

# RLUIPA AT FOUR: EVALUATING THE SUCCESS AND CONSTITUTIONALITY OF RLUIPA’S PRISONER PROVISIONS

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*“Remember those in prison as if you were their fellow prisoners, and those who are mistreated as if you yourselves were suffering.”*  
*Hebrews 13:3*

## I. INTRODUCTION

More often than not, when Congress or the courts have remembered prisoners, it has been to further circumscribe their right to access the courts. For example, the Prisoner Litigation Reform Act of 1995 placed a variety of procedural and administrative barriers in place before prisoners could access the federal courts,<sup>1</sup> and Congress’s 1996 habeas reform,<sup>2</sup> limited the range of substantive claims prisoners could bring in federal courts. The Supreme Court has also been stingy in extending rights to prisoners, holding in a pair of cases that limitations on prisoners’ constitutional rights in civil cases—including the right to free exercise of religion—are subject only to the rational basis test, the lowest level of constitutional scrutiny.<sup>3</sup> Lower courts also gutted the protections afforded to prisoners’ religious exercise under the Religious Freedom Restoration Act (RFRA) in the four years it applied to the states (before being held unconstitutional), ruling against prisoners in over 90% of the cases.<sup>4</sup>

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)<sup>5</sup> represents a remarkable departure from that this trend. In

1. Prison Litigation Reform Act of 1995 (“PLRA”), Pub. L. No. 104-134, Title I, § 101(a), Title VIII, §§ 801-810, 110 Stat. 1321-66 to-77 (1996). The PLRA became law in 1996 and sought to reduce frivolous prisoner lawsuits by “institute[ing] certain restrictive filing requirements on prisoners, such as payment of filing fees out of an institutional account, the need to pass a court clerk’s review, and a “three strikes and you’re out” provision on frequent frivolous filers.” Lee Boothby & Nicholas P. Miller, *Prisoner Claims for Religious Freedom and State RFRA’s*, 32 U.C. DAVIS L. REV. 573, 596–97 (1999).

2. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

3. See *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987); *Turner v. Safley*, 482 U.S. 78 (1987).

4. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 607–17 (1998) (collecting federal and state court prisoner RFRA cases and demonstrating that prisoners lost ninety out of ninety-nine RFRA claims for which there were reported decisions). See also *infra* note 29.

5. 42 U.S.C. § 2000cc-1 *et seq.*

RLUIPA, Congress created—without a dissenting vote<sup>6</sup>—a specific cause of action to protect and accommodate the religious exercise rights of prisoners. Specifically, it provides that state action that “substantially burdens” a prisoner’s “religious exercise” is unlawful unless prison officials can demonstrate that burdening religious exercise is the “least restrictive means” of achieving a “compelling government interest.” Moreover, recognizing that lower courts had undermined the protections of RFRA by construing it to protect only a narrow range of religious exercise, Congress took special care in drafting RLUIPA to enact a definition of religious exercise that corresponds to the inclusive approach the Supreme Court has taken in defining protected religious exercise under the Free Exercise Clause.<sup>7</sup>

Though a circuit split on the Act’s constitutionality has provoked the Supreme Court to address RLUIPA’s constitutionality this term,<sup>8</sup> it is significant that the Act has already survived longer than its predecessor, RFRA, and recently enjoyed its fourth anniversary. Accordingly, with four years of data to examine, it is appropriate to take stock of how the Act operates, whether it has had more success than RFRA in protecting prisoners’ religious exercise, and whether the arguments of its critics that it is unconstitutional have any merit.

Part I of this article provides a historical overview of the protection of the religious exercise rights of prisoners in the United States and a description of RLUIPA’s legislative history. Part II examines RLUIPA’s provisions in detail and lays out what a prisoner must prove to invoke RLUIPA’s jurisdictional provision, what remedies a prisoner is entitled to under RLUIPA, what a prisoner must prove to establish a substantial burden on religious exercise, and what type of religious exercise is protected under RLUIPA. Particular attention is paid to how RLUIPA’s definition of “religious exercise” seeks to rectify judicial interpretations of RFRA that led to prisoners losing the overwhelming majority of claims brought under RFRA. This section also examines what prison officials must demonstrate to establish a compelling government interest and the least restrictive means of advancing that interest and how a faithful application of RLUIPA’s

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6. RLUIPA’s legislative history reveals that the Act passed both the House and the Senate by unanimous consent. See S.2869, Bill Summary and Status for 106th Congress, (2000), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:SN02869:@@L&summ2=m&>.

7. U.S.C. § 2000cc-5(7).

8. *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003) cert. granted Oct. 12, 2004 (No. 03-9877).

strict scrutiny test is likely to affect the most commonly asserted reasons for prison officials' decisions to burden religious exercise.

Part III of this article then turns to an empirical examination of how RLUIPA prisoner claims have fared in the first four years of the Act's existence. This section concludes that the record thus far indicates that the Act has enabled prisoners to enjoy moderately more success in pursuing religious liberty claims than prisoners did under RFRA. The empirical record also reveals that the flood of claims feared by RLUIPA's critics has not materialized. Finally, in light of the Supreme Court's decision to resolve the circuit split concerning RLUIPA's constitutionality, Part IV examines and rejects the arguments of RLUIPA's critics that the Act is an unconstitutional exercise of congressional power.

## II. RLUIPA'S LEGISLATIVE HISTORY AND THE HISTORICAL BACKGROUND OF PROTECTION OF RELIGIOUS EXERCISE OF PRISONERS

The desire to engage in religious exercise among prisoners in the United States is widespread. One recent study found that “[r]eligious practice in prison can be very extensive with about 50% of inmates attending religious services an average of six times per month.”<sup>9</sup> Historically, however, prisoners in the United States enjoyed very little protection of their religious exercise rights, as a prisoner was simply viewed, in the words of one court, as a “slave of the State.”<sup>10</sup> “Even when the earliest American prisons allowed worship, [t]here was little tolerance granted to prisoners of religions that did not fit the [Protestant] mold.”<sup>11</sup> Although federal courts began to increasingly open their doors in the New Deal era and afterwards to constitutional claims against state officials, they continued to display little interest in providing a forum for prisoners to bring free exercise (or other constitutional) challenges to the policies of prison administrators. As

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9. Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. OFFENDER REHAB. 11, 28 (2002). See also Thomas P. O'Connor et al., Home for Good in Oregon: A Community, Faith and State Re-entry Partnership to Increase Restorative Justice, *Corrections Today*, Oct. 2004, at 73, available at [http://www.oregon.gov/DOC/TRANS/docs/pdf/home\\_4\\_good.pdf](http://www.oregon.gov/DOC/TRANS/docs/pdf/home_4_good.pdf) (census of Oregon state prisoners showed that 52 percent of them are involved in religious activities).

10. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871). See also Note, *In the Belly of the Whale: Religious Practice in Prison*, 115 HARV. L. REV. 1891, 1892–93 (2002).

11. *In the Belly of the Whale*, *supra* note 10, at 1893 (quoting MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS 255 (2d ed. 1993)).

one circuit court put it in the 1950's, "it is not the function of the Courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."<sup>12</sup>

In the 1960s and 70s, however, the pendulum began to swing the other way, as federal courts became increasingly receptive to prisoner religious exercise claims. This opening volley in religious freedom prisoner litigation was led largely by Black Muslims and other minority religions, and, for the first time, resulted in declarations from lower federal courts that "insofar as possible within the limits of prison discipline[,] . . . prisoners" should be allowed to practice their religion in prison."<sup>13</sup> Then, in *Cruz v. Beto*,<sup>14</sup> the Supreme Court added its weight to this trend, holding that a prison had a duty to provide Muslim prisoners "reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts." In the 15 years following *Cruz v. Beto*, prisoners enjoyed the highest level of protection for their First Amendment religious exercise rights in the nation's history. Though there was a conflict among the circuits over exactly what level of scrutiny burdens on the religious exercise of prisoners received, the lower courts generally extended some form of either strict or heightened scrutiny.<sup>15</sup>

The renaissance of prisoner free exercise claims ended with the Supreme Court's 1987 decision in *O'Lone v. Estate of Shabazz*.<sup>16</sup>

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12. *Adams v. Ellis*, 197 F.2d 483, 485 (5th Cir. 1952). See also *Kelly v. Dowd*, 140 F.2d 81, 83 (7th Cir. 1944) (holding that because prisoner was incarcerated in a state prison, the reasonableness of the refusal to provide religious materials was a subject for the state courts).

13. *Sostre v. McGinnis*, 334 F.2d 906 (2d Cir. 1964). See also *Pierce v. LaVallee*, 293 F.2d 233 (2d Cir. 1961), *on remand*, 212 F.Supp. 865 (N.D.N.Y. 1962), *aff'd per curiam*, 319 F.2d 844 (2d Cir. 1963); *Bryant v. Wilkins*, 258 N.Y.S.2d 455, 45 Misc.2d 923 (N.Y. Sup.1965).

14. 405 U.S. 319, 322 (1972).

15. Compare *Barnett v. Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969) (burden on prisoner religious exercise justified only if state shows a compelling state interest and no alternatives that would not infringe upon First Amendment rights) with *O'Lone v. Shabazz*, 482 U.S. 342 (1987) (burden on prisoner religious exercise justified if burden serves important penological goals and prison demonstrates no reasonable method by which religious rights can be accommodated) with *Wali v. Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985) (where prisoner religious exercise was not presumptively dangerous, prison officials were required to show "that a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved," but greater deference was given to prison officials where evidence was presented that the desired religious exercise was dangerous).

16. *O'Lone*, 482 U.S. at 353.

Citing its earlier precedent of *Turner v. Safley*,<sup>17</sup> which narrowly construed the due process rights of prisoners, the Court rejected both strict and heightened scrutiny for prisoner free exercise claims. Instead, the Court held that the standard was one of mere “reasonableness” that turned on whether the prison’s action in burdening religious exercise was “reasonably related to legitimate penological interests.”<sup>18</sup> Reasonableness, the Court held, would be determined by a balance of the four factors laid out in *Turner*: (1) whether there is a “‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it,” and whether that connection is not “so remote as to render the policy arbitrary or irrational”;<sup>19</sup> (2) whether inmates retain alternative means of exercising the circumscribed right; (3) the impact of accommodating the right on other inmates, guards, and prison resources generally; and (4) whether there are alternatives to the regulation restricting religious liberty that “fully accommodate[ ] the prisoner’s rights at *de minimis* cost to valid penological interests”; the “existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns.”<sup>20</sup>

In many ways, *O’Lone* turned out to be the Court’s first step in a wider retreat from religious liberty protection that would extend beyond the free exercise rights of prisoners. In 1990, the Supreme Court issued its landmark decision in *Employment Division v. Smith*.<sup>21</sup> Whereas the Court’s prior decisions outside of the prison context had seemed to subject *all* laws that substantially burdened religious exercise to strict scrutiny,<sup>22</sup> the *Smith* Court announced a new rule

17. 482 U.S. 78 (1987).

18. *O’Lone*, 482 U.S. at 349 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

19. Significantly, where the government objective is discriminatory, and thus arbitrary, the *Turner/O’Lone* inquiry is at an end and the plaintiff is entitled to relief. See *Shaw v. Murphy*, 532 U.S. 223, 229–30 (2001) (“If the connection between the regulation and the asserted goal is ‘arbitrary or irrational,’ then the regulation fails, irrespective of whether the other [*Turner*] factors tilt in [the state’s] favor”); *Crawford v. Indiana Dep’t of Corr.*, 115 F.3d 481, 486 (7th Cir. 1997), *abrogated on other grounds by* *Erickson v. Board of Governors*, 207 F.3d 495 (7th Cir. 2000) (“[T]here is no general right of prison officials to discriminate against prisoners on grounds of . . . religion.”). See also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“[T]he protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs.”).

20. *Turner*, 482 U.S. at 89–91.

21. 494 U.S. 872 (1990).

22. See *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Review Bd. of Indep. Employment Sec. Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136 (1987); *Hernandez v.*



applying mere rational basis scrutiny in the usual case where religious exercise was burdened as a result of a neutral and generally applicable law.<sup>23</sup> The Court held that strict scrutiny was reserved only for laws that were not neutral or generally applicable, involved a system of individualized exemptions or assessments, or involved the newly minted constitutional phrase “hybrid rights.”<sup>24</sup>

In November 1993, Congress responded to the Court’s narrowing of Free Exercise protections in *Smith* and *O’Lone* by enacting the Religious Freedom Restoration Act (“RFRA”), which established a single strict scrutiny standard for evaluating the validity of *any* law or regulation that substantially burdened religious exercise.<sup>25</sup> The stated purpose of the Act was to “restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*,” and to apply it to all government acts that “substantially burdened” religious exercise, even if the burden results from a neutral law of general applicability.<sup>26</sup> The statute drew no distinction between claims by prisoners and claims by others; in fact, its legislative history made clear that courts were to apply strict scrutiny to prisoners’ claims.<sup>27</sup> An amendment seeking to exempt prisons from the bill was rejected,<sup>28</sup> and the legislative history reveals that Congress found that religion played a vital role in the rehabilitative process for some inmates.<sup>29</sup>

RFRA, however, did not live up to its potential in improving the free exercise rights of prisoners (or others). First, the lower courts applied RFRA’s standards in such a way that over 90% of all prisoner RFRA claims failed.<sup>30</sup> Second, RFRA was struck down, as applied to the states, less than four years after its passage. In *City of Boerne v. Flores*,<sup>31</sup> the Supreme Court found that although Congress may enforce constitutional rights under Section 5 of the Fourteenth

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Comm’r, 490 U.S. 680 (1989).

