

Sanctioning Free Exercise: Religious Freedom and Financial Liberty

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The United States is, in many ways, built on promises of religious freedom. For better or worse, these principles have carried the country through centuries. Each generation of Americans must challenge, modify, and contend with the reality of religious freedom in a secular state. This generation is no different. In the past few decades, the population of American Muslims has exploded, forcing this country to reckon with its commitment to religious freedom, especially as it pertains to Islam. Most recently, the sanctions against the Islamic Republic of Iran have prohibited American Shi'ah Muslims from paying a twenty percent religious tax allocated for charitable projects worldwide. It is a tricky situation—on the one hand, there is the long-standing slogan of religious freedom in American ethos while on the other hand, there is a perceived question of national security surrounding Iran and the threat some believe it poses. However, given how these concerns impose on the ability of Shi'ah Muslims to pay their religious taxes and dues, one must ask: do sanctions on Iran that prohibit required charitable giving violate the protections for free exercise laid out in the Religious Freedom Restoration Act (RFRA) of 1993? This Note argues that they do and that this violation is intolerable. The sanctions substantially burden the ability of Shi'ah Muslims to pay this religious tax (known as khums). The government's actions do not further any compelling interest and are too broad. Where the government should use a scalpel, it has gone in with a hatchet at the expense of the religious liberty of American citizens. This Note discusses the religious obligation of Shi'ah Muslims, its relation to the RFRA protections, and counterarguments. Centuries after the founding of this nation, civil liberties and national security are once again colliding; if the commitments of America are to mean anything at all, civil liberties deserve preservation.

The Muslim community is no stranger to strict sanctions. Fourteen hundred years ago, the Prophet of Islam began spreading his message in Mecca.¹ Infuriated by this disruption of the status quo, tribal leaders banded

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1. See ANITA RAI, MUHAMMAD: UNCOVERING THE TRUE STORY 62, 64–66, 74, 79–80 (2006) (describing Prophet Muhammad's visit from the Archangel Gabriel in 610 C.E., a second

together and instituted strict sanctions against the Prophet and his family.² The chiefs drafted a document, isolating the Muslims financially and socially from Meccan society.³ The danger posed by the tribes in Mecca forced the family and companions of the Prophet to seek refuge in a valley on the outskirts of the desert.⁴ Despite hunger, thirst, and poverty, the Muslims persevered and remained resilient.⁵ Accounts of these tribulations even record that termites ate away at the proclamation instituting the sanctions three years later, leaving behind only one word still affixed to the Kaaba: God.⁶

Similarly, in the 1620s and 1630s, the British Parliament was up in arms against the King of England, who wanted desperately to procure funds for a costly war.⁷ Parliament remained wary, fearing the King would use his power to subjugate religious minorities.⁸ The King tired of the battle with Parliament and dissolved the body to obtain his funds without obstruction, leading to the famed Eleven Years Tyranny.⁹ This era was the impetus for about eight hundred Puritans to sail across the Atlantic, searching for religious freedom and landing in what would become the United States.¹⁰

As both the Prophet's persecution and the flight of the Puritans suggest, religious freedom and the price one must pay for it are strong themes in the ethos of both Islamic tradition and the very fabric of American society. However, today the threads of this rich heritage are woven together in complex ways, creating novel problems of religious exercise and freedom. As Muslim communities continue to cement themselves in American society, this country's commitment to religious freedom is put to the test. This Note argues that international sanctions against Iran, as applied, violate the religious freedom protections as articulated by the Religious Freedom Restoration Act (RFRA).

Revelation, the sharing of the message to Prophet Muhammad's family, and the sharing of the message in Mecca in the few years following the first Revelation).

2. REZA ASLAN, *NO GOD BUT GOD: THE ORIGINS, EVOLUTION, AND FUTURE OF ISLAM* 46–47 (2006).

3. HASSAN ABBAS, *THE PROPHET'S HEIR* 38 (2021).

4. RAI, *supra* note 1, at 132.

5. *See id.* at 135 (describing the hardships and how the Muslims overcame them).

6. ABBAS, *supra* note 3, at 38.

7. *See The Personal Rule of Charles I*, UK PARLIAMENT, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/civilwar/overview/personal-rule/> [<https://perma.cc/RU9A-P94L>] (discussing Charles I's use of non-parliamentary methods to raise money for the "inevitable renewal of war," which was disfavored by the English political elite).

8. *Id.*

9. *The Great Migration of Picky Puritans, 1620–40*, NEW ENGLAND HIST. SOC'Y, <https://www.newenglandhistoricalsociety.com/great-migration-of-picky-puritans-1620-40> [<https://perma.cc/QS7Z-35UZ>].

10. *Id.*

Introduction

In 1993, the Religious Freedom Restoration Act (RFRA) was enacted to provide stronger protections for religious exercise than already guaranteed in the First Amendment.¹¹ RFRA provides that government shall not substantially burden a person's free exercise of religion.¹² Today, RFRA's applicability seems to be embattled in yet another issue: the United States' sanctions against Iran.

For decades, nations have used international sanctions to respond to significant geopolitical challenges.¹³ Despite criticism of the effectiveness of sanctions, many countries employ them, including the United States.¹⁴ Unsurprisingly, since the 1979 revolution that overthrew the United States-backed Shah, a long-standing target of American sanctions has been Iran, a Muslim-majority country nestled in the Middle East.¹⁵

To this day, Iran remains a Shi'ah-majority nation-state,¹⁶ meaning it has strong ties to the minority sect of Islam—the Twelver Shi'ah—which also has a significant presence in the United States.¹⁷ A 2009 Pew Research Study estimated that of over two million Muslims in the United States, about 10–15% (200,000–400,000) identified as Shi'ah Muslims.¹⁸ Many Shi'ah from across the world send their *khums* (a mandatory religious tax similar to

11. David Schultz, *Religious Freedom Restoration Act of 1993*, THE FIRST AMEND. ENCYC., <https://mtsu.edu/first-amendment/article/1092/religious-freedom-restoration-act-of-1993> [https://perma.cc/2EGW-68RY]; *Holt v. Hobbs*, 574 U.S. 352, 357 (2015).

12. 42 U.S.C. § 2000bb-1(a).

13. Jonathan Masters, *What Are Economic Sanctions?*, COUNCIL ON FOREIGN RELS. (Aug. 12, 2019), <https://www.cfr.org/background/what-are-economic-sanctions> [https://perma.cc/ASL5-LC8R]; Gernot Biehler, *Legal Limits to International Sanctions*, 4 HIBERNIAN L.J. at 15, 15 (2003).

14. Masters, *supra* note 13.

15. D. Parvaz, *Iran 1979: The Islamic Revolution That Shook the World*, AL JAZEERA (Feb. 11, 2014), <https://www.aljazeera.com/features/2014/2/11/iran-1979-the-islamic-revolution-that-shook-the-world> [https://perma.cc/H2VH-XCM2]; Kate Hewitt & Richard Nephew, *How the Iran Hostage Crisis Shaped the US Approach to Sanctions*, BROOKINGS INST. (Mar. 12, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/03/12/how-the-iran-hostage-crisis-shaped-the-us-approach-to-sanctions/> [https://perma.cc/JX9L-S7JV]; Iranian Transactions and Sanctions Regulations, 83 Fed. Reg. 55,269 (Nov. 5, 2018) (to be codified at 31 C.F.R. 560).

16. *The Sunni-Shia Divide*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/interactives/sunni-shia-divide#!/sunni-shia-divide> [https://perma.cc/9K8Y-USVX].

17. See Omar Sacirbey, *Shiite Muslims Quietly Establish a Foothold in U.S.*, WASH. POST (Oct. 2, 2012), https://www.washingtonpost.com/national/on-faith/shiite-muslims-quietly-establish-a-foothold-in-us/2012/10/02/f21dc568-0cd6-11e2-ba6c-07bd866eb71a_story.html [https://perma.cc/9FEC-N67K] (stating that Shi'ah Muslims make up about fifteen percent of Muslims in the United States and that there has been recent growth in the community).

18. *Mapping the Global Muslim Population*, PEW RSCH. CTR. (Oct. 7, 2009), <https://www.pewforum.org/2009/10/07/mapping-the-global-muslim-population/> [https://perma.cc/Z2BC-CJ9J].

a tithe, which is a ten percent tax in the Christian Church¹⁹) to Iran for charitable giving.

In mid-2020, two American citizens were arrested and charged in the United States for gathering *khums* on behalf of religious leaders in Iran and allegedly transporting the money to Iran in violation of American economic sanctions.²⁰ This backdrop poses a new question as to RFRA's reach: do economic sanctions violate the religious freedom of Shi'ah Americans? This Note argues that the sanctions, as applied, violate RFRA. Parts I and II provide background to the discussion: Part I lays out the current situation and the impetus for this question, while Part II surveys the religious exercise of *khums* and how Shi'ah practice this obligation. Parts III and IV discuss the First Amendment and RFRA and apply RFRA's test to the sanctions against Iran. Finally, Part V discusses the hurdles an RFRA claim may face because of the unique cross-section of civil liberties and foreign policy implicated by this question.

I. Current Situation

On Tuesday, August 18, 2020, the American Shi'ah community was in an uproar when two Shi'ah citizens were arrested in Houston, Texas, on criminal charges relating to *khums*.²¹ According to the criminal complaint, both men allegedly gathered *khums* from practicing Shi'ah in the United States as representatives of the office of Ayatollah Sayyid Ali Hosseini Khamenei in Iran for charitable distribution.²² The U.S. government contends that this is a violation of the Iranian Transaction and Sanctions Regulations (ITSR).²³

The relevant sanctions were instituted by President Trump on June 24, 2019, against the Supreme Leader of Iran and the Supreme Leader's Office, one year after President Trump withdrew from the 2015 Iran nuclear deal that had terminated all previous economic sanctions.²⁴ In particular, the 2019

19. *Tithes and Offerings: Your Questions Answered*, RAMSEY SOLUTIONS (Aug. 26, 2021), <https://www.daveramsey.com/blog/daves-advice-on-tithing-and-giving#:~:text=What%20Is%20a%20Tithe%3F,as%20part%20of%20their%20faith> [<https://perma.cc/H5LJ-DSJ9>].

20. Press Release, U.S. Dep't of Just., Two U.S. Citizens, One Pakistani National Charged with Moving U.S. Currency to Iran (Aug. 19, 2020), <https://www.justice.gov/opa/pr/two-us-citizens-one-pakistani-national-charged-moving-us-currency-iran> [<https://perma.cc/7MAH-L2BQ>] [hereinafter DOJ Press Release].

21. *Id.*; see, e.g., @freemuzzamil, INSTAGRAM (Aug. 30, 2020), <https://www.instagram.com/p/CEhE1efJIG3/> [<https://perma.cc/EZ27-6G6V>] (advertising a campaign to raise money for Muzzamil Zaidi's legal defense against his "unjust detention").

22. Complaint ¶ 2, *United States v. Zaidi*, No. 4:20-mj-01487 (S.D. Tex. Aug. 18, 2020).

23. *Id.* ¶¶ 12, 14, 18–21.

24. Exec. Order No. 13,876, 84 Fed. Reg. 30,573 (June 24, 2019); Quint Forgey, *Trump Administration Unveils New Sanctions on Iran Despite Foreign Resistance*, POLITICO (Sept. 21, 2020, 1:25 PM), <https://www.politico.com/news/2020/09/21/trump-administration-sanctions-iran-419408> [<https://perma.cc/JU8N-LVZR>].

sanctions prohibited transactions with individuals or organizations blocked by the sanctions.²⁵ Ayatollah Khamenei is one of the individuals named in the order as he is the Supreme Leader of the government of Iran.²⁶

While this particular issue only came to light during the Trump presidency, there were American citizens a decade ago who were prosecuted by the government under similar circumstances. In 2006 and 2007, U.S. authorities raided several Shi'ah organizations because adherents had been paying *khums* that the U.S. government viewed as antithetical to the War on Terror, with the government later targeting individual American citizens as well.²⁷ During that time, President Obama pledged in a 2009 speech to change regulations that made it difficult for American Muslims to pay their *khums*.²⁸

Yet, many of these violations still go unrecorded and are overlooked. The criminal prosecution against the two men in Houston sent shockwaves across the community. As many Shi'ah households reacted to the news, many asked: what about *our* religious freedom?

