims, implicated the crime and tort defense category.<sup>102</sup> Religious expression claims were 23.5% of appellate claims.<sup>103</sup> The majority of these claims (78.3%) were asserted by individuals.<sup>104</sup> The subject matter of

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<sup>95</sup> See RFRA Case Data, *supra* note 26; see also Dhooge, *State RFRAs*, *supra* note 47, at 606.

<sup>96</sup> See Dhooge, *State RFRAs*, *supra* note 47, at 606.

<sup>97</sup> *Id.*

<sup>98</sup> See *id.*

<sup>99</sup> See *id.* at 606, 645.

<sup>100</sup> See *id.* at 606.

<sup>101</sup> The thirty claims based upon conditions of confinement were divided among the following circuits: Third Circuit (eight claims); D.C. Circuit (six claims); Seventh and Eleventh Circuits (three claims each); Second, Fourth, and Ninth Circuits (two claims each); Fifth, Sixth, Eighth, and Tenth Circuits (one claim each). See RFRA Case Data, *supra* note 26.

<sup>102</sup> The nineteen crime and tort defense claims by incarcerated individuals were allocated among the following circuits: Ninth Circuit (eight claims); Tenth Circuit (five claims); Eighth Circuit (four claims); Fifth and Eleventh Circuits (one claim each). See *id.* The two remaining crime and tort defense claims concerned a place of worship contesting the issuance of a contempt citation for failure to comply with a subpoena, and an individual challenging the obligation to pay federal income taxes. See *In re Grand Jury Empaneling of Special Grand Jury*, 171 F.3d 826 (3d Cir. 1999); *Adams v. Comm’r*, 170 F.3d 173 (3d Cir. 1999).

<sup>103</sup> See RFRA Case Data, *supra* note 26.

<sup>104</sup> The eighteen religious expression claims brought by individuals were allocated among the following circuits: D.C. Circuit (five claims); Ninth Circuit (four claims); Second and



these claims was diverse.<sup>105</sup> Five religious expression claims involved places of worship and religious organizations.<sup>106</sup>

The remaining 24.5% of claims concerned legal processes, land use, and education.<sup>107</sup> The majority of legal processes claims (53.3%) were brought by private individuals.<sup>108</sup> The remaining legal processes claims were asserted by places of worship,

Eleventh Circuits (three claims each); Eighth Circuit (two claims); and Fifth Circuit (one claim). *See id.*

<sup>105</sup> *See, e.g.,* *Newdow v. Peterson*, 753 F.3d 105 (2d Cir. 2014) (concerning claimant's objection to "In God We Trust" on U.S. currency), *cert. denied*, 135 S. Ct. 1000 (2015); *Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011) (religious art on a public sidewalk); *Harrell v. Donahue*, 638 F.3d 975 (8th Cir. 2011) (concerning failure to provide accommodation to mail carrier who refused to work on Saturdays); *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010) (concerning claimant's objection to "In God We Trust" on U.S. currency), *cert. denied*, 562 U.S. 1271 (2011); *Perkel v. U.S. Dep't of Justice*, 365 F. App'x 755 (9th Cir. 2010) (marijuana possession on church property); *Malouse v. Winter*, 338 F. App'x 356 (5th Cir. 2009) (concerning refusal to dispense contraception); *Potter v. Dist. of Columbia*, 558 F.3d 542 (D.C. Cir. 2009) (concerning grooming policies for firefighters); *Olsen v. Mukasey*, 541 F.3d 827 (8th Cir. 2008) (marijuana possession), *cert. denied*, 556 U.S. 1221 (2009); *Veitch v. England*, 471 F.3d 124 (D.C. Cir. 2006) (concerning claimant's discharge from Navy chaplaincy), *cert. denied*, 552 U.S. 809 (2007); *Henderson v. Kennedy*, 265 F.3d 1072 (D.C. Cir. 2001) (concerning ban on T-shirt sales on the National Mall), *cert. denied*, 535 U.S. 986 (2002); *Gibson v. Babbitt*, 223 F.3d 1256 (11th Cir. 2000) (possession of eagle feathers); *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999) (concerning objection to utilization of income tax payments to support the military), *cert. denied*, 528 U.S. 1116 (2000); *Hall v. Am. Nat'l Red Cross*, 86 F.3d 919 (9th Cir. 1996) (concerning denial of counseling certification), *cert. denied*, 519 U.S. 1010 (1996).

<sup>106</sup> *See* *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015) (concerning Archdiocese of Milwaukee's transfer of funds from bankruptcy estate), *cert. denied*, 136 S. Ct. 581 (2015); *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (possession of eagle feathers); *Multi-Denominational Ministry of Cannabis & Rastafari, Inc. v. Holder*, 365 F. App'x 817 (9th Cir. 2010) (government seizure of marijuana); *La Voz Radio de la Comunidad v. FCC*, 223 F.3d 313 (6th Cir. 2000) (radio broadcasting without a license); *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (concerning revocation of tax-exempt status for political advertisements).

<sup>107</sup> *See* RFRA Case Data, *supra* note 26.

<sup>108</sup> *See, e.g.,* *Leonard v. U.S. Dep't of Defense*, 598 F. App'x 9 (D.C. Cir. 2015) (concerning inability to lead religious services during federal government shutdown), *cert. denied*, 136 S. Ct. 261 (2015); *Stratton v. Mecklenburg Cty. Dep't of Soc. Servs.*, 521 F. App'x 278 (4th Cir. 2013) (concerning termination of parental rights), *cert. denied*, 134 S. Ct. 1290 (2014); *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (concerning insurance mandate in the Affordable Care Act), *cert. denied*, 567 U.S. 951 (2012); *Muhammad v. Ahern*, 350 F. App'x 529 (2d Cir. 2009) (border searches at airport arrivals); *Larsen v. U.S. Navy*, 525 F.3d 1 (D.C. Cir. 2008) (concerning the use of quotas in appointing Navy chaplains), *cert. denied*, 555 U.S. 1071 (2008); *Fernandez v. Mukasey*, 520 F.3d 965 (9th Cir. 2008) (concerning removal pursuant to immigration laws); *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007) (concerning border searches at U.S.-Canada border); *Droz v. Comm'r*, 48 F.3d 1120 (9th Cir. 1995) (payment of Social Security taxes), *cert. denied*, 516 U.S. 1042 (1996).

educational institutions, and religious and business organizations.<sup>109</sup> Seven of the eight land-use claims involved places of worship or individuals.<sup>110</sup> There was one claim based upon education.<sup>111</sup> The subject matter of claims by identity of the claimant and as a percentage of the claims filed in appellate courts are summarized in Table 7 below.

**Table 7: Subject Matter of Claims in U.S. Appellate Courts by Identity of the Claimant**

CLAIMANT	TYPE OF CLAIM	CLAIMS	PERCENTAGE
Incarcerated individuals	Conditions of confinement	30	30.6%
Incarcerated individuals	Crime/tort defense	19	19.4%
Private individuals	Religious expression	18	18.4%
Private individuals	Legal processes	8	8.2%
Private individuals	Land use	3	3.1%
Private individuals	Education	1	1.0%

<sup>109</sup> See *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014) (concerning contraception mandate in the Affordable Care Act); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (concerning contraception mandate in the Affordable Care Act); *Gonzales v. O Centro Espirita Beneficente União Do Vegetal*, 546 U.S. 418 (2006) (concerning seizure of hoasca utilized in religious rituals); *Liberty Univ., Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013) (concerning individual and employer insurance mandates in the Affordable Care Act), *cert. denied*, 134 S. Ct. 683 (2013); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003) (concerning designation of Islamic charity as a terrorist organization), *cert. denied*, 540 U.S. 1218 (2004); *United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000) (concerning failure to pay employment tax), *cert. denied*, 531 U.S. 1112 (2001); *In re Young*, 141 F.3d 854 (8th Cir. 1998) (concerning recovery of tithes from church in bankruptcy proceeding), *cert. denied*, 525 U.S. 811 (1998).

<sup>110</sup> See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (concerning denial of building permit); *Oklevueha Native Am. Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012 (9th Cir. 2016) (concerning marijuana cultivation), *cert. denied*, 137 S. Ct. 510 (2016); *St. John's United Church of Christ v. FAA*, 550 F.3d 1168 (D.C. Cir. 2008) (concerning relocation of cemetery to facilitate airport expansion), *cert. denied*, 558 U.S. 820 (2009); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008) (concerning physical access to sacred site); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (concerning waste water disposal on sacred site), *cert. denied*, 556 U.S. 1281 (2009); *Kiczenski v. Gonzales*, 237 F. App'x 149 (9th Cir. 2007) (concerning hemp cultivation); *Vill. of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006) (concerning relocation of cemetery to facilitate airport expansion). One land-use claim was filed by a non-profit organization. See *La Cuna de Aztlán Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of Interior*, 603 F. App'x 651 (9th Cir. 2015) (concerning access to sacred sites), *cert. denied*, 136 S. Ct. 2407 (2016).

<sup>111</sup> See *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15 (1st Cir. 2004) (concerning failure to provide equal services to disabled children in religious schools), *cert. denied*, 543 U.S. 988 (2004).

CLAIMANT	TYPE OF CLAIM	CLAIMS	PERCENTAGE
Private individuals	Crime/tort defense	1	1.0%
Places of worship	Land use	4	4.1%
Places of worship	Religious expression	3	3.1%
Places of worship	Legal processes	3	3.1%
Places of worship	Crime/tort defense	1	1.0%
Religious organizations	Religious expression	2	2.0%
Religious organizations	Legal processes	1	1.0%
Educational organizations	Legal processes	2	2.0%
Non-profit organizations	Land use	1	1.0%
Business organizations	Legal processes	1	1.0%
<b>Total</b>		<b>98</b>	<b>100.0%</b>

The prevalence of claims arising from conditions of confinement, the crime and tort defense, and religious expression is also apparent in the composite of appellate claims by subject matter. It is notable that 75.5% of cases concerned one of these three claims.<sup>112</sup> Another 15.3% of claims related to legal processes.<sup>113</sup> Claims relating to land-use issues and education were a minority at 8.2% and 1.0%, respectively.<sup>114</sup> Only two cases involved the LGBTQ+ community, a group whose assertion of rights has motivated both sides in recent RFRA debates.<sup>115</sup> The composite of claims by subject matter in appellate courts is summarized in Table 8 below.

**Table 8: Claims in U.S. Appellate Courts by Subject Matter**

TYPE OF CLAIM	CLAIMS	PERCENTAGE
Conditions of confinement	30	30.6%
Religious expression	23	23.5%
Crime/tort defense	21	21.4%
Legal processes	15	15.3%
Land use	8	8.2%
Education	1	1.0%
<b>Total</b>	<b>98</b>	<b>100.0%</b>

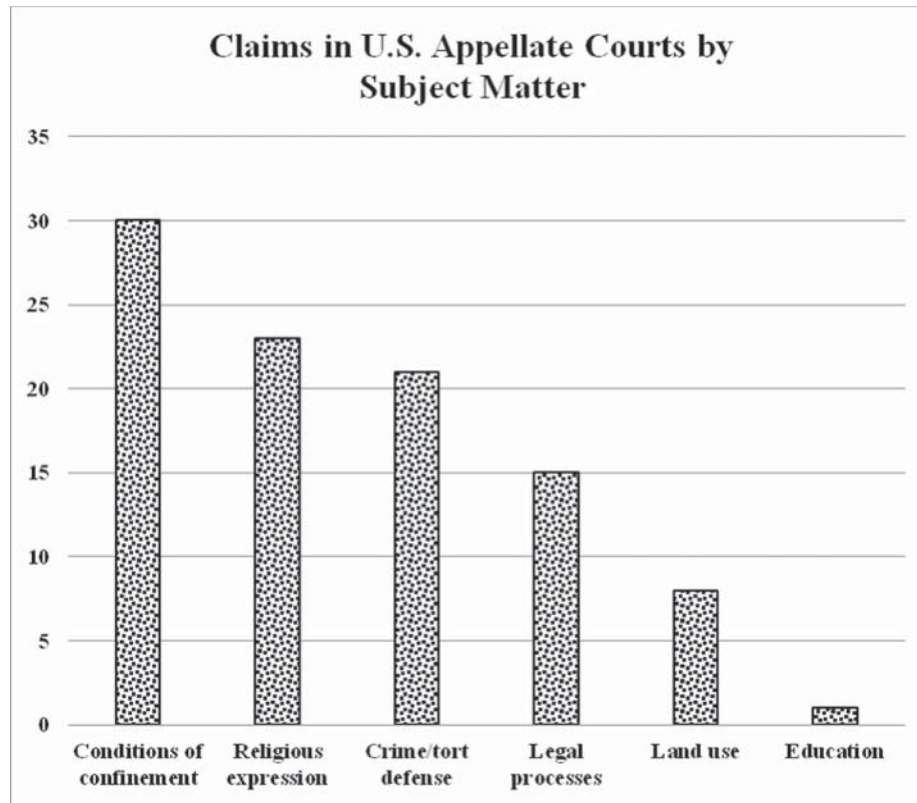
<sup>112</sup> See *supra* notes 101–06 and accompanying text.

<sup>113</sup> See *supra* notes 108–09 and accompanying text.

<sup>114</sup> See *supra* notes 110–11 and accompanying text.

<sup>115</sup> See *Wilson v. James*, No. 13-CV-01351, 2016 WL 3043746 (D.C. Cir. May 17, 2016) (concerning use of government account by member of air national guard to object to same-sex marriage), *cert. denied*, 137 S. Ct. 695 (2017); *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012) (concerning refusal to provide counseling services to same-sex couples); see also *Brammer*, *supra* note 13; *Koppelman*, *supra* note 14; *Knauer*, *supra* note 19; *Day & Weatherby*, *supra* note 20, at 911–12; *Koppelman*, *supra* note 21.

Chart 8



## 2. Subject Matter of Claims in U.S. District Courts

Conditions of confinement, religious expression, and the crime and tort defense were the most common claims addressed by district courts.<sup>116</sup> Conditions of confinement claims were more common in district courts than their appellate counterparts, accounting for more than half of all opinions.<sup>117</sup> The remaining claims by incarcerated individuals, an additional 10.2% of claims, implicated the crime and tort defense category.<sup>118</sup>

<sup>116</sup> See RFRA Case Data, *supra* note 26.

<sup>117</sup> The one hundred and six claims based upon conditions of confinement were divided among district courts in the following circuits: Fourth and Fifth Circuits (seventeen claims each); Third Circuit (fourteen claims); Seventh Circuit (thirteen claims); D.C. and Ninth Circuits (nine claims each); Tenth Circuit (eight claims); Second Circuit (seven claims); Sixth Circuit (six claims); Eleventh Circuit (three claims); Eighth Circuit (two claims); and First Circuit (one claim). See RFRA Case Data, *supra* note 26.