23. *Smith*, 494 U.S. at 879 (“[T]he right of free exercise [of religion] does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability.’”).

24. *Id.* at 882.

25. 42 U.S.C. § 2000bb(a)(5).

26. 42 U.S.C. §§ 2000bb(b), 2000bb-1.

27. See S. REP. NO. 103-111, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1899 (expressing intent to restore “protection afforded to prisoners to observe their religions[,] which was weakened by the decision in *O’Lone v. Estate of Shabazz*”).

28. See 139 CONG. REC. S14,468 (daily ed. October 27, 1993); S. REP. NO. 103-111, *reprinted in* 1993 U.S.C.C.A.N. 1892.

29. See, e.g., 139 CONG. REC. S14,465 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch) (“[E]xposure to religion is the best hope we have for rehabilitation of a prisoner. Most prisoners, like it or not, will eventually be returning to our communities.”)

30. Lupu, *supra* note 4.

31. 521 U.S. 507, 532 (1997).

Amendment, RFRA exceeded Congress's Enforcement Clause authority by defining rights instead of enforcing them. *Id.* at 532. Second, the lower courts applied RFRA's standards in such a way that over 90% of all prisoner RFRA claims failed.<sup>32</sup>

After RFRA was struck down, Congress held a series of hearings to gather evidence of state abuses of religious liberty around the nation and began drafting a new piece of religious freedom legislation designed to withstand the constitutional deficiencies identified by the Court in *Boerne*.<sup>33</sup> After numerous hearings and two draft bills, the new law was eventually narrowed to address "those areas of law where the congressional record of religious discrimination and discretionary burden was the strongest."<sup>34</sup> Laws governing institutionalized persons (*i.e.*, prisoners and persons in mental institutions) and land use laws.<sup>35</sup> Three factors led Congress and its diverse array of supporters (including the ACLU, People for the American Way, Prison Fellowship, the Aleph Institute, and the Family Research Council) to conclude that prisoners ought to be beneficiaries of this new legislation.

First, during the hearings there was a growing concern among inmates, clergy, prisoners' rights advocates, and members of Congress that prisoners were being unfairly prevented from practicing their faiths.<sup>36</sup> Indeed, there were reports throughout the country of frivolous and arbitrary deprivations of religious rights in prisons, such as denials of prayer shawls and matzo to Jewish inmates and small amounts of sacramental wine to Catholic inmates.<sup>37</sup> Moreover, Reverend Donald W. Brooks, a director of prison ministry in

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32. Lupu, *supra* note 4.

33. *See infra* note 131.

34. Roman P. Storzer and Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 944 (2001) [hereinafter "Storzer & Picarello"].

35. A discussion of the land use portions of RLUIPA is beyond the scope of this article. For a thorough discussion of those portions of RLUIPA, see *id.*

36. *See, e.g.*, Statements of Sens. Hatch and Kennedy, Statements on Introduced Bills and Joint Resolutions (July 13, 2000); *The Need for Federal Protection of Religious Freedom and Boerne v. Flores, II: Oversight Hearing Before the House Comm. on the Judiciary, Subcomm. on the Constitution*, 105th Cong. 37 – 45 (March 26, 1998) (statement of Isaac M. Jarsoslawicz, Director of Legal Affairs, Aleph Institute); *The Need for Federal Protection of Religious Freedom After Boerne v. Flores: Hearing Before the House Comm. on the Judiciary, Subcomm. on the Constitution*, 105th Congress 54 – 66 (February 26, 1998) (statement of Rev. Donald W. Brooks, Director of Prison Ministry, Roman Catholic Archdiocese of Oklahoma City and the Roman Catholic Diocese of Tulsa).

37. *See, e.g.*, Testimony of Jarsoslawicz; Testimony of Brooks, *supra* note 36.

Oklahoma, testified that even vitally important religious items such as the Bible, the Koran and the Talmud were being confiscated from inmates under harsh prison regulations.<sup>38</sup> Such testimony sparked congressional concern that religious faith in American prisons was being unduly constrained, even where it did not undermine the “discipline, order, or safety” of such institutions, and thus that prisoners should receive the protection of the proposed religious freedom act.<sup>39</sup>

Second, in light of strong evidence that spiritual development and religious practice promote rehabilitation and reduce recidivism in inmates,<sup>40</sup> and that most states were unlikely to implement their own laws promoting the free exercise rights of prisoners, the need for federal protection seemed clear.<sup>41</sup> Indeed, one prisoner rights advocate testified to the House Judiciary Committee that protecting the free exercise rights of prisoners was simply “good policy.”<sup>42</sup> Religious observance by prisoners, he asserted, cut recidivism rates by two-thirds, so protecting such observances had benefits beyond the protection of a fundamental right. Even opponents of the Act were forced to concede the rehabilitative effects of prisoner religious exercise.<sup>43</sup>

Lastly, RLUIPA was seen as a way to remove state-imposed barriers from those seeking to minister to prisoners. Clergymen and prisoner rights advocates repeatedly voiced their concerns that in the absence of such a federal law they would lack the leverage to compel

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38. Testimony of Brooks, *supra* note 36.

39. Statement of Sens. Hatch and Kennedy, *supra* note 36.

40. See Mark C. Young et al., *Long-Term Recidivism Among Federal Inmates Trained as Volunteer Prison Ministers*, 22 J. OFFENDER REHAB. 97, 104, 110–11 (1995) (recidivism rate lower for prisoners participating in intensive prison ministry as compared to prisoners in the general population); Melvina T. Sumter, *Religiousness and Post-Release Community Adjustment*, *Graduate Research Fellowship—Executive Summary* 10 (Sept. 25, 2000), available at <http://www.ncjrs.org/pdffiles/nij/grants/184509.pdf> (same).

41. See, e.g., Testimony of Jarsoslawicz, *Protecting Religious Liberty After Boerne v. Flores: Hearing Before the House Comm. on the Judiciary, Subcomm. on the Constitution*, 105th Cong. 3 – 11 (July 14, 1997) (statement of Charles W. Colson, President, Prison Fellowship Ministries).

42. *Id.*

43. See *Hearing Before the Senate Comm. on the Judiciary: Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure*, 106th Cong. 73, 175 (1999) (statement of Glenn S. Goord, Commissioner New York State Department of Correctional Services) (“[E]very correction administrator in the country recognizes the vital role played by most religious practices and beliefs in furthering inmate rehabilitation, in maintaining a sense of hope and purpose among individual inmates and in enhancing overall institutional safety and well-being. Most inmates who sincerely practice their religious beliefs do not pose institutional problems. Rather, as a rule of thumb, they promote institutional stability.”).

prison administrators to allow them to conduct their ministries effectively and to respect the free exercise rights of prisoners.<sup>44</sup> As one advocate remarked, “Whether prison or on the outside, the brute fact is that when confronting an overweening bureaucrat, ‘I’ll sue you’ is much more effective than, ‘I’ll have my state representative offer a bill changing what you’re doing to me.’”<sup>45</sup>

While RLUIPA ultimately passed both the House and the Senate without dissent, a small minority of Congressman, prison authorities, and state officials asserted that including prisoners under the protections of RLUIPA would lead to a “flood of frivolous lawsuits” and consume prison resources.<sup>46</sup> Such lawsuits, they claimed, were likely to include “bizarre” demands for the “recognition of the right to burn bibles, the right to possess and distribute racist literature, the right to engage in animal sacrifice and the right to group martial arts classes.”<sup>47</sup>

Such concerns about a flood of frivolous suits were unfounded, even during the Congressional hearing phase of RLUIPA. Witnesses provided evidence that prisoner lawsuits had not significantly increased under RFRA—primarily because suits which raised a RFRA claim also raised constitutional claims—thereby demonstrating that the situation would likely be no different under RLUIPA.<sup>48</sup> Witnesses also noted that any claims brought under RLUIPA would be subject to The Prison Litigation Reform Act, which curtailed the ability of inmates to bring trivial lawsuits against prison officials.<sup>49</sup> Accordingly, concerns about frivolous lawsuits ultimately carried little weight in light of the available evidence and statutory law in place to limit to such claims.

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44. See, e.g., Testimony of Jarsoslawicz; Testimony of Colson.

45. Testimony of Colson.

46. See, e.g., 146 CONG. REC. S7,991 (daily ed. Sept. 5, 2000) (statement of Sen. Thurmond); *Protecting Religious Liberty After Boerne v. Flores: Hearing Before the House Comm. on the Judiciary, Subcomm. on the Constitution*, 105th Cong. 59 - 89 (July 14, 1997) (testimony of Jeffrey Sutton, Solicitor, State of Ohio).

47. See, e.g., Testimony of Sutton.

48. Letter from Robert Raben, Ass’t Att’y Gen. to Sens. Hatch and Leahy; Kennedy Statement.

49. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

### III. HOW THE ACT OPERATES

#### *A. A Brief Overview of the Act*

RLUIPA Section 3 provides as follows:

(a) GENERAL RULE- No government<sup>[50]</sup> shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION- This section applies in any case in which—

- (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
- (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

In addition, RLUIPA specifies that the administrative exhaustion requirements of the PLRA apply to claims brought under the Act.<sup>51</sup> Thus, RLUIPA requires a prisoner<sup>52</sup> to prove the following to make

50. RLUIPA defines the term “government” to mean as follows:

- (i) a State, county, municipality, or other governmental entity created under the authority of a State;
- (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
- (iii) any other person acting under color of State law; and

. . . for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

42 U.S.C. § 2000cc-5(4). Notably, this definition excludes the federal government from the applicability of the prisoner provisions of RLUIPA § 3. However, RFRA continues to apply against the federal government and provide a cause of action for federal prisoners against the federal government. Moreover, Section 7 of RLUIPA amended RFRA so that the scope of “religious exercise” protected by RLUIPA is the same as that protected by RFRA. See Section 7 of Pub. L. No. 106-274 (Sept. 22, 2000), 114 Stat. 803 (available at [www.rluipa.org](http://www.rluipa.org)) and 42 U.S.C. § 2000bb-2(4).

51. 42 U.S.C. § 2000cc-2(e).

52. For convenience, this article uses the word “prisoner” rather than “institutionalized persons” to denote the beneficiaries of RLUIPA Section 3. It is worth noting, however,

out a prima facie claim:

- (1) that prison officials have imposed a “substantial burden” on his “religious exercise” (a merits requirement);
- (2) that the “substantial burden” was either (a) imposed in a program or activity that receives federal funds or (b) affects interstate commerce (a jurisdictional requirement); and
- (3) that he has exhausted any available administrative remedies (an exhaustion requirement).

If the prisoner succeeds in making out a prima facie claim, then the Act shifts the burden to the defendant prison officials to demonstrate that their decision to substantially burden that prisoner’s religious exercise meets strict scrutiny—*i.e.*, that burdening religious exercise is the least restrictive means of advancing a compelling government interest. RLUIPA specifies that if prison officials cannot satisfy strict scrutiny then a prison is entitled to “any appropriate relief” and attorney fees.<sup>53</sup>

The remainder of this section details what a prisoner must prove to establish the merits, jurisdictional, and exhaustion requirements of RLUIPA, what prison officials must prove to satisfy their burden of strict scrutiny, and what remedies are available to a prisoner who prevails on a RLUIPA claim.

### *B. The Elements of a Prisoner’s Claim for Relief Under RLUIPA*

#### *1. RLUIPA’s Merits Requirement—Demonstrating a Substantial Burden on Religious Exercise*

The threshold inquiry in considering the merits of a prisoner’s claim under RLUIPA is whether the challenged prison policy<sup>54</sup> or conduct in question “substantially burdens” the prisoner’s “religious exercise.” If a prisoner fails to demonstrate by appropriate evidence<sup>55</sup>

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that RLUIPA, by including within its scope any “person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997),” includes not just prisoners, but also persons confined to mental institutions.

53. 42 U.S.C. § 2000cc-2(a).

54. Notably, RLUIPA does not apply to the federal government. *See* Ish Yerushalayim v. United States, 374 F.3d 89 (2d Cir. 2004) (construing the definition of “government” under RLUIPA to not include the federal government). However, federal prisoners may still vindicate their religious liberty rights by utilizing the provisions of RFRA, which protects the same scope of religious exercise in the same manner as RLUIPA to bring suit against the federal government.

55. Because it is the prisoner’s burden to prove a substantial burden on religious exercise, judgment is appropriate in favor of the defendants where a prisoner fails to

that there is a substantial burden on his or her religious exercise, RLUIPA does not apply. Two immediate questions arise, then: what is a “substantial burden,” and what counts as “religious exercise”?