II. Background

As briefly discussed, *khums* is a religious tax practiced in Islam. In the Shi'ah school, *khums* applies more broadly and impacts almost every Shi'ah. To better understand the general requirement of *khums* and where the *khums* funds are sent and subsequently used, this Part will address a few critical questions about the religious practice, namely: (1) what *khums* is; (2) how it is used; and (3) what the role of an Ayatollah—like Ayatollah Khamenei—is in this process.

A. What Is Khums?

Khums is similar to tithing in the Christian church. As practiced by many Christians, tithing is the giving of one-tenth of one's income to his or her local church.²⁹ In Islam, paying one's *khums* is mandatory and required for wealth to be considered legitimate.³⁰ *Khums* is calculated on an individual's total savings after the costs for the year are deducted (one-fifth of the total

25. Exec. Order No. 13,876, 84 Fed. Reg. 30,573 (June 24, 2019).

26. *Id.*; Steve Holland & Stephen Kalin, *Trump Puts Sanctions on Iranian Supreme Leader, Other Top Officials*, REUTERS (June 24, 2019, 10:14 AM), <https://www.reuters.com/article/us-mideast-iran-usa/trump-puts-sanctions-on-iranian-supreme-leader-other-top-officials-idUSKCN1TP13D> [<https://perma.cc/96X9-SGHH>].

27. Sally Howell, *(Re)Bounding Islamic Charitable Giving in the Terror Decade*, 10 UCLA J. ISLAMIC & NEAR E. L. at 35, 35–36, 49–51 (2010–11); Gareth Porter, *How the U.S. Used a "Terrorism" Ploy to Attack Islamic Charity to Iran*, LA PROGRESSIVE (Jan. 21, 2014), <https://www.laprogressive.com/attacking-islamic-charity/> [<https://perma.cc/88JN-RNNF>].

28. Porter, *supra* note 27.

29. *Tithes and Offerings*, *supra* note 19.

30. SHEIK SHABBIR HASSAN MAISAMI, ISLAMIC FINANCIAL RESPONSIBILITIES 132–33 (2009).

savings is allocated as *khums*).³¹ For example, if a person has \$2,000 saved at the end of the year and \$500 in expenses, *khums* would be obligatory on the remaining \$1,500. The individual would calculate 20% of the total savings—\$300—and allocate it for *khums*. As used in this Note, “*khums*” refers to both the practice of allocating the funds and the fund itself.

The textual basis for this practice comes from the Qur’an—the holy text for all Muslims. In the eighth chapter, forty-first verse, the Qur’an states: “And know ye (*O’ believers*) that whatever of a thing ye acquire a fifth of it is for God, and for the Apostle and for the (*Apostle’s*) near relatives and the orphans and the needy and the wayfarer. . . .”³²

Some scholars maintain that *khums* was first introduced by the Prophet’s grandfather when he found a treasure near a famous well in Mecca.³³ He dedicated one-fifth of the treasure to God and kept the rest, a practice then instituted by the Prophet in his lifetime.³⁴ In the years following the Prophet’s death, factions debated *khums*, and over time, legal schools in the religion of Islam have come to view *khums* differently.³⁵ The Shi’ah school contends that paying *khums* is required.³⁶ The fund is divided into two parts: one part for propagation and support of religion and the other for charitable purposes, specifically the poor, orphans, and stranded travelers.³⁷ From the example above, of the \$300 allocated for *khums*, \$150 would be earmarked for charitable giving and the other \$150 would propagate the religion by sponsoring students studying in seminaries, buying and publishing religious books, and other such work.

Paying *khums* is also obligatory in the spiritual sense because of the emphasis Islam places on the collective betterment of society.³⁸ The direct successor to the Prophet, Ali ibn Abi Talib, famously sent a letter to a governor who stole from the public treasury and misappropriated the *khums* fund, asking him: “Do you realize the enormity of your sin? Out of the money which was earmarked for the use of orphans, paupers and destitutes or which

31. SAYYID MUHAMMAD RIZVI, *KHUMS: AN ISLAMIC TAX* 7, 11–12 (3d ed. 1992); see MAISAMI, *supra* note 30, at 137, for a sample *khums* calculation form.

32. THE HOLY QUR’AN, 8:41 (S.V. Mir Ahmed Ali trans., 1988).

33. Renat I. Bekkin, *Islamic Insurance: National Features and Legal Regulation*, 21 *ARAB L.Q.* 251, 263 (2007).

34. *Id.*; MAISAMI, *supra* note 30, at 92–94.

35. Abdulaziz Sachedina, *Al-Khums: The Fifth in the Imāmī Shī’ī Legal System*, 39 *J. NEAR E. STUD.* 275, 278 (1980); compare Document #1047413: *IRB—Immigration and Refugee Board of Canada*, EUR. COUNTRY OF ORIGIN INFO. NETWORK (May 20, 2002), <https://www.ecoi.net/en/document/1047413.html> [<https://perma.cc/B6BY-U9QW>] with RIZVI, *supra* note 31, at 7–8.

36. Document #1047413: *IRB—Immigration and Refugee Board of Canada*, EUR. COUNTRY OF ORIGIN INFO. NETWORK (May 20, 2002), <https://www.ecoi.net/en/document/1047413.html> [<https://perma.cc/B6BY-U9QW>].

37. RIZVI, *supra* note 31, at 24.

38. MAISAMI, *supra* note 30, at 83.

was reserved for faithful Muslims . . . you provided for yourself means of your enjoyments and pleasures,”³⁹ showing the importance of the *khums* fund as a spiritual matter and as part of the Islamic project to create a sound society. Wealth is seen as a trust given by God, and it comes with the responsibility to aid those who need support.⁴⁰ The fifth Shi’ah Imām reportedly said that God does not excuse those who misappropriate *khums* because they have used the money in a way it was not meant to be used.⁴¹

In the 1940s, *khums* supported and stabilized the Shi’ah Muslims in India, who suffered financially after British decolonization and the subsequent backlash and massacre against Muslims in the newly independent nation.⁴² Other projects include educational scholarships in Mali and aid to flood victims in Pakistan.⁴³ In 2014, Ayatollah Sistani used *khums* to support the mobilization of the Iraqi citizenry against ISIS as the group seized Mosul and continued to advance across Iraq.⁴⁴

B. *What Is an Ayatollah, and Why Do Shi’ah Muslims Refer to the Rulings of Ayatollahs?*

The Shi’ah believe a series of twelve Imāms (literally meaning “leader”) represent God on earth after the Prophet.⁴⁵ The Twelfth Imām is considered alive and present but hidden until he appears as a messiah for the people.⁴⁶ Ordinarily, adherents paid the part of their *khums* related to the propagation of the religion directly to the living Imām of the time.⁴⁷ The Twelfth Imām went into occultation in 844 C.E., about 1200 years ago.⁴⁸ In his absence, this

39. ALI IBN ABI TALIB, *PEAK OF ELOQUENCE* 608–09 (Syed Muhammad Wasi & Amir Ali Aini eds., Askari Jafri trans.) (13th impression 2001).

40. Mark Aaron Goldfeder, *There Is a Place for Muslims in America: On Different Understandings of Neutrality*, 93 NOTRE DAME L. REV. ONLINE 59, 66 (2018).

41. Seyed Mohammad Reza Mohaddes, *Zakat and Khums as Two Obligatory Alms in Islam*, SPIRITUAL QUEST, Summer and Autumn 2015, at 93, 97–98 (2015).

42. RIZVI, *supra* note 31, at 32; Mike Thomson, *Hyderabad 1948: India’s Hidden Massacre*, BBC (Sept. 24, 2013), <https://www.bbc.com/news/magazine-24159594> [<https://perma.cc/3AC3-QXDJ>].

43. Jack Watling, *The Funding of Terrorism (Part IV)—A Trust Deficit Is Undermining the Investigation of Terrorist Financing Across MENA*, STRIFE BLOG (Aug. 9, 2019), <https://www.strifeblog.org/2019/08/09/the-funding-of-terrorism-part-iv-a-trust-deficit-is-undermining-the-investigation-of-terrorist-financing-across-mena/> [<https://perma.cc/ZP63-QDA4>].

44. *Id.*

45. *Key Beliefs in Islam*, BBC: BITESIZE (2021), <https://www.bbc.co.uk/bitesize/guides/zr4r97h/revision/4#:~:text=Shi'a%20Muslims%20believe%20that,an%20without%20making%20any%20errors> [<https://perma.cc/FSR5-T2CX>].

46. *Shias Await the Return of the Twelfth Imam*, THE IRISH TIMES (Feb. 10, 2013), <https://www.irishtimes.com/news/shias-await-the-return-of-the-twelfth-imam-1.1033888> [<https://perma.cc/4LH7-BMKM>].

47. RIZVI, *supra* note 31, at 23–24.

48. The *ghaybat* or occultation of the Twelfth Imām began in 844 C.E. and continues to this day. SAYYID MUHAMMAD RIZVI, *ISLAM: FAITH, PRACTICE & HISTORY* 158, 466 (2004). During

portion of *khums* must be used in ways that the Imām would support.⁴⁹ The consensus among qualified experts in Islamic jurisprudence is that scholars who are most well-versed in Islamic law and the views of the Imāms are best qualified to determine which causes the Imām would support—scholars who are known as *mujtahids*.⁵⁰ These *mujtahids* are scholars who have spent decades obtaining an advanced level of Islamic education such that they can derive the law directly from its sources and possess religious knowledge that differs significantly from the level of expertise of the average scholar in local mosques.⁵¹ *Mujtahids* are somewhat comparable to Catholic cardinals.⁵²

However, not every *mujtahid* collects *khums* or has followers among the general populace. The most qualified *mujtahids* are known as *marja'* (singular—*marja'*), and they collect *khums* from those who refer to their rulings.⁵³ A *marja'* is often referred to by the honorific title, “Ayatollah.”⁵⁴ Most Ayatollahs receive *khums* and direct the funds for use in righteous purposes.⁵⁵ They sponsor and support long-term projects such as education, orphanages, medical research, and food provisions for the poor.⁵⁶ Most Ayatollahs are located primarily in Iran and Iraq.⁵⁷

this period, *khums* continues to be collected and distributed based on the studies and opinions of Islamic scholars. MAISAMI, *supra* note 30, at 124.

49. RIZVI, *supra* note 31, at 26.

50. *Id.*

51. Linda S. Walbridge, *Introduction: Shi'ism and Authority*, in *THE MOST LEARNED OF THE SHI'A: THE INSTITUTION OF THE MARJA' TAQLID* 3, 4 (Linda S. Walbridge ed., 2001); see Anita Rai, *Can the West Dismantle the Deadliest Weapon Iran Has in Its Armory?*, 30 AM. INTEL. J. 84, 84 (2012) (discussing the high ranking authority and binding rulings of *marja'*); Brendan Koerner, *So You Want To Be an Ayatollah*, SLATE (Apr. 6, 2004, 6:11 PM), <https://slate.com/news-and-politics/2004/04/how-do-you-become-an-ayatollah.html> [https://perma.cc/J64H-EN9T] (explaining the education required to become a *marja'* and that *marji'* directly interpret Islamic text).