<sup>118</sup> The twenty-one crime and tort defense claims by incarcerated individuals were allocated among district courts in the following circuits: Tenth Circuit (five claims); Ninth Circuit (four claims); First, Third, Sixth, and Eighth Circuits (two claims each); and Second, Fourth, Fifth, and Eleventh Circuits (one claim each). See RFRA Case Data, *supra* note 26. Three of the remaining nine crime and tort defense claims were brought by religious organizations. See *United States v. Phila. Yearly Meeting of Religious Soc’y of Friends*, 322 F. Supp. 2d 603

Religious expression claims were the second most common claim in district courts constituting 15.6% of all claims.<sup>119</sup> The majority of these claims (68.7%) were asserted by individuals.<sup>120</sup> The subject matter of these claims was as diverse as their appellate counterparts.<sup>121</sup> The remaining religious expression claims involved places of worship and non-profit, religious, and business organizations.<sup>122</sup>

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(E.D. Pa. 2004) (concerning refusal to honor levy on employee for unpaid income taxes); *United States v. Any & All Radio Station Transmission Equip.*, No. 00-Civ.-893 (GBD), 2004 WL 2848532 (S.D.N.Y. Dec. 9, 2004) (concerning forfeiture of transmission equipment utilized by an unlicensed radio station); *United States v. Any & All Radio Station Transmission Equip.*, No. Civ. A. 99-2260, 1999 WL 718646 (E.D. Pa. Aug. 31, 1999) (concerning forfeiture of transmission equipment utilized by an unlicensed radio station). Individuals and non-profit organizations utilized the crime and tort defense on two occasions each. *See United States v. Berst*, No. 6:11-cv-6370-TC, 2012 WL 4361408 (D. Or. Aug. 2, 2012) (misbranded alternative herbal medicines); *United States v. Islamic Am. Relief Agency*, No. 07-00087-CR-W-NKL, 2009 WL 4016478 (W.D. Mo. Nov. 18, 2009) (export control violations); *Off. of Foreign Assets Control v. Voices in Wilderness*, 329 F. Supp. 2d 71 (D.D.C. 2004) (export control violations); *In re Three Children*, 24 F. Supp. 2d 389 (D.N.J. 1998) (concerning a motion to quash subpoena). Educational institutions and business organizations utilized the crime and tort defense on one occasion each. *See Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016) (concerning wrongful discharge of transgender employee); *Goodman v. Archbishop Curley High Sch., Inc.*, 149 F. Supp. 3d 577 (D. Md. 2016) (concerning the sexual abuse of a student).

<sup>119</sup> *See* RFRA Case Data, *supra* note 26.

<sup>120</sup> The twenty-two religious expression claims brought by individuals were allocated among district courts in the following circuits: D.C. Circuit (five claims); Eighth Circuit (three claims); Second, Third, Fourth, Ninth and Tenth Circuits (two claims each); First, Fifth, Seventh and Eleventh Circuits (one claim each). *See* RFRA Case Data, *supra* note 26.

<sup>121</sup> *See, e.g., Singh v. McConville*, 187 F. Supp. 3d 152 (D.D.C. 2016) (concerning military grooming policy as applied to Sikhs); *Abeles v. Metro. Wash. Airports Auth.*, No. 1:15-cv-00792, 2016 WL 6892103 (E.D. Va. Apr. 1, 2016) (concerning leave policy for religious activities); *Heap v. Carter*, 112 F. Supp. 3d 402 (E.D. Va. 2015) (concerning plaintiff's rejection as a Navy chaplain); *Tagore v. United States*, No. H-09-0027, 2014 WL 2880008 (S.D. Tex. June 24, 2014) (concerning the right to carry ceremonial sword in the workplace); *Gover v. United States*, No. 08-5207, 2009 WL 754692 (W.D. Ark. Mar. 19, 2009) (marijuana possession); *Loop v. United States*, No. 05-575, 2006 WL 1851140 (D. Minn. June 30, 2006) (marijuana use); *Rylee v. Ashcroft*, No. CIVS05-0068 DFLCMK, 2005 WL 3309348 (E.D. Cal. Dec. 5, 2005) (marijuana possession); *Newdow v. Bush*, 355 F. Supp. 2d 265 (D.D.C. 2005) (concerning objection to prayer at the presidential inauguration); *Utah v. Evans*, 143 F. Supp. 2d 1290 (D. Utah 2001) (concerning failure to include missionaries in U.S. Census); *Packard v. United States*, 7 F. Supp. 2d 143 (D. Conn. 1998) (concerning an objection to payment of income taxes); *Rigdon v. Perry*, 962 F. Supp. 2d 150 (D.D.C. 1997) (concerning ban on anti-abortion activities by military chaplains); *Planned Parenthood Ass'n of South-eastern Pa., Inc. v. Walton*, 949 F. Supp. 290 (E.D. Pa. 1996) (anti-abortion protest); *United States v. Dinwiddie*, 885 F. Supp. 1286 (W.D. Mo. 1995) (concerning threats toward and blockade of abortion clinic); *United States v. Brock*, 863 F. Supp. 851 (E.D. Wis. 1994) (anti-abortion protest).

<sup>122</sup> *See Comité Fiestas de la Calle San Sebastián, Inc. v. Cruz*, 207 F. Supp. 3d 129 (D.P.R.

Objections to legal processes were 13.7% of district court claims.<sup>123</sup> Claims by individuals were far more prevalent than their appellate counterparts, constituting 82.1% of such claims.<sup>124</sup> The remaining legal processes claims were asserted by places of

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Sept. 13, 2016) (concerning participation in a religious festival); *Mathis v. Christian Heating & Air Conditioning, Inc.*, 158 F. Supp. 3d 317 (E.D. Pa. 2016) (concerning an objection to religious message on company name badge); *In re Nichols*, No. TDC-14-0625, 2014 WL 4094340 (D. Md. Aug. 15, 2014) (concerning status of donations to church in bankruptcy proceeding); *Penn v. N.Y. Methodist Hosp.*, No. 11-cv-9137 (NSR), 2013 WL 5477600 (S.D.N.Y. Sept. 30, 2013) (employment discrimination); *Church of Holy Light of the Queen v. Holder*, No. 1:08-cv-3095-PA, 2012 WL 5985122 (D. Or. Nov. 29, 2012) (concerning possession and consumption of “Daime” tea containing a controlled substance); *Care Net Pregnancy Ctr. v. U.S. Dep’t of Agric.*, 896 F. Supp. 2d 98 (D.D.C. Oct. 10, 2012) (concerning access to government loans); *Council for Life Coal. v. Reno*, 856 F. Supp. 1422 (S.D. Cal. 1994) (concerning an anti-abortion protest); *Secs. Inv’r Prot. Corp. v. Bernard L. Madoff Inv. Secs., LLC*, 531 B.R. 439 (Bankr. S.D.N.Y. 2015) (concerning objection to clawback); *In re Bloch*, 207 B.R. 944 (Bankr. D. Colo. 1997) (concerning the status of tithes in bankruptcy proceeding); *In re Newman*, 203 B.R. 468 (Bankr. D. Kan. 1996) (concerning the status of tithes in bankruptcy proceeding).

<sup>123</sup> See RFRA Case Data, *supra* note 26.

<sup>124</sup> See *New Doe Child #1 v. Cong. of United States*, No. 5:16CV59, 2016 WL 6995358 (N.D. Ohio Nov. 30, 2016) (concerning reference to God on currency); *Tanvir v. Lynch*, 128 F. Supp. 3d 756 (S.D.N.Y. Sept. 3, 2015), *rev’d on procedural grounds*, *Tanvir v. Tanzin*, 2018 WL 3096962 (2d Cir. May 2, 2018) (concerning plaintiffs’ inclusion on federal no-fly list); *Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. Aug. 12, 2015) (concerning government official’s refusal to issue marriage licenses to same-sex couples); *Howe v. Burwell*, No. 2:15-CV-6, 2015 WL 4479757 (D. Vt. July 21, 2015) (concerning utilization of funds pursuant to the Affordable Care Act); *United States v. Town of Colorado City*, No. 3:12-cv-8123-HRH, 2014 WL 5465104 (D. Ariz. Oct. 28, 2014) (concerning an objection to compelled deposition); *Carmichael v. Sebelius*, No. 3:13CV129, 2013 WL 5755618 (E.D. Va. Oct. 23, 2013) (concerning required utilization of Social Security number); *Cherri v. Mueller*, 951 F. Supp. 2d 918 (E.D. Mich. 2013) (concerning searches, detentions, and questioning of Muslims at U.S.-Canadian border); *Fazaga v. Fed. Bureau of Investigation*, 884 F. Supp. 2d 1022 (C.D. Cal. Aug. 14, 2012) (concerning surveillance by law enforcement); *Leitgeb v. S.C. Dep’t of Motor Vehicles*, No. 7:10-2989-TMC, 2011 WL 5878157 (D.S.C. Nov. 23, 2011) (concerning required utilization of Social Security number); *Jacobson v. United States*, 764 F. Supp. 2d 221 (D.D.C. 2011) (concerning an objection to Selective Service registration); *Moore-Backman v. United States*, No. CV 09-397-TUC-RCC, 2010 WL 3342106 (D. Ariz. Aug. 25, 2010) (concerning payment of federal income taxes); *Muhammad v. Bonner*, No. 05-CV-1851(RJD)(LB), 2008 WL 926574 (E.D.N.Y. Mar. 31, 2008) (concerning detention and search of luggage at airport); *Wong v. Beebe*, No. 01-718-ST, 2007 WL 1170621 (D. Or. Apr. 10, 2007), *rev’d*, *Kwai Fun Wong v. Beebe*, 381 F. App’x 715 (9th Cir. 2010) (concerning strip search by Immigration & Naturalization Service agents); *Marrero v. Apfel*, 87 F. Supp. 2d 340 (S.D.N.Y. 2000) (concerning entitlement to disability payments); *Lipton v. Peters*, No. CIV.SA-99-CA-0235-EP, 1999 WL 33289705 (W.D. Tex. Oct. 12, 1999)

worship, a non-profit organization, and an educational institution.<sup>125</sup> The remaining nine district court claims involved land-use and education issues.<sup>126</sup> Six of the seven land-use claims were brought by individuals.<sup>127</sup> The two education claims were asserted by an individual and an educational institution.<sup>128</sup> The subject matter of claims by identity of the claimant and as a percentage of the claims in district courts is summarized in Table 9 below.

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(concerning denial of military discharge); *In re Hodge*, 220 B.R. 386 (Bankr. D. Idaho 1998) (concerning status of tithes in bankruptcy proceeding); *Tinsley v. Comm’r*, No. 396-CV-1769-P, 1998 WL 59481 (N.D. Tex. Feb. 9, 1998) (concerning request pursuant to Freedom of Information Act); *Steckler v. United States*, No. Civ.A. 96-1054, 1998 WL 28235 (E.D. La. Jan. 26, 1998) (concerning required utilization of Social Security number); *Kennedy v. Rubin*, No. C95-1270 SBA, 1995 WL 552148 (N.D. Cal. Sept. 7, 1995) (concerning utilization of federal income tax proceeds for military); *In re Gomes*, 219 B.R. 286 (Bankr. D. Or. 1998) (concerning status of tithes in bankruptcy proceeding); *In re Andrade*, 213 B.R. 765 (Bankr. E.D. Cal. 1997) (concerning status of tithes in bankruptcy proceeding); *In re Turner*, 193 B.R. 548 (Bankr. N.D. Cal. 1996) (concerning disclosure of Social Security number in bankruptcy proceeding); *In re Faulkner*, 165 B.R. 644 (Bankr. W.D. Mo. 1994) (concerning status of tithes in bankruptcy proceeding).

<sup>125</sup> See *Iglesia Pentecostal Casa de Dios Para Las Naciones, Inc. v. Johnson*, No. 15-CV-2612-DDC-GEB, 2016 WL 3936435 (D. Kan. July 21, 2016) (concerning denial of immigrant visa petition); *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, No. 1:06-cv-01207-JDB-egb, 2012 WL 1155465 (W.D. Tenn. Apr. 5, 2012) (concerning objection to enforcement of contempt citation); *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166 (D.D.C. 2000) (concerning labeling of genetically modified foods); *Fordham Univ. v. Brown*, 856 F. Supp. 684 (D.D.C. 1994) (concerning denial of radio broadcasting license); *In re Roman Catholic Archbishop of Portland*, 335 B.R. 842 (Bankr. D. Or. 2005) (concerning objection to sale of church property).

<sup>126</sup> See RFRA Case Data, *supra* note 26.

<sup>127</sup> See *Cherokee Nation W. v. U.S. Army Corps of Eng’rs*, No. 14-CV-612-JED-TLW, 2016 WL 4548441 (N.D. Okla. Aug. 31, 2016) (concerning access to federal land for religious ceremony); *Battle Mountain Band v. U.S. Bureau of Land Mgmt.*, No. 3:16-CV-0268-LRH-WGC, 2016 WL 4497756 (D. Nev. Aug. 26, 2016) (concerning construction on sacred land); *Armstrong v. Jewell*, No. 15-215-ML, 2015 WL 8160721 (D.R.I. Dec. 7, 2015) (marijuana use in a national park); *Winnemem Wintu Tribe v. U.S. Dep’t of Interior*, 725 F. Supp. 2d 1119 (E.D. Cal. 2010) (concerning access to sacred sites located on federal land); *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008) (concerning construction on sacred land); *Nenninger v. U.S. Forest Serv.*, No. 07-3028, 2008 WL 2693186 (W.D. Ark. July 3, 2008) (concerning use permit for national forest). The sole land-use claim not involving a private individual concerned a religious organization. See *C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d 903 (N.D. Ill. 2001) (concerning requirement of a special-use permit to operate a church in a commercial zone).

<sup>128</sup> See *Smith v. Jefferson Cty. Bd. of Educ.*, No. 3:15-CV-57(GROH), 2015 WL 5031666 (N.D.W. Va. Aug. 25, 2015) (teaching of evolution in public schools); *In re Scroggins*, 209 B.R. 727 (Bankr. D. Ariz. 1997) (refusal to issue academic transcripts).

**Table 9: Subject Matter of Claims in U.S. District Courts by Identity of the Claimant**

CLAIMANT	TYPE OF CLAIM	NUMBER	PERCENTAGE
Incarcerated individuals	Conditions of confinement	106	51.7%
Incarcerated individuals	Crime/tort defense	21	10.2%
Private individuals	Legal processes	23	11.2%
Private individuals	Religious expression	22	10.7%
Private individuals	Land use	6	2.9%
Private individuals	Crime/tort defense	2	1.0%
Private individuals	Education	1	0.5%
Places of worship	Religious expression	5	2.4%
Places of worship	Legal processes	3	1.5%
Non-profit organizations	Religious expression	3	1.5%
Non-profit organizations	Crime/tort defense	2	1.0%
Non-profit organizations	Legal processes	1	0.5%
Religious organizations	Crime/tort defense	3	1.5%
Religious organizations	Land use	1	0.5%
Religious organizations	Religious expression	1	0.5%
Educational institutions	Legal processes	1	0.5%
Educational institutions	Education	1	0.5%
Educational institutions	Crime/tort defense	1	0.5%
Business organizations	Religious expression	1	0.5%
Business organizations	Crime/tort defense	1	0.5%
<b>Total</b>		<b>205</b>	<b>100.1%</b>

The prevalence of claims concerning conditions of confinement, religious expression, and the crime and tort defense is also apparent in the composite of district court claims by subject matter.<sup>129</sup> Almost 82.0% of district court claims, one hundred and sixty-eight claims in all, are classifiable under one of these three headings.<sup>130</sup> The disparity is more pronounced when legal processes claims are factored into the equation, with 95.6% of district court claims arising from one of these four classifications.<sup>131</sup> Only 4.4% of district court claims, nine cases in total, arose from land use or education.<sup>132</sup> Furthermore, only two cases involved the LGBTQ+ community.<sup>133</sup> The composite of claims by subject matter in district courts is summarized in Table 10 below.