*a. Substantial Burden*

With regard to the first question, Congress did not define in the Act what a “substantial burden” is. Accordingly, it is appropriate to apply the standard canon of statutory construction that where a term is not defined in a statute, it is to be given its ordinary or natural meaning.<sup>56</sup> In the case of RLUIPA, this task of giving “substantial burden” its ordinary meaning is not difficult. The term “substantial burden” is a term of art that is a familiar part of Free Exercise Clause jurisprudence,<sup>57</sup> and the legislative history of RLUIPA also supports the position that Congress intended to codify the Supreme Court jurisprudence on this subject.<sup>58</sup> It should be noted that it is another familiar canon of statutory construction that when Congress codifies a term of art, then courts should interpret that term consistent with its established meaning.<sup>59</sup>

The Supreme Court has articulated what constitutes a “substantial burden” on several occasions. In *Sherbert v. Verner*,<sup>60</sup> the Court held that a substantial burden exists when government action or qualifications placed on benefits and privileges have a “tendency to inhibit” religious exercise. As an example of such a burden, the *Sherbert* Court said that a substantial burden is present when an individual is required to “choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning

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produce any competent evidence (even if it is only declaration testimony explaining why it is that the prison policy burdens his or her religious exercise) to demonstrate a substantial burden. See *Piscitello v. Berge*, 2003 WL 23095741, at \*5 (Apr. 17, 2003) (summary judgment granted to prison officials where plaintiff offered only a “one sentence” argument in his brief that RLUIPA was violated and did not introduce any evidence to show how the prison’s policy had substantially burdened his religious exercise).

56. See, e.g., *Turner v. Cook*, 362 F.3d 1219, 1227 (1st Cir. 2004).

57. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).

58. See 146 CONG. REC. S7774-75 (July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy) (stating that the term “substantial burden” is to “be interpreted by reference to existing Supreme Court jurisprudence.”).

59. *Morrisette v. United States*, 342 U.S. 246, 263 (1952) (when Congress codifies a term of art “it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.”); *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (“In the absence of contrary indication, we assume that when a statute uses . . . a term [of art], Congress intended it to have its established meaning.”).

60. 374 U.S. 398, 404 & n.6 (1963).

one of the precepts of her religion . . . on the other.”<sup>61</sup> Similarly, in *Hobbie v. Unemployment Appeals Comm’n of Fla.*,<sup>62</sup> and *Thomas v. Review Bd. of Ind. Employment Sec. Div.*,<sup>63</sup> the Court held that a substantial burden exists when government puts “substantial pressure on an adherent to modify his behavior and to violate his beliefs.” And in *Lyng v. Northwest Indian Cemetery Protective Ass’n*,<sup>64</sup> the Court held that religious adherents can show a substantial burden where the government’s policy has “a tendency to coerce individuals into acting contrary to their religious beliefs.”

Though these articulations of the standard do leave open some room for interpretation at the edges (and may well necessitate future guidance from the Supreme Court),<sup>65</sup> the general contours of this test as defined by the Supreme Court are straightforward and were recently synthesized by one appellate court as follows:

The combined import of these articulations [by the Supreme Court] leads us to the conclusion that a ‘substantial burden’ must place more than an inconvenience on religious exercise; a ‘substantial burden’ is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.<sup>66</sup>

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61. *Id.* at 404.

62. 480 U.S. 136, 141 (1987).

63. 450 U.S. 707, 717–18 (1981).

64. 485 U.S. 439, 450 (1988).

65. Lower courts have not always shown consistency in the ways in which they have restated the substantial burden test. *Compare* *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (holding that a substantial burden is one that has a “tendency to coerce individuals into acting contrary to their religious beliefs”) (quoting *Lyng*, 485 U.S. at 450–51); *Jolly v. Coughlin*, 76 F.3d 468, 476–77 (2d Cir. 1996) (holding that “a substantial burden exists where the state ‘put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs’”) (quoting *Thomas*, 450 U.S. at 718); *Islamic Center of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988) (concluding that zoning laws that make religious assemblies “relatively inaccessible within the city limits” and thereby ensure that “churches, synagogues, and mosques [be] accessible only to those affluent enough to travel by private automobile” create an “obvious[] burden [on] the exercise of religion by the poor”) *with* *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) (significant burdens of “convenience and expense” are insufficient to be a substantial burden); *Rector, Wardens & Members of the Vestry of St. Bartholomew’s Church v. City of New York*, 914 F.2d 348, 355 (2d Cir. 1990) (no substantial burden absent “coercion in religious practices or the . . . inability to carry out [a] religious mission . . .”); *Grosz v. City of Miami Beach*, 721 F.2d 729, 739 (11th Cir. 1983) (no substantial burden absent “prohibition [of] religious conduct per se”). To the extent these different statements lead to different results, the Supreme Court would be advised to grant certiorari in a particular case to clarify application of its standard.

66. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).



Or put more succinctly, the appropriate standard for determining whether a burden is “substantial” is to ask whether government action either (1) puts pressure on individuals to modify their religious behavior or (2) prevents them from engaging in religious conduct, in a way that is greater than a mere inconvenience. It is also worth noting that consistent with the normal rigors of *facial* challenges, plaintiffs challenging a government policy on its face (as opposed to its application to them in a concrete situation) must show that under no set of circumstances can the policy be applied in a way that will not burden their religious exercise.<sup>67</sup>

### *b. Religious Exercise*

With regard to the second question of what counts as “religious exercise” that may not be substantially burdened, Congress took care to define the term. Moreover, in enacting RLUIPA, Congress specified<sup>68</sup> that RLUIPA’s definition of “religious exercise” would also apply to RFRA (which, as originally enacted, had essentially left the term “religious exercise” undefined),<sup>69</sup> thereby making a

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The *Midrash* court was summarizing Supreme Court precedent on “substantial burden” in order to give meaning to Section 2(a) of RLUIPA, which in language essentially identical to RLUIPA’s prisoner provisions in Section 3, 42 U.S.C. § 2000cc(a)(3)(2004), forbids a government from “impos[ing] or implement[ing] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person . . . unless . . . imposition of the burden . . . is in furtherance of a compelling government interest and is the least restrictive means of furthering that compelling interest.” 42 U.S.C. § 2000cc(a)(1)(2004). See also *Coronel v. Paul*, 316 F. Supp. 2d 868, 880 (D. Ariz. 2004) (holding that “state action substantially burdens the exercise of religion within the meaning of the [prisoner provisions of] RLUIPA when it prevents a religious adherent from engaging in conduct both important to the adherent and motivated by sincere religious belief.”); *Jolly*, 76 F.3d at 477 (holding that choice between submitting to a TB test or adhering to Rastafarian beliefs and enduring medical keeplock constitutes a substantial burden on religious exercise).

67. See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (plaintiffs bringing a facial challenge must show that “no set of circumstances exists” in which the law can be applied lawfully). Although it appears that no facial challenges have arisen yet under RLUIPA’s prisoner provisions, courts applying RLUIPA’s land-use sections to facial challenges have required plaintiffs to show that a statute or policy renders their religious exercise “effectively impracticable.” *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), a standard that is consistent with the gauntlet *Salerno* has throw down for facial challenges.

68. Specifically, section 7 of RLUIPA amended RFRA so that the scope of “religious exercise” protected by RLUIPA is the same as that protected by RFRA. See Section 7 of Pub.L. 106-274 (Sept. 22, 2000), 114 Stat. 803 (available at [www.rluipa.org](http://www.rluipa.org)) and 42 U.S.C. § 2000bb-2(4). Thus, RFRA now provides “the term “exercise of religion” means religious exercise, as defined in section 2000cc-5 [i.e., RLUIPA] of this title.” 42 U.S.C. § 2000bb-2(4).

69. RFRA, as originally enacted, simply defined “exercise of religion” by reference to First Amendment jurisprudence, but did not attempt to codify any particular religious doctrine. See 42 U.S.C. § 2000bb-2(4) (1993).

significant clarification to the scope of protection afforded to religious exercise by RFRA.

Specifically, RLUIPA (and RFRA as amended) define religious exercise as follows:

IN GENERAL—The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.<sup>70</sup>

There are several important features of this definition, each of which will be discussed in turn.

*i. “Any” religious exercise is protected by RLUIPA*

First, like the text of the Free Exercise Clause itself, which does not limit the range or types of religious exercise eligible for protection, the Act’s definition makes clear that “any” discrete instance of religious exercise is covered by the Act. Specifying that “any” particular practice of religious exercise is protected is of great benefit to the religious exercise rights of prisoners because it remedies an especially harsh (and dubious) interpretation of the *Turner/O’Lone* test. Courts routinely apply the *Turner/O’Lone* test to disqualify claims alleging that the prison had impermissibly burdened a particular practice of religious exercise by holding that, because the prison did not deny the prisoner *all* means of practicing his or her religion, the fact that it had burdened this discrete act of religious exercise was of no moment.<sup>71</sup> Thus, for example, the Third Circuit rejected the Free Exercise claim of a Buddhist prisoner that his religious exercise had been burdened by the prison’s denial a diet that would not defile his body because the prisoner had alternative means of exercising his religion such as prayer, meditation, and scripture study.<sup>72</sup>

Such a rule allows prisons to provide as few religious accommodations as they can get away with (especially, perhaps, with minority or disfavored religions). In addition, it places courts in the impossible position of deciding what minimum amount of religious exercise is sufficient for any particular religion. This is a task that

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70. 42 U.S.C. § 2000cc-5(7)(A) (2004).

71. *See, e.g., DeHart v. Horn*, 227 F.3d 47, 55 (3d Cir. 2000) (court must consider whether the inmate has “alternative means of practicing his or her religion generally, not whether [the] inmate has alternative means of engaging in [any] particular practice”).

72. *Id.* at 54. *See also Friedman v. Arizona*, 912 F.2d 328, 332 (9th Cir. 1990) (religious exercise of Jewish plaintiff not burdened by requiring him to break a command to have a beard because the prison did not deny all means of exercising his faith).

judges manifestly lack competence to assume and one in which they will likely err in proportion to the degree of their unfamiliarity with the religious faith at issue in the particular case before them. RLUIPA's definition of "religious exercise" is significant then, in that it rejects this rule and its attendant problems and instead provides prisoners a potential remedy for *any* discrete act of religious exercise that is burdened.

A recent Tenth Circuit case illustrates how RLUIPA's abandonment of the *Turner/O'Lone* 'other means available' inquiry will likely expand the scope of religious accommodations under RLUIPA. In *Hammons v. Saffle*, a Muslim inmate brought suit under the Free Exercise Clause, contending that the prison's policy of denying him prayer oils for use in his daily prayers substantially burdened his religious exercise; the district court ruled in favor of the prison and the Tenth Circuit affirmed, finding that the inmate had other means available to him to practice his religion and therefore did not need the prayer oils.<sup>73</sup> However, the Tenth Circuit, noting RLUIPA's more protective standard, remanded the case to the district court so that the inmate could pursue his claim under RLUIPA.<sup>74</sup>

*ii. Actions Must Be "Religious" to Be Protected*

Though it should be an obvious point, it is worth briefly noting that RLUIPA, consistent with the Free Exercise Clause, only extends protection to actions that are *religiously* motivated.<sup>75</sup> This requires a plaintiff to show two things.

First, a plaintiff must demonstrate that the government action in question has burdened a "religious belief," and not a "way of life . . . based on purely secular considerations" or a "philosophical and personal" choice.<sup>76</sup> The Supreme Court has broadly defined "religious belief" so as to include all sincere beliefs "based upon a power or being, or upon a faith, to which all else is subordinate or

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73. 348 F.3d 1250, 1256 (10th Cir. 2003). *See also* Marria v. Broaddus, 2003 WL 21782633, at \*13 (S.D.N.Y. July 31, 2003) (fact that prisoner could still "practice certain aspects of belief" not sufficient to show religious exercise was not substantially burdened under RLUIPA by absolute ban on his access to religious text that was an "integral part" of the plaintiff's daily practice of his beliefs and prohibition of group worship services with other members of his faith).

74. *Hammons*, 348 F.3d at 1258.

75. *See, e.g.*, Coronel v. Paul, 316 F. Supp. 2d 868, 876 (D. Ariz. 2004) (RLUIPA requires a showing that the desired conduct is "motivated by sincere religious belief").

76. *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972). *See also* Ochs v. Thalacker, 90 F.3d 293, 296 (8th Cir. 1996) ("Purely secular views or personal preferences will not support a Free Exercise Clause claim.").

upon which all else is ultimately dependent.”<sup>77</sup> Lower courts have also set forth “useful indicia” in applying this definition to determine the existence of a religion:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.<sup>78</sup>

Though the Supreme Court has stated that “the very concept of ordered liberty precludes allowing” a person a blanket privilege “to make his own standards on matters of conduct in which society as a whole has important interests,”<sup>79</sup> the Court has also hastened to make clear that “[t]he determination of what is a ‘religious’ belief or practice is more often than not a difficult and delicate task.”<sup>80</sup> The very nature of this inquiry requires courts to proceed with some humility as they must take heed not to let their own biases (whether based on reason or their own faith) about what a religious belief should look like determine the issue.<sup>81</sup> For that reason the Supreme Court has cautioned that “the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”<sup>82</sup> Moreover, a court may “not undertake to dissect religious beliefs because the believer admits that he is ‘struggling’ with his position or because his beliefs are not articulated with the

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77. *United State v. Seeger*, 380 U.S. 163, 176 (1965); *see also id.* at 185 (test for religious belief within meaning of draft law exemptions is “whether beliefs professed . . . are sincerely held and whether they are, in claimant’s own scheme of things, religious). This statement is broader than definitions given by earlier Supreme Court justices. *See, e.g., Davis v. Beason*, 133 U.S. 333, 342 (1890) (“[T]he term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”); *United States v. Macintosh*, 283 U.S. 605, 633–34 (1931) (Hughes, C.J., dissenting) (“The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.”).