52. Bobby Ghosh, *Talking Politics, Diabetes, and Socks with Iran's Most Liberal Grand Ayatollah*, QUARTZ (Dec. 9, 2015), <https://qz.com/569314/talking-politics-diabetes-and-socks-with-irans-most-liberal-grand-ayatollah/> [https://perma.cc/U8ZZ-JQES].

53. Walbridge, *supra* note 51, at 4.

54. Jean Calmard, *Ayatollah*, OXFORD ISLAMIC STUD. ONLINE, <http://www.oxfordislamicstudies.com/article/opr/t236/e0088> [https://perma.cc/8EGD-TTL6].

55. See RIZVI, *supra* note 31, at 26 (explaining that “the most learned and trustworthy mujtahid[s]” are to handle and direct the *khums*).

56. Ahlulbayt: Documentaries, *The Grand Ayatollah*, YOUTUBE (Aug. 22, 2016), <https://www.youtube.com/watch?v=qbzBJIWNorc&t=1986s> [https://perma.cc/UG47-8B45].

57. Mohammad R. Kalantari & Ali Hashem, *Washington Doesn't Understand Shiite Clerics in Iran or Iraq*, FOREIGN POL'Y (Jan. 30, 2020, 12:53 PM), <https://foreignpolicy.com/2020/01/30/washington-doesnt-understand-shiite-clerics-in-iran-or-iraq/> [https://perma.cc/BVT6-N22V]. Prominent Ayatollahs include Ayatollah Ali Al-Sistani (based in Najaf, Iraq), Ayatollah Sayid Sadiq Al-Shirazi (based in Qom, Iran), and the Ayatollah at the center of the criminal prosecution that spurred this research, Ayatollah Sayyid Ali Hosseini Khamenei. *Grand Ayatollah Ali al-Sistani Fast Facts*, CNN (July 18, 2021, 8:38 AM), <https://www.cnn.com/2013/07/17/world/meast/grand-ayatollah-ali-al-sistani-fast-facts/index.html> [https://perma.cc/2YTJ-WRAJ]; *Biography Summary*, ENGLISH SHIRAZI, <http://www.english.shirazi.ir/biography->

How does one select to which Ayatollah to send their *khums*? At the age of maturity—fifteen for boys, nine for girls—Shi’ah adherents typically select one of the Ayatollahs for *taqleed* (meaning to follow or imitate). They then subscribe to that Ayatollah for answers and rulings regarding day-to-day religious activities,⁵⁸ including prayer, fasting, and of course, *khums*. Over decades, each Ayatollah produces a handbook with a comprehensive set of rulings about religious practices.⁵⁹ In short, following an Ayatollah is based on nonexperts deferring to experts.⁶⁰ The process of deciding to change adherence requires a high level of research and understanding; the decision is not made on a whim.⁶¹

Most importantly for this Note, at least half of the total *khums* an individual allocates must go to his or her *mujtahid* or Ayatollah.⁶² The Ayatollah then approves projects for the *khums* such as expenses for the poor and needy, disaster relief, or the teaching of religion.⁶³ Most *khums* does not go to the Ayatollah directly and is allocated, with permission, for charitable projects worldwide.⁶⁴ The benefits of these donations are not limited to Iran, Iraq, or even the Middle East. For example, *khums* has been used in Canada, America, Europe, the U.A.E., East Africa, India, and Pakistan to help support the needs of Shi’ah Muslims.⁶⁵

Islamic law strictly controls the usage of *khums*. For example, some of the dedicated recipients based on the revelation in the Qur’an are orphans, the needy, and stranded travelers.⁶⁶ Orphans are only eligible until they

summary/ [https://perma.cc/3RTR-AVVT]; *Iran: How Ayatollah Khamenei Became Its Most Powerful Man*, BBC (Mar. 9, 2020), https://www.bbc.com/news/world-middle-east-29115464 [https://perma.cc/A3RN-KXVZ]; Complaint ¶ 2, *United States v. Zaidi*, No. 4:20-mj-01487 (S.D. Tex. Aug. 17, 2020).

58. *See Rules of Taqleed*, THE OFFICIAL WEBSITE OF GRAND AYATOLLAH MUHAMMAD FAZEL LANKARANI, http://www.lankarani.com/eng/tal/tawdhih-al-masael/taqleed.php [https://perma.cc/XEP6-VHJ4] (detailing that at age of maturity, Muslims should do *taqleed*, i.e., following the ruling of a *mujtahid*; *mujtahids* are often styled as and referred to as Ayatollahs); IMAM KHOEI, ARTICLES OF ISLAMIC ACTS 2 (Al-Khoei Foundation 1991) (1985) (“The minimum age-limit for [adults] bound to perform religious precepts is 15 lunar years in boys and 9 lunar years in girls.”).

59. *See generally* SAYYID ALI AL-HUSAINI AS-SEESTĀNI, ISLAMIC LAWS (4th prtg. 2006) (an example of a handbook authored by an Ayatollah containing rules for various Islamic practices including prayer, fasting, and *khums*); KHOEI, *supra* note 58, at 370–88 (another handbook of rules, authored by Ayatollah Khoei).

60. MAKARIM SHIRAZI & JA’FAR SUBHANI, RELIGIOUS QUESTIONS ANSWERED: LOGIC FOR ISLAMIC RULES 293 (Syed Sibtul Hasan Hazeen ed., Syed Athar Husain S.H. Rizvi trans., 2003).

61. *See AS-SEESTĀNI, supra* note 59, at 2 (describing how to identify a *mujtahid*).

62. RIZVI, *supra* note 31, at 24, 26; J.R.I. COLE, ROOTS OF NORTH INDIAN SHI’ISM IN IRAN AND IRAQ: RELIGION AND STATE IN AWAGH, 1722–1859, at 199 (1988).

63. MAISAMI, *supra* note 30, at 125–26.

64. RIZVI, *supra* note 31, at 27.

65. MAISAMI, *supra* note 30, at 127.

66. *See supra* note 32 and accompanying text.

become adults, the needy cease to be eligible once they become financially sound, and stranded travelers are no longer eligible once they reach home.⁶⁷

Critically, there is a fiduciary duty regarding the usage of *khums* based on classic Islamic law.⁶⁸ Throughout Islamic thought, the fiduciary obligation between a principal and an agent is discussed in the Qur'an repeatedly, specifically in the context of the affairs and assets of an orphan;⁶⁹ this was later applied by jurists to voluntary contractual relationships⁷⁰ and to the relationship between public officials and the public.⁷¹ The crux of this doctrine was an understanding that fiduciary duties in Islamic law took on an altruistic dimension, motivated by a genuine sense of moral responsibility and awareness that the discharge of this duty is subject to divine supervision.⁷² *Khums* is an obligation found directly in Quranic sources, and it carries a fiduciary duty. When a follower turns over their *khums* to an agent per Islamic teachings, this same moral duty and divine supervision apply in the distribution and usage of the *khums*, with trust that the agent directs the *khums* to the proper purposes.

This background shows that (1) *khums* is a required practice in the Shi'ah school, (2) the money gathered as *khums* is allocated for specific benevolent purposes, and (3) adherents must send a portion of their *khums* to the Ayatollah they follow or to an authorized representative or project.

III. The First Amendment and the Religious Freedom Restoration Act (RFRA)

The First Amendment and RFRA may be related, but there are still vital differences between the two. The First Amendment prohibits the government from making a law that *expressly* interferes with a person's free exercise of religion.⁷³ Laws frequently do not explicitly interfere with free exercise, but facially neutral laws, when enforced, can violate this right. The Supreme Court addressed this issue in 1963 with *Sherbert v. Verner*,⁷⁴ which articulated what became known as the compelling interest test: if a plaintiff can make out a prima facie case that a generally applicable, facially neutral law substantially burdens his or her free exercise of religion, the government

67. RIZVI, *supra* note 31, at 24.

68. See Mohammad Fadel, *Fiduciary Principles in Classical Islamic Law Systems*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 525, 525 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff, eds., 2019) (discussing the "rich body of doctrines affirming basic principles of fiduciary law" present in classical Islamic law, including for charitable giving).

69. *Id.* at 528–29.

70. *Id.* at 533–34.

71. *Id.* at 538.

72. *Id.* at 543.

73. U.S. CONST. amend. I.

74. 374 U.S. 398 (1963).

cannot apply the law to that plaintiff unless the government shows (1) that it has a compelling interest in applying the law and (2) that enforcing it against the plaintiff is the least restrictive means of accomplishing this compelling interest.⁷⁵

The next notable case was *Employment Division v. Smith*,⁷⁶ which came down twenty-seven years after *Sherbert*. *Smith* did away with the compelling interest test, holding instead that incidental effects of neutral laws on free exercise did not raise First Amendment concerns.⁷⁷

In response to this holding—which limited challenges to the government’s actions on First Amendment grounds—Congress passed the Religious Freedom Restoration Act (RFRA) in 1993, intending to restore the compelling interest test first articulated in *Sherbert*.⁷⁸ Specifically, RFRA provided that the government cannot substantially burden one’s free exercise of religion even through a rule of general applicability.⁷⁹ RFRA provided a means of defense against the enforcement of any law that interferes with the free exercise of religion, even one of neutral or general applicability. An RFRA defense against government action is a statutory claim but is often brought along with other constitutional claims. While the Supreme Court, notably, held RFRA unconstitutional as applied to state law,⁸⁰ the sanctions regime is a federal action subject to RFRA’s reach.

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,⁸¹ the Supreme Court considered an RFRA claim and emphasized the high burden the government has under the compelling interest test.⁸² Interestingly, *Smith* and *Gonzales* featured similar fact patterns,⁸³ but the result in each was different—the Court in *Smith* held for the government⁸⁴ and in *Gonzales*, for the plaintiffs⁸⁵—demonstrating the shift in religious freedom protection after RFRA’s enactment.

75. *Id.* at 403, 406–07.

76. 494 U.S. 872 (1990).

77. *Id.* at 878.

78. James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412–14, 1437 (1992); Jonathon Griffin, *Religious Freedom Restoration Acts*, NAT’L CONF. OF STATE LEGISLATORS (May 2015), <https://www.ncsl.org/research/civil-and-criminal-justice/religious-freedom-restoration-acts-lb.aspx> [https://perma.cc/B4HX-9XE7].

79. 42 U.S.C. § 2000bb-1(a).

80. *City of Boerne v. Flores*, 521 U.S. 507, 511, 532–36 (1997).

81. 546 U.S. 418 (2006).

82. *Id.* at 429.

83. See *Emp. Division v. Smith*, 494 U.S. 872, 874–76 (1990) and *Gonzales*, 546 U.S. at 423 for two cases that deal with challenges to laws banning the use of hallucinogens based on individuals’ First Amendment rights.

84. *Smith*, 494 U.S. at 878.

85. *Gonzales*, 546 U.S. at 423.

Since then, the Supreme Court has expanded RFRA's reach. In 2020, the Court considered remedies for RFRA violations.⁸⁶ The Court held that a litigant could sue under RFRA and be awarded monetary damages against federal officials in their individual capacities when appropriate.⁸⁷

Given the compelling interest test and its wider reach compared to the more restrictive test of the First Amendment, this Note focuses on RFRA as a statutory defense to the criminal charges and an independent civil claim.

IV. RFRA and International Sanctions

The compelling interest test codified in RFRA requires that:

- The burden of a government action falls on a sincerely held religious belief; and
- The plaintiff prove the burden is substantial (i.e., legally significant).⁸⁸

If an adherent establishes these prongs, the burden shifts to the government to justify the substantial burden by showing:

- The substantial burden is in furtherance of a compelling interest; and
- Enforcing the law against the adherent is the least restrictive means of furthering that interest.⁸⁹

If the government can meet this high standard, the substantial burden on free exercise is considered justified and not violative of RFRA.