<sup>129</sup> See *supra* Table 9; RFRA Case Data, *supra* note 26.

<sup>130</sup> See *supra* notes 117–22 and accompanying text.

<sup>131</sup> See *supra* notes 117–25 and accompanying text.

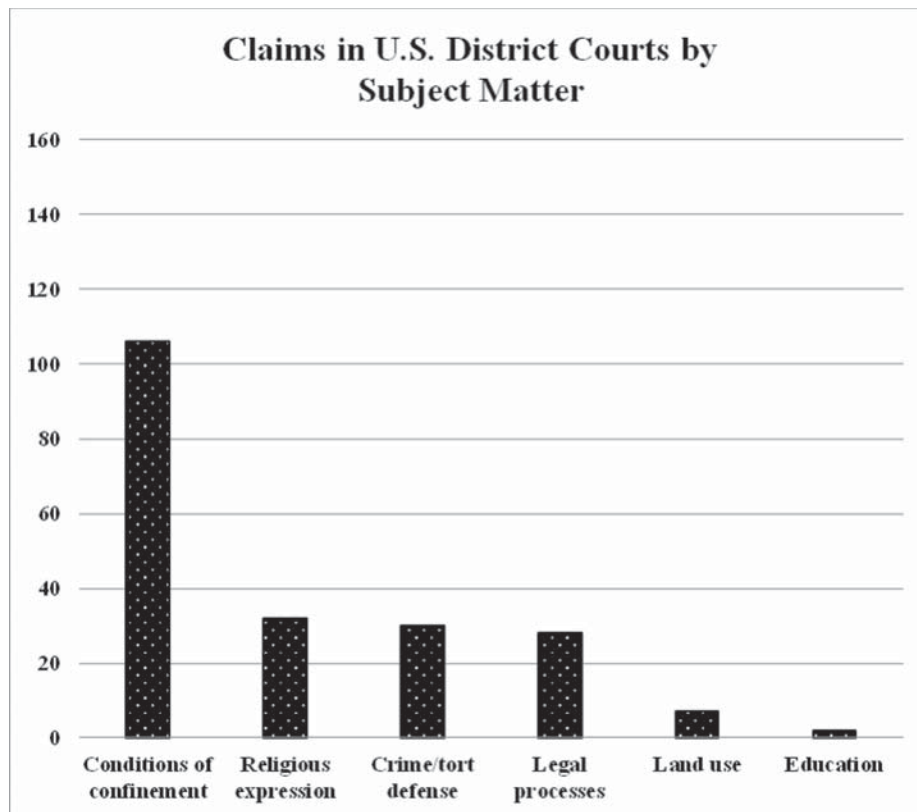
<sup>132</sup> See *supra* notes 127–28 and accompanying text.

<sup>133</sup> See *Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016); *Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. 2015).



**Table 10: Claims in U.S. District Courts by Subject Matter**

TYPE OF CLAIM	NUMBER	PERCENTAGE
Conditions of confinement	106	51.7%
Religious expression	32	15.6%
Crime/tort defense	30	14.6%
Legal processes	28	13.7%
Land use	7	3.4%
Education	2	1.0%
<b>Total</b>	<b>205</b>	<b>100.0%</b>

**Chart 10**

### 3. Composite Subject Matter of Claims

Two hundred and forty-two claims, almost 80% of the combined appellate and district court cases, were based upon conditions of confinement, religious expression, or the crime and tort defense.<sup>134</sup> This dominance is reflected in the circuit-by-circuit data. Conditions of confinement prevailed in the D.C., Second, Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits.<sup>135</sup> Religious expression claims or the crime and tort defense were the second most common claim in six of these circuits.<sup>136</sup> Religious expression and the crime and tort defense were equally split in the First Circuit, at 28.6% of all claims.<sup>137</sup> The crime and tort defense was the most common claim in the Eighth, Ninth, and Tenth Circuits.<sup>138</sup> The second most common claim in these circuits was divided between religious expression, legal processes, and conditions of confinement.<sup>139</sup>

Objections to legal processes constituted 14.2% of all claims, with the remaining 6.0% split among land-use and education claims.<sup>140</sup> Only 1.3% of all claims, four cases in total, related to the LGBTQ+ community.<sup>141</sup> The subject matter of claims by identity of the claimant and as a percentage of the claims filed in appellate and district courts is summarized in Table 11 below. The composite of claims by subject matter in appellate and district courts is summarized in Table 12 below.

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<sup>134</sup> See *supra* notes 101–06, 117–22 and accompanying text.

<sup>135</sup> Conditions of confinement constituted 40.5% of thirty-seven claims in the D.C. Circuit, 37.5% of twenty-four claims in the Second Circuit, 72.7% of thirty-three claims in the Third Circuit, 64.3% of twenty-eight claims in the Fourth Circuit, 69.2% of twenty-six claims in the Fifth Circuit, 46.7% of fifteen claims in the Sixth Circuit, 80.0% of twenty claims in the Seventh Circuit, and 50.0% of twelve claims in the Eleventh Circuit. See *supra* notes 101, 117 and accompanying text.

<sup>136</sup> Religious expression claims were 32.4% of claims in the D.C. Circuit, 29.2% of claims in the Second Circuit, 11.5% of claims in the Fifth Circuit, 10.0% of claims in the Seventh Circuit, and 33.3% of claims in the Eleventh Circuit. See *supra* notes 104–06, 118–21, and accompanying text. The crime and tort defense constituted 21.2% of claims in the Third Circuit. See *supra* notes 102, 118, and accompanying text. Legal processes claims constituted the second most common claim in the Fourth Circuit (14.3%) and the Sixth Circuit (26.7%). See *supra* notes 108–09 and accompanying text.

<sup>137</sup> See Dhooge, *State RFRA*s, *supra* note 47, at 606; *supra* notes 101–02 and accompanying text.

<sup>138</sup> See Dhooge, *State RFRA*s, *supra* note 47, at 606; *supra* notes 101–02 and accompanying text. Claims based upon the crime and tort defense constituted 35.3% of seventeen claims in the Eighth Circuit, 25.9% of fifty-four claims in the Ninth Circuit, and 38.5% of twenty-six claims in the Tenth Circuit. See RFRA Case Data, *supra* note 26.

<sup>139</sup> Religious expression claims were 29.4% of claims in the Eighth Circuit; claims based upon legal processes were 22.2% of claims in the Ninth Circuit; and conditions of confinement accounted for 34.6% of claims in the Tenth Circuit. See RFRA Case Data, *supra* note 26.

<sup>140</sup> See *supra* notes 124–25 and accompanying text.

<sup>141</sup> See *supra* note 115 and accompanying text; see also Dhooge, *Public Accommodation Statutes and Sexual Orientation*, *supra* note 21.

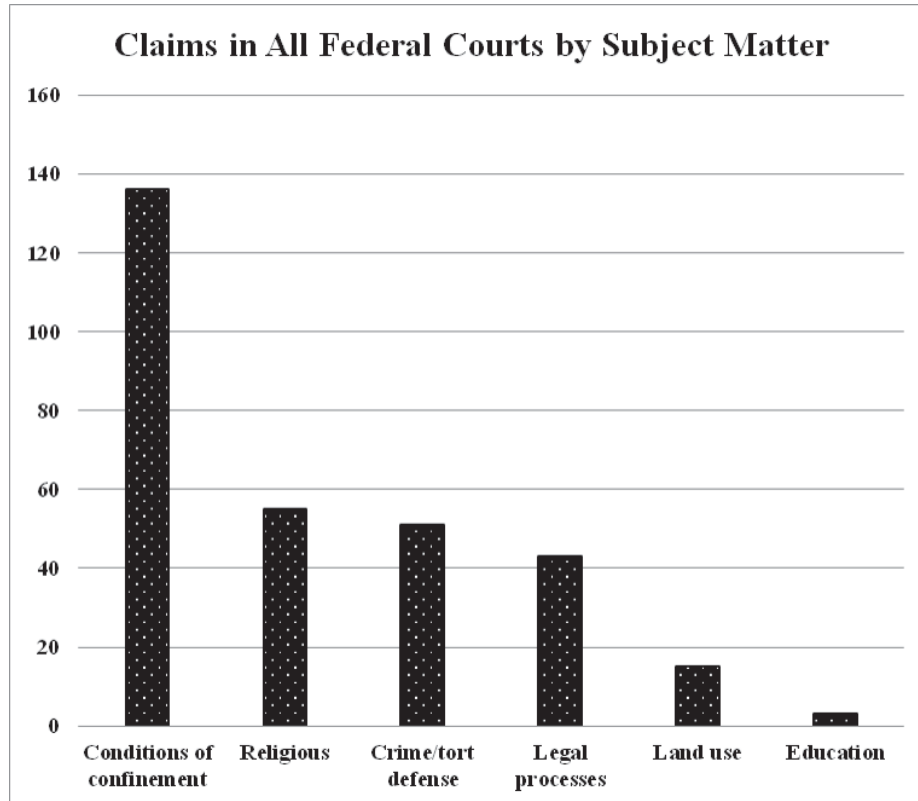
**Table 11: Subject Matter of Claims in All Federal Courts by Identity of the Claimant**

CLAIMANT	TYPE OF CLAIM	NUMBER	PERCENTAGE
Incarcerated individuals	Conditions of confinement	136	44.9%
Incarcerated individuals	Crime/tort defense	40	13.2%
Private individuals	Religious expression	40	13.2%
Private individuals	Legal processes	31	10.2%
Private individuals	Land use	9	3.0%
Private individuals	Crime/tort defense	3	1.0%
Private individuals	Education	2	0.7%
Places of worship	Religious expression	8	2.6%
Places of worship	Legal processes	6	2.0%
Places of worship	Land use	4	1.3%
Places of worship	Crime/tort defense	1	0.3%
Non-profit organizations	Religious expression	3	1.0%
Non-profit organizations	Crime/tort defense	2	0.7%
Non-profit organizations	Legal processes	1	0.3%
Non-profit organizations	Land use	1	0.3%
Religious organizations	Crime/tort defense	3	1.0%
Religious organizations	Religious expression	3	1.0%
Religious organizations	Legal processes	1	0.3%
Religious organizations	Land use	1	0.3%
Educational institutions	Legal processes	3	1.0%
Educational institutions	Education	1	0.3%
Educational institutions	Crime/tort defense	1	0.3%
Business organizations	Legal processes	1	0.3%
Business organizations	Religious expression	1	0.3%
Business organizations	Crime/tort defense	1	0.3%
<b>Total</b>		<b>303</b>	<b>99.8%</b>

**Table 12: Claims in All Federal Courts by Subject Matter**

TYPE OF CLAIM	NUMBER	PERCENTAGE
Conditions of confinement	136	44.9%
Religious	55	18.1%
Crime/tort defense	51	16.8%
Legal processes	43	14.2%
Land use	15	5.0%
Education	3	1.0%
<b>Total</b>	<b>303</b>	<b>100.0%</b>

Chart 12



These statistics were unsurprising given the previously discussed allocations by claim in appellate and district courts.<sup>142</sup> There were three additional expected findings. First, the absence of a significant number of land-use cases was expected, given the nonapplicability of RFRA to state and local governments, which bear considerable responsibility for actions that may result in such claims.<sup>143</sup> The second expected finding was the dearth of claims by educational institutions and business organizations.<sup>144</sup> Educational institutions accounted for three claims relating to legal processes, and one claim each relating to education and the crime and tort defense.<sup>145</sup> Business organizations utilized RFRA on three occasions relating to legal processes, religious expression, and the crime and tort defense, a mere 1.0% of the sample, thus undercutting the fear that the U.S. Supreme Court's holding in *Burwell v. Hobby Lobby Stores*,

<sup>142</sup> See *supra* Sections D.1–D.3; Tables 9, 10, 11 & 12.

<sup>143</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 532–36 (1997) (holding that RFRA violated Congress's power pursuant to the Fourteenth Amendment by expanding the coverage of the First Amendment in contravention of the states' authority to regulate the welfare of its citizens).

<sup>144</sup> See *supra* notes 109, 118, 122, 125, 128 and accompanying text.

<sup>145</sup> See *supra* notes 109, 118, 125, 128 and accompanying text.

*Inc.* provides such organizations with a ready-made weapon with which to engage in widespread discrimination.<sup>146</sup>

The third expected finding was the utilization of RFRA as a defense to criminal or tortious behavior. Although the crime and tort defense was the third most common type of claim after conditions of confinement and religious expression, forty of the fifty-one claims (78.4%) concerned incarcerated individuals.<sup>147</sup> The crime and tort defense was a mere 3.5% of the eighty-five claims asserted by private individuals, and 5.3% of the nineteen claims brought by places of worship.<sup>148</sup> These percentages increased significantly in the case of business, non-profit, and religious organizations, and educational institutions, but only represent a total of seven claims.<sup>149</sup> Perhaps the only unexpected result was the utilization of the crime and tort defense by every class of claimant.<sup>150</sup>

A related measure is whether claims utilized RFRA in an offensive or defensive manner. Offensive utilization refers to a claimant's utilization of RFRA as a means to challenge a federal statute, regulation, or decision. Defensive utilization refers to a claimant's utilization of RFRA as a shield to civil claims or criminal charges brought by private parties or the federal government in administrative and judicial proceedings. The majority of utilizations would be expected to be offensive, given the larger number of instances to which such utilizations might be applicable.<sup>151</sup> Defensive utilizations apply to a narrower set of circumstances and would thus be expected to be smaller in number.<sup>152</sup>

An initial comparison is between offensive or defensive utilization and the identity of claimants. Offensive and defensive utilization by identity of the claimant is summarized in Table 13 below.

**Table 13: Offensive and Defensive Utilization by Identity of the Claimant in All Federal Courts**

CLAIMANT	OFFENSIVE	DEFENSIVE	OFFENSIVE / DEFENSIVE
Incarcerated individuals	133	43	75.6% / 24.4%
Private individuals	69	16	81.2% / 18.8%
Places of worship	11	8	57.9% / 42.1%

<sup>146</sup> See *supra* notes 109, 118, 122 and accompanying text.

<sup>147</sup> See *supra* notes 102, 118 and accompanying text.

<sup>148</sup> See *supra* notes 102, 118 and accompanying text.

<sup>149</sup> The crime and tort defense constituted 37.5% of claims brought by religious organizations, 33.3% of claims brought by business organizations and educational institutions, and 28.6% of claims brought by non-profit organizations. See *supra* notes 102, 118 and accompanying text.

<sup>150</sup> See *supra* Table 9; RFRA Case Data, *supra* note 26.

<sup>151</sup> See *infra* Table 13; RFRA Case Data, *supra* note 26.

<sup>152</sup> See *infra* Table 13; RFRA Case Data, *supra* note 26.