78. *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981) (citing *Malnak v. Yogi*, 592 F.2d 197, 207–09 (3d Cir. 1979)).

79. *Yoder*, 406 U.S. at 215–16.

80. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981).

81. *See, e.g., Africa*, 662 F.2d at 1032 (courts “must avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs. Religions now accepted were persecuted, unpopular and condemned at their inception.”) (internal citations and quotation marks omitted).

82. *Id.*; *see also Werner v. McCotter*, 49 F.3d 1476, 1479 n.1 (10th Cir. 1995) (“A plaintiff, however, need not hew to any particular religious orthodoxy; it is enough for the plaintiff to demonstrate that a government has interfered with the exercise or expression of her or his own deeply held faith.”).

clarity and precision that a more sophisticated person might employ.”<sup>83</sup> In short, though “[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection,”<sup>84</sup> the risks involved in the inquiry of the state declaring what constitutes a religious belief for a particular religion requires that any doubts should be resolved in favor of finding that a particular belief or practice is religious.<sup>85</sup> RLUIPA reflects such an approach by providing that it “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.”<sup>86</sup>

Second, a plaintiff must demonstrate that the religious belief is sincerely held.<sup>87</sup> The plaintiff must sincerely hold the burdened belief because the “government need only accommodate the exercise of actual religious convictions.”<sup>88</sup> Protection does not extend—whether under the First Amendment or RLUIPA—to “so-called religions which . . . are obviously shams and absurdities and whose members are patently devoid of religious sincerity.”<sup>89</sup> However, the fact that other members of plaintiff’s faith may have a different view of the religious obligations of the faith is irrelevant where a plaintiff’s belief is “different and sincerely held.”<sup>90</sup> “[T]he relevant question is not what others regard as an important religious practice, but what the plaintiff believes.”<sup>91</sup>

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83. *Thomas*, 450 U.S. at 715. See also *Love v. Reed*, 216 F.3d 682, 688 (8th Cir. 2000) (“It is not the place of the courts to deny a man the right to his religion simply because he is still struggling to assimilate the full scope of its doctrine.”).

84. *Thomas*, 450 U.S. at 715.

85. See Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1063 (1978) (arguing that “the characterization of a belief as religious would seem to be beyond the competence of anyone other than the adherent”); *Ochs v. Thalacker*, 90 F.3d 293, 296 (8th Cir. 1996) (“Courts must be cautious in attempting to separate real from fictitious religious beliefs.”).

86. 42 U.S.C. § 2000cc-3(g) (2004).

87. *Wisconsin v. Yoder*, 406 U.S. 205, 215–19 (1972).

88. *Werner v. McCotter*, 49 F.3d 1476, 1479 n.1 (10th Cir. 1995).

89. *Therault v. Carlson*, 495 F.2d 390, 395 (5th Cir. 1974), cert. denied, 419 U.S. 1003 (1974). See also *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981) (“A First Amendment inquiry into sincerity . . . address[es] the sincerity with which the claimant holds the allegedly religious belief itself.”); *Stevens v. Berger*, 428 F. Supp. 896, 899 (E.D.N.Y. 1977) (discussing sincerity requirement); *United States v. Kuch*, 288 F. Supp. 439 (D. D.C. 1968) (same).

90. *Lewis v. Scott*, 910 F. Supp. 282, 288 (E.D. Tex. 1995).

91. *Rouser v. White*, 944 F. Supp. 1447, 1454 (E.D. Cal. 1996) (citations omitted).

iii. *Religious Exercise Need Not Be “Compelled” by a System of Religious Belief to Be Protected*

Not only does RLUIPA’s definition of “religious exercise” provide that “any” religious exercise is protected, it also makes explicit that this protection is *not* limited to practices that are compelled by the individual’s religion.<sup>92</sup> Thus, religious exercise that some might claim is *discretionary* on the part of the believer—*e.g.*, a Catholic’s desire to pray the rosary, a Muslim’s desire to utilize prayer oils during daily prayers, or a Jewish believer’s decision to wear a yarmulke—is also protected and may not be substantially burdened. This is an important feature of the Act, and, as explained below, is one designed both to comply with Supreme Court precedent and to reject the approach taken by some courts in interpreting RFRA that religious exercise must be mandated in order to be protected.

An examination of decisions discussing substantial burden reveals that the Supreme Court has never held that religious conduct must be compelled by the believer’s faith to be protected. To the contrary, the Court has recognized that religious exercise may be substantially burdened even where there was no showing that the particular religious exercise at issue was mandated by the plaintiff’s faith. For example, in *Goldman v. Weinberger*, the Court found that a Jewish serviceman’s practice of wearing a particular yarmulke, “a practice described by [the serviceman] as silent devotion akin to prayer,” was religiously motivated conduct eligible for protection under the substantial burden standard, despite the absence of evidence showing that this practice was compelled by his Jewish faith.<sup>93</sup> And in *Frazee v. Illinois Department of Employment Security*, the Court expressly repudiated a test extending protection only to religious exercise that was compelled: “[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.”<sup>94</sup>

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92. See 42 U.S.C. § 2000cc-5(7) (2004) (“[R]eligious exercise’ includes any exercise of religion, *whether or not compelled by . . . a system of religious belief.*”) (emphasis added).

93. 475 U.S. 503, 509 (1986). The Court went on, however, to rule against the plaintiff, finding that the military had interests justifying the imposition of the burden on religious exercise. *Id.* at 509–10.

94. 489 U.S. 829, 834 (1989). See also *Levitan v. Ashcroft*, 281 F.3d 1313, 1319 (D.C. Cir. 2002) (“A requirement that religious practice be mandatory to warrant First Amendment protection finds no support in the cases of the Supreme Court or of this court.”); *McEachin v. McGuinnis*, 357 F.3d 197, 203 (2d Cir. 2004) (“[A] burdened practice need not be mandated by the adherent’s religion in order to sustain a prisoner’s free exercise claim.”) (internal citation omitted).

The Supreme Court's aversion to adopting a requirement that religious exercise be mandated by a faith in order to be protected flows directly from the Court's consistent position that "[c]ourts are not arbiters of scriptural interpretation."<sup>95</sup> To require a court to inquire into whether a particular religious practice is compelled by the believer's faith is to force a court into a role "not within the judicial function and judicial competence,"<sup>96</sup> because it necessitates a judgment as to what a religion requires of its believers. Such an outcome would be particularly troubling because the coercive power of the state would enforce the court's judgment. Fortunately, such an unappealing situation is not a part of the Supreme Court's doctrine.<sup>97</sup>

If compulsion was a prerequisite, these problems would be even more pronounced because very often the issue of whether a practice is mandated by faith arises when the state seeks to defeat a believer's claim of substantial burden by introducing testimony of another member of the believer's faith who opines that the particular practice is not mandated. For example, in one lower court case,<sup>98</sup> the plaintiff prisoner, a sincere adherent of Islam, argued that the prison's failure to provide him leave to obtain a Friday Juma'ah service substantially burdened his religious exercise. The prison responded by producing an affidavit of its Muslim chaplain who testified that in his understanding of Islam, attending Juma'ah was not required. The court could have avoided a decision on what Islam required and found that the prison's policy substantially burdened religious exercise by completely preventing the plaintiff's sincerely motivated religious

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95. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981). See also *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969) (holding that First Amendment "forbids civil courts" from "the interpretation of particular church doctrines and the importance of those doctrines to the religion"); *Jones v. Wolf*, 443 U.S. 595, 603 (1979) (adopting neutral-principles approach to resolving church property disputes because it frees courts from deciding "questions of religious doctrine, polity, and practice"); *United States v. Ballard*, 322 U.S. 78, 87 (1944) ("[L]ittle indeed would be left of religious freedom" if courts were allowed to determine "truth or falsity" of religious beliefs); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.") (emphasis added).

96. *Thomas*, 450 U.S. at 707.

97. It should be noted, as Ira Lupu has pointed out, that *Yoder* also does not provide support for a requirement that religious exercise be mandated in order to be protected. See Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 203 (1995) (noting that the Amish faith does not mandate withdrawal of teenage children from school).

98. *Abdur-Rahman v. Michigan Dep't of Corr.*, 65 F.3d 489, 491-92 (6th Cir. 1995).

conduct. Instead, the court waded into the thicket of what Islam requires of its adherents and brought the coercive power of the state down on the side of the prison's preferred view that Juma'ah was not required. This use of the views of other religious believers whose interpretation the state prefers is precisely the kind that the Supreme Court has held that the state is not competent to make: "Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences."<sup>99</sup>

Judge Posner has eloquently described why the religious judgment of whether a practice is mandated is not the business of courts or other government officials:

[R]equir[ing] the courts to determine what practices the plaintiff's religion obligates him to follow . . . [means] requiring the court to determine the authoritative sources of law for the religion in question and to interpret the commands emanating from those sources. In the case of hierarchical religions such as Roman Catholicism this process of identification and interpretation, which resembles the procedures of legal positivism, is feasible. In the case of nonhierarchical religions, however, such as Islam, Judaism, and a multitude of Protestant sects, the process is infeasible, or at least very difficult and attended with a high degree of indeterminacy. The danger that courts will find themselves taking sides in religious schisms, if they must opine on matters of

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99. *Thomas*, 450 U.S. at 715 (rejecting state's attempt to defeat a claim of substantial burden by arguing that that the religious exercise of plaintiff, a Seventh Day Adventist, was not burdened on the basis of testimony of another Adventist that plaintiff's religious beliefs were not mandated by the Adventist faith). See also *Ward v. Walsh*, 1 F.3d 873, 878 (9th Cir. 1993) ("In religious matters, we take judicial notice of the fact that often the keenest disputes and the most lively intolerance exists among persons of the same general religious belief, who, however, are in disagreement as to what that faith requires in particular matters."); Steven C. Seeger, *Restoring Rites to Rights: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 MICH. L. REV. 1472, 1507-08 (1997) ("Individuals invariably form religious views that differ from those held by members of the same faith. Because individuals develop personally tailored religious beliefs, the religious views of other believers cannot be used to contest the beliefs of a particular claimant . . . . Th[e] right to form one's own religious beliefs would be circumscribed if courts could consider the subjective religious views of other individuals when addressing the avowed beliefs of a particular litigant."); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1391 (1981) ("[E]mphasis on doctrine and requirements ignores the fluidity of doctrine and the many factors that can contribute to doctrinal change. A church is a complex and dynamic organization, often including believers with a variety of views on important questions of faith . . . . [O]fficially promulgated church doctrine, on which courts too often rely, is not a reliable indication of what the faithful believe. At best the officially promulgated doctrine of a large denomination represents the . . . most commonly held view; it cannot safely be imputed to every believer.").



religious obligation, is not a trivial one.<sup>100</sup>

Courts have also recognized that a compulsion requirement presents an additional danger of providing less protection for minority religious faiths. “[W]hile some religions instruct their followers to obey the commands and prohibitions of the faith, others, especially those outside the Judeo-Christian tradition, lack the concept of religious compulsion.”<sup>101</sup> For example, “Theravada Buddhism . . . is a nonduty-based religion, which emphasizes inward spiritual maturity rather than obedience to religious mandates.”<sup>102</sup> Imposition of a test that requires a showing of religious mandate behind a practice would have an inevitable disparate impact on the ability of adherents to such nontraditional religions to exercise their religion free of government burdens.<sup>103</sup>

Moreover, even in religions that do expressly prescribe or proscribe certain acts, a test that only protected such mandated religious exercise would overlook a huge amount of religious exercise that is motivated, but not required, by religious belief. For example, believers may be motivated by their religious belief to fast, sing in the choir, pray the rosary, or wear a crucifix. Such actions are obviously very important to believers. Thus courts and commentators have recognized that a rule requiring compulsion before the state must recognized a practice as religious exercise eligible for protection would eliminate a broad swath of religious conduct from protection.<sup>104</sup>

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100. *Mack v. O’Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996), *judgment vacated on other grounds*, *O’Leary v. Mack*, 522 U.S. 801 (1997).

101. *Coronel v. Paul*, 316 F. Supp. 2d 868, 877 (D. Ariz. 2004) (internal citations and quotation marks omitted).

102. *Id.*

103. *See Seeger*, *supra* note 99, at 1503 (“[T]he compulsion test views the practice of religion as obedience to a set of sacred commands and prohibitions. This narrow conception of religion results in . . . foreclos[ing] the opportunity to challenge state action . . . when the state infringes upon religions that do not compel the conduct of their followers.”).

104. *Mack*, 80 F.3d at 1179 (“Many religious practices that clearly are not mandatory . . . are important to their practitioners, who would consider the denial of them a grave curtailment of their religious liberty.”); *Laycock*, *supra* note 99, at 1390 (“One of the most common errors in free exercise analysis is to try to fit all free exercise claims into the conscientious objector category and reject the ones that do not fit. Under this approach, every free exercise claim requires an elaborate judicial inquiry into the conscience or doctrines of the claimant. If he is not compelled by religion to engage in the disputed conduct, he is not entitled to free exercise protection . . . . This approach reflects a rigid, simplistic, and erroneous view of religion.”); *Seeger*, *supra* note 99, at 1499 (“Under the compulsion test, the state could encroach upon any of these religious practices with impunity, because those who engage in such noncompulsory conduct would be unable to establish that the government burdened a compulsory religious practice.”).