The sanctions against Iran limit and prohibit American Shi'ah from exercising their religious obligation to collect and send monetary *khums*, violating RFRA's protection. Subpart A compares *khums* to established case law to prove that *khums* is a sincerely held religious belief, while subpart B shows the burden imposed by the sanctions on this religious belief is substantial. Subparts C and D discuss the onus on the government to justify the substantial burden via the compelling interest test—that the measure is in furtherance of a compelling interest and is the least restrictive means to achieve that interest—and argues that the government is unable to meet that burden.

86. See *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020) (examining “appropriate relief” for RFRA violations).

87. *Id.*

88. *Smith v. Fair Emp. & Hous. Comm'n*, 913 P.2d 909, 922 (Cal. 1996).

89. *Id.* at 922–23; see also *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963) (using this same compelling interest test in a First Amendment case that preceded RFRA).

A. *Khums: A Sincerely Held Religious Belief*

Paying *khums* is a sincerely held religious belief for all Muslims, particularly for the Shi'ah Muslim community. The criminal prosecution in Houston focused on collecting and distributing *khums* on behalf of a particular Ayatollah.⁹⁰ government actions that prohibit or limit *khums* collection and distribution would form the basis of an RFRA defense or claim if *khums* is a religious belief that is sincerely held.

The Supreme Court defined the limits of free exercise before RFRA as central religious beliefs or practices.⁹¹ It emphasized that the clause protects only beliefs rooted in religion.⁹² Congress described free exercise more broadly in the RFRA statute as any exercise of religion related to a system of religious belief, regardless of whether it is compelled by or central to a system of religious belief.⁹³ Congress further cemented this broad definition of religious practice in RFRA's companion statute. There, Congress mandated that free exercise be construed broadly to protect religious exercise to the maximum extent permitted.⁹⁴ Therefore, Congress's enactment of RFRA provides an expansive definition of free exercise that the Supreme Court had previously limited. In considering issues under RFRA's compelling interest test, qualifying religious practices would have to be sincere to warrant protection.⁹⁵ However, because the definition under RFRA does not require centrality or compulsion under religion, the Supreme Court's central inquiry in RFRA claims is not scrutinizing particular religious practices but rather the substantial burden of government action.⁹⁶ Nonetheless, *khums* collection and distribution fits neatly into the definition of a protected religious practice.

Moreover, the Supreme Court has taken up RFRA and free exercise claims multiple times. The Court identified specific examples of free exercise

90. DOJ Press Release, *supra* note 20.

91. *See Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) (defining the limits of free exercise as central religious beliefs or practices).

92. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 713 (1981).

93. 42 U.S.C. § 2000bb-2(4) (directing to 42 U.S.C. § 2000cc-5(7)(A) for purposes of defining free exercise of religion, which in turn defines religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief").

94. 42 U.S.C. § 2000cc-3(g) ("This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.").

95. *Kaemmerling v. Lappin*, 553 F.3d 669, 677–78 (2008); *see Burwell v. Hobby Lobby*, 573 U.S. 682, 717, 720, 723, 725–26 (2014) (mentioning sincerity and implying its relevance in the context of a RFRA claim, although the sincerity issue was conceded).

96. *See Hobby Lobby*, 573 U.S. at 725–26 (discussing the "narrow function" of the court in evaluating religious beliefs when assessing the substantial burden imposed on those beliefs); *see also Kaemmerling*, 553 F.3d at 678 ("Because the burdened practice need not be compelled by the adherent's religion to merit statutory protection, we focus not on the centrality of the particular activity to the adherent's religion but rather on whether the adherent's sincere religious exercise is substantially burdened.").

of religion instructive to the *khums* inquiry. One prominent example is the belief held by many Christians that human life begins at conception and that some contraception methods risk the death of the human embryo (i.e., cause an abortion).⁹⁷ The Court held that forcing employers who held this belief sincerely to provide contraception options would violate RFRA.⁹⁸ Other examples include the right of an employee not to be denied unemployment benefits after being fired for refusing to work on the Sabbath;⁹⁹ the right of Amish children not to comply with a law that forced them to remain in school until the age of 16, contrary to Amish teachings;¹⁰⁰ and the right of a Muslim inmate to keep a beard despite a prison regulation that disallowed it.¹⁰¹ Notably, not all of these beliefs are central to or compelled by religion, yet they qualify as sincerely held religious beliefs under RFRA.

When comparing these examples to *khums*, two aspects of *khums* are essential for the analysis:

- Muslim holy text requires *khums*: the Prophet and Imāms implemented the practice in the early days of Islam. They emphasized it as both a legal obligation as well as a spiritual one;¹⁰² and
- Shi'ah Muslims today are still required to send their *khums* to one of the most qualified jurists in matters of Islamic law or an approved project.¹⁰³

Notably, payment of *khums* differs from the earlier examples in ways that give it a more robust basis for an RFRA claim: it was and continues to be compelled by religion and it is central to faith as one of the pillars of Islam.¹⁰⁴ The Qur'an orders payment of *khums*, and the Prophet of Islam widely instituted it in his lifetime; the practice continues today. Additionally, in some cases, courts, in deciding if a practice is a sincerely held religious belief, consider whether a tradition prescribes a moral or ethical system that may create duties requiring an adherent to move beyond self-interest for the

97. See *Hobby Lobby*, 573 U.S. at 691, 720 (2014) (discussing RFRA as it applies to contraception and the sincerely held religious belief that life begins at conception).

98. *Id.* at 736.

99. *Sherbert v. Verner*, 374 U.S. 398, 399–403 (1963).

100. *Wisconsin v. Yoder*, 406 U.S. 205, 210–11, 234–36 (1972).

101. *Holt v. Hobbs*, 574 U.S. 352, 355–56 (2015). *Holt* involved a companion statute to RFRA titled the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 that prevented the government from substantially burdening the free exercise of institutionalized persons. *Id.*

102. See *supra* subpart II(A) (discussing the practice of *khums* in Islamic text and history).

103. See *supra* subpart II(B) (detailing how *khums* is paid in the modern-day).

104. See generally Sachedina, *supra* note 35, at 276–77 (framing the discussion of *khums* as a pillar of faith that is compelled by and central to Islam).

sake of a greater good.¹⁰⁵ *Khums* quite clearly meets that threshold, as its spiritual value is a part of Islam's project to create an economically sound society by distributing wealth in charitable endeavors. While these are not requirements of religious practice under the statute, they certainly bolster the argument that *khums* qualifies as a protected practice.

Some may argue that *khums* is not uniformly practiced across the Muslim world, namely that Sunni Muslims do not pay or give *khums* in the same way Shi'ah Muslims do or that Shi'ah jurists disagree on the nuances of *khums* payment and distribution, and therefore that *khums* cannot be a protected religious practice. However, the Supreme Court has clearly articulated that a belief need not be orthodox to be protected.¹⁰⁶ It is not a court's role to declare what is or should be orthodox regarding religious beliefs,¹⁰⁷ nor is it to determine whether an adherent has correctly perceived their religion's principles.¹⁰⁸ A court's role in analyzing a RFRA claim is to afford legal protection to sincere acts of faith.¹⁰⁹

Khums is a religious practice eligible for protection, comparable to others addressed by the Supreme Court. Like the belief against providing contraception, giving *khums* is a sincere belief. Like the requirement of keeping a beard, *khums* is a practice compelled by religion. Like Amish schooling practice, forbidding *khums* is directly contrary to the Shi'ah school's jurisprudence and spirituality teachings. Collection and payment of *khums* is thus a sincerely held religious belief falling under RFRA's protection.

B. *Substantial Burden on the Practice of Khums*

Having established that *khums* is a protected religious practice, the next question is whether the sanctions place a substantial burden on the exercise of this religious practice. RFRA's substantial burden analysis is divided into two conceptual parts: (1) substantial religious costs if the claimant complies with the law; and (2) substantial secular costs if the claimant violates the law.¹¹⁰ The test asks whether a government action forces adherents to choose

105. See, e.g., *United States v. Meyers*, 906 F. Supp. 1494, 1502 (D. Wyo. 1995) (using the acting-beyond-self-interest consideration as a factor in determining whether a belief is "religious" under RFRA).

106. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1738 (2018).

107. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (stating that no official can decide "what shall be orthodox").

108. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981).

109. Cf. *Masterpiece Cakeshop*, 138 S. Ct. at 1738 (stating that in a Free Exercise Clause case, the court's job is to "afford legal protection to any sincere act of faith").

110. Frederick Mark Gedicks, "*Substantial*" Burdens: *How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 96 (2017).

between engaging in conduct that violates their religious beliefs or facing severe consequences for choosing to adhere to their religious beliefs.

The Supreme Court held that lower courts could not rule on the substantiality of religious costs but rather must evaluate whether claimants are sincere in alleging spiritual costs.¹¹¹ The Court has stated that when a believer must act against or at odds with a religious belief to comply with the law, the First Amendment ought to protect that believer.¹¹² Notably, forcing adherents to *refrain* from religiously motivated conduct is also a substantial burden when it inhibits or constrains behavior that manifests a tenet of a person's religious beliefs.¹¹³

Coercing individuals to act contrary to their religious beliefs by threatening civil or criminal sanctions is a secular cost that constitutes a substantial burden.¹¹⁴ The Supreme Court requires that the burden be substantial but has clarified that the compulsion on an adherent to modify his or her behavior can be indirect and still constitute a substantial burden.¹¹⁵ However, a mere inconvenience is not a violation.¹¹⁶

Sanctions that stop adherents from collecting and giving funds on behalf of scholars overseas effectively render the exercise of the requirement of *khums* impractical. Shi'ah adherents must send a part of their *khums* to their Ayatollah, and the sanctions have barred any money, regardless of its purpose, from reaching the required Ayatollah or being collected in his name. In this case, the law essentially forces Shi'ah to refrain from fulfilling their obligation in a way that is at odds with this fundamental tenet.¹¹⁷ A law that

111. *Id.* at 97.

112. *See Wisconsin v. Yoder*, 406 U.S. 205, 218, 234–36 (1972) (discussing the conflict between the “firmly grounded” belief among the Amish to cut off education in the eighth grade and compulsory education laws, and holding that these laws violated the First Amendment as applied to the Amish community).

113. *See Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) (noting that a substantial burden is found when there is “substantial pressure on an adherent to modify his behavior and to violate his beliefs” (internal quotations and emphasis omitted)); *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (“[A] substantial burden on the free exercise of religion . . . forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.”); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (“[A] substantial burden can result from pressure that tends to force adherents to forego religious precepts”); *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (“A substantial burden exists when government . . . puts substantial pressure on an adherent to modify his behavior and to violate his beliefs” (internal quotations removed)).

114. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008).

115. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981).

116. *Midrash Sephardi*, 366 F.3d at 1227.

117. *Cf. Yoder*, 406 U.S. at 218 (holding that a compulsory-attendance law required the Amish to act “at odds with fundamental tenets of their religious beliefs”).

puts a strict moratorium on collecting and sending the *khums* is a chokehold that inhibits and constrains the fulfillment of the obligation.¹¹⁸

Suggesting that followers send their *khums* elsewhere is based on an inaccurate understanding of the requirement to follow an Ayatollah discussed earlier.¹¹⁹ Adherents cannot change their commitment to an Ayatollah on a whim. Therefore, sanctions make the free exercise of *khums* for devotees of the Shi'ah school who follow Ayatollah Khamenei virtually impossible. This restriction is not a mere inconvenience for followers;¹²⁰ rather, it is a substantial burden because it hamstring the required collection and sending of *khums*. The loss of this freedom for even a minimal period constitutes a burden and irreparable injury.¹²¹

Some may argue that the effect is indirect because the object of the sanctions is not *khums* and the regulations are facially neutral, and thus the sanctions are acceptable. However, in practice, the indirect impact is on American Shi'ah attempting to engage in *khums* as part of the religious requirement of their faith. Per established jurisprudence, even an indirect impact of government action constitutes a violation of free exercise protections when religious obligations are impeded.¹²² As stated previously, a court's role is not to evaluate whether these costs are substantial on their face, but rather to evaluate in the context of the sincerity of the burdens claimed.¹²³ Whether or not a court agrees with the theology or belief is irrelevant. The logical and sincere showing that these sanctions will hamper the ability of Shi'ah to fulfill their obligation is evident.