CLAIMANT	OFFENSIVE	DEFENSIVE	OFFENSIVE / DEFENSIVE
Religious organizations	4	4	50.0% / 50.0%
Non-profit organizations	5	2	71.4% / 28.6%
Educational institutions	3	2	60.0% / 40.0%
Business organizations	1	2	33.3% / 66.7%
<b>Total</b>	<b>226</b>	<b>77</b>	<b>74.6% / 25.4%</b>

Unsurprisingly, 55.8% of defensive utilizations involved incarcerated individuals.<sup>153</sup> It is equally unsurprising that private individuals were the largest utilizer of RFRA for defensive purposes outside of incarcerated individuals, with claims constituting 20.8% of defensive uses.<sup>154</sup> These claims were 47% of defensive utilizations by nonincarcerated claimants and 5.3% of opinions within the sample.<sup>155</sup>

Although defensive utilization of RFRA as a percentage of claims was much higher for claimants other than private individuals, the number of utilizations overall was significantly lower. Places of worship utilized RFRA defensively on eight occasions, which constituted 10.4% of defensive uses.<sup>156</sup> Religious organizations utilized

<sup>153</sup> See *supra* Table 13; RFRA Case Data, *supra* note 26.

<sup>154</sup> See *supra* Table 13; *Adams v. Comm’r*, 170 F.3d 173 (3d Cir. 1999) (concerning an objection to payment of federal income taxes); *Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. 2015); *United States v. Town of Colorado City*, No. 3:12-cv-8123-HRH, 2014 WL 5465104 (D. Ariz. Oct. 28, 2014); *United States v. Dillard*, No. 11-1098-JTM, 2012 WL 5505201 (D. Kan. Nov. 13, 2012) (concerning threats directed at abortion provider); *United States v. Berst*, No. 6:11-cv-6370-TC, 2012 WL 4361408 (D. Or. Aug. 2, 2012); *In re Three Children*, 24 F. Supp. 2d 389 (D.N.J. 1998); *In re Hodge*, 220 B.R. 386 (D. Idaho 1998); *Planned Parenthood Ass’n of Southeastern Pa., Inc. v. Walton*, 949 F. Supp. 290 (E.D. Pa. 1996); *United States v. Brock*, 863 F. Supp. 851 (E.D. Wis. 1994); *In re Khan*, No. 10-46901-ess, 2014 WL 10474969 (Bankr. E.D.N.Y. Dec. 24, 2014) (concerning an objection to clawback); *In re C.F. Foods, Inc.*, No. CIV.A. 01-2849, 2001 WL 1632272 (Bankr. E.D. Pa. Dec. 20, 2001) (concerning status of contributions in bankruptcy proceeding); *In re Gomes*, 219 B.R. 286 (Bankr. D. Or. 1998); *In re Saunders*, 215 B.R. 800 (Bankr. D. Mass. 1997) (concerning tithing during bankruptcy proceedings); *In re Andrade*, 213 B.R. 765 (Bankr. E.D. Cal. 1997); *In re Turner*, 193 B.R. 548 (Bankr. N.D. Cal. 1996); *In re Faulkner*, 165 B.R. 644 (Bankr. W.D. Mo. 1994); see also *supra* notes 102, 118, 121, 124 and accompanying text.

<sup>155</sup> See *supra* Table 13.

<sup>156</sup> See *supra* Table 13; *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006); *In re Grand Jury Empaneling of Special Grand Jury*, 171 F.3d 826 (3d Cir. 1999) (concerning an objection to a subpoena); *In re Young*, 141 F.3d 854 (8th Cir. 1998); *In re Nichols*, No. TDC-14-0625, 2014 WL 4094340 (D. Md. Aug. 15, 2014); *Gen. Conference Corp. of Seventh-day Adventists v. McGill*, No. 1:06-cv-01207-JDB-egb, 2012 WL 1155465 (W.D. Tenn. Apr. 5, 2012); *In re Roman Catholic Archbishop of Portland*, 335 B.R. 842 (Bankr. D. Or. 2005); *In re Bloch*, 207 B.R. 944 (D. Colo. 1997) (concerning status of tithes in bankruptcy proceeding); *In re Newman*, 203 B.R. 468 (D. Kan. 1996); see also *supra* notes 109, 122, 125 and accompanying text. Defensive utilization by places of worship was 23.5% of defensive utilizations by nonincarcerated claimants and 2.6% of opinions within the sample. See *supra* Table 13.

RFRA defensively on four occasions, which constituted 5.2% of defensive uses.<sup>157</sup> The four combined defensive utilizations by non-profit organizations and educational institutions also constituted 5.2% of defensive uses.<sup>158</sup> Business organizations were the only claimant that had more defensive than offensive utilizations.<sup>159</sup>

A second comparison is between types of utilization and claims. Offensive and defensive utilization by type of claim is summarized in Table 14 below.

**Table 14: Offensive and Defensive Utilization by Type of Claim in All Federal Courts**

CLAIM	OFFENSIVE	DEFENSIVE	OFFENSIVE/ DEFENSIVE
Conditions of confinement	131	5	96.3% / 3.7%
Religious expression	44	11	80.0% / 20.0%
Crime/tort defense	2	49	3.9% / 96.1%
Legal processes	32	11	74.4% / 25.6%
Land use	15	0	100.0% / 0.0%
Education	2	1	66.7% / 33.3%
<b>Total</b>	<b>226</b>	<b>77</b>	<b>74.6% / 25.4%</b>

Offensive utilization predominated in all types of claims except, unremarkably, for the crime and tort defense.<sup>160</sup> Defensive utilization of the crime and tort defense

<sup>157</sup> See *supra* Table 13; *United States v. Any & All Radio Station Transmission Equip.*, No. 00 Civ. 893 (GBD), 2004 WL 2848532 (S.D.N.Y. Dec. 9, 2004); *United States v. Phila. Yearly Meeting of the Religious Soc’y of Friends*, 322 F. Supp. 2d 603 (E.D. Pa. 2004); *United States v. Any & All Radio Station Transmission Equip.*, No. Civ.A. 99-2260, 1999 WL 718646 (E.D. Pa. Aug. 31, 1999); *Secs. Inv’r Prot. Corp. v. Bernard L. Madoff Inv. Secs., LLC*, 531 B.R. 439 (Bankr. S.D.N.Y. 2015); see also *supra* notes 118, 122 and accompanying text. Defensive utilization by religious organizations were 11.8% of defensive utilizations by non-incarcerated claimants and 1.3% of opinions within the sample. See *supra* Table 13.

<sup>158</sup> See *supra* Table 13; *Goodman v. Archbishop Curley High Sch., Inc.*, 149 F. Supp. 3d 577 (D. Md. 2016); *United States v. Islamic Am. Relief Agency*, No. 07-00087-CR-W-NKL, 2009 WL 4016478 (W.D. Mo. Nov. 18, 2009); *Office of Foreign Assets Control v. Voices in Wilderness*, 329 F. Supp. 2d 71 (D.D.C. 2004); *In re Scroggins*, 209 B.R. 727 (Bankr. D. Ariz. 1997); see also *supra* notes 118, 128 and accompanying text. Defensive utilization by non-profit organizations and educational institutions constituted 11.8% of defensive utilizations by nonincarcerated claimants and 1.3% of opinions within the sample. See *supra* Table 13.

<sup>159</sup> See *supra* Table 13; *Equal Emp’t Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016); *Mathis v. Christian Heating & Air Conditioning, Inc.*, 158 F. Supp. 3d 317 (E.D. Pa. 2016); see also *supra* notes 118, 122 and accompanying text.

<sup>160</sup> Defensive utilization of the crime and tort defense constituted 96.1% of such claims and 63.6% of total defensive uses. See *supra* Table 14. The sample included two instances

made up 68.0% of defensive uses not associated with conditions of confinement and 16.2% of all claims.<sup>161</sup> Thirty-eight of the forty-nine opinions (77.5%) in which the crime and tort defense was utilized defensively involved incarcerated individuals.<sup>162</sup> These opinions addressed a broad range of claims.<sup>163</sup> The remaining claims were divided between private individuals and religious organizations (three claims each); non-profit organizations (two claims); and places of worship, educational institutions, and business organizations (one claim each).<sup>164</sup> Conversely, offensive utilization of conditions of confinement constituted 96.3% of such claims, and there were only five instances in which this claim was utilized in a defensive manner.<sup>165</sup>

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of offensive use of the crime and tort defense. *See* Farfan v. United States, No. 15-61772-CIV-ZLOCH, 2015 WL 7568173 (S.D. Fla. Nov. 24, 2015) (concerning a wrongful conviction); Williams v. U.S. Dep't of Justice, No. 08-2631-KHV, 2009 WL 1313253 (D. Kan. May 12, 2009) (concerning a wrongful conviction).

<sup>161</sup> *See supra* Table 14.

<sup>162</sup> *See* RFRA Case Data, *supra* note 26.

<sup>163</sup> *See, e.g.*, United States v. Mitchell, 502 F.3d 931 (9th Cir. 2007) (concerning an objection to jury instruction on capital punishment); United States v. DeWitt, 95 F.3d 1374 (8th Cir. 1996) (manufacture of methamphetamines); United States v. Manneh, 645 F. Supp. 2d 98 (E.D.N.Y. 2008) (importation of bush meat); United States v. Adeyemo, 624 F. Supp. 2d 1081 (N.D. Cal. 2008) (possession of leopard skins); United States v. Acevedo-Delgado, 167 F. Supp. 2d 477 (D.P.R. 2001) (trespass on a military base). The vast majority of opinions addressed marijuana-related issues and possession of eagle feathers by Native Americans. *See, e.g.*, United States v. Comrie, 842 F.3d 348 (5th Cir. 2016) (marijuana possession); United States v. Vasquez-Ramos, 531 F.3d 987 (9th Cir. 2008) (possession of eagle feathers); United States v. Friday, 525 F.3d 938 (10th Cir. 2008) (possession of eagle feathers); United States v. Oliver, 255 F.3d 588 (8th Cir. 2001) (possession of eagle feathers); United States v. Bauer, 75 F.3d 1366 (9th Cir. 1996) (marijuana possession); Deegan v. West Virginia, No. 6:12-CV-00523, 2012 WL 1899668 (S.D.W. Va. Apr. 25, 2012), *report and recommendation adopted*, 2012 WL 1899662 (S.D.W. Va. May 24, 2012) (marijuana possession); United States v. Hardman, 622 F. Supp. 2d 1129 (D. Utah 2009) (possession of eagle feathers); Martin v. United States, No. 04-73878, 2008 WL 4225835 (E.D. Mich. Mar. 27, 2008) (marijuana possession); United States v. Brown, No. 07-5037, 2007 WL 2746608 (W.D. Ark. Sept. 18, 2007) (marijuana cultivation); Olsen v. United States, No. 07-34-B-W, 2007 WL 1100457 (D. Me. Apr. 10, 2007) (marijuana distribution); United States v. Winddancer, 435 F. Supp. 2d 687 (M.D. Tenn. 2006) (possession of eagle feathers); United States v. Forchion, No. 04-949-ALL, 2005 WL 2989604 (E.D. Pa. July 22, 2005) (marijuana possession in a federal park); United States v. Gonzales, 957 F. Supp. 1225 (D.N.M. 1997) (possession of eagle feathers).

<sup>164</sup> *See supra* notes 154–59 and accompanying text.

<sup>165</sup> *See supra* Table 14; United States v. Israel, 317 F.3d 768 (7th Cir. 2003) (concerning challenge to conditions for parole); United States v. Girod, No. 5:15-CR-87-DCR-REW-1, 2015 WL 10031958 (E.D. Ky. Dec. 30, 2015) (concerning Amish criminal defendant's objection to being photographed by police); United States v. Jefferson, 175 F. Supp. 2d 1123 (N.D. Ind. 2001) (concerning challenge to conditions for parole); United States v. Valrey, No. CR96-549Z, 2000 WL 692647 (W.D. Wash. Feb. 22, 2000) (concerning challenge to conditions for parole); United States v. Marks, 947 F. Supp. 858 (E.D. Pa. 1996) (concerning challenge to conditions for bail).



The remaining types of claims were overwhelmingly offensive in nature.<sup>166</sup> The fifteen land-use claims within the sample were offensive utilizations.<sup>167</sup> Eighty percent of religious expression claims, and almost three quarters of legal processes claims were offensive.<sup>168</sup> Offensive utilization of religious expression claims constituted 19.5% of offensive uses, 46.3% of such uses not associated with conditions of confinement, and 14.5% of all claims within the sample.<sup>169</sup> Offensive claims based upon legal processes constituted 14.1% of offensive uses, 33.3% of such uses not associated with conditions of confinement, and 10.6% of all claims included in the sample.<sup>170</sup> Two of the three education claims were offensive in nature.<sup>171</sup>

#### *E. Data Point Four: Outcomes*

A final means by which to measure RFRA's impact is through outcomes. A large number of favorable outcomes would be expected if religious liberty is in need of the enhanced protection afforded by RFRA.<sup>172</sup> These outcomes also may support the view of RFRA opponents as to its pernicious nature and the need to resist efforts to expand its reach.<sup>173</sup>

Outcomes are organized in two categories with each category further divided into subcategories. The first category (unsuccessful claims) is further subdivided as follows: (1) termination of a claim pursuant to a motion to dismiss or strike; (2) termination of a claim pursuant to a motion for summary judgment; (3) termination of a claim pursuant to other miscellaneous motions or judicial actions;<sup>174</sup> (4) trial at which a claimant

<sup>166</sup> See *supra* Table 14.

<sup>167</sup> See *supra* notes 110–11 and accompanying text.

<sup>168</sup> See *supra* Table 14.

<sup>169</sup> See *supra* Table 14; see also *supra* notes 103–04, 119–20 and accompanying text; Ruiz-Diaz v. United States, 703 F.3d 483 (9th Cir. 2012) (concerning adjustment of visa status for religious workers); Jenkins v. Comm'r, 483 F.3d 90 (2d Cir. 2007) (concerning objection to payment of federal income taxes); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995) (concerning protest at an abortion clinic); Singh v. McHugh, 185 F. Supp. 3d 201 (D.D.C. 2016) (concerning military grooming policy as applied to Sikhs); Singh v. Carter, 168 F. Supp. 3d 216 (D.D.C. 2016) (concerning military grooming policy as applied to Sikhs).

<sup>170</sup> See *supra* Table 14; see also *supra* notes 108–09, 123–25 and accompanying text; Leonard v. U.S. Dep't of Defense, 598 F. App'x 9 (D.C. Cir. 2015) (concerning inability to lead religious services during federal government shutdown).

<sup>171</sup> See Gary S. v. Manchester Sch. Dist., 374 F.3d 15 (1st Cir. 2004) (concerning the provision of disability benefits and services at a private religious school); Smith v. Jefferson Cty. Bd. of Educ., No. 3:15-CV-57 (GROH), 2015 WL 5031666 (N.D.W. Va. Aug. 25, 2015) (concerning the teaching of evolution in public schools); see also *supra* notes 111, 128 and accompanying text.

<sup>172</sup> See *supra* notes 11–16 and accompanying text.

<sup>173</sup> See *supra* notes 17–24 and accompanying text.