A recent Alabama district court case applying RLUIPA illustrates how RLUIPA's rejection of a compulsion inquiry avoids both disparately impacting minority religions and the problem of the government deciding what is necessary for religious adherents to practice their faith. In *Limbaugh v. Thompson*,<sup>105</sup> a group of Native American religious adherents sued under RLUIPA contending that the prison's flat ban on sweat lodges prevented them from performing a religious purification rite. Lacking a creedal system in their Native American religion, the plaintiffs did not produce evidence that use of the sweat lodge was mandated by their religion. The prison responded by asserting that the plaintiffs had not shown that use of the sweat lodge was the *only* means to achieve their goal of purification. In other words, the prison argued that use of the sweat lodge was not mandated by the plaintiffs' religious faith because a sweat lodge was just one means they could use to purify themselves. The court rejected this argument, recognizing that RLUIPA does not allow the issue of whether a practice is mandated to be decisive and pointed out that if a prison could defeat a claim to substantial burden on the basis of pointing to some other means of religious exercise preferred by the prison, it would be the *government* rather than the religious adherent who would be choosing what is "orthodox"<sup>106</sup> for the plaintiff's religion.<sup>107</sup>

The outcome in *Limbaugh* is also significant in pointing out the difference that RLUIPA's rejection of a compulsion or mandate element should make in the success of prisoner claims when compared with the success of prisoner claims under RFRA (prior to its amendment in 2000). The *Limbaugh* court is within the Eleventh Circuit and is of course bound by that court's precedent. In applying RFRA prior to its amendment in 2000, the Eleventh Circuit held in *Cheffer v. Reno* that RFRA plaintiffs must prove that "their religion

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105. No. 93-D-1404-N, slip op. at 2–3 (M.D. Ala. Sept. 29, 2003).

106. *Id.* at 3. The court reasoned that not only would permitting "prison officials to determine what is orthodox" violate RLUIPA, but that it would run afoul of Justice Jackson's famous maxim that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

107. See also *Charles v. Verhagen*, 220 F. Supp. 2d 937, 948 (W.D. Wis. 2002), *aff'd*, 348 F.3d 601 (7th Cir. 2003) (finding that policy of denying use of prayer oils by Muslim, an act of "religiously motivated conduct," constituted a substantial burden, and rejecting prison's argument that use of Islamic prayer oils was not required by Islam because RLUIPA precludes inquiry into whether "a particular practice is *required* by the prisoner's faith").

requires” them to carry out the particular religious practice at issue in order to be eligible for protection under the substantial burden standard.<sup>108</sup> Thus, but for RLUIPA extending protection to a religious practice regardless of whether it is required or compelled, the *Limbaugh* court would have been forced to follow *Cheffer*’s restrictive definition and rule against the plaintiff.

The Eleventh Circuit was not alone in ignoring the Supreme Court’s admonition not to become arbiters of what is compelled or mandated by a particular religious faith. The Fourth,<sup>109</sup> Fifth,<sup>110</sup> and Ninth Circuits,<sup>111</sup> as well as several district courts<sup>112</sup> and state courts,<sup>113</sup> also held that a particular act of religious exercise must be “required,” “mandated,” or “compelled” in order to be protected under RFRA’s substantial burden provision. Not only did these courts ignore Supreme Court precedent barring courts from being arbiters of religious practice, they also ignored RFRA’s legislative history in which Congress considered but declined to enact a compulsion test.<sup>114</sup>

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108. 55 F.3d 1517, 1522 (11th Cir. 1995).

109. *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 172–73 (4th Cir. 1995) (holding that plaintiffs failed to establish a claim under RFRA’s substantial burden provision because they “have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take” (emphasis added).

110. *Hicks v. Garner*, 69 F.3d 22, 26 n.22 (5th Cir. 1995) (“To be a ‘substantial burden,’ the government must either compel a person do something in contravention of their religious beliefs or require them to refrain from doing something *required* by their religious beliefs.”) (emphasis added).

111. *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (“‘The religious adherent . . . has the obligation to prove that a governmental [action] burdens the adherent’s practice of his or her religion . . . by preventing him or her from engaging in conduct or having a religious experience *which the faith mandates*. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.’”) (quoting *Graham v. Comm’r*, 822 F.2d 844, 850–51 (9th Cir. 1987)) (alterations in original) (emphasis added).

112. *See, e.g., Morris v. Midway Southern Baptist Church*, 183 B.R. 239, 251 (Bankr. D. Kan. 1995). *See also* district court cases cited *infra* note 117.

113. *See Winters v. State*, 549 N.W.2d 819, 820 (Iowa 1996) (requiring a showing that religious exercise be compelled); *Bartley v. Mamoulides*, 694 So. 2d 1050, 1052 (La. Ct. App. 1997) (same).

114. *See, e.g., Douglas Laycock, RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 151 (1995) (surveying RFRA’s legislative history and concluding “Congress rejected the view that only religious compulsion is protected. In committee hearings, lobbyists offered amendments to change to a compulsion standard, but those amendments went nowhere.”); *Religious Freedom Restoration Act: Hearings on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong. 46 (1992) (statement of Oliver S. Thomas on behalf of the Baptist Joint Committee and the American Jewish Committee) (“[A] law that protects only religiously compelled acts would exclude many acts that are obviously religious. Most believers seek to do more than the bare minimum that God requires. Is prayer compelled? Only on occasion . . . . Is serving as a minister compelled? Not always. These acts would not be protected by the compulsion test. Clearly, they should be

The impact of these courts' decision to narrow the scope of RFRA's protection by requiring a showing that the religious practice was mandated was devastating, especially on prisoner claims. A study of prisoner RFRA claims from the passage of RFRA in 1993 to its being declared unconstitutional as applied to the states by *Boerne* in 1997 reveals that prisoners lost more than ninety percent<sup>115</sup> of those claims, and more than seventy-five percent<sup>116</sup> of those unsuccessful claims failed because the court found there was no showing of substantial burden. A closer examination of these cases reveals that the most common reason for the holding of no substantial burden was a determination that the prisoner had failed to show that the religious exercise at issue was mandated or required by his faith.<sup>117</sup>

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protected, and are, by RFRA.”); *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 129 (1992) (letter dated June 22, 1992, from Rep. Solarz to Rep. Edwards) (“[I]t would be a mistake to tighten the language of the Act by confining it to conduct “compelled by” religious belief.”) (quoting letter dated Feb. 21, 1991, from Michael W. McConnell, professor, University of Chicago Law School, Edward McGlynn Gaffney, dean, Valparaiso Law School, and Douglas Laycock, professor, University of Texas School of Law, to Reps. Solarz and Henry)).

115. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 591 (finding that 85 of 94 prisoner RFRA claims in federal court ended in judgments against the prisoner).

116. *Id.* at 608–15 (finding that 59 of the 85 unsuccessful federal claims were dismissed for failure to establish a substantial burden).

117. *See Weir v. Nix*, 114 F.3d 817, 821 (8th Cir. 1997) (dismissing RFRA claim because prisoner did not show that his faith “mandate[d]” any minimum amount of congregational worship activity beyond the three hours provided him); *Canell v. Jacobson*, No. 96-35110, 1997 WL 75651, at \*1 (9th Cir. Feb. 20, 1997) (dismissing RFRA claim because Sunni Muslim prisoners did not show that limitations on ritual washing conflicted with a practice “mandate[d]” by their faith); *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996) (dismissing RFRA claim because CJCC prisoner failed to show that his religion “require[d]” that he read religious book confiscated by prison authorities); *Boyd v. Arizona*, No. 95-16957, 1996 WL 341273, at \*2 (9th Cir. June 19, 1996) (dismissing RFRA claim because Mormon prisoner failed to establish that forbidden practices of “study[ing] scriptures and praying with his wife daily and “render[ing] physical affection to his wife while he is in prison” were “mandated” by his faith); *Hunter v. Baldwin*, No. 95-35330, 1996 WL 95046, at \*1 (9th Cir. Mar. 5, 1996) (dismissing RFRA claim because prisoner failed to show that reading certain religious literature was “mandated” by his faith); *Miller-Bey v. Schultz*, No. 94-1583, 1996 WL 67941, at \*4 (6th Cir. Feb. 15, 1996) (dismissing RFRA claim by Moorish Science Muslim prisoner because he did not show that membership in his faith was “dependent on” possession of the religious identity card in question); *Wynn v. McManus*, No. 95-35466, 1996 WL 32110, at \*1 (9th Cir. Jan. 26, 1996) (dismissing RFRA claim because prisoner failed to establish that attending Christian religious service every Sunday was “mandated” by his faith); *Abate v. Walton*, No. 94-15942, 1996 WL 5320, at \*5 (9th Cir. Jan. 5, 1996) (dismissing RFRA claim because prisoner failed to establish that a special religious diet was “mandated” by his faith, the Ethiopian Orthodox Tewahido Church); *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (dismissing RFRA claim because Pentecostal Christian prisoner failed to establish that the Pentecostal religious activities such as speaking in tongues and laying on of hands prohibited by the prison were “mandated by his faith”); *Abdul-Malik v. Goord*, No. 96 CIV. 1021-DLC, 1997 WL 83402, at \*6 (S.D.N.Y. Feb. 27, 1997) (dismissing RFRA claim because Muslim prisoner failed to establish that receiving meat as part of Halal diet

All of those cases which imposed a requirement that the religious exercise at issue be compelled, mandated, or required by the believer's faith have been effectively overruled by the definition of religious exercise in RLUIPA (and RFRA as amended) and should no longer be relied on as good law as courts apply RLUIPA.

Thus, RLUIPA's definition of religious exercise to include any religious exercise, whether or not compelled, mandated, or required by the religious adherent's faith, is one of the most significant features of the Act and should result in more prisoners succeeding under RLUIPA than under RFRA. Not only is it specifically crafted to conform to Supreme Court precedent concerning the limits of judicial competence to inquire into religious beliefs, but it removes one of the biggest obstacles that lower courts had imposed to the success of prisoner RFRA cases.

*iv. Religious Exercise Need Not Be "Central" to a System of Religious Belief to Be Protected*

RLUIPA's definition of religious exercise also makes explicit that

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was "require[d]" by his faith); *Reese v. Coughlin*, No. 93 CIV. 4748-LAP, 1996 WL 288994, at \*7 (S.D.N.Y. July 3, 1996) (dismissing RFRA claim because prisoner did not establish that possession of tarot cards was "mandate[d]" by his faith); *Eskew v. Baker*, Civil No. N-94-2822, 1996 WL 807889, at \*3 (D. Md. May 2, 1996) (dismissing RFRA claim because prisoner did not establish that desired religious practice of reading Ku Klux Klan literature was "mandated" by his faith); *Metheny v. Anderson*, 953 F. Supp. 854, 861 (N.D. Ohio 1996) (dismissing RFRA claim because prisoner failed to show that confiscated Bible study materials prevented him from engaging in activity "mandate[d]" by his faith); *Lucero v. Hensley*, 920 F. Supp. 1067, 1073-74 (C.D. Cal. 1996) (dismissing RFRA claim because Native American prisoner did not establish that possession of animal hides was "mandate[d]" by his faith); *Abdul-Akbar v. Dep't of Corr.*, 910 F. Supp. 986, 1008 (D. Del. 1995) (dismissing RFRA claim because Muslim prisoner did not establish that wearing a kufi was "mandated by his religion"); *Muhammad v. City of New York Dep't of Corr.*, 904 F. Supp. 161, 191 (S.D.N.Y. 1995) (dismissing RFRA claim because prisoner did not show that prison's "generic Muslim service offends or ignores particular practices or beliefs that are *mandated* by NOI teachings"); *Crosley-El v. Berge*, 896 F. Supp. 885, 888 (E.D. Wis. 1995) (dismissing RFRA claim because prisoner did not identify any practice or instrument "'mandated' by the Moorish religion" not accommodated by the general Muslim service); *Loden v. Peters*, No. 92 C 20209, 1995 WL 89951, at \*10 n.4 (N.D. Ill. Mar. 1, 1995) (dismissing RFRA claim because prisoner did not show that desire to worship nude was "central to and mandated by his religion"); *Reimann v. Murphy*, 897 F. Supp. 398, 402 (E.D. Wis. 1995) (dismissing RFRA claim because prisoner did not show that possession of certain religious literature was "required" by his faith); *Boone v. Comm'r of Prisons*, No. CIV. A. 93-5074, 1994 WL 383590, at \*8 (E.D. Pa. July 21, 1994) (dismissing RFRA claim because prisoner did not establish that group religious meetings were "mandated by his faith"); *Winters v. State*, 549 N.W.2d 819, 820 (Iowa 1996) (dismissing RFRA claim because CJCC inmate did not show that his religious beliefs "required" him not to share a cell with a black inmate); *Bartley v. Mamoulides*, 694 So. 2d 1050, 1052 (La. Ct. App. 1997) (dismissing RFRA claim because Muslim inmate did not show that being called by a religious name was a compelling requirement[]" of his religion).

consideration of whether the religious exercise at issue in the case is “central” (or fundamental) to a particular religion is irrelevant.<sup>118</sup> Accordingly, particular acts of religious exercise are protected from being substantially burdened under RLUIPA, regardless of whether a judge (or any other government official) feels they are not of sufficient importance to a religion to be worthy of protection. Like the exclusion of whether a religious practice is “compelled” by faith, RLUIPA’s rejection of a “centrality” inquiry in its definition of religious exercise is designed to comply with Supreme Court precedent and correct the error that some lower courts adopted in restricting the scope of RFRA’s protection.