Even more critical, the secular costs involved with violating the sanctions include criminal prosecution.¹²⁴ For context, the charge relating to the sanctions carries a sentence of up to twenty years in federal prison.¹²⁵ On a base level, this charge meets the Supreme Court's standards for coercion by threatening adherents with criminal sanctions should they act per their

118. See *Mack*, 80 F.3d at 1179 (holding that when a burden "inhibits or constrains" religious conduct that is a central tenet of a person's religious beliefs, it is a substantial burden).

119. See *supra* notes 58–61 and accompanying text.

120. See *Midrash Sephardi*, 366 F.3d at 1227 (holding that a substantial burden must be more than an inconvenience).

121. See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (affirming that *Elrod's* irreparable harm analysis applies in the religious liberty context); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) (ruling that establishing a likely RFRA violation satisfies the irreparable harm analysis by analogy).

122. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981).

123. *Gedicks*, *supra* note 110, at 97.

124. DOJ Press Release, *supra* note 20.

125. *Id.*

religious beliefs.¹²⁶ The current prosecution is evidence enough that the danger of these charges is weighty and can impact the ability of Shi'ah to comply with their religious beliefs. The inflammatory language used by media outlets merely furthers the fear of criminal prosecution in the community.¹²⁷ The concern is so widespread that it prompted community mobilization as Shi'ah grappled with the reality that this religious practice may land them in jail.¹²⁸ A popular hashtag also cropped up after the arrests: #KhumsIsNotACrime.¹²⁹ All this is to say that the threat of twenty years in prison, a lengthy federal trial, defense costs, and reputational damage is not a minor “inconvenience”;¹³⁰ it is unquestionably a substantial burden.

These two angles reveal that sanctions substantially burden Shi'ah attempting to fulfill the obligation of *khums* by forcing them to refrain from practicing a central religious tenant. On the one hand, the spiritual value of *khums* and the ability to fulfill the obligation are stripped away. On the other hand, violation of the law leads to serious criminal charges.

C. Furtherance of a Compelling Interest

The enactment of RFRA reinstated the compelling interest test, which allowed for the substantial burdening of religious exercise when it was in furtherance of a compelling government interest *and* was the least restrictive means of achieving that interest.¹³¹ Notably, this inquiry requires strict scrutiny to ensure that the restriction is narrowly tailored to achieve the compelling interest.¹³² Generalized assertions that a measure will further a

126. See *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069–70 (9th Cir. 2008) (holding that a “substantial burden” under RFRA exists when an individual is “coerced to act contrary to their religious beliefs by the threat of . . . criminal sanctions”).

127. For an example of inflammatory language, see Austin Bodetti, *A Plot to Acquire Hard Currency for Iran's Supreme Leader*, IRAN WATCH (Sept. 30, 2020), <https://www.iranwatch.org/our-publications/international-enforcement-actions/plot-acquire-hard-currency-irans-supreme-leader> [<https://perma.cc/N2ZN-BA5R>].

128. See, e.g., *Statement in Solidarity with Muzzamil Zaidi and Asim Naqvi*, AM. MUSLIM BAR ASS'N (Aug. 21, 2020), <https://www.ambalegal.org/post/statement-in-solidarity-with-muzzamil-zaidi-and-asim-naqvi> [<https://perma.cc/96QC-MLKU>] (statement written and circulated by an organization of Shi'ah attorneys in the United States—the American Muslim Bar Association—in response to the arrests); Free Muzzamil (@freemuzzamil), INSTAGRAM, <https://www.instagram.com/freemuzzamil/> [<https://perma.cc/PL8R-S7FM>] (an Instagram account created to raise awareness of the arrest and prosecution).

129. Free Muzzamil (@freemuzzamil), INSTAGRAM, <https://www.instagram.com/freemuzzamil/> [<https://perma.cc/PL8R-S7FM>].

130. See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (“[A] ‘substantial burden’ must place more than an inconvenience on religious exercise. . . .”).

131. See *supra* notes 73–87 and accompanying text (laying out the history of RFRA’s enactment and its relevant standards).

132. See *Open Soc’y Just. Initiative v. Trump*, 510 F. Supp. 3d 198, 211 (S.D.N.Y. 2021) (outlining the strict scrutiny framework of the compelling interest test in a First Amendment case).

compelling interest simply are not enough to meet the test.¹³³ Therefore, the next step in the analysis is to consider whether a compelling government interest can justify the substantial burden on free exercise.

The government describes potential interests in the executive order that promulgated the sanctions, including countering terrorism, slowing the advance of Iran's ballistic missile program, and countering what the Administration claimed was Iran's "irresponsible and provocative actions."¹³⁴ Presumably, these posited reasons form the compelling interest upon which the government would attempt to exempt itself from RFRA's reach.

RFRA was designed by Congress to provide broader protection for religious liberty.¹³⁵ In interpreting RFRA, the Supreme Court has said that Congress intended RFRA to apply at all levels of government and to cover official actions regardless of subject matter.¹³⁶ Although *Flores* held that RFRA was not valid in its application to state governments,¹³⁷ Congress's intent to protect religious freedom to the farthest extent possible should be kept in mind.

Federal courts across the country have identified aspects of the compelling interest test that inform the scope and nature of the interest. First, the government must demonstrate that the compelling interest is satisfied by applying the challenged law to the *particular* claimant whose religious exercise is substantially burdened.¹³⁸ When a broadly formulated interest is at issue, the Supreme Court has conducted a focused inquiry to see if that broad interest is substantively furthered by applying strict rules to individual claimants.¹³⁹ RFRA's companion statute also applies the compelling interest test. In evaluating it, the Court has directed lower courts to consider the harm to the interest in allowing exemptions for particular religious claimants and the marginal interest in enforcing the challenged government action in the specific situation at hand.¹⁴⁰

Therefore, analysis of the compelling interest must be applied to a particular religious claimant and the religious exercise he or she is claiming has been burdened. That said, there is an extensive debate about the

133. *Merced v. Kasson*, 577 F.3d 578, 592 (5th Cir. 2009) ("The government cannot rely upon general statements of its interests, but must tailor them to the specific issue at hand. . . .").

134. Exec. Order No. 13,876, 84 Fed. Reg. 30,573 (June 24, 2019).

135. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014).

136. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). Note, however, that *Flores* also held that "RFRA exceeds Congress' power" as it applies to states. *Id.* at 511, 532–36.

137. *Id.* at 511, 532–36.

138. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006); *Hobby Lobby*, 573 U.S. at 726; *Singh v. McHugh*, 109 F. Supp. 3d 72, 93 (D.D.C. 2015).

139. *Holt v. Hobbs*, 574 U.S. 352, 362–63 (2015).

140. *Id.* at 363.

effectiveness of international sanctions. While research suggests that sanctions on Iran are ineffective to the interests laid out in the Executive Order,¹⁴¹ the inquiry here is whether burdening the exercise of paying *khums* for a *particular* adherent furthers the interests. The following sections will begin by critically discussing whether the interest is compelling and then turn to whether the interest (with the assumption that it be considered compelling) is furthered by applying a substantial burden to the free exercise of a particular claimant. The analysis will also examine whether the sanctions are narrowly tailored as required by the strict scrutiny test.

1. Is There a Compelling Interest Being Furthered?—Khums is allocated for charitable and educational purposes.¹⁴² The standard for using *khums* is high, and there is little to no precedent of *khums* being used to support a state of any kind in the modern day. The compelling interest test is a high bar. A government interest must be so compelling that it allows the government to effectively violate a right guaranteed to a citizen by the First Amendment—a right reinforced by RFRA. Shaky ground and unsupported interests are not going to cut it. To that end, the interests articulated in the executive order are not likely furthered by the sanctions because the efficacy is not backed with fact, but rather political spins used by politicians to cement relationships with allies and align themselves globally. While prevention of terrorism is an interest, the sanctions on *khums* collection do not further that interest.

Three factors show that the compelling interest test is not met, and, therefore, the government cannot justify the substantial burden on religious exercise, namely that:

- *Khums* has a designated use and is not a general fund the state has the liberty to draw from;
- There is a separation between Ayatollah Khamenei's role as a state leader and his role as a religious leader, which is instructive in analyzing this problem; and
- The U.S. government has recognized the politicization of *khums* in other countries as a violation of liberty meant only to target the opposition. Other evidence also suggests that these sanctions do not represent furtherance of a compelling interest but rather a political move.

141. See generally Ali Fatollah-Nejad, *Why Sanctions Against Iran Are Counterproductive: Conflict Resolution and State-Society Relations*, 69 INT'L J. 48 (2014) (arguing that sanctions are ineffective and prolong conflict instead of moving towards resolution); KENNETH KATZMAN, CONG. RSCH. SERV., RS20871, IRAN SANCTIONS 62 (2019) (arguing that the sanctions have had an economic impact on Iran's economy).

142. MAISAMI, *supra* note 30, at 125–26.

a. Assigned Uses of Khums.—*Khums* has a designated use.¹⁴³ It is not a general treasury fund that can be redirected for any purpose of the state. It is an *amanah*, or form of trust, given to an Ayatollah's approved projects on behalf of an adherent so that the *khums* can serve its Islamic purpose of bettering the community through charitable work and promoting education. This context is a far cry from the allegation that funds are redirected to build a nuclear weapon or help buy guns for terrorists. To imply that the funds are thrown into the state treasury and used at the state's leisure is a fundamental misunderstanding of *khums*. In the case at hand, no funds went directly to the office of the Ayatollah but were simply collected on his behalf to be spent in charitable endeavors his office approved.

Khums is not a tax that was created recently. The modern nation-state of Iran came to be in 1979¹⁴⁴—*khums* has over 1,400 years of jurisprudence about the restrictions, the usage, and the details of payment and distribution.¹⁴⁵ These principles are not likely to be overturned in a handful of decades.

Notably, Shi'ah thought emphasizes the proper allocation of the *khums* funds. A story about the first Imām of the Shi'ah school, Ali ibn Abi Talib, is a prime example. Two men once came to him to secure themselves positions of power in the government in exchange for their support of the Imām.¹⁴⁶ When they arrived, before they even sat down, the Imām extinguished his candle and lit another.¹⁴⁷ The men asked him why he had done so.¹⁴⁸ The Imām told them the candle he had extinguished was purchased from the money of the public treasury, composed partially of *khums*.¹⁴⁹ Because the men had come to him for their personal business, he lit another candle he purchased from his own money because he would not misappropriate the funds that belonged to another purpose.¹⁵⁰

Applying sanctions to individuals paying *khums* will not further any interest the U.S. government has to stop alleged state-sponsored terrorism

143. See generally Part II (discussing the Islamic laws on the usage and allocation of *khums*).

144. Suzanne Maloney & Keian Razipour, *The Iranian Revolution—A Timeline of Events*, BROOKINGS INST. (Jan. 24, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/01/24/the-iranian-revolution-a-timeline-of-events/> [<https://perma.cc/Z9KE-59F9>].