<sup>174</sup> This subcategory includes motions to enforce court orders, issue preliminary injunctions,

was unsuccessful;<sup>175</sup> and (5) unsuccessful outcomes in criminal cases.<sup>176</sup> The second category (successful claims) is further subdivided as follows: (1) denial of an opposing party's motion to dismiss; (2) denial of an opposing party's motion for summary judgment; (3) granting of a claimant's motion for summary judgment; (4) granting relief to a claimant pursuant to other miscellaneous motions or judicial actions; (5) trial at which a claimant prevailed or remand for trial by an appellate court; and (6) successful outcomes in criminal cases.<sup>177</sup>

### 1. Outcomes in U.S. Appellate Courts

Sixteen of the ninety-eight cases in appellate courts resulted in successful outcomes for claimants, for an overall success rate of 16.3%.<sup>178</sup> Five courts did not have a successful claim.<sup>179</sup> Success rates varied among the remaining eight courts from 75.0% in the U.S. Supreme Court (out of four claims) to 8.7% in the Ninth Circuit (out of twenty-three claims).<sup>180</sup> The results in appellate courts by type of outcome are summarized in Table 15 below.

**Table 15: Outcomes in U.S. Appellate Courts by Type**

SUCCESSFUL	NUMBER	% SUCCESSFUL	% OF ALL CLAIMS
Denial of summary judgment	6	37.5%	6.1%
Miscellaneous motions	3	18.7%	3.1%
Denial of dismissal	2	12.5%	2.0%
Trial	2	12.5%	2.0%
Criminal case	2	12.5%	2.0%
Grant of summary judgment	1	6.3%	1.0%
<b>Total</b>	<b>16</b>	<b>100.0%</b>	<b>16.3%</b>

disregard judicial procedures, and amend pleadings, as well as unsuccessful appeals of administrative decisions.

<sup>175</sup> This subcategory includes verdicts and motions for judgment as a matter of law.

<sup>176</sup> This subcategory includes motions to suppress evidence, issue writs of habeas corpus, strike jury instructions and unsuccessful challenges to criminal convictions.

<sup>177</sup> This subcategory includes dismissal of prosecution, vacating conviction, suppression of evidence, and modifying terms of release.

<sup>178</sup> See *infra* Table 15.

<sup>179</sup> The eighteen claims addressed by the First, Fourth, Sixth, Seventh, and Tenth Circuits were unsuccessful. See RFRA Case Data, *supra* note 26.

<sup>180</sup> See *id.* The success rates in the remaining circuits were as follows: D.C. Circuit (two of eighteen claims, or 11.1%); Second Circuit (one of seven claims, or 14.3%); Third Circuit (three of ten claims, or 30.0%); Fifth Circuit (one of four claims, or 25.0%); Eighth Circuit (three of seven claims, or 42.8%); and the Eleventh Circuit (one of seven claims, or 14.3%).

UNSUCCESSFUL	NUMBER	% UNSUCCESSFUL	% OF ALL CLAIMS
Dismissal	31	37.8%	31.6%
Summary judgment	24	29.3%	24.5%
Criminal case	19	23.2%	19.4%
Miscellaneous motions	6	7.3%	6.1%
Trial	2	2.4%	2.0%
<b>Total</b>	<b>82</b>	<b>100.0%</b>	<b>83.7%</b>

Of the eighty-two unsuccessful claims, the vast majority failed as a result of motions to dismiss or for summary judgment.<sup>181</sup> Thirty-one claims (31.6% of appellate cases) were dismissed, and twenty-four claims (24.5% of appellate cases) were subject to summary judgment.<sup>182</sup> The remaining unsuccessful claims were the result of criminal proceedings (nineteen claims), miscellaneous motions (six claims), and trial (two claims).<sup>183</sup>

Six of the sixteen successful appellate outcomes were classified as such based upon the denial of an opposing party's motion for summary judgment.<sup>184</sup> Three opinions were classified as successful based upon the outcome of miscellaneous motions.<sup>185</sup>

<sup>181</sup> See *supra* Table 15.

<sup>182</sup> See *supra* Table 15. Motions to dismiss were granted with the following frequency: D.C. Circuit (ten claims); Ninth Circuit (five claims); Second and Fourth Circuits (four claims each); Third Circuit (three claims); Eighth and Eleventh Circuits (two claims each); and Sixth Circuit (one claim). See RFRA Case Data, *supra* note 26. Summary judgment was entered with the following frequency: D.C. and Ninth Circuits (five claims each); Seventh Circuit (four claims); Second, Fifth, and Eleventh Circuits (two claims each); and First, Third, Sixth, and Tenth Circuits (one claim each). See *id.*

<sup>183</sup> See *supra* Table 15. Unsuccessful outcomes in criminal cases were distributed among the following circuits: Ninth Circuit (eight claims); Tenth Circuit (five claims); Eighth Circuit (two claims); and Third, Fifth, Seventh, and Eleventh Circuits (one claim each). See RFRA Case Data, *supra* note 26. Miscellaneous motions terminated three claims in the Ninth Circuit, two claims in the Third Circuit, and one claim in the D.C. Circuit. See *id.* The two instances of appellate affirmation of results at trial occurred in the U.S. Supreme Court and the Eleventh Circuit. See *id.*

<sup>184</sup> See *Potts v. Holt*, 617 F. App'x 148 (3d Cir. 2015) (concerning claim by incarcerated individual relating to diet); *Davila v. Gladden*, 777 F.3d 1198 (11th Cir. 2015) (concerning incarcerated individual's access to ornaments for the practice of Santería); *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (possession of feathers derived from endangered eagles); *Daley v. Lappin*, 555 F. App'x 161 (3d Cir. 2014) (concerning claim by incarcerated individual relating to diet); *Levitan v. Ashcroft*, 281 F.3d 1313 (D.C. Cir. 2002) (concerning claim by incarcerated individual relating to access to communion wine); *Davidson v. Chestnut*, 193 F.3d 144 (2d Cir. 1999) (concerning claim by incarcerated individual relating to kosher diet); see also *supra* note 109 and accompanying text.

<sup>185</sup> See *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418 (2006); see also *supra* note 109 and accompanying text.

Six additional opinions were equally divided between denial of an opposing party's motion to dismiss, outcome at trial, or as the result of a criminal proceeding.<sup>186</sup> One opinion resulted in the granting of a claimant's motion for summary judgment.<sup>187</sup> However, it is uncertain whether any of the successful claims from denials of dismissal and denials of summary judgment ultimately resulted in favorable outcomes for the claimants.<sup>188</sup> The success rate plunges to eight claims (8.2%) if the determination of success is based solely upon these outcomes.<sup>189</sup>

Another dimension by which to analyze outcomes is by their correlation with the identity of claimants. The outcomes in appellate courts by identity of the claimant are summarized in Table 16 below.

**Table 16: Outcomes in U.S. Appellate Courts by Identity of the Claimant**

CLAIMANT	UNSUCCESSFUL	SUCCESSFUL	SUCCESS RATE
Business organizations	0	1	100.0%
Educational institutions	1	1	50.0%
Places of worship	8	3	27.3%
Incarcerated individuals	39	10	20.4%
Private individuals	30	1	3.2%
Non-profit organizations	1	0	0.0%
Religious organizations	3	0	0.0%
<b>Total</b>	<b>82</b>	<b>16</b>	<b>16.3%</b>

<sup>186</sup> See *Mack v. Warden*, 839 F.3d 286 (3d Cir. 2016) (denying motion to dismiss incarcerated individual's discrimination claim); *United States v. Ali*, 682 F.3d 705 (8th Cir. 2012) (vacating in part and remanding conviction for criminal contempt of court); *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008) (affirming verdict in favor of an incarcerated individual relating to diet); *United States v. Zimmerman*, 514 F.3d 851 (9th Cir. 2007) (denying motion to dismiss incarcerated individual's claim regarding provision of blood sample); *In re Young*, 141 F.3d 854 (8th Cir. 1998) (concerning recovery of bankrupt's tithes to church as fraudulent transfers); *United States v. Bauer*, 84 F.3d 1549 (9th Cir. 1996) (concerning Rastafarian defendants' conspiracy to manufacture and distribute marijuana and money laundering charges); see also *supra* notes 109, 163 and accompanying text.

<sup>187</sup> See *Potter v. Dist. of Columbia*, 558 F.3d 542 (D.C. Cir. 2009). See also *supra* note 105 and accompanying text.

<sup>188</sup> See *Mack*, 839 F.3d at 286 (denying motion to dismiss); *Potts*, 617 F. App'x at 148 (denying motion summary judgment); *Davila*, 777 F.3d at 1198 (reversing grant of summary judgment for defendant); *McAllen Grace*, 764 F.3d at 465 (denying motion for summary judgment); *Daley*, 555 F. App'x at 161 (denying motion for summary judgment); *Zimmerman*, 514 F.3d 851 (denying motion to dismiss); *Levitan*, 281 F.3d at 1313 (denying motion for summary judgment); *Davidson*, 193 F.3d at 144 (denying motion for summary judgment); see also RFRA Case Data, *supra* note 26.

<sup>189</sup> See *supra* notes 185–87 and accompanying text.

The success rate of business organizations is misleading as it is based upon a single opinion.<sup>190</sup> Equally misleading is the success rate for educational institutions which is based on two opinions, one of which resulted in a favorable outcome.<sup>191</sup> Of the remaining claimants, places of worship were successful in three of eleven cases for a success rate of 27.3%.<sup>192</sup> Incarcerated individuals were successful in ten of forty-nine claims for a success rate of 20.4%.<sup>193</sup> Individuals had a success rate of 3.2% consisting of a single opinion.<sup>194</sup> The four claims filed by religious and non-profit organizations were unsuccessful.<sup>195</sup>

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<sup>190</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2751 (2014) (granting preliminary injunction); see also *supra* note 109 and accompanying text.

<sup>191</sup> See *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2806 (2014) (granting preliminary injunction); see also *supra* note 109 and accompanying text. The unsuccessful opinion involving an educational institution dismissed a challenge to the Affordable Care Act's insurance mandate. See *Liberty Univ., Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013).

<sup>192</sup> See *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006) (granting preliminary injunction); *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (denying defendant's motion for summary judgment); *In re Young*, 141 F.3d 854 (8th Cir. 1998) (affirming trial verdict); see also *supra* notes 106, 109 and accompanying text. Unsuccessful opinions involving places of worship were divided among summary judgment (four claims) and dismissal, miscellaneous motions, criminal proceedings, and at trial (one claim each). See RFRA Case Data, *supra* note 26.

<sup>193</sup> See *Mack v. Warden*, 839 F.3d 286 (3d Cir. 2016) (denying motion to dismiss); *Potts v. Holt*, 617 F. App'x 148 (3d Cir. 2015) (denying motion for summary judgment); *Davila v. Gladden*, 777 F.3d 1198 (11th Cir. 2015) (denying motion for summary judgment); *Daley v. Lappin*, 555 F. App'x 161 (3d Cir. 2014) (denying motion for summary judgment); *United States v. Ali*, 682 F.3d 705 (8th Cir. 2012) (remanding conviction of criminal contempt of court); *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008) (affirming trial verdict); *United States v. Zimmerman*, 514 F.3d 851 (9th Cir. 2007) (denying motion to dismiss); *Levitan v. Ashcroft*, 281 F.3d 1313 (D.C. Cir. 2002) (denying motion for summary judgment); *Davidson v. Chestnut*, 193 F.3d 144 (2d Cir. 1999) (denying motion for summary judgment); *United States v. Bauer*, 75 F.3d 1366 (9th Cir. 1996) (reversing conviction); see also *supra* notes 163, 184, 186 and accompanying text. Unsuccessful opinions involving incarcerated individuals were divided among criminal proceedings (eighteen claims), dismissal (twelve claims), summary judgment (eight claims), and miscellaneous motions (one claim). See RFRA Case Data, *supra* note 26.

<sup>194</sup> See *Potter v. Dist. of Columbia*, 558 F.3d 542 (D.C. Cir. 2009) (granting claimant's motion for summary judgment); see also *infra* note 105 and accompanying text. Unsuccessful opinions involving individuals were divided among dismissal (fifteen claims), summary judgment (ten claims), miscellaneous motions (four claims), and unfavorable outcome at trial (one claim). See RFRA Case Data, *supra* note 26.

<sup>195</sup> See *La Cuna de Aztlán Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior*, 603 F. App'x 651 (9th Cir. 2015) (granting summary judgment); *Multi-Denominational Ministry of Cannabis & Rastafari, Inc. v. Holder*, 365 F. App'x 817 (9th Cir. 2010) (granting dismissal); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003) (granting summary judgment); *La Voz Radio de la Comunidad v. FCC*, 223 F.3d 313 (6th Cir. 2000) (granting dismissal); see also *supra* notes 106, 109–10, and accompanying text.

The success rates assume a favorable outcome in those instances where motions to dismiss or for summary judgment were denied.<sup>196</sup> However, it is impossible to determine from the opinions whether this assumption is entirely accurate.<sup>197</sup> The success rates of two claimants decrease significantly if successful outcomes are limited to those instances where a claimant was granted summary judgment or injunctive relief, prevailed at trial, or was successful in challenging a criminal conviction.<sup>198</sup> The success rate of places of worship drops to 18.2% if the measure of success is so limited.<sup>199</sup> The success rate for claims by incarcerated individuals drops to 4.1% utilizing this measure.<sup>200</sup>

A second comparison is between outcomes and the types of claims. The outcomes in appellate courts by type of claim are summarized in Table 17 below.

**Table 17: Outcomes in U.S. Appellate Courts by Type of Claim**

TYPE OF CLAIM	UNSUCCESSFUL	SUCCESSFUL	SUCCESS RATE
Conditions of confinement	22	8	26.7%
Legal processes	11	4	26.7%
Crime/tort defense	19	2	9.5%
Religious expression	21	2	8.7%
Education	1	0	0.0%
Land use	8	0	0.0%
<b>Total</b>	<b>82</b>	<b>16</b>	<b>16.3%</b>

The success rate varies from 26.7% for claims relating to conditions of confinement and legal processes to 0.0% for claims based upon land use and education.<sup>201</sup> The eight successful claims relating to conditions of confinement were the result of five denials of motions for summary judgment, two denials of motions to dismiss, and one affirmation of a trial verdict.<sup>202</sup> However, the success rate is reduced to a single claim, 3.3% of claims relating to conditions of confinement, if the measure of success

<sup>196</sup> See *supra* note 188.

<sup>197</sup> See *supra* note 188.

<sup>198</sup> See *supra* notes 185–87 and accompanying text.

<sup>199</sup> See *supra* note 192 and accompanying text.

<sup>200</sup> See *supra* note 193 and accompanying text.

<sup>201</sup> See *supra* Table 17. The land-use claims were terminated as a result of summary judgment (three claims), miscellaneous motions and dismissal (two claims each), and affirmation of a trial verdict (one claim). See RFRA Case Data, *supra* note 26; see also *supra* note 110 and accompanying text. The education claim was terminated by summary judgment. See RFRA Case Data, *supra* note 26; see also *supra* note 111 and accompanying text.