RLUIPA omits the “centrality” inquiry precisely to *comply* with the Supreme Court’s unequivocal admonition to avoid it. Specifically, the Court stated in *Smith*:

It is no more appropriate for judges to determine the “centrality” of religious beliefs before applying a “compelling interest” test in the free exercise field, than it would be for them to determine the “importance” of ideas before applying a “compelling interest” test in the free speech field.<sup>119</sup>

The Supreme Court identified the problem with a centrality test to be similar to that posed by the inquiry into whether a particular religious practice is compelled by the religious adherent’s faith: it puts the court in the position of evaluating a religious belief system and making a religious judgment about how central or fundamental a particular practice is to a religion.<sup>120</sup> Where the state and believers

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118. See 42 U.S.C. § 2000cc-5(7) (2004) (“[R]eligious exercise’ includes any exercise of religion, *whether or not . . . central to*] a system of religious belief.”) (emphasis added).

119. 494 U.S. at 886–87. The Court also observed, “What principle of law or logic can be brought to bear to contradict a believer’s assertion that a particular act is ‘central’ to his personal faith?” *Id.* at 887. See also *id.* at 906 (O’Connor, J., concurring in the judgment) (“I agree with the Court that . . . [i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith.”) (citations omitted); *id.* at 919 (Blackmun, J., dissenting) (“I agree with Justice O’Connor that courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is ‘central’ to the religion.”); *Muslim v. Frame*, 897 F. Supp. 215, 220 (E.D. Pa. 1995) (recognizing that the *Smith* Court “unanimously rejected a centrality inquiry on the basis of judicial competence”).

120. *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 457–58 (1988) (“[T]he dissent thus offers us the prospect of this Court’s holding that some sincerely held religious beliefs and practices are not ‘central’ to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent’s approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.”).

disagree whether a practice is central to a religion or not, the court is forced to potentially second-guess believers about what their own faith teaches and then put the force of the state behind an interpretation that a particular practice is not central. That, the Court has held, the state may not do.<sup>121</sup>

Given the Supreme Court's clear instruction in *Smith* and other cases, numerous lower courts<sup>122</sup> since *Smith* have obeyed this limitation on the "substantial burden" inquiry and refused to take on the "misguided enterprise" of measuring the comparative "import of certain religious practices" by deciding what practices are more central or fundamental to a particular faith than others.<sup>123</sup> Courts have also recognized that the very concept of "centrality," like the notion of a particular act being required by a faith, is one that some minority religions do not recognize; accordingly, courts have recognized that not imposing a centrality requirement also serves the goal of not disadvantaging less mainstream religions.<sup>124</sup>

121. See *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith . . ."). It is true that the Court has occasionally mentioned in passing that a religious claimant's views and practices are "central to their faith." See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972), but the Court never held in *Yoder* or any other case that a showing of "centrality" is necessary to state a claim of substantial burden. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1247 (2d ed. 1988) ("[T]he Court has never specifically required free exercise claimants to demonstrate that the state requirement burdens a central tenet of their beliefs.").

122. See, e.g., *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002) ("Because '[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires,' courts are not permitted to inquire into the centrality of a professed belief to the adherent's religion . . .") (quoting *Smith*, 494 U.S. at 886–87); *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1549 (11th Cir. 1993) (stating that inquiry into centrality is foreclosed by Supreme Court precedent); *Kreisner v. City of San Diego*, 1 F.3d 775, 781 (9th Cir. 1993) (same); *Salvation Army v. Dep't of Cmty. Affairs*, 919 F.2d 183, 189 n.4 (3d Cir. 1990) (same); *Charles v. Verhagen*, 220 F. Supp. 2d 937, 946 (W.D. Wis. 2002) (same); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1227 n.12 (C.D. Cal. 2002) (same); *McBride v. Shawnee County*, 71 F. Supp. 2d 1098, 1101 (D. Kan. 1999) (same); *Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272, 1284 (S.D. Fla. 1999) (same); *Al-Amin v. City of New York*, 979 F. Supp. 168, 171 (E.D.N.Y. 1997) (same); *Blanken v. Ohio Dep't of Rehab. and Corr.*, 944 F. Supp. 1359, 1365 (S.D. Ohio 1996) (same); *Estep v. Dent*, 914 F. Supp. 1462, 1466–67 (W.D. Ky. 1996) (same); *Muslim v. Frame*, 891 F. Supp. 226, 230 (E.D. Pa. 1995) (same); *Religious Tech. Ctr. v. F.A.C.T.N.E.T., Inc.*, 907 F. Supp. 1468, 1472 (D. Colo. 1995) (same); *Luckette v. Lewis*, 883 F. Supp. 471, 478 (D. Ariz. 1995) (same); *Phipps v. Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995) (same); *Campos v. Coughlin*, 854 F. Supp. 194, 211 (S.D.N.Y. 1994) (same).

123. *McEachin v. McGuinnis*, 357 F.3d 197, 202 (2d Cir. 2004).

124. See, e.g., *Coronel v. Paul*, 316 F. Supp. 2d 868, 877 (D. Ariz. 2004) ("[N]ot all religions have practices that are more central than others. '[F]aiths that either embrace all religions, such as certain New Age religions, or groups that support no unifying creed, such as the Quakers, may not be able to demonstrate that any particular practice is central

However, despite the Supreme Court's clear instruction that courts lack competence to inquire into whether a religious practice is central or fundamental to an individual's religious faith, several lower courts including the Sixth,<sup>125</sup> Seventh,<sup>126</sup> Eighth,<sup>127</sup> Ninth,<sup>128</sup> and Tenth<sup>129</sup> circuits and some district courts,<sup>130</sup> imposed a "centrality" requirement in order for religious practice to be protected under RFRA. The impact of this decision, like the decision of courts to impose a compulsion requirement discussed above, was to narrow the scope of RFRA's protections by enabling the government to defeat plaintiffs' claims without the government ever being required to make its showing that burdening religious exercise was the least restrictive means of advancing a compelling government interest. An examination of prisoner cases decided prior to *Boerne* reveals that imposition of the centrality test was another common reason for the enormous percentage of prisoner cases being dismissed by courts for

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to their religious beliefs.") (quoting SEEGER, *supra* note 99, at 1503).

125. *Abdur-Rahman v. Michigan Dep't of Corr.*, 65 F.3d 489, 491–92 (6th Cir. 1995) (finding no substantial burden because prisoner's religious practice of attending Friday evening Muslim services was not "fundamental" to the claimant's religion).

126. *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) ("We hold, therefore, that a substantial burden on the free exercise of religion, within the meaning of the Act, is one that 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 . . ."). *vacated on other grounds*, 522 U.S. 801 (1997).

127. *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996) (holding that to establish a substantial burden a plaintiff must demonstrate government conduct "significantly inhibit[s] or constrain[s] conduct or expression that manifests some *central* tenet of a [person's] individual beliefs," and "assuming for purposes of analysis that courts can constitutionally determine the parameters of religious belief, what beliefs are important or fundamental, and whether a particular practice is of only minimal religious significance") (emphasis added).

128. *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) ("The religious adherent . . . has the obligation to prove that a governmental [action] burdens the adherent's practice of his or her religion . . . by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is *central* to religious doctrine.") (alterations in original) (emphasis added) (quoting *Graham v. Comm'r*, 922 F.2d 844, 851 (9th Cir. 1987)).

129. *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (holding that to "exceed the 'substantial burden' threshold, government regulation must significantly inhibit or constrain conduct or expression that manifests some *central* tenet of a prisoner's individual beliefs, must meaningfully curtail a prisoner's ability to express adherence to his or her faith; or must deny a prisoner reasonable opportunities to engage in those activities that are *fundamental* to a prisoner's religion") (citations omitted) (emphasis added).

130. *See, e.g., Winburn v. Bologna*, 979 F. Supp. 531, 535 (W.D. Mich. 1997) (holding that, to satisfy the substantial burden requirement of RFRA, plaintiff had to show that the government's action interfered with a tenet or belief that is central to the religious doctrine). *See also* district court cases cited *infra* note 126.



failure to establish a substantial burden on religious exercise.<sup>131</sup>

With the passage of RLUIPA (and the amendment of RFRA), all of these cases that imposed a centrality requirement have been overruled and should not be cited as good law. The effect that this should have on the accommodation of prisoners' religious exercise is illustrated by *Mayweathers v. Terhune*,<sup>132</sup> a recent case arising out of a lower court within the Ninth Circuit. In *Mayweathers*, a group of Muslim prisoners challenged California's prison policy that refused to allow them to grow one-half inch beards. There was no question in the case that the prisoners' desire to wear the beards was religiously motivated. However, the prisoners did not present evidence that the practice of growing beards was "central" to their faith, and the prison put forth evidence to the effect that growing a beard was not even

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131. See *Weir v. Nix*, 114 F.3d 817, 821 (8th Cir. 1997) (dismissing RFRA claim because fundamentalist Christian prisoner did not show that worshipping on Sunday was a "central tenet" of his religion); *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996) (dismissing RFRA claim because CJCC prisoner failed to show that book confiscated by the prison was "central to his religious practices"); *Smith v. Beatty*, 82 F.3d 420, No. 95-1493, 1996 WL 166270, at \*2 (7th Cir. Apr. 5, 1996) (dismissing RFRA claim because prisoner failed to establish that participating in communal worship was "of central importance" to his faith); *Hall v. Sullivan*, No. 95-1203, 1995 WL 750312, at \*1 (10th Cir. Dec. 14, 1995) (dismissing RFRA claim because Nation of Islam prisoner could not establish that any of the religious literature he received was so "significant to the practice of his religion" as to burden his free exercise); *Abdur-Rahman v. Michigan Dep't of Corr.*, 65 F.3d 489, 492 (6th Cir. 1995) (dismissing RFRA claim because Muslim prisoner did not establish that attending Friday service was "fundamental" to his religion); *Dickinson v. Austin*, No. 93-17350, 1995 WL 394360, at \*1 (9th Cir. June 30, 1995) (dismissing RFRA claim because prisoner failed to establish that wearing a religious medallion was "central to his religious doctrine"); *Collins v. Scott*, 961 F. Supp. 2d 1009, 1014 (E.D. Tex. 1997) (dismissing RFRA claim because prisoner failed to establish that his religiously based modesty belief that he should not be exposed naked to women was "central" to Muslim religion); *Williams v. Roberts*, No. 96 C 4290, 1997 WL 13628, at \*2 (N.D. Ill. Mar. 20, 1997) (dismissing RFRA claim because prisoner did not show that Jehovah's Witness literature was "central" or "essential" to his religious exercise); *Williams v. Muhammad*, No. 96 C 4291, 1997 WL 136270, at \*3 (N.D. Ill. Mar. 20, 1997) (dismissing RFRA claim because prisoner failed to show that receiving particular religious cassette tape was "central" to his faith); *Eskew v. Baker*, Civil No. N-94-2822, 1996 WL 807889, at \*3 (D. Md. May 2, 1996) (dismissing RFRA claim because prisoner did not establish that desired religious practice of reading Ku Klux Klan literature was "central" to any religion); *Best v. Kelly*, 879 F. Supp. 305, 308 (W.D.N.Y. 1995) (dismissing RFRA claim because "plaintiff has not alleged that attendance at services is essential to following his religion"); *Rhinehart v. Gomez*, No. 93-CV-3747, 1995 WL 364339, at \*5 (N.D. Cal. June 8, 1995) (dismissing RFRA claim because Muslim prisoner failed to show that submitting to tuberculosis test would violate an "essential element of his religion"); *Abdur-Ra'ooof v. Dep't of Corr.*, 562 N.W. 2d 251, 253 (Mich. Ct. App. 1997) (dismissing RFRA claim because Muslim prisoner did not establish that attending Friday service was "fundamental" to his religion); *Schuch v. Rogers*, 681 N.E.2d 1388, 1390 (Ohio Ct. App. 1996) (dismissing RFRA claim because Native American prisoners "never offered any evidence of how the requested items were central to the tenets of their religion").

132. No. Civ. S-96-1582 (E.D. Cal. Feb. 8, 2002), available at <http://www.pacer.psc.uscourts.gov>.

mentioned in the Koran.<sup>133</sup> Because the Ninth Circuit had held that RFRA required a prisoner to meet a “centrality” requirement,<sup>134</sup> that would have been the end of the claim. But applying RLUIPA, the district court found that the prisoners were not required to show centrality and that they had carried their burden of showing that the prison’s no-beard rule imposed a substantial burden on their sincere religious convictions.<sup>135</sup>

Thus, RLUIPA’s definition of religious exercise to preclude inquiry into whether the particular religious exercise at issue is central or fundamental to the religious adherent’s faith is another very important feature of the Act. Not only does this definition to exclude centrality conform to Supreme Court precedent concerning the limits of judicial competence to inquire into religious matters, but it also addresses another of the common means lower courts employed under RFRA to limit the success of prisoner claims. This should increase the success of prisoners under RLUIPA as compared to RFRA.