145. See Norman Calder, *Khums in Imami Shi'i Jurisprudence, from the Tenth to the Sixteenth Century A.D.*, 45 BULL. SCH. ORIENTAL & AFR. STUD., UNIV. OF LONDON 39, 39 (1982) (describing *khums* jurisprudence written from 1013 to approximately 1604).

146. *Imam Ali (AS) and the Candle*, SIBTAYN INT'L FOUND. (July 5, 2021), https://www.sibtayn.com/en/index.php?option=com_content&view=article&id=7029:imam-ali-as-and-the-candle&catid=262&Itemid=334 [<https://perma.cc/BUJ2-AMKY>].

147. *Id.*

148. *Id.*

149. *Id.*; see TALIB, *supra* note 39, at 609 (discussing public treasury funds partially made up of *khums*).

150. SIBTAYN INT'L FOUND., *supra* note 146.

because the fiduciary duty is not only a legal duty, but a moral one taught in the Shi'ah school. Because *khums* has a designated purpose and a fiduciary duty to secure that purpose, the alleged interests of the government would not be furthered by sanctions that indirectly prohibit the collection of *khums*.

b. Separation of Roles.—The separation of roles for Ayatollah Khamenei is also instructive in analyzing *khums*' usage on his behalf. The role of Ayatollah Khamenei as a religious leader is distinct from his role as the Supreme Leader. Shi'ah around the world refer to Ayatollah Khamenei in questions of their Islamic duties but not as their government leader. Similarly, Iranian citizens follow Ayatollah Khamenei as a leader of the government. However, they may adhere in religious matters to other scholars, such as Ayatollah Ali Al-Sistani or Ayatollah Sayid Sadiq Al-Shirazi. This dichotomy shows that conflating the interest of countering terrorism from the state of Iran to the religious practice of *khums* is erroneous. The Iranian Constitution implies this distinction as well; it lays out the state duties for the Supreme Leader and makes no mention of religious obligations.¹⁵¹ Instead, it omits reference to the Supreme Leader's spiritual role, implying that they are distinctly separate.

Khums cannot be used for state purposes, let alone state terrorism. Blocking individuals from paying *khums* does not further this interest because the *khums* has no relation to the state's activities or funds.

c. Politically Targeting Opposition.—There is also strong evidence that these sanctions are more political posturing than legitimate, interest-based moves. A U.S. State Department report made this very point in discussing human rights violations around the world. In the report, the State Department references Bahrain and efforts taken by that nation's government to supposedly counter the financing of terrorism.¹⁵² One such action was the targeting of a Shi'ah cleric collecting *khums* who was subsequently arrested and prosecuted by the Bahraini government for allegedly funding militants indirectly.¹⁵³ In its report, the State Department calls this a potential politicization of the fight against terrorism financing and suggests such prosecutions conflate legitimate crackdowns on militants with actions that are politically motivated and aimed simply to harm mainstream opposition

151. IRAN (ISLAMIC REPUBLIC OF)'S CONSTITUTION OF 1979 WITH AMENDMENTS THROUGH 1989, art. 110 (available at https://www.constituteproject.org/constitution/Iran_1989.pdf?lang=en [<https://perma.cc/XZW6-3WYF>]).

152. U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY. REPORTS ON TERRORISM 2017, at 126–27 (2018), https://www.state.gov/wp-content/uploads/2019/04/crt_2017.pdf [<https://perma.cc/QXW9-YK3B>].

153. *Id.*

groups.¹⁵⁴ Since 2016, authorities have questioned over seventy religious leaders and at least nine served prison sentences for violations of Bahrain's anti-terrorism laws.¹⁵⁵ The actions of the Bahraini government are strikingly similar to the issue at hand in the United States; the prosecution in Houston targeted a Shi'ah cleric who was arrested for collection of *khums* and accused of indirectly funding militant activities in Iran.

It is no secret that Iran and the United States have had a tense relationship for decades.¹⁵⁶ The relationship had just begun to thaw and move towards cooperation under the Obama Administration¹⁵⁷ before President Trump pulled the U.S. out of the nuclear deal and began instituting a slew of new sanctions,¹⁵⁸ which have resulted in domestic prosecution of Shi'ah adherents who have ties to Iran.¹⁵⁹ It seems unlikely that any *compelling* interest is being furthered, but rather that this is another mode to punish and intimidate the political opposition. While this Note is not a comment on politics, it is still crucial to say that no one's rights should depend on the White House's political inclinations during a particular era. That is not how the founders intended it, nor is it how RFRA has been applied to protect the free exercise of religion as promised in the First Amendment.

The marginal interest¹⁶⁰ of enforcing the sanctions is slim. The sanctions effectively choke off *khums*—even though this has no bearing on stopping funds from being used for terrorist purposes—allowing a violation of civil liberties on a misconceived and ill-informed notion of how the money will *perhaps* be spent, which is unjust.

On the other hand, allowing an exemption under the law causes little to no harm. As discussed later in subpart IV(D), there are many ways to utilize existing state structures to create an exemption that allows for the religious practice while giving the government assurance that its interests are not hindered.

Therefore, the state's alleged interests to justify the substantial burden are not furthered by these sanctions.

2. Is the Interest Furthered by the Application of the Sanctions to a Particular Adherent?—Even if the sanctions furthered any such interest,

154. *Id.*

155. Bill Law, *Requiem for BICI*, GLOB. POL'Y J. (Mar. 8, 2017), <https://www.globalpolicyjournal.com/blog/08/03/2017/requiem-bici> [<https://perma.cc/5FSN-V9U6>].

156. *US–Iran Relations: A Brief History*, BBC (Jan. 6, 2020), <https://www.bbc.com/news/world-middle-east-24316661> [<https://perma.cc/G9PW-53XY>].

157. *See id.* (stating that Obama and Iran's president had a top-level conversation, the first of its kind in over thirty years).

158. *Id.*

159. DOJ Press Release *supra* note 20.

160. *Holt v. Hobbs*, 574 U.S. 352, 363 (2015).

RFRA jurisprudence clarifies that applying the substantial burden to the particular claimant must further the interest.¹⁶¹ The question is whether preventing an individual American Shi'ah from sending *khums* to Iran furthers government interests by preventing terrorism, controlling ballistic missiles, and curbing perceived irresponsible acts of Iran.

In analyzing this question, the Supreme Court has looked beyond broadly formulated interests and scrutinized the harm of granting specific exemptions to particular adherents.¹⁶² The government needs to show with specificity how the interest would be adversely affected by granting an exemption no matter how compelling the interest is.¹⁶³ In *Gonzales*, the Court applied these principles. Here, a religious sect received communion with a sacramental tea, brewed from plants that included a hallucinogen regulated under the Controlled Substances Act by the Federal government.¹⁶⁴ The Court found that the government merely invoking the general characteristics of Schedule I substances and its interest in uniform enforcement of the Act would not “carry the day.”¹⁶⁵ Even Congressional determination about the harms of Schedule I substances did not relieve the government of the obligation to meet its burden.¹⁶⁶ The Court also noted existing exceptions to the ban for religious use, which the Court found to show that exemptions were possible.¹⁶⁷ The interest was not necessarily being furthered by applying this law to the particular claimants in violation of their civil liberties.¹⁶⁸

The situation at hand is remarkably similar. The government will have a burden to prove that any interest is furthered by applying the sanctions to particular claimants. A general invocation of prevention of terrorism will not be enough, and a higher showing will be required. Even in the criminal complaint that brought this issue to light, the government did not directly allege that the *khums* collected went to state-sponsored terrorism.¹⁶⁹ The complaint made bare assertions that Iran had been named a state sponsor of terrorism by the U.S. and that a Department of State report discussed Iran and allegations of terrorism without direct linkage to the practice of *khums*.¹⁷⁰ These assertions are similar to the government's general assertions of a compelling interest in *Gonzales*. There, the Court pushed back and held the

161. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006).

162. *Id.* at 431.

163. *Wisconsin v. Yoder*, 406 U.S. 205, 206, 213, 221 (1972).

164. *Gonzales*, 546 U.S. at 423.

165. *Id.* at 432.

166. *Id.*

167. *Id.* at 433.

168. *Id.*

169. *See generally* Complaint, *United States v. Zaidi*, No. 4:20–mj–01487 (S.D. Tex. Aug. 17, 2020) (failing to allege that the *khums* went to state-sponsored terrorism).

170. *Id.* ¶¶ 9, 27, 30.

government to a higher standard. In considering this claim, courts should do the same.

Further, the U.S. Department of Treasury houses the Office of Foreign Assets Control (OFAC), which has issued general licenses authorizing nongovernmental organizations (NGOs) to engage in services in Iran in support of certain non-profit activities.¹⁷¹ The license allows NGOs to transfer up to \$500,000 per year in support of such activities.¹⁷² While the license does not let the money go to the government of Iran or other sanctioned entities,¹⁷³ the funds involved in *khums* do not go to those entities in the first place; instead, the funds are pre-allocated for charitable projects and distribution. Like the exemptions in *Gonzales* that cut at a posited government interest, the existing charitable exemption with OFAC's license cuts at the proposed government interest as applied to a particular claimant.

3. Are the Sanctions Narrowly Tailored to Meet the Strict Scrutiny Test?—The RFRA inquiry includes the strict scrutiny test, requiring that the measure be narrowly tailored to achieve the asserted interest. The sanctions in question do not meet that test because (1) they limit the rights of American citizens more than necessary, and (2) they are potentially underinclusive in their reach and therefore not in furtherance of the interest in a consistent manner as required by the test.

While national security is undoubtedly essential, broadly prohibiting American citizens from engaging in protected activities is not narrowly tailored to meet the strict scrutiny test. In 2021, a federal district court considered sanctions, free speech, and foreign policy. In that case, the plaintiffs brought suit to challenge the lawfulness of an executive order that sanctioned certain persons associated with the International Criminal Court, saying the order and the resulting regulations violated their First Amendment rights.¹⁷⁴ The court applied the strict scrutiny test and analyzed whether the restriction was narrowly tailored to achieve the government's interest.¹⁷⁵ The court recognized that protecting the government's foreign policy is an important interest and the government is therefore entitled to some deference regarding sensitive national security issues.¹⁷⁶

171. *E.g.*, OFF. OF FOREIGN ASSETS CONTROL, DEP'T OF THE TREASURY, GENERAL LICENSE E: AUTHORIZING CERTAIN SERVICES IN SUPPORT OF NONGOVERNMENTAL ORGANIZATIONS' ACTIVITIES IN IRAN (2013).

172. *Id.*

173. *Id.*

174. *Open Soc'y Just. Initiative v. Trump*, 510 F. Supp. 3d 198, 202 (S.D.N.Y. Jan. 4, 2021).

175. *Id.* at 210–13.

176. *Id.* at 211 (citing *Haig v. Agee*, 453 U.S. 280, 307 (1981)); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 33–34 (2010).

However, the court ruled in favor of the plaintiffs, quoting the Supreme Court in saying that national security concerns cannot be a catchall that is used to dispose of inconvenient claims.¹⁷⁷ A proffered national security justification was inadequate to overcome the interests in protecting First Amendment rights.¹⁷⁸ The government's interest did not meet the strict scrutiny test because the prohibition on First Amendment rights was far too broad.¹⁷⁹ OFAC also had not offered details on how it intended to implement a licensing process to create exceptions to the sanctions at issue in the case.¹⁸⁰

This situation bears many similarities to the issue at hand with *khums* and the sanctions against Iran. First Amendment rights are at issue, specifically free exercise, and the government action is wide sweeping without articulated exceptions. The court in the above case considered and weighed the national security interest and, in circumstances very close to the matter at hand, ruled that the measure was not narrowly tailored and inadequate to overcome the public's interest in First Amendment rights, valid as the national security interest may be.¹⁸¹

It can be argued that the sanctions are indeed narrowly tailored. The sanctions order names specific individuals, government entities, and other organizations. It only prohibits transactions with those groups. Applying these facts to the narrow-tailoring requirement, it could be asserted that given the national security interest, the tailoring is as narrow as it can be. Anything more narrow or exclusive would hinder the interest itself.