<sup>202</sup> See *supra* notes 184, 186, 193 and accompanying text. The unsuccessful claims relating to conditions of confinement were terminated on the basis of dismissal (twelve claims), summary judgment (eight claims), and miscellaneous motions and criminal proceedings (one claim each). See RFRA Case Data, *supra* note 26.

is limited to a result with a degree of finality.<sup>203</sup> The four successful legal processes claims were the result of three motions granting preliminary injunctions and one affirmation of a trial verdict.<sup>204</sup> This success rate is of considerable importance given that three opinions are from the U.S. Supreme Court.<sup>205</sup> As expected, the crime and tort defense was rarely successful.<sup>206</sup>

Claims relating to religious expression prevailed in only two of twenty-three cases for a success rate of 8.7%.<sup>207</sup> The low success rate for what might be the most traditional use of RFRA may be indicative of the ineffectiveness of the statute and its possible misuse through the assertion of groundless claims.<sup>208</sup> The success rate of religious expression claims is reduced to a single claim if the measurement of favorable outcomes is limited to a final result.<sup>209</sup>

## 2. Outcomes in U.S. District Courts

The lack of success in appellate courts was repeated in district courts. Thirty-six of the two hundred and five cases (17.6%) in district courts were successful.<sup>210</sup> District courts in two circuits did not have a successful claim.<sup>211</sup> Success rates varied among courts in the remaining circuits from 53.3% out of fifteen claims in the Seventh Circuit to 4.2% out of twenty-four claims in the Fourth Circuit.<sup>212</sup> Success rates were higher in district courts than in appellate courts in eight circuits, lower in three circuits, and identical in one circuit.<sup>213</sup> The combined appellate and district court success rates

<sup>203</sup> See *supra* note 193 and accompanying text.

<sup>204</sup> See *supra* notes 109, 190–92 and accompanying text. The unsuccessful claims relating to legal processes were terminated on the basis of dismissal (seven claims), summary judgment (three claims), and a miscellaneous motion (one claim). See RFRA Case Data, *supra* note 26.

<sup>205</sup> See *supra* note 109 and accompanying text.

<sup>206</sup> See *supra* notes 186, 193 and accompanying text. The unsuccessful claims relating to the crime and tort defense were terminated on the basis of criminal proceedings (eighteen claims) and a miscellaneous motion (one claim). See RFRA Case Data, *supra* note 26.

<sup>207</sup> See *supra* notes 192, 194 and accompanying text. The unsuccessful claims relating to religious expression were subject to dismissal (ten claims), summary judgment (nine claims), and a miscellaneous motion and affirmation of a trial verdict (one claim each). See RFRA Case Data, *supra* note 26.

<sup>208</sup> See RFRA Case Data, *supra* note 26.

<sup>209</sup> See *supra* note 194 and accompanying text.

<sup>210</sup> See *infra* Table 18.

<sup>211</sup> The sixteen claims in district courts in the First and Eighth Circuits were unsuccessful. See RFRA Case Data, *supra* note 26.

<sup>212</sup> See RFRA Case Data, *supra* note 26. The success rates in the remaining circuits were as follows: D.C. Circuit (three of nineteen claims, or 15.8%); Second Circuit (three of seventeen claims, or 17.6%); Third Circuit (three of twenty-three claims, or 13.0%); Fifth Circuit (two of twenty-two claims, or 9.1%); Sixth Circuit (two of thirteen claims, or 15.4%); Ninth Circuit (five of thirty-one claims, or 16.1%); Tenth Circuit (eight of twenty claims, or 40.0%); and Eleventh Circuit (one of five claims, or 20.0%).

<sup>213</sup> Success rates were higher in district courts in the D.C., Second, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. See *supra* notes 179–80 and accompanying text. Success

by circuit varied from 40.0% in the Seventh Circuit to 3.6% in the Fourth Circuit.<sup>214</sup> The results in district courts by type of outcome are summarized in Table 18 below.

**Table 18: Outcomes in U.S. District Courts by Type**

SUCCESSFUL	NUMBER	% SUCCESSFUL	% OF ALL CLAIMS
Denial of dismissal	16	44.4%	7.8%
Denial of summary judgment	6	16.7%	2.9%
Trial	6	16.7%	2.9%
Grant of summary judgment	4	11.1%	2.0%
Criminal case	4	11.1%	2.0%
Miscellaneous motions	0	0.0%	0.0%
<b>Total</b>	<b>36</b>	<b>100.0%</b>	<b>17.6%</b>

UNSUCCESSFUL	NUMBER	% UNSUCCESSFUL	% OF ALL CLAIMS
Dismissal	70	41.4%	34.1%
Summary judgment	51	30.2%	24.9%
Criminal case	28	16.5%	13.6%
Miscellaneous motions	16	9.5%	7.8%
Trial	4	2.4%	2.0%
<b>Total</b>	<b>169</b>	<b>100.0%</b>	<b>82.4%</b>

One hundred and twenty-one unsuccessful district court claims failed as a result of motions to dismiss or for summary judgment.<sup>215</sup> Seventy claims (34.1%) were dismissed, and fifty-one claims (24.9%) were subject to summary judgment.<sup>216</sup> An

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rates were lower in district courts in the Third, Fifth, and Eighth Circuits. *See id.* The success rate was identical in the First Circuit, which was the only circuit without a single successful claim at the appellate or district court levels. *See supra* note 179 and accompanying text.

<sup>214</sup> *See supra* notes 179–80, 211–13 and accompanying text. The combined appellate and district court success rates by circuit in the remaining circuits were D.C. Circuit (five of thirty-seven claims, or 13.5%); Second Circuit (four of twenty-four claims, or 16.7%); Third Circuit (six of thirty-three claims, or 18.2%); Fifth Circuit (three of twenty-six claims, or 11.5%); Sixth Circuit (two of fifteen claims, or 13.3%); Eighth Circuit (three of seventeen claims, or 17.6%); Ninth Circuit (seven of fifty-four claims, or 13.0%); and the Eleventh Circuit (two of twelve claims, or 16.7%); *see also* RFRA Case Data, *supra* note 26.

<sup>215</sup> *See supra* Table 18.

<sup>216</sup> *See supra* Table 18. Motions to dismiss were granted by district courts with the following frequency: Fourth Circuit (fourteen claims); D.C., Second, Ninth and Tenth Circuits (eight claims each); Third Circuit (seven claims); Fifth Circuit (six claims); Eighth Circuit (four claims); Sixth Circuit (three claims); First Circuit (two claims); and Seventh and Eleventh Circuits (one claim each). Summary judgment was entered by district courts with the following frequency: Fifth Circuit (ten claims); Third Circuit (eight claims); Fourth Circuit (seven claims); Ninth Circuit (six claims); D.C. and Seventh Circuits (four claims each); Second and Sixth



additional twenty-eight unsuccessful claims (13.6%) involved criminal proceedings.<sup>217</sup> Sixteen claims failed as a result of miscellaneous motions.<sup>218</sup> The remaining four unsuccessful claims were unfavorable results at trial.<sup>219</sup>

Sixteen of the thirty-six successful district court outcomes were classified as such based upon the denial of an opposing party's motion to dismiss.<sup>220</sup> Twelve successful outcomes were split equally between denial of an opposing party's motion for

Circuits (three claims each); Eighth and Tenth Circuits (two claims each); and First and Eleventh Circuits (one claim each). *See* RFRA Case Data, *supra* note 26.

<sup>217</sup> *See supra* Table 18. Unsuccessful outcomes in criminal cases were distributed among district courts in the following circuits: Ninth Circuit (five claims); Third Circuit (four claims); Second, Fifth, Sixth, and Eighth Circuits (three claims each); First and Seventh Circuits (two claims each); and Fourth, Tenth, and Eleventh Circuits (one claim each). *See* RFRA Case Data, *supra* note 26.

<sup>218</sup> *See supra* Table 18. Adverse rulings on miscellaneous motions were distributed among district courts in the following circuits: Ninth Circuit (six claims); D.C. Circuit (three claims); Sixth Circuit (two claims); First, Third, Fourth, Tenth, and Eleventh Circuits (one claim each). *See* RFRA Case Data, *supra* note 26.

<sup>219</sup> *See supra* Table 18. The four adverse results at trial were in district courts in the D.C., Fifth, Eighth, and Ninth Circuits. *See* RFRA Case Data, *supra* note 26.

<sup>220</sup> *See* *Ajaj v. United States*, No. 15-cv-00992-RBJ-KLM, 2016 WL 6212518 (D. Colo. Oct. 25, 2016) (concerning access to worship services, medication, and dietary policy for incarcerated individual); *Cherokee Nation W. v. U.S. Army Corps of Eng'rs*, No. 14-CV-612-JED-TLW, 2016 WL 4548441 (N.D. Okla. Aug. 31, 2016) (concerning private organization's access to federal land for religious ceremony); *Rosales v. Watts*, No. 2:15-cv-94, 2016 WL 3432463 (S.D. Ga. June 17, 2016) (concerning access to worship services by incarcerated individual); *Hale v. Fed. Bureau of Prisons*, No. 14-cv-00245-MSK-MJW, 2015 WL 5719649 (D. Colo. Sept. 30, 2015) (concerning dietary policy and ban on receipt of mail for incarcerated individual); *Womack v. Cross*, No. 15-cv-00543-MJR, 2015 WL 3567537 (S.D. Ill. June 8, 2015) (concerning use of sweat lodge by incarcerated individual); *Njos v. Carney*, No. 3:CV-12-1375, 2015 WL 328249 (M.D. Pa. Jan. 26, 2015) (concerning dietary policy for incarcerated individual); *Tagore v. United States*, No. H-09-0027, 2014 WL 2880008 (S.D. Tex. June 24, 2014) (concerning the right to carry a ceremonial sword in the workplace); *Rezaq v. United States*, No. 13-cv-00990-MJR, 2013 WL 5809351 (S.D. Ill. Oct. 29, 2013) (concerning dietary policy for incarcerated individual); *Penn v. N.Y. Methodist Hosp.*, No. 11-cv-9137 (NSR), 2013 WL 5477600 (S.D.N.Y. Sept. 30, 2013) (concerning alleged employment discrimination on the basis of religion); *Skurdal v. Fed. Det. Ctr.*, No. C12-706 RSM, 2013 WL 3897772 (W.D. Wash. July 29, 2013) (concerning dietary policy for incarcerated individual); *Chesser v. Rivas*, No. 13-cv-00456-JPG, 2013 WL 2634798 (S.D. Ill. June 12, 2013) (concerning dietary policy for incarcerated individual); *Cooke v. U.S. Bureau of Prisons*, 926 F. Supp. 2d 720 (E.D.N.C. 2013) (concerning access to worship services for incarcerated individual); *Yassin v. Corrs. Corp. of Am.*, No. 11cv0421 LAB (JMA), 2011 WL 4501403 (S.D. Cal. Sept. 27, 2011) (concerning dietary policy for incarcerated individual); *Kole v. FCI Danbury*, No. 09-cv-1865(JCH), 2010 WL 2679981 (D. Conn. June 28, 2010) (concerning dietary policy for incarcerated individual); *Saunders v. Wilner*, No. 09-cv-00114-REB-KMT, 2010 WL 582373 (D. Colo. Feb. 18, 2010) (concerning access to worship services for incarcerated individual); *Ford v. Fed. Bureau of Prisons*, No. 08-cv-00882-LTB-BNB, 2009 WL 3011112 (D. Colo. Sept. 16, 2009) (concerning dietary policy for incarcerated individual).

summary judgment and outcomes at trial.<sup>221</sup> The remaining eight claims were divided equally between the granting of a claimant's motion for summary judgment and positive outcomes in criminal cases.<sup>222</sup>

As in the case of claims in appellate courts, these success rates may be inflated, as it is uncertain whether any of the claims other than as a result of the granting of a motion for summary judgment, the entry of a verdict at trial, or success in a criminal case, ultimately resulted in favorable outcomes for the claimants.<sup>223</sup> The success rate drops to fourteen claims (6.8%) if the determination of success is based solely upon these three outcomes.<sup>224</sup>

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<sup>221</sup> See *Roman v. Fed. Bureau of Prisons*, No. 3:15-CV-2247, 2016 WL 8673129 (M.D. Pa. Sept. 30, 2016) (denying motion for summary judgment regarding access to worship services for incarcerated individuals); *Pauley v. Samuels*, No. 15-158 Erie, 2016 WL 5468065 (W.D. Pa. Sept. 29, 2016) (denying motion for summary judgment regarding access to worship services for incarcerated individuals); *Crowder v. Lariva*, No. 2:14-cv-00202-JMS-MJD, 2016 WL 4733539 (S.D. Ind. Sept. 12, 2016) (denying motion for summary judgment regarding dietary policy for incarcerated individual); *Atkinson v. Mackinnon*, No. 14-cv-736-bbc, 2016 WL 2901753 (W.D. Wis. May 18, 2016) (denying motion for summary judgment regarding incarcerated individual's discrimination claim); *Rezaq v. Fed. Bureau of Prisons*, No. 13-cv-00990-MJR-SCW, 2016 WL 97763 (S.D. Ill. Jan. 8, 2016) (denying summary judgment regarding access to worship services for incarcerated individual); *United States v. Girod*, 159 F. Supp. 3d 773 (E.D. Ky. 2015) (granting injunction); *Lindh v. Dir.*, No. 2:14-cv-151-JMS-WGH, 2015 WL 4086373 (S.D. Ind. July 6, 2015) (entering judgment in favor of incarcerated individual regarding access to worship services); *Church of the Holy Light of the Queen v. Holder*, No. 1:08-cv-3095-PA, 2012 WL 5985122 (D. Or. Nov. 29, 2012) (granting injunction); *Forde v. Baird*, 720 F. Supp. 2d 170 (D. Conn. 2010) (entering judgment in favor of incarcerated individual); *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008) (granting injunction); *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23 (D.D.C. 2002) (entering judgment in favor of incarcerated individual regarding grooming policy); *In re Hodge*, 220 B.R. 386 (Bankr. D. Idaho 1998) (denying trustee's motion for summary judgment); see also *supra* notes 122, 124, 127, 165 and accompanying text.

<sup>222</sup> See *Lindh v. Warden*, No. 2:14-cv-00142-JMS-DKL, 2016 WL 4528478 (S.D. Ind. Aug. 30, 2016) (granting summary judgment on challenge to strip search policy); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016) (granting summary judgment); *Singh v. McHugh*, 185 F. Supp. 3d 201 (D.D.C. 2016) (granting summary judgment); *United States v. Hardman*, 622 F. Supp. 2d 1129 (D. Utah 2009) (vacating conviction); *United States v. Ramon*, 86 F. Supp. 2d 665 (W.D. Tex. 2000) (granting motion to suppress marijuana evidence); *United States v. Valrey*, No. CR96-549Z, 2000 WL 692647 (W.D. Wash. Feb. 22, 2000) (modifying terms of release); *Rigdon v. Perry*, 962 F. Supp. 2d 150 (D.D.C. 1997) (granting summary judgment); *United States v. Gonzales*, 957 F. Supp. 1225 (D.N.M. 1997) (dismissing criminal prosecution for possession of eagle feathers); see also *supra* notes 118, 121, 163, 165, 169 and accompanying text.