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In sum, then, RLUIPA requires that plaintiffs demonstrate a substantial burden on their religious exercise. RLUIPA incorporates the Supreme Court’s standard for substantial burden, which asks whether government action (1) puts pressure on individuals to modify their religious behavior or (2) prevents them from engaging in religious conduct in a way that is greater than a mere inconvenience. Under RLUIPA’s definition of religious exercise, any discrete act of sincere, religiously motivated behavior is eligible for protection. Moreover, whether the religious exercise is compelled or mandated by the plaintiffs’ faith has no bearing on the inquiry. Whether the religious exercise is central or fundamental to the plaintiffs’ faith is similarly irrelevant.

## 2. *RLUIPA’s Jurisdictional Requirements—Demonstrating Either Spending Clause or Commerce Clause Jurisdiction*

*Boerne* foreclosed Congress’s ability to rely on its Fourteenth

133. *Id.* slip op. at 7.

134. *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (requiring that plaintiff establish “interference with a tenet or belief that is central to religious doctrine”) (quoting *Graham v. Comm’r*, 822 F.2d 844 (9th Cir. 1987)).

135. *Mayweathers*, No. Civ. S-96-1582, at 7–9. The case is also another example of how RLUIPA’s rejection of a compulsion standard benefits prisoner religious exercise claims, as the court also refused to consider the testimony of a prison imam that growing a beard was not mandated by the Muslim faith. *Id.* at 7.

Amendment Enforcement Clause powers to enact a more protective standard for the religious exercise of state prisoners than the Supreme Court has held that the First Amendment requires.<sup>136</sup> Accordingly, rather than relying on the Fourteenth Amendment in enacting RLUIPA's prisoner provisions, Congress invoked its Spending and Commerce Clause powers. Specifically, RLUIPA hinges the applicability of its protections for prisoners on whether the plaintiff can establish at least one of two jurisdictional requirements:

[(1)] the substantial burden [on the prisoner's religious exercise] is imposed in a program or activity that receives Federal financial assistance [Spending Clause jurisdiction]; or [(2)] the substantial burden [on the prisoner's religious exercise] affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes [Commerce Clause jurisdiction].<sup>137</sup>

A plaintiff who fails to affirmatively plead and prove the existence of one of these two jurisdictional requirements will not be entitled to relief under the statute.<sup>138</sup>

#### *a. Spending Clause Jurisdiction*

Congress imposed RLUIPA's requirements as a condition of the receipt of federal funds. The statute applies where a "government" imposes a substantial burden on a prisoner's religious exercise "in a program or activity that receives Federal financial assistance." The term "program or activity" encompasses "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or local government."<sup>139</sup> In other words, once a state department of corrections accepts federal funds, all of its operations must abide with RLUIPA.<sup>140</sup> Thus, to invoke jurisdiction under

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136. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

137. 42 U.S.C. § 2000cc-1(b) (2004).

138. *See, e.g., Ephraim v. Angelone*, 313 F. Supp. 2d 569, 574 (E.D. Va. 2003) (dismissing prisoner's RLUIPA claims because his complaint did "not allege[] sufficient facts to properly invoke [jurisdiction] . . . [He] has not alleged that the [defendant] Lunenberg Correctional Center . . . receive[s] federal financial assistance. Nor has Plaintiff alleged a substantial burden that would affect interstate or foreign commerce. Absent such a showing, Plaintiff cannot invoke the general rule set forth in subsection (a).").

139. 42 U.S.C. § 2000d-4a; 42 U.S.C. § 2000cc-5(6) ("The term 'program or activity' means all of the operations of any entity as described in paragraph (1) or (2) or section 2000d-4a of this title.").

140. *See also Orafan v. Goord*, No. 00-CV-2022 (LEK/RFT), 2003 WL 21972735, at \*7 (N.D.N.Y. Aug. 11, 2003) ("No where [sic] in this definition [of program and activity] does it state that a receiver of federal funds is at liberty to decide which programs are under the auspice of RLUIPA.").

RLUIPA's Spending Clause hook, prisoners must prove that the prison or the department of corrections that supervises their prison received federal funds. Ordinarily, this should not be a difficult task, as the federal government gives tens of millions of dollars a year in grants to state and local departments of corrections.<sup>141</sup> Plaintiffs should be able to use the discovery process to gather the necessary proof of the specific federal funds received by the department of corrections that has imposed the burden on their religious exercise.<sup>142</sup>

### *b. Commerce Clause Jurisdiction*

If for some reason prisoners cannot establish jurisdiction under the Spending Clause hook, they may also seek to establish jurisdiction under RLUIPA's Commerce Clause jurisdictional element.<sup>143</sup> In evaluating whether prisoners have met their burden of proof of establishing jurisdiction, courts will assess whether the substantially burdened religious exercise in question—e.g., a denial of a religiously required diet, refusing access to devotional materials, not providing worship facilities—“substantially affects interstate commerce.”<sup>144</sup>

141. See Lynn Bauer & Steven D. Owen, *Justice Expenditure and Employment in the United States, 2001*, BUREAU OF JUSTICE STATISTICS BULLETIN 4, <http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeus01.pdf> (May 2004) (detailing that the federal government gave out \$881,000,000 in intergovernmental transfers to correctional facilities in year 2001).

142. Even without the discovery process, details of the federal money that a state department of corrections receives may be readily found. For example, the amount of federal funds received by Georgia, Ohio, and California—three states that have challenged RLUIPA's constitutionality—may be found on their respective state websites. Specifically, Georgia's Department of Corrections received over \$18 million in federal funds in 2003. Sonny Purdue, *Fiscal Year 2005: The Governor's Budget Report* 72, <http://www.opb.state.ga.us/Budget/FY05BR.pdf> (last visited Dec. 5, 2004). Ohio's Department of Rehabilitation and Correction spent \$9,136,000 in 2002 and an estimated \$33,680,000 in 2003 from what it called the “Federal Special Revenue Fund Group.” State of Ohio Office of Budget Management, *Executive Budget: Fiscal Years 2004 and 2005* E-289, [http://obm.ohio.gov/Information/Budget/Bluebook0405/pdf/e\\_drc.pdf](http://obm.ohio.gov/Information/Budget/Bluebook0405/pdf/e_drc.pdf) (Feb. 2003). And the California Department of Corrections recently received a \$1 million federal grant to provide intensive care and supervision to “serious and violent offenders who suffer from mental health and/or substance abuse problems.” California Department of Corrections, *Federal Grant Awarded to Parole Division*, <http://www.corr.ca.gov/ParoleDiv/Grant.asp> (last visited Dec. 5, 2004).

143. In *United States v. Lopez*, 514 U.S. 549, 558–59 (1995), the Supreme Court described three categories of activity that fall within Congress's power under the Commerce Clause. First, “Congress may regulate the use of the channels of interstate commerce.” *Id.* at 558. Second, “Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” *Id.* Third, “Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.” *Id.* at 558–59 (citation omitted).

144. *Id.* at 559.

Interstate effect is measured by examining the activity at issue “taken together with that of many others similarly situated.”<sup>145</sup> These aggregated effects fall beyond the commerce power only if they are “so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local.”<sup>146</sup>

Prisoners should be able to meet this test easily in some of the typical cases that have arisen thus far under RLUIPA. For example, where the burden involves failing to provide a religious diet or access to devotional items, it seems clear that refusing to provide these accommodations to a particular prisoner, “taken together with . . . many others similarly situated,” would “substantially affect interstate commerce.” Even if every commercial transaction involved in supplying a religious diet or devotional item would occur exclusively in the state of the prison that imposed this burden on religious exercise—unlikely though that may be—the aggregate effect of similar activity elsewhere would still implicate the commerce power.<sup>147</sup> By contrast, the regulated activity in *Lopez*—possessing a gun in a school zone—was not one “that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”<sup>148</sup> Moreover, a court would not need to “pile inference upon inference”<sup>149</sup> to get from the regulated category of activity to an effect on interstate commerce. A state’s refusal to accommodate prisoners’ request for a religious diet<sup>150</sup> or access to devotional items<sup>151</sup> directly

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145. *Id.* at 556 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942); see also *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 586 (1997) (relying on “interstate commercial activities of nonprofit entities as a class” in Commerce Clause determination, citing *Lopez* and *Wickard*) (emphasis added).

146. *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

147. See, e.g., *Camps*, 520 U.S. at 586 (“[A]lthough the [Christian Scientist] summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant.”).

148. *Lopez*, 514 U.S. at 567.

149. *Id.*

150. Indeed, prisons already engage in a large number of commercial transactions in providing food for prisoners. The provision of a religiously prescribed diet likewise would require such transactions, the only difference being the *kind* of food purchased. The refusal of a prison to provide such a diet actually *prevents* a large number of commercial transactions.

151. Devotional materials, especially highly specialized materials for followers of minority religions, will often need to be purchased out-of-state or even internationally. Indeed, interstate purchase and transportation of personal items for prisoners is a daily occurrence, as prisoners are generally permitted to have certain personal items. Permitting prisoners to have certain devotional items merely adds to the volume of interstate

and immediately prevents numerous commercial transactions, i.e., those necessary to establish and operate a religious meal program or to procure the devotional items in question. In addition, applying RLUIPA in those situations would not threaten “the distinction between what is national and what is local.”<sup>152</sup> RLUIPA neither replaces state rules for prison administration with federal ones, nor provides religious adherents a blanket exemption from such state rules; instead, RLUIPA requires state authorities to provide additional justification for a limited category of rules, namely, those that both burden religious exercise and affect interstate commerce.<sup>153</sup>

In addition, a persuasive argument can be made that Commerce Clause jurisdiction is applicable to the administration of prisoners—including whether their religious exercise is burdened—by the fact that states frequently send some of their prisoners to out-of-state facilities. This is done for various reasons, including prison overcrowding. Whenever a state does this, it necessarily engages in interstate commerce to handle requests for religious and other personal property from inmates.<sup>154</sup> Because “Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce” and to “regulate those activities having a substantial relation to interstate commerce,”<sup>155</sup> requests for religious accommodation from inmates transferred to out-of-state facilities would be subject to regulation under the Commerce Clause, and accordingly under RLUIPA’s jurisdiction.

Although RLUIPA places the burden on prisoners to prove that the jurisdictional element of an effect on commerce has been met, the Act also provides defendants a double measure of protection in such cases. Specifically, if the sole basis for the applicability of RLUIPA rests on the Commerce Clause power, a defendant can defeat the claim that RLUIPA is inapplicable if the burden at issue applied “throughout the nation would not lead in the aggregate to a substantial effect on [interstate] commerce.”<sup>156</sup>

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commerce that is already occurring as part of the day-to-day administration of prisons, and refusing to allow prisoners to possess such materials prevents many commercial transactions.

152. *Lopez*, 514 U.S. at 557, 567.

153. See also *Johnson v. Martin*, 223 F. Supp. 2d 820, 829 (W.D. Mich. 2002) (noting that “RLUIPA covers regulation of the free exercise of religion, an objectively interstate activity,” and that religious exercise “affects interstate commerce in a multitude of ways”).

154. *Charles v. Verhagen*, 348 F.3d 601, 609 n.3 (7th Cir. 2003).

155. *Lopez*, 514 U.S. at 558–59.

156. 42 U.S.C. § 2000cc-2(g).

### 3. *RLUIPA's Exhaustion Requirement—Demonstrating Compliance with the PLRA*

RLUIPA does not relieve prisoners of their obligation under the Prison Litigation Reform Act<sup>157</sup> to first exhaust any administrative remedies provided by the prison before filing suit.<sup>158</sup> “Exhaustion of administrative remedies as required by [42 U.S.C.] § 1997e, is a condition precedent to suit” and courts lack discretion to decide claims on the merits if the exhaustion requirement is not met.<sup>159</sup> While a prisoner, to successfully exhaust the administrative process, need only “provide with his grievance all relevant information reasonably available to him,”<sup>160</sup> prisoners should take care to explain, with reasonable specificity, how a challenged policy burdens their religious exercise.<sup>161</sup>

#### *C. Defending Against a RLUIPA Claim*

Once a plaintiff has proved that a prison has imposed a substantial burden on his or her religious exercise, RLUIPA shifts the burden to the defendants to prove that this burden is necessitated by a “compelling government interest,” and that substantially burdening the plaintiff’s religious exercise is the “least restrictive means” of achieving that interest.<sup>162</sup>

##### *1. The Strict Scrutiny Test Applies*

Because RLUIPA does not define “compelling government interest” or “least restrictive means,” these terms must be given their ordinary meaning.<sup>163</sup> Like the statute’s use of the term “substantial

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157. 42 U.S.C. § 2000cc-2(e).

158. 42 U.S.C. § 1997e(a) (“No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” (emphasis added). “The exhaustion requirement of § 1997e(a) is mandatory, and there is no discretion to waive this requirement or provide continuances of prisoner litigation in the event that a claim has not been exhausted prior to filing.” *Wilson v. Moore*, No. 4:01CV158-RV, 2002 WL 950062, at \*2 (N.D. Fla. Feb. 28, 2002).

159. *Dixon v. Page*, 291 F.3d 485, 488 (7th Cir. 2002).

160. *See, e.g., Brown v. Sikes*, 212 F.3d 1205, 1208 (11th Cir. 2000).