While that argument is valid on its face, the reality is that the sanctions order is broader than needed. The order sweeps in every American citizen and prohibits them from engaging in any transaction of any kind with these groups. As demonstrated by this analysis, the order pulls in religious giving and charitable donations, a restriction that does not further counterterrorism interests. Instead, any potential order should be carved out to exclude potential violations of religious liberties to be appropriately tailored.

The government's interest also does not hold because there is potential underinclusion of measures to achieve the interest. In *Holt v. Hobbs*,¹⁸² the Supreme Court considered the claim of a Muslim inmate under RFRA's companion statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹⁸³ The plaintiff claimed the Department of Corrections had violated his religious rights because it denied his request to grow a one-half-

177. *Open Soc'y Just. Initiative*, 510 F. Supp. 3d at 217 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017)).

178. *Id.*

179. *Id.* at 212–13.

180. *Id.* at 212.

181. *Id.* at 213, 217.

182. 574 U.S. 352 (2015).

183. *Id.* at 355–56.

inch beard per his faith.¹⁸⁴ The Court found in favor of the plaintiff, partially because the Department had not explained why its grooming policy was substantially underinclusive.¹⁸⁵ Other inmates with dermatological conditions were allowed to grow one-quarter-inch beards and all inmates were permitted to grow hair on the head to more than one-half inch.¹⁸⁶ The Court noted that the Department of Corrections failed to show why there was a meaningful increase in security risk with the extra one-quarter inch requested and noted that it has repeatedly rejected the argument that no exceptions should be allowed at all.¹⁸⁷

Applying *Holt* to this situation, there is an argument that the United States does not uniformly enforce the interest of preventing state-sponsored terrorism. The policy is underinclusive without a meaningful justification and is therefore not a compelling interest furthered by the sanctions. For example, the United States maintains diplomatic relations with Saudi Arabia, which has been shown to sponsor terrorism.¹⁸⁸ Without a meaningful justification for sanctioning Iran and not sanctioning Saudi Arabia, the analogy from *Holt* dictates that the sanctions do not legitimately further this interest because of underinclusiveness.

The bottom line of this analysis is that the interests offered by the government are not furthered by the sanctions as applied to a particular claimant and do not meet the strict scrutiny test.

D. Sanctions as the Least Restrictive Means to Achieving a Compelling Interest

Even if the government shows furtherance of a compelling interest enough to justify a substantial burden on free exercise, RFRA then requires a showing that the government action is the least restrictive means to achieve the furtherance of that compelling interest.¹⁸⁹ Congress wanted the courts to strike a sensible balance between religious liberty and competing governmental interests.¹⁹⁰ The least-restrictive-means standard is demanding and requires that the government show that applying a substantial burden *to the person in question* is the least restrictive means to further the compelling

184. *Id.*

185. *Id.* at 367.

186. *Id.*

187. *Id.* at 368.

188. DANIEL L. BYMAN, CONFRONTING PASSIVE SPONSORS OF TERRORISM 1, 9 (2005).

189. 42 U.S.C. § 2000bb-1(b)(2).

190. 42 U.S.C. § 2000bb(a)(5).

government interest.¹⁹¹ It requires the government to show that viable alternatives would be unfeasible.¹⁹²

In a recent Supreme Court case, *Burwell v. Hobby Lobby*,¹⁹³ the Court discussed regulations that would force companies to provide contraception benefits to all women.¹⁹⁴ The Court said the government had not demonstrated that an alternative to the regulation—namely that the government would shoulder the cost of contraceptives for all women who needed them—was not a viable alternative and ruled in favor of the plaintiffs.¹⁹⁵ Through this, the Court demonstrated that the government had the burden to show that other possible options would not satisfy its goal.¹⁹⁶ Going further, the Court said RFRA allows for creating new programs to achieve a less restrictive means.¹⁹⁷ In some circumstances, RFRA may require the government to allocate and spend additional funds to accommodate citizens' religious beliefs, a principle also endorsed by Congress.¹⁹⁸

A total prohibition on any money being collected as *khums* for a class of adherents is incredibly restrictive. It is a chokehold on the ability of Muslim devotees to fulfill their obligation. However, other options exist. Luckily, the first of them does not even require a new program. OFAC is in charge of enforcing economic and trade sanctions based on U.S. foreign policy.¹⁹⁹ The office tracks and monitors sanctions activity,²⁰⁰ and it seems plausible that an already existing agency could create a subgroup for religious donations to monitor the money. The U.S. Department of Treasury also recognizes the ability of OFAC to make exceptions when dealing with international sanctions.²⁰¹

191. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014).

192. *Hobby Lobby*, 573 U.S. at 728.

193. 573 U.S. 682 (2014).

194. *Id.* at 688–90.

195. *Id.* at 728, 736.

196. *Id.* at 728.

197. *Id.* at 729–30.

198. *Id.* at 730.

199. *Office of Foreign Assets Control—Sanctions Programs and Information*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information> [<https://perma.cc/3Y9J-7RWC>].

200. *Id.*

201. *Frequently Asked Questions: Basic Information on OFAC and Sanctions*, U.S. DEP'T OF TREASURY (June 16, 2006), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/3> [<https://perma.cc/EY3R-54EL>] (“Prohibited transactions are trade or financial transactions and other dealings in which U.S. persons may not engage *unless authorized by OFAC* or expressly exempted by statute. Because each program is based on different foreign policy and national security goals, prohibitions may vary between programs.” (emphasis added)).

In the name of sensible balance, this solution does not demand that Shi'ah adherents have free rein to defy the government, but rather that they are sensibly accommodated by a program within OFAC that can monitor religious donations abroad. As discussed earlier, OFAC is fully capable of doing this.²⁰² It already grants exemptions to NGOs operating in Iran.²⁰³ Like the NGOs, adherents donate these funds for charitable use, meaning a potential alternative to these strict sanctions could simply be extending the reach of the already existing exemption.

Another alternative is to require those religious donations to be verified by receipts or donated through an official office. The cost of enforcing the sanctions and criminally prosecuting Shi'ah who violate them to fulfill their religious obligation would surely be expected to exceed the cost of setting up an office within OFAC to address this concern. Additionally, creating an exception for all international religious donations will benefit multiple faith groups, whether it be Muslim adherents paying *khums*, Christians allocating funds as tithes,²⁰⁴ or assistance from Jewish charities sent to Israel.²⁰⁵

The criminal prosecution of the men in Houston targeted these individuals based on their collection of *khums* on behalf of Ayatollah Khamenei and not on the allegation that the *khums* money actually made its way into the hands of a sanctioned individual. Therefore, another alternative would be for the government to allow *khums* collection on behalf of the Ayatollah as long as money is spent domestically on approved charitable projects. This alternative also presents a less restrictive means than the current sanctions.

Beyond these accommodations, current events show other, less restrictive means to achieve the same interests. Both President Biden and President Obama have demonstrated that a nuclear deal—which previously eliminated the sanctions—is a means of achieving the government's interests.²⁰⁶ Such a deal would lift this restriction and burden on religious free

202. See *supra* notes 171–173 and accompanying text.

203. *Id.*; *Frequently Asked Questions: Iran Sanctions*, U.S. DEP'T OF TREASURY (Oct. 26, 2020), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/828> [https://perma.cc/4SEZ-NSUK].

204. *Tithes and Offerings*, *supra* note 19.

205. Larry Luxner, *Despite Crises at Home, US Jewish Charities Keep Sending Money to Israel*, JEWISH TELEGRAPHIC AGENCY (May 18, 2020, 12:14 PM), <https://www.jta.org/2020/05/18/united-states/despite-crises-at-home-us-jewish-charities-keep-sending-money-to-israel> [https://perma.cc/XF5C-KM7J].

206. Patrick Wintour, *Iran Says It Will Comply with Nuclear Deal if Biden Lifts All Sanctions*, GUARDIAN (Dec. 3, 2020, 10:40 AM), <https://www.theguardian.com/world/2020/dec/03/iran-comply-nuclear-deal-biden-lifts-all-sanctions> [https://perma.cc/8WNJ-6V25]; JTA & Ron Kampeas, *Biden Says He Will Reenter Iran Deal Without New Conditions, Then Negotiate New Agreement*, HAARETZ (Dec. 2, 2020), <https://www.haaretz.com/us-news/biden-says-will-reenter-iran-deal-without-new-conditions-then-negotiate-new-deal-1.9344292> [https://perma.cc/8FVW-5FEW]; F. Brinley Bruton, *What Is the Iran Nuclear Deal?*, NBC NEWS (May 10, 2018, 4:04 AM

exercise while not compromising the compelling interests of national security.

In short, there is room for many solutions that allow for a sensible balance between religious duty and government interest—indeed, many more than can be discussed here. Sanctions that strike at the heart of American religious liberty are not the least restrictive avenue the government could adopt. These varied, viable alternatives show that such broad-sweeping action by the state is not the least restrictive means.

Under the narrow-tailoring requirement of the strict scrutiny test, there is an understanding that such broad actions will not hold up when it comes to matters of religious liberty. Strict scrutiny dictates that context matters; if a religious accommodation is to be denied, individual circumstances must be considered.²⁰⁷ In the current case, the government has not offered exceptions or even attempted a facially apparent effort at making these sanctions less restrictive. The government maintains its broad reach and uses the sanctions to prosecute American citizens for the exercise of religious liberty. Where it should be using a scalpel, the government goes in with a hatchet. As it currently stands, the sanctions regime is not the least restrictive means to achieving a compelling interest.

This analysis demonstrates that these sanctions, as applied, violate the statutory protections of RFRA. *Khums* is a sincerely held religious belief that is substantially burdened by the threat of civil and criminal penalties flowing from enforcement. The government's compelling interest is not furthered by the substantial burden applied to a particular claimant. Should one assume that it is, the means employed are not the least restrictive. Thus, RFRA provides a statutory defense and an independent claim.

V. Countervailing Arguments

While the analysis of the RFRA jurisprudence shows that sanctions burden the practice of *khums*, there are potential hurdles to such a claim holding in federal court. National security and foreign policy concerns are sensitive, and since the inception of the nation, the courts have considered these questions delicately. The major hurdles that an RFRA claim could face relate to emergency powers, the political question doctrine, and the fungibility of funds. Although discussion of each of these is extensive, this Section briefly addresses the counterarguments to a potential RFRA claim or defense.

CDT), <https://www.nbcnews.com/storyline/smart-facts/what-iran-nuclear-deal-n868346> [https://perma.cc/UE8G-XFHU].

207. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–32 (2006).

A. *Emergency Powers and the Political Question Doctrine*

Because national security is involved, emergency powers and the political question doctrine are relevant to this discussion. The Constitution does not expressly grant emergency powers, but presidents have nonetheless claimed this power over time.²⁰⁸ In the past, presidents used emergency powers to impose sanctions on Iran,²⁰⁹ but notably, they are not a blank check for presidents to use at their whim. While useful in times of crisis, emergency powers are subject to review by the courts, and in the past, courts have struck down measures based on such powers. Take, for example, Abraham Lincoln's suspension of habeas corpus during the Civil War.²¹⁰ Justice Taney struck down the suspension, mentioning that the writ of habeas corpus is incredibly important to the basic liberty of citizens.²¹¹ Decades later, the Supreme Court similarly struck down President Truman's unilateral seizure of private property to better supply the troops during the Korean War.²¹² These two instances show that while emergency power can be a counterargument to an RFRA claim against the sanctions, it is not a full bar. Because this situation involves constitutional civil liberties—as did President Lincoln's suspension of the writ of habeas corpus—it should be subject to review by the courts, despite the emergency powers.