<sup>223</sup> When a party prevails on a summary judgment motion or receives a favorable outcome at trial, the trial proceedings terminate as the court has entered a final judgment. However, when a party prevails on a motion to dismiss or other miscellaneous motion, the proceedings do not necessarily end. Courts, for example, may dismiss a claim, but allow the claimant to amend its complaint. See Fed. R. Civ. P. 15(a)(2).

<sup>224</sup> See *supra* notes 220–22 and accompanying text.

The correlation between outcomes and the identity of claimants in district courts was largely similar to appellate cases.<sup>225</sup> The outcomes in district courts by identity of the claimants are summarized in Table 19 below.

**Table 19: Outcomes in U.S. District Courts by Identity of the Claimant**

CLAIMANT	UNSUCCESSFUL	SUCCESSFUL	SUCCESS RATE
Business organizations	1	1	50.0%
Places of worship	6	2	25.0%
Incarcerated individuals	100	27	21.2%
Private individuals	48	6	11.1%
Educational institutions	3	0	0.0%
Religious organizations	5	0	0.0%
Non-profit organizations	6	0	0.0%
<b>Total</b>	<b>169</b>	<b>36</b>	<b>17.6%</b>

The success rate of business organizations in district courts is statistically insignificant as it is based upon a single opinion which was ultimately reversed on appeal.<sup>226</sup> Of the remaining district court claimants, places of worship, incarcerated individuals, and religious and non-profit organizations had success rates that were identical or very similar to such rates in appellate court opinions.<sup>227</sup>

The success rates of educational institutions and individuals varied significantly between appellate and district courts.<sup>228</sup> Educational institutions were unsuccessful in all three district court opinions as compared to a 50.0% success rate in appellate courts, although this difference is less significant than it appears given that the total sample consists of only five claims.<sup>229</sup> The success rates for private individuals in district courts was 11.1%, which constitutes six out of fifty-four claims.<sup>230</sup>

Reasons for the difference between success rates for individuals in appellate and district courts are unclear. One possible explanation may be the underlying weakness

<sup>225</sup> Compare *infra* Table 19 (district court claims) with *supra* Table 16 (appellate court claims).

<sup>226</sup> See *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, *rev'd*, 884 F.3d 560 (6th Cir. 2018).

<sup>227</sup> See *supra* notes 193, 195, 220–22 and accompanying text.

<sup>228</sup> Compare *supra* Table 19 (district court claims) with *supra* Table 16 (appellate court claims).

<sup>229</sup> See *supra* notes 109, 118, 125, 128 and accompanying text.

<sup>230</sup> See *supra* Table 19; *Cherokee Nation W. v. U.S. Army Corps of Eng'rs*, No. 14-CV-612-JED-TLW, 2016 WL 4548441 (N.D. Okla. Aug. 31, 2016); *Singh v. McHugh*, 185 F. Supp. 3d 201 (D.D.C. 2016); *Tagore v. United States*, No. H-09-0027, 2014 WL 2880008 (S.D. Tex. June 24, 2014); *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008); *In re Hodge*, 220 B.R. 386 (Bankr. D. Idaho 1998); *Rigdon v. Perry*, 962 F. Supp. 2d 150 (D.D.C. 1997); see also *supra* notes 121, 124, 127, 154, 220–24 and accompanying text.

of individual claims considered by appellate courts. Several claims raised issues upon which individuals were unlikely to prevail, such as challenges to federal policies concerning taxation, immigration, narcotics control, and administrative and military procedures.<sup>231</sup> It is clear that the differing success rates are not attributable to a less-rigorous application of RFRA by district courts, since every district court opinion reviewed by an appellate court resulted in an affirmation.<sup>232</sup> These explanations may render the difference in success rates less significant.

The success rates of places of worship, incarcerated individuals, and other individuals, vary depending upon how favorable outcomes are measured. The success rate for places of worship is halved to a single claim if success is defined as the granting of a motion for summary judgment, the entry of a verdict at trial, or success in a criminal case.<sup>233</sup> The success rate for incarcerated individuals drops to 7.1%, representing nine claims utilizing this measure.<sup>234</sup> There are three successful claims by private individuals utilizing this measure for an overall success rate of 5.5%.<sup>235</sup>

The correlation between outcomes and the type of claim also differs in district courts. The outcomes in district courts by type of claims are summarized in Table 20 below.

**Table 20: Outcomes in U.S. District Courts by Type of Claim**

TYPE OF CLAIM	UNSUCCESSFUL	SUCCESSFUL	SUCCESS RATE
Land use	5	2	28.6%
Conditions of confinement	82	24	22.6%
Religious expression	27	5	15.6%
Crime/tort defense	26	4	13.3%
Legal processes	27	1	3.6%
Education	2	0	0.0%
<b>Total</b>	<b>169</b>	<b>36</b>	<b>17.6%</b>

<sup>231</sup> See *supra* notes 105, 108, 110, 154, 169–70 and accompanying text.

<sup>232</sup> See, e.g., *Leonard v. U.S. Dep't of Def.*, 598 F. App'x 9 (D.C. Cir. 2015); *Ruiz-Diaz v. United States*, 703 F.3d 483 (9th Cir. 2012); *Perkel v. U.S. Dep't of Justice*, 365 F. App'x 755 (9th Cir. 2010) (denying petitions for review); *Muhammad v. Ahern*, 350 F. App'x 529 (2d Cir. 2009); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008) (denying petition for review); *Olsen v. Mukasey*, 541 F.3d 827 (8th Cir. 2008); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008); *Larsen v. U.S. Navy*, 525 F.3d 1 (D.C. Cir. 2008) (remanding with instructions to dismiss); *Fernandez v. Mukasey*, 520 F.3d 965 (9th Cir. 2008) (denying petition for review); *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007); *Kiczenski v. Gonzales*, 237 F. App'x 149 (9th Cir. 2007); *Jenkins v. Comm'r*, 483 F.3d 90 (2d Cir. 2007); *Veitch v. England*, 471 F.3d 124 (D.C. Cir. 2006); *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999); *Adams v. Comm'r*, 170 F.3d 173 (3d Cir. 1999); *Droz v. Comm'r*, 48 F.3d 1120 (9th Cir. 1995).

<sup>233</sup> See *supra* note 221 and accompanying text; RFRA Case Data, *supra* note 26.

<sup>234</sup> See *supra* notes 221–22 and accompanying text; RFRA Case Data, *supra* note 26.

<sup>235</sup> See *supra* notes 220–22 and accompanying text; RFRA Case Data, *supra* note 26.

Land-use claims were the second-smallest claim but had the highest success rate at 28.6%, although this rate was the result of only two positive outcomes.<sup>236</sup> Positive outcomes are reduced to a single case if a final judgment in favor of the claimant is utilized as the measure of success.<sup>237</sup> Religious expression claims were less frequent as a percentage of claims in district courts, but more successful with positive outcomes in five of thirty-two cases.<sup>238</sup> Positive outcomes are reduced to three claims, representing a success rate of 9.4%, if a final judgment in favor of the claimant is utilized as the measure of success.<sup>239</sup> This rate is only slightly higher than the success rate for such claims in appellate courts.<sup>240</sup> The crime and tort defense was also small as a percentage of district court claims, but was more successful than in appellate courts.<sup>241</sup>

Success rates of two types of claims were lower in district courts.<sup>242</sup> Claims based upon conditions of confinement were more common in district courts, but slightly less successful.<sup>243</sup> Successful outcomes based upon conditions of confinement are reduced to 5.7% representing six claims, if success is measured by final outcomes.<sup>244</sup> This rate is higher than its appellate counterpart.<sup>245</sup> The most significant difference concerned legal processes claims. Legal processes claims prevailed in district courts in a single opinion for an overall success rate of 3.6%.<sup>246</sup> This rate would be 0.0% if utilizing a more rigorous measure of success.<sup>247</sup> There are several possible reasons for this difference. The success rate for legal processes claims in appellate courts is inflated due to three successful claims at the U.S. Supreme Court.<sup>248</sup> There was a single

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<sup>236</sup> See *supra* Table 20. The five unsuccessful land-use claims were subject to dismissal (three claims) and summary judgment and a miscellaneous motion (one claim each). See RFRA Case Data, *supra* note 26; see also *supra* notes 127, 220–21, 230 and accompanying text.

<sup>237</sup> See *supra* note 221 and accompanying text; RFRA Case Data, *supra* note 26.

<sup>238</sup> See *supra* Table 20. The twenty-seven unsuccessful religious expression claims were subject to entry of summary judgment (ten claims), dismissal (eight claims), miscellaneous motion (seven claims), and negative outcomes at trial or in a criminal case (one claim each). See RFRA Case Data, *supra* note 26; see also *supra* notes 119–22, 220–22, 230–31 and accompanying text.

<sup>239</sup> See *supra* notes 219–22, 230 and accompanying text; RFRA Case Data, *supra* note 26.

<sup>240</sup> See *supra* note 209 and accompanying text.

<sup>241</sup> See *supra* Table 20; see also *supra* notes 163, 222, 226 and accompanying text. The success rate for the crime and tort defense in district courts is unaffected by changes in the measures of success, as each claim resulted in a final judgment in favor of the claimant. See RFRA Case Data, *supra* note 26.

<sup>242</sup> Compare *supra* Table 20 (regarding outcomes in district courts) with *supra* Table 17 (regarding outcomes in appellate courts).

<sup>243</sup> See *supra* Table 20; see also *supra* notes 202–03, 220–21 and accompanying text; RFRA Case Data, *supra* note 26.

<sup>244</sup> See *supra* note 221 and accompanying text; RFRA Case Data, *supra* note 26.

<sup>245</sup> See *supra* notes 193, 203 and accompanying text.

<sup>246</sup> See *supra* Table 20; see also *supra* note 221 and accompanying text; RFRA Case Data, *supra* note 26.

<sup>247</sup> See *supra* note 220 and accompanying text.

<sup>248</sup> See *supra* notes 109, 190–92, 205 and accompanying text.

successful legal processes claim in appellate courts outside of the U.S. Supreme Court.<sup>249</sup> Furthermore, the subject matter of legal processes claims raised issues upon which claimants were unlikely to prevail.<sup>250</sup> A reluctance to grant relief is reflected in the predominance of orders dismissing claims or granting motions for summary judgment in appellate and district courts.<sup>251</sup> This reluctance is also reflected in the affirmation of results by appellate courts.<sup>252</sup> The differences in success rates are less pronounced given these factors.

### 3. Composite Outcomes

Fifty-two claims in the sample (17.2%) resulted in a favorable outcome for claimants.<sup>253</sup> Composite outcomes in federal courts by type of outcome are summarized in Table 21 below.

**Table 21: Outcomes in All Federal Courts by Type**

SUCCESSFUL	NUMBER	% SUCCESSFUL	% OF ALL CLAIMS
Denial of motion to dismiss	18	34.6%	5.9%
Denial of summary judgment	12	23.1%	4.0%
Trial	8	15.4%	2.6%
Criminal case	6	11.5%	2.0%
Grant of summary judgment	5	9.6%	1.7%
Miscellaneous motions	3	5.8%	1.0%
<b>Total</b>	<b>52</b>	<b>100.0%</b>	<b>17.2%</b>

UNSUCCESSFUL	NUMBER	% UNSUCCESSFUL	% OF ALL CLAIMS
Dismissal	101	40.2%	33.3%
Summary judgment	75	29.9%	24.7%
Criminal case	47	18.7%	15.5%
Miscellaneous motions	22	8.8%	7.3%
Trial	6	2.4%	2.0%
<b>Total</b>	<b>251</b>	<b>100.0%</b>	<b>82.8%</b>

<sup>249</sup> See *supra* notes 109, 192, 204 and accompanying text.

<sup>250</sup> See *supra* note 231 and accompanying text.

<sup>251</sup> Unsuccessful legal processes claims in appellate courts were subject to dismissal in seven cases (63.6% of claims), and entry of summary judgment in three cases (27.3% of claims). Unsuccessful legal processes claims in district courts were subject to dismissal in fourteen cases (51.8% of claims), and entry of summary judgment in eight cases (25.9% of claims). See RFRA Case Data, *supra* note 26.

<sup>252</sup> See *supra* notes 231–32 and accompanying text.

<sup>253</sup> See *infra* Table 21; see also RFRA Case Data, *supra* note 26.

The composite success rate varied from the rates in appellate and district courts.<sup>254</sup> Denials of motions to dismiss were the most common successful outcome for claimant in district courts, but were infrequent in appellate courts, resulting in a composite percentage of 34.6% of successful outcomes.<sup>255</sup> This pattern repeated with respect to outcomes based upon the entry of summary judgment and judgment as a result of a trial.<sup>256</sup> The pattern reversed with respect to denials of summary judgment and outcomes in criminal cases, all of which were larger percentages of successful outcomes for claimants in appellate courts.<sup>257</sup> The composite claimant success rate for miscellaneous motions was entirely dependent upon outcomes in appellate courts.<sup>258</sup>

The composite success rate is considerably lower if it is calculated utilizing only final positive outcomes. Twenty-two claims qualify as successful if this method of classification is utilized resulting in a composite success rate for claimants of 7.3%.<sup>259</sup> This method of classification also changes the overall distribution of successful outcomes. Positive outcomes at trial constitute 36.4% of all successful outcomes for claimants followed by outcomes in criminal cases at 27.3%.<sup>260</sup> Cases in which a claimant's motion for summary judgment is granted would be 22.7% of all successful outcomes for claimants with the remaining 13.6% attributable to miscellaneous motions.<sup>261</sup>

The composite of unsuccessful outcomes for claimants mirrors those in appellate and district courts. Dismissals were the most common outcome in appellate and district courts and in the composite, constituting 40.2% of unsuccessful outcomes and one-third of all outcomes.<sup>262</sup> The same conclusion holds true for termination of claims through the entry of summary judgment and miscellaneous motions.<sup>263</sup> The pattern is slightly different with respect to outcomes in criminal cases, which were a larger percentage of unsuccessful outcomes in appellate courts than in district courts.<sup>264</sup> Unsuccessful trial outcomes for claimants as a percentage of unsuccessful and total claims were identical in appellate and district courts, and thus were identical to the composite.<sup>265</sup>

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<sup>254</sup> Compare *supra* Table 21 (composite outcomes) with *supra* Tables 17 & 20.

<sup>255</sup> See *supra* notes 186, 220 and accompanying text; see also *supra* Tables 15, 18 & 21.

<sup>256</sup> See *supra* notes 186–87, 221–22 and accompanying text; see also *supra* Tables 15, 18 & 21.

<sup>257</sup> See *supra* notes 184, 186, 221–22 and accompanying text; see also *supra* Tables 15, 18 & 21.

<sup>258</sup> See *supra* note 185 and accompanying text; see also *supra* Table 15.

<sup>259</sup> See *supra* notes 185–87, 221–22 and accompanying text.

<sup>260</sup> See *supra* Table 21.

<sup>261</sup> See *supra* Table 21.

<sup>262</sup> See *supra* notes 182, 216 and accompanying text; see also *supra* Tables 15, 18 & 21.

<sup>263</sup> See *supra* notes 182–83, 216, 218 and accompanying text; see also *supra* Tables 15, 18 & 21.

<sup>264</sup> See *supra* Table 21; *supra* notes 183, 217 and accompanying text; see also *supra* Tables 15 & 18.