161. *See, e.g., Henderson v. Sebastian*, No. 04-C-0039-C, 2004 WL 1946398 (W.D. Wis. Aug. 25, 2004) (finding that prisoner’s grievances failed to adequately exhaust claim that he was improperly denied access to two Taoist texts). *See also Kikumura v. Hurley*, 242 F.3d 950, 956 (10th Cir. 2001) (“A litigant’s failure to raise issues during an administrative appeal can constitute a failure to exhaust administrative remedies.”).

162. 42 U.S.C. § 2000cc-1(a).

163. *Cf., e.g., Turner v. Cook*, 362 F.3d 1219, 1227 (1st Cir. 2004) (noting in the context of the FDCPA that “a fundamental canon of statutory construction directs us to

burden,” these are terms of art with an established meaning in constitutional jurisprudence, familiar to jurist and first year law student alike as constituting the “strict scrutiny” test.<sup>164</sup> Accordingly, in codifying this test, the statute directs courts to apply established precedent concerning what constitutes a compelling government interest and the least restrictive means of furthering that interest.

The Supreme Court has repeatedly emphasized the stringent nature of the compelling government interest standard. In *Wisconsin v. Yoder*, the Court defined a compelling interest as “only those interests of the highest order.”<sup>165</sup> Similarly, in *Sherbert v. Verner*, the Court held that “[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.”<sup>166</sup> Moreover, where the compelling interest standard applies, that test “is not ‘water[ed] . . . down’ but ‘really means what it says.’”<sup>167</sup> Examples of compelling interests include avoiding disclosure of sensitive governmental information;<sup>168</sup> maintaining the tax system,<sup>169</sup> enforcing participation in the social security system,<sup>170</sup> protecting an endangered

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interpret words according to their ordinary meaning”).

164. See, e.g., *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1251 (11th Cir. 2004) (“[S]trict scrutiny[] [is] the requirement that the government use the least restrictive means of advancing a compelling government interest.”); *Thomas v. Review Bd. of Ind. Sec. Div.*, 450 U.S. 707, 718 (1981) (“The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.”); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance ‘interests of the highest order’ and must be narrowly tailored in pursuit of those interests.” (internal citations omitted)).

165. 406 U.S. 205, 215 (1972) (“[O]nly those interests of the highest order and not those otherwise served can overbalance legitimate claims to the free exercise of religion.”).

166. 374 U.S. 398, 406 (1963). (“It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, [o]nly the gravest abuses [by religious adherents], endangering paramount interests, give occasion for permissible limitation [on the exercise of religion].” (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945))).

167. *Church of the Lukumi Babalu*, 508 U.S. at 546 (1993) (quoting *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990)). See also BLACK’S LAW DICTIONARY 282 (6th ed. 1990) (defining “compelling government interest” as “[o]ne which the state is forced or obliged to protect. Term used to uphold action in the face of attack grounded on Equal Protection or First Amendment rights because of serious need for such state action”) (internal citations omitted); *Storzer & Picarello*, *supra* note 34, at 929, 962–63 (2001) (describing what amounts to a compelling government interest under the land use provisions of RLUIPA).

168. See *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989).

169. See *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 699 (1989).

170. See *United States v. Lee*, 455 U.S. 252, 258–59 (1982).



species;<sup>171</sup> preventing “a clear and present, grave and immediate danger to public health, peace, and welfare”;<sup>172</sup> and maintaining safety and order in public schools.<sup>173</sup> In the prison context, clear examples of compelling government interests include preventing illegal drug use,<sup>174</sup> preventing the spread of infectious diseases,<sup>175</sup> suppressing violent gang activity,<sup>176</sup> and maintaining institutional security and safety.<sup>177</sup>

Constitutional jurisprudence has made clear that “‘least restrictive means’ is a severe form of the more commonly used ‘narrowly tailored’ test.”<sup>178</sup> The accompanying searching inquiry is what makes strict scrutiny strict.<sup>179</sup> Satisfying the least restrictive means test requires the government to prove that “no alternative forms of regulation would combat” the target of the government’s compelling interests without infringing the protected right.<sup>180</sup> A law fails least restrictive means where the “government could tailor its regulation more closely to fit . . . conduct likely to threaten the harms it fears.”<sup>181</sup> In other words, if the government’s compelling “interests could be achieved by narrower ordinances [or policies] that burdened religion

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171. See *United States v. Antoine*, 318 F.3d 919, 921 (9th Cir. 2003).

172. *First Covenant Church v. City of Seattle*, 840 P.2d 174, 187 (Wash. 1992) (finding a compelling interest under the state constitution) (quotation marks and citations omitted).

173. See *Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir. 1995).

174. See, e.g., *United States v. Israel*, 317 F.3d 768, 771 (7th Cir. 2003).

175. See, e.g., *Karolis v. N.J. Dep’t of Corr.*, 935 F.Supp. 523, 528 (D. N.J. 1996) (finding a compelling interest in preventing the spread of tuberculosis).

176. See, e.g., *Charles v. Frank*, No. 04-1674, 2004 WL 1303403, at \*2 (7<sup>th</sup> Cir. Jun. 9, 2004) (noting that “[S]uppressing gang activity to promote a secure and safe prison environment is indisputably a compelling interest.”).

177. See, e.g., *May v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997) (noting that maintaining prison security is a compelling government interest); *Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996) (“prison safety and security” is a compelling government interest); *Lawson v. Singletary*, 85 F.3d 502, 512 (11th Cir. 1996) (“It is well established that states have a compelling interest in security and order within their prisons.”). See also *Pell v. Procunier*, 417 U.S. 817, 823 (1974) (“[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.”).

178. See, e.g., *United States v. Hardman*, 297 F.3d 1116, 1130 (10th Cir. 2002)(citing *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)).

179. *Nasir v. Morgan*, 350 F.3d 366, 370 n.4 (3d Cir. 2003) (“[A] least-restrictive means test test[] [is] the hallmark of strict scrutiny analysis.”).

180. *Sherbert*, 374 U.S. at 407. See also *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”).

181. *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1255 (11th Cir. 2004). See also LAWRENCE H. TRIBE, *AMERICAN CONSTITUTION LAW* § 12-7, at 829 n.23 (2d ed. 1988) (defining “least restrictive means” as “the unavailability of other measures with less detrimental effect on” the infringing right).

to a far lesser degree,” the government has not used the least restrictive means available.<sup>182</sup>

A recent district court case applying RLUIPA’s strict scrutiny standard illustrates these principles in action. In *Leishman v. Holland*,<sup>183</sup> the plaintiff, an adherent of the Asatru religion, challenged the prison’s absolute ban on the possession of a Rune set. Runes are “small tablets with ancient symbols on them” and, according to the plaintiff, the “most important of all ritual tools used in the faith of Asatru.”<sup>184</sup> The court found that the prison had a compelling interest in preventing gambling because of the security threat it posed and that a flat ban on a Rune set was rationally related to that interest because it was possible that runes could be diverted for gambling use.<sup>185</sup> However, the court held that a flat ban was not the least restrictive means of achieving that interest because limits could be placed on plaintiff’s use of the runes (e.g., use in designated areas only) so that they would not be diverted to gambling.<sup>186</sup> That the prison would incur additional costs in monitoring the runes’ use was not grounds to find that the prison did not have a less restrictive alternative to a flat ban.<sup>187</sup> *Leishman* thus illustrates how strict scrutiny should be applied: where the government’s compelling interest can be served by alternative policies that impose either no burden or a lighter burden on religious exercise, the government has not used the least restrictive means.

Although strict scrutiny is not a novel doctrine, there are several

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182. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

183. No. 01-CV-926 (D. Utah May 28, 2004), available at <http://www.pacer.psc.uscourts.gov>. “Asatru is the term used for the indigenous pagan religion of pre-Christian northern Europe.” *Id.*

184. *Leishman*, slip op. at 3–4 (quoting *Odinism/Asatru: A Statement of Facts for Department of Corrections*).

185. *Id.* at 19–20.

186. *Id.* at 20.

187. *Id.* In contrast to the absolute ban adopted by the prison in *Leishman*, the Seventh Circuit recently upheld a less draconian policy on the possession of religious items. *Charles v. Frank*, No. 04-1674, 2004 WL 1303403, at \*2 (7th Cir. Jun. 9, 2004). There, a prisoner challenged a policy that denied him the ability to openly wear prayer beads of a certain size in common areas of the prison. Pursuant to the policy, the prisoner was allowed to wear his prayer beads in his cell and in common areas of the prison so long as the beads were sufficiently small for them to remain hidden under his shirt. The court first found that the prison had a compelling interest in preventing gang activity and the wearing of symbols that could indicate gang association. Turning to the least restrictive means inquiry, the court noted that it would be a different case if the prison had flatly prohibited prayer beads. The court found that the prison had chosen the least restrictive means because allowing the prisoner to wear his beads in common areas, but under his shirt, was narrowly tailored to achieve the compelling interest. *Id.*

important issues raised by RLUIPA's codification of strict scrutiny in the prison context that warrant additional discussion.

2. *Unlike the Turner/O'Lone standard, RLUIPA Shifts the Burden of Proof to Defendants*

Before RLUIPA, to prevail in a Free Exercise clause challenge to a prison policy, prison administrators often had to little do more than assert a legitimate interest for burdening the plaintiff's religious exercise, a task that they generally became quite adept at doing.<sup>188</sup> This is because under the *Turner/O'Lone* test, the burden of proof and production fell wholly on the prisoner to establish that there was no rational relationship between the prison's asserted interest and the policy burdening religious exercise.<sup>189</sup>

RLUIPA changed this. Not only is a prison policy that burdens religious exercise now subject to strict, instead of rational basis scrutiny, but RLUIPA provides that prison administrators now have the burden of "demonstrat[ing]" a compelling interest and that substantially burdening religious exercise was the least restrictive means to achieve that interest.<sup>190</sup> Under the Act, "[t]he term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion."<sup>191</sup> Thus, the government has both the burden of producing evidence and the burden of persuasion to prove the existence of a compelling government interest and least restrictive means. The burden of production is "a party's obligation to come forward with evidence to support its claim."<sup>192</sup> "The burden of persuasion includes the burden of establishing before a fact-finder that a given proposition is correct."<sup>193</sup> Where "the evidence is evenly balanced, the party that bears the burden of persuasion must lose."<sup>194</sup>

RLUIPA's assignment to the government of the burden of production and persuasion reflects the general rule of cases in which

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188. As one prison administrator forthrightly stated, "After *O'Lone*, we tried to standardize the system statewide and make sure that all reasons for denial of any type of [religious] practice were based upon security concerns." Telephone Interview with Imam A. J. Sabree, Assistant Director of Chaplaincy, Ga. Dep't of Corr. (Dec. 6, 2001)) (cited in *In the Belly of the Whale: Religious Practice in Prison*, 115 HARV. L. REV. 1891, 1894 n.19 (2002)).

189. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987).

190. U.S.C. § 2000cc-1(a).

191. 42 U.S.C. § 2000cc-5.

192. *Dir., Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994).

193. *United States v. Hollis*, 569 F.2d 199, 204 n.6 (3d Cir. 1977).

194. *Greenwich Collieries*, 512 U.S. at 272 (1994).

strict scrutiny applies: “[t]o survive strict scrutiny . . . a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest.”<sup>195</sup> This burden of production and persuasion requires that the government “build[] a record that proves that the statutory and regulatory scheme in question is the least restrictive means of advancing the government’s compelling interests.”<sup>196</sup> Furthermore RLUIPA requires that the government must “demonstrate[] that imposition of the [substantial] burden on that person,” (i.e., the plaintiff) advances a compelling interest by the least restrictive means, not merely that application of the law in general achieves its compelling interest.<sup>197</sup> In other words, “a court does not consider the prison regulation in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the prison regulation to the individual claimant.”<sup>198</sup> As one court put it, while it “is undeniable that, in the abstract, [commonly asserted interests such as] safety, security, internal order and discipline, and the management and conservation of resources are ‘compelling interests[,]’ [i]t does not follow . . . that anything that furthers one or more of these interests, however marginally, is equally ‘compelling.’”<sup>199</sup>

At a minimum, the requirement that prison administrators build a record to prove that burdening religious exercise is the least restrictive

195. *Burson v. Freeman*, 504 U.S. 191, 199 (1992). *See also* *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 141 (1987) (state laws burdening religions “must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (government bears burden of “justify[ing]” classification subject to strict scrutiny); *Fulani v. Krivanek*, 973 F.2d 1539, 1542–43 (11th Cir. 1992) (“Under strict-scrutiny analysis, once a plaintiff has demonstrated the burden . . . the state must show ‘that the law advances a compelling interest and is narrowly tailored to meet that interest.’”) (internal citations omitted); *Stiles v. Blunt*, 912 F.2d 260, 263 (8th Cir. 1990) (“[T]he strict scrutiny test requires the government to *prove* that it has a compelling interest.”).

196. *United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002). Speculation will not suffice to carry the burden. *See* *Sherbert v. Verner*, 374 U.S. 348, 407 (1963) (“The [state] suggest[s] no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. . . . [T]here is no proof whatever to warrant such fears of malingering or deceit as those which the [state] now advance[s].”); *Wisconsin v. Yoder*, 406 U.S. 205, 224–25 (1972) (demanding “specific evidence” of the interests advanced and how lifting the burden on religious exercise would affect them).

197. 42 U.S.C. § 2000cc-1.

198. *Kikumura v. Hurley*, 242 F.3d 950, 962