The second issue is the political question doctrine. The doctrine essentially dictates that some topics, like foreign relations, are the sole responsibility of the Legislative and Executive Branches, and federal courts cannot preside over them.²¹³ Some may argue that the question of the sanctions falls under this umbrella, and therefore, the courts have no jurisdiction to hear this claim. On its face, there is merit to the argument. The political question doctrine arises from constitutionally mandated separation of powers.²¹⁴ The doctrine prohibits the judiciary from overreaching into policy choices and value determinations that the Constitution has assigned to Congress or the Executive.²¹⁵ It could be argued that counterterrorism and foreign affairs fall squarely into the domain of the Legislative and Executive Branches. The issue implicates foreign relations with Iran, international economic policy, and diplomatic posturing on the world stage. Because of

208. Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, ATL (Jan./Feb. 2019), <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/> [<https://perma.cc/GML7-84QZ>].

209. *Id.*

210. *Ex parte Merryman*, 17 F. Cas. 144, 147–48 (C.C.D. Md. 1861).

211. *Id.* at 148, 152–53.

212. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583, 589–90 (1952).

213. *E.g.*, *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

214. *Al-Tamimi v. Adelson*, 916 F.3d 1, 8 (D.C. Cir. 2019).

215. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

the political question doctrine, a court may decline to hear the case and dismiss it outright.

However, this claim is not one purely of politics; instead, it involves a fundamental question of liberty guaranteed by the First Amendment. Courts are not permitted to avoid their responsibility to enforce statutory rights because the issues have political implications.²¹⁶ While it is likely true that ruling on the value determinations and policy choices would be impermissible, under these circumstances the court would be ruling on the statutory claim and evaluating the harm to individual American citizens.

Additionally, courts have considered claims of sanctions and religious freedom for decades without being barred by the political question doctrine.²¹⁷ A potential RFRA claim that involves religious liberty would not be barred because there is a tangential relationship to a political issue.

These counterarguments do not constitute a bar to an RFRA claim. The courts can consider the claim despite the political question doctrine, and the emergency powers do not bypass oversight by the judicial system to stop an RFRA claim on this issue in its tracks.

B. Fungibility

There is a fear that money exchanged with a sanctioned entity is considered fungible and can be used for unlawful purposes.²¹⁸ In this case, *khums* is money sent to or collected on behalf of a sanctioned entity, even though *khums* is designated for charitable and peaceful purposes. Two critical cases from the federal courts discuss the issue of fungibility. Nevertheless, it is important to note that (1) these cases should not bar an RFRA claim, and (2) the Supreme Court has yet to weigh in, and there is room for oversight.

The first notable case—*Holy Land Foundation for Relief & Development v. Ashcroft*²¹⁹—featured a large Muslim charitable foundation in the United States designated as a terrorist organization by OFAC and whose assets were subsequently blocked.²²⁰ In that case, money was going directly to the sanctioned entity.²²¹ The other critical case is *Humanitarian*

216. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)).

217. *See, e.g., Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003) (raising questions about sanctions and the First Amendment at the district and circuit court level without being barred by the political question doctrine).

218. *Holy Land*, 219 F. Supp. 2d at 77; *see also Humanitarian L. Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000), *partly aff'd en banc*, 393 F.3d 903 (9th Cir. 2004) (stating money is fungible and even contributions for peaceful purposes can be harmful because it frees up resources that could be used for unlawful purposes).

219. 219 F. Supp. 2d 57 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003).

220. *Holy Land*, 219 F. Supp. 2d at 62.

221. *Id.* at 69, 71.

Law Project v. Reno,²²² where the court ruled that money is fungible and can be used to promote an organization's unlawful activities, regardless of donor intent.²²³ In that case, there was no regulation of a First Amendment right, but rather the independent act of giving material support to an alleged terrorist organization.²²⁴

The *khums* situation differs from these cases in two ways. First, there is no evidence to suggest the money would go directly to a sanctioned entity like in *Holy Land*; the money goes to approved charitable projects that are *not* sanctioned entities. Second, unlike in *Humanitarian Law Project*, the burdened conduct is religious and therefore covered by the free exercise clause of the First Amendment.

Beyond these cases, it is also essential to recognize that the authority of the International Emergency Economic Powers Act (IEEPA), the statute that authorizes implementation of sanctions, is limited by a humanitarian aid exception that restricts the President's power to prohibit donations such as food, clothing, and medicine.²²⁵ The humanitarian exception applies to entities blocked by sanctions.²²⁶ While Congress excluded monetary contributions from the exception, the reason was that Congress believed the monetary exclusion would increase the chance that the donations would be used for the originally intended charitable purpose.²²⁷ When it comes to fungibility for *khums*, the same policy could be applied. Like articles of clothing, food, or medicine, *khums* has a designated purpose and even comes with strict Islamic laws about its use. The vital fiduciary duty also attached to *khums* supports the policy that underlies the humanitarian exception. A court considering the fungibility of *khums* can easily see that it should not allow the substantial burden on free exercise on these grounds. Further, as discussed, there is a multitude of options for OFAC to more closely monitor where the funds are allocated to alleviate the concern that the money is directed to fund terrorist organizations.

While fungibility is no doubt a concern, because of the unique nature of this situation, fungibility should not bar an RFRA claim.

Conclusion

Discrimination against the Muslim community in the United States is not breaking news. After 9/11, hundreds of thousands of Muslims were

222. 205 F.3d 1130, 1136 (9th Cir. 2000), *partly aff'd en banc*, 393 F.3d 903 (9th Cir. 2004).

223. *Id.* at 1134, 1136.

224. *Id.* at 1136–37.

225. International Emergency Economic Powers Act, 50 U.S.C. § 1702(b)(2).

226. *Holy Land*, 219 F. Supp. 2d at 68.

227. *Veterans Peace Convoy, Inc. v. Schultz*, 722 F. Supp. 1425, 1431 (S.D. Tex. 1988) (quoting testimony from Senate hearing).

directly and indirectly targeted by the events happening abroad.²²⁸ Almost twenty years later, the saga continues. Criminal prosecution of Shi'ah for paying *khums* is a phenomenon that should concern us all. RFRA provides a means to protect these believers from a gross infringement of their religious rights. A chokehold of these religious rights is not a sensible balance for the furtherance of any government interest and is a blatant attack on American Shi'ah.

The issue of *khums* is a microcosm for the broader trend of attack on the religious freedom of the American Shi'ah community, specifically via sanctions. In December 2020, the Trump Administration leveled sanctions against Al-Mustafa International University,²²⁹ the premier university in Iran for international students hoping to engage in religious studies. Many American citizens are current or former students of Al-Mustafa, and the sanctions forced them to flee Iran, abandoning their religious education for fear of prosecution.²³⁰ In January 2021, the Administration leveled more sanctions against a religious, charitable organization, Astan Quds Razavi (AQR), which manages the Razavi Holy Shrine in Mashhad, Iran.²³¹ The shrine draws 20 million pilgrims per year,²³² with many coming from the United States.²³³ The sanctions against AQR have similarly chilled American Shi'ah from undertaking the pilgrimage for fear that they too will be

228. See Kelsey Dallas, *How 9/11 Changed the Government's Relationship to American Muslims*, DESERET NEWS (Sept. 10, 2019, 10:00 PM), <https://www.deseret.com/indepth/2019/9/10/20857801/9-11-american-muslims-government-surveillance> [<https://perma.cc/L6KZ-PY79>] (describing how Muslim Americans have been systematically surveilled, targeted, and profiled because the government “coded terrorist to mean Muslim”).

229. Arshad Mohammed, *U.S. to Blacklist Iranian Official, University—U.S. Official*, REUTERS (Dec. 8, 2020, 2:52 PM), <https://www.reuters.com/article/usa-iran-sanctions-idUKKBN28I23P> [<https://perma.cc/U2TE-QXDV>].

230. See Press Release, U.S. Dep't of the Treasury, Treasury Sanctions Iran's envoy in Yemen and University Facilitating Recruitment for Qods Force (Dec. 8, 2020), <https://home.treasury.gov/news/press-releases/sm1205> [<https://perma.cc/79MK-FY2D>] (stating that there are many American students at Al-Mustafa and that sanctioning the university for “materially assist[ing], sponsor[ing] or provid[ing] financial, material, or technological support for, or goods or services to or in support of, the IRGC-QF” prevents transactions between U.S. persons and the university).

231. Press Release, U.S. Dep't of the Treasury, Treasury Targets Billion Dollar Foundations Controlled by Iran's Supreme Leader (Jan. 13, 2021), <https://home.treasury.gov/news/press-releases/sm1234> [<https://perma.cc/7BEX-ZQVD>]; *What Is Astan Quds Razavi?*, IMAM REZA SHRINE, <https://globe.razavi.ir/en/69512/what-astan-quds-razavi> [<https://perma.cc/ZTS2-YG9K>].

232. Aya Batrawy, *Iranian Clerics Keep Shrines Open, Even as Virus Spreads*, ASSOCIATED PRESS (Feb. 25, 2020), <https://apnews.com/article/7b8f420db1a339116d66bc55c9085d7c> [<https://perma.cc/7Y EZ-82NZ>].

233. E.g., Marjohn Sheikhi, *Razavi Pilgrimage, an Opportunity to Get Close to Allah*, MEHR NEWS (July 17, 2016, 7:54 PM), <https://en.mehrnews.com/news/118151/Razavi-Pilgrimage-an-opportunity-to-get-close-to-Allah> [<https://perma.cc/59P7-Z3BB>] (detailing a visit to the shrine by Americans).

prosecuted.²³⁴ In response to an influx of inquiries from the community, OFAC released guidance for pilgrimage in light of the sanctions on AQR.²³⁵ In the guidelines, OFAC recognized that religious pilgrimage to the Razavi Holy Shrine was exempt from the sanctions order.²³⁶ OFAC's latest guidance demonstrates an understanding that these sanctions can impede religious practice and that an exemption is appropriate. While *khums* seems to be the tip of the iceberg, there is hope that OFAC and the government can and will take steps to remedy this violation of religious freedom.

It is high time this effort to persecute American Shi'ah be curbed and replaced with a sensible policy that can satisfy the government's desire to limit financial assistance to Iran while not contravening the fundamental rights of Muslims in this country. Over two centuries ago, a coalition of men came together to establish a framework to provide liberty and natural rights to the American people, among them, the freedom of religion.²³⁷ While many things may have changed since then, that promise continues to ring true. It is time we act like it.

234. See Aziz Huq, *How Anti-Terrorism Laws Equip Law Enforcement to Crack Down on Iranian Americans*, WASH. POST (Jan. 7, 2020), <https://www.washingtonpost.com/outlook/2020/01/07/how-anti-terror-laws-equip-law-enforcement-crack-down-iranian-americans/> [https://perma.cc/J9XS-7LF2] (describing how sanctions and other measures have negatively impacted Iranian-Americans).

235. *Frequently Asked Questions: Iran Sanctions*, U.S. DEP'T OF THE TREASURY (Sept. 30, 2021), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/932> [https://perma.cc/JZ2D-HV3Q].

236. *Id.*

237. Nicholas Rathod, *The Founding Fathers' Religious Wisdom*, CTR. FOR AM. PROGRESS (Jan. 8, 2008, 9:00 AM), <https://www.americanprogress.org/issues/religion/news/2008/01/08/3794/the-founding-fathers-religious-wisdom/#:~:text=The%20First%20Amendment%20says%2C%20%E2%80%9CCongress,founding%20fathers'%20purposes%20were%20clear> [https://perma.cc/UT55-CD82].