<sup>265</sup> See *supra* notes 183, 219 and accompanying text; see also *supra* Tables 15, 18 & 21.

One common feature is the preference for resolution of claims through motion practice.<sup>266</sup> Motions resolved thirty-eight of the successful claims and one hundred and ninety-eight of the unsuccessful claims that did not involve a trial or criminal proceeding.<sup>267</sup> Two hundred and thirty-six claims (77.9%) were resolved through motion practice.<sup>268</sup>

The differing outcomes in appellate and district courts balance one another in the composite correlation of outcomes by identity of the claimant. Composite outcomes in federal courts by identity of the claimant are summarized in Table 22.

**Table 22: Outcomes in All Federal Courts by Identity of the Claimant**

CLAIMANT	UNSUCCESSFUL	SUCCESSFUL	SUCCESS RATE
Business organizations	1	2	66.6%
Places of worship	14	5	26.3%
Incarcerated individuals	139	37	21.0%
Educational institutions	4	1	20.0%
Private individuals	78	7	9.0%
Non-profit organizations	7	0	0.0%
Religious organizations	8	0	0.0%
<b>Total</b>	<b>251</b>	<b>52</b>	<b>17.2%</b>

The 100.0% success rate for claims asserted by business organizations in appellate courts was offset by the 50.0% success rate for such claimants in district courts.<sup>269</sup> The same holds true with respect to the 50.0% success rate for educational institutions in appellate courts which was offset by their absence of success in district courts.<sup>270</sup> Places of worship were also slightly more successful in appellate courts than in district courts, resulting in a composite success rate of 26.3%.<sup>271</sup> Incarcerated individuals were slightly more successful in district courts, which resulted in a composite success rate of 21.0%.<sup>272</sup> Private individuals were substantially more successful in district courts, but this success was tempered by their almost complete absence of success in appellate courts.<sup>273</sup> As a result, the composite success rate for private individuals was a

<sup>266</sup> See *supra* Tables 15, 18 & 21.

<sup>267</sup> See *supra* notes 184–87, 220–22 and accompanying text; see also *supra* Tables 15, 18 & 21.

<sup>268</sup> See *supra* notes 182–83, 216, 218 and accompanying text; see also *supra* Tables 15, 18 & 21.

<sup>269</sup> See *supra* notes 190, 226 and accompanying text; see also *supra* Tables 16, 19 & 22.

<sup>270</sup> See *supra* notes 191, 226 and accompanying text; see also *supra* Tables 16, 19 & 22.

<sup>271</sup> See *supra* notes 192, 227 and accompanying text; see also *supra* Tables 16, 19 & 22.

<sup>272</sup> See *supra* notes 193, 227 and accompanying text; see also *supra* Tables 16, 19 & 22.

<sup>273</sup> See *supra* notes 194, 230–31 and accompanying text; see also *supra* Tables 16 & 19.



meager 9.0%.<sup>274</sup> Non-profit and religious organizations failed in all fifteen of their asserted claims.<sup>275</sup>

The success rates of some claimants is reduced if positive outcomes are equated with finality of result.<sup>276</sup> The most significant decline is with respect to incarcerated individuals. The composite success rate for such claimants dropped from 21.0% to 6.8% utilizing this more stringent calculus.<sup>277</sup> The composite rate for private individuals is reduced by almost half, from 9.0% to 4.7%, applying this method of measurement.<sup>278</sup> The composite rate for places of worship also declines from 26.3% to 15.8%.<sup>279</sup> The success rates of business organizations and educational institutions are unaffected.<sup>280</sup>

The dominance of successful claims by incarcerated individuals was an unexpected finding. Such individuals accounted for 71.1% of combined successful claims.<sup>281</sup> Successful claims by other parties lagged far behind. Private individuals accounted for 13.5% of successful claims, followed by places of worship at 9.6%.<sup>282</sup> Equally unexpected was the complete absence of successful claims by religious and non-profit organizations.<sup>283</sup>

The composite success rates by claimants lend support to two conclusions regarding RFRA's impact. First, the dominance of claims by incarcerated individuals and the low success rates for places of worship, private individuals, and religious and non-profit organizations, supports the conclusion that RFRA, as applied, has been inconsistent with congressional intent. This conclusion assumes RFRA's primary intent was to protect the religious liberty of individuals in wake of the holding in *Smith*.<sup>284</sup> This conclusion is not to denigrate the religious rights of incarcerated individuals, but rather to note that this group was not the most likely intended beneficiary of RFRA. The second conclusion impacts arguments on both sides of the RFRA controversy. The meager success rates for most claimants undermines arguments that religion was and remains under attack, and that RFRA provides an effective means by which to thwart this attack.<sup>285</sup> The success rates call into question the past and present necessity of the legislation.<sup>286</sup> However, feared harms such as discrimination and interference with the rule of law have not occurred.<sup>287</sup> The minute

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<sup>274</sup> See *supra* Table 22.

<sup>275</sup> See *supra* notes 195, 227 and accompanying text; see also *supra* Tables 16 & 19.

<sup>276</sup> See *supra* notes 196, 220–21, 233 and accompanying text.

<sup>277</sup> See *supra* notes 200, 220–22, 234 and accompanying text.

<sup>278</sup> See *supra* notes 187, 194, 221–22, 235 and accompanying text.

<sup>279</sup> See *supra* notes 192, 227 and accompanying text.

<sup>280</sup> See *supra* notes 190–91, 226 and accompanying text.

<sup>281</sup> See *supra* Table 22.

<sup>282</sup> See *supra* notes 192, 194, 227, 230–31 and accompanying text; see also *supra* Tables 16, 19 & 22.

<sup>283</sup> See *supra* notes 195, 227 and accompanying text; see also *supra* Tables 16, 19 & 22.

<sup>284</sup> See *supra* notes 7–8 and accompanying text.

<sup>285</sup> See *supra* note 11 and accompanying text.

<sup>286</sup> See *supra* notes 11–13 and accompanying text.

<sup>287</sup> See *supra* notes 21–24 and accompanying text.

number of successful claims by individuals and groups other than incarcerated individuals hardly represents such a threat. However, RFRA's ineffectiveness may encourage supporters to seek more robust legislative solutions. Any such solution may pose the risks asserted by RFRA opponents.<sup>288</sup>

Appellate and district court outcomes also balance one another in the composite correlation of outcomes by type of claim. Composite outcomes in federal courts by type of claim are summarized in Table 23.

**Table 23: Outcomes in All Federal Courts by Type of Claim**

TYPE OF CLAIM	UNSUCCESSFUL	SUCCESSFUL	SUCCESS RATE
Conditions of confinement	104	32	23.5%
Land use	13	2	13.3%
Religious expression	48	7	12.7%
Crime/tort defense	45	6	11.8%
Legal processes	38	5	11.6%
Education	3	0	0.0%
<b>Total</b>	<b>251</b>	<b>52</b>	<b>17.2%</b>

The success rates in appellate courts for conditions of confinement and legal processes (26.7% each) were offset by much lower success rates for similar claims in district courts, resulting in composite success rates of 23.5% and 11.6% respectively.<sup>289</sup> The composite rate for claims relating to conditions of confinement declines to 5.1% (seven of one hundred and thirty-six claims) if successful outcomes are measured by finality.<sup>290</sup> The success rate of legal processes claims declines to 9.3% (four of forty-three claims) if the same limitation is applied.<sup>291</sup>

The higher success rates for land-use and religious expression claims and the crime and tort defense in district courts are offset by lower rates in appellate courts.<sup>292</sup> Although land use was the most successful claim in district courts, there was an absence of successful outcomes in appellate courts, resulting in a composite success rate of 13.3%.<sup>293</sup> This composite rate is halved if success is measured by final outcomes.<sup>294</sup> Religious expression claims had the third-highest composite rate of success (12.7%),

<sup>288</sup> See *supra* notes 17–24 and accompanying text.

<sup>289</sup> See *supra* notes 202–03, 204–05, 243, 246–52 and accompanying text; see also *supra* Tables 17, 20 & 23.

<sup>290</sup> See *supra* notes 203, 244 and accompanying text.

<sup>291</sup> See *supra* notes 204–05, 246–52 and accompanying text.

<sup>292</sup> See *supra* notes 262, 268–69 and accompanying text; see also *supra* Tables 17, 20 & 23.

<sup>293</sup> See *supra* notes 201, 236 and accompanying text; see also *supra* Tables 17, 20 & 23.

<sup>294</sup> See *supra* note 237 and accompanying text.

reflecting a higher success rate at the district court level.<sup>295</sup> The composite rate declines to 7.3% if successful outcomes are measured exclusively by finality.<sup>296</sup> The same result holds true for the crime and tort defense, which had a success rate of 13.3% in district courts but a composite rate of 11.8%, given only two successful outcomes in appellate courts.<sup>297</sup> Legal processes claims were slightly less successful, with a success rate of 11.6%.<sup>298</sup> The success rate of such claims was fully expected for reasons previously discussed.<sup>299</sup>

Although it was expected that conditions of confinement would have the highest success rate given the sheer number of claims, their dominance, 61.5% of successful outcomes, was not anticipated.<sup>300</sup> This dominance is reflected in the data in which conditions of confinement constituted half of all successful appellate outcomes and two-thirds of all corresponding district court outcomes.<sup>301</sup> This dominance may support the conclusion that, as applied, RFRA has been inconsistent with congressional intent.

The success rates for most types of claims weaken the contention that religion is under attack while supporting doubts about its necessity.<sup>302</sup> This conclusion is reinforced by the relatively low success rate for claims other than conditions of confinement and especially religious expression and legal processes.<sup>303</sup> The deployment of RFRA in criminal and tort proceedings, although largely unsuccessful, amplifies arguments relating to its potential misuse.<sup>304</sup> However, the weak showing of such claims, when combined by the lack of success of legal processes claims, rebuts these contentions.<sup>305</sup> These conclusions are reached with the caveat that future legislative strengthening of RFRA to address perceived shortcomings, or radical judicial expansion of its reach, is not without risk.

The correlations between positive outcomes and offensive and defensive uses also reflect the relative infrequency of successful RFRA claims. Successful offensive utilizations of RFRA constituted 78.8% of all successful outcomes for claimants.<sup>306</sup> However, offensive utilizations were largely unsuccessful for claimants, as reflected

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<sup>295</sup> See *supra* notes 207, 238 and accompanying text; see also *supra* Tables 17, 20 & 23.

<sup>296</sup> See *supra* notes 208, 239 and accompanying text.

<sup>297</sup> See *supra* notes 206, 241 and accompanying text; see also *supra* Tables 17, 20 & 23. The composite rate is unaffected by restricting the definition of successful outcomes, as the six prevailing claims represented final outcomes. See *supra* notes 206, 241 and accompanying text.

<sup>298</sup> See *supra* notes 201, 204–05, 246 and accompanying text; see also *supra* Tables 17, 20 & 23.

<sup>299</sup> See *supra* notes 231–32, 246–52 and accompanying text.

<sup>300</sup> See *supra* Table 23.

<sup>301</sup> See *supra* notes 201–02, 243 and accompanying text; see also *supra* Tables 17 & 20.

<sup>302</sup> See Peters, *supra* note 11; see also *supra* notes 286–87 and accompanying text.

<sup>303</sup> See *supra* notes 286–87 and accompanying text.

<sup>304</sup> See *supra* notes 23–24 and accompanying text.

<sup>305</sup> See *supra* notes 22–24, 296–97 and accompanying text.

<sup>306</sup> See *supra* Tables 13 & 14; *infra* Table 24.

in the composite success rates of 18.1% of all offensive utilizations and 13.5% of all claims.<sup>307</sup> Successful defensive utilizations were unsurprisingly rare. Successful defensive utilizations were 21.2% of all successful outcomes, but were only 14.3% of all defensive utilizations and 3.6% of all claims.<sup>308</sup> Outcomes by offensive and defensive utilization are summarized in Table 24 below.

**Table 24: Outcomes in All Federal Courts by Type of Utilization**

UTILIZATION	OUTCOME	NUMBER OF CLAIMS	% OF CLAIMS
Offensive	Unsuccessful	185	61.1%
Offensive	Successful	41	13.5%
Defensive	Unsuccessful	66	21.8%
Defensive	Successful	11	3.6%
<b>Total</b>		<b>303</b>	<b>100.0%</b>

#### CONCLUSION

Detailed analysis of the case law leads to the conclusion that RFRA is neither as effective nor as harmful as portrayed by either side of the debate.<sup>309</sup> Although RFRA filings have remained in double digits since 2006 and increased significantly in 2016, these data alone are not indicative of a growing threat to religious liberty or harmful use. The single largest group of claimants, incarcerated individuals, do not pose a threat of misuse of RFRA and resultant injury.<sup>310</sup> These data, when combined with the fact that little more than one-third of claimants were private individuals, places of worship or religious organizations, may be indicative of the absence of substantial threats to religious freedom. RFRA also has not been subject to abuse by business organizations which have accounted for all of three claims since 1993.<sup>311</sup>

RFRA's muddled record is also apparent from the subject matter of the claims, almost 60.0% of which related to conditions of confinement or the crime and tort defense filed by incarcerated individuals.<sup>312</sup> Other types of claims were distinctly in the minority. Combined, religious expression and legal processes claims accounted for less than 30.0% of all claims.<sup>313</sup> It may be concluded from these data that religious liberties, whether they take the form of religious expression, objection to legal processes, or arise from land-use or educational settings, are not under unrelenting

<sup>307</sup> See *supra* Tables 13 & 14; *infra* Table 24.

<sup>308</sup> See *supra* Tables 13 & 14; *infra* Table 24.

<sup>309</sup> See *supra* notes 11–24 and accompanying text.

<sup>310</sup> See *supra* Tables 4, 5 & 6.

<sup>311</sup> See *supra* Table 6.

<sup>312</sup> See *supra* Tables 7 & 9.

<sup>313</sup> See *supra* Tables 7 & 9.

attack. Furthermore, only four claims concerned issues related to the LGBTQ+ community.<sup>314</sup> This is hardly proof that RFRA has served as a means by which to deprive members of the LGBTQ+ community of their rights.

These conclusions are bolstered by the ability of federal courts to distinguish between meritorious and less compelling claims. Courts have terminated nonmeritorious claims through motions in more than 78.0% of all claims.<sup>315</sup> Places of worship and incarcerated individuals have been the most successful claimants.<sup>316</sup> Other claimants have either filed small numbers of claims or have been largely unsuccessful.<sup>317</sup> The number of successful claims other than those relating to conditions of confinement (twenty in total over the course of twenty-five years) can hardly be described as posing a threat to the rule of law.<sup>318</sup> This paucity of successful claims is also indicative of an absence of a sustained threat to the free exercise of religion. It is imperative for all parties to the ongoing controversy over religious rights to forego exaggerations and misrepresentations and take RFRA's judicial history into account in future debates.

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<sup>314</sup> *See supra* notes 115, 133 and accompanying text.

<sup>315</sup> *See supra* Table 18.

<sup>316</sup> *See supra* Tables 16 & 19.

<sup>317</sup> *See supra* Tables 16 & 19.

<sup>318</sup> *See supra* Tables 17 & 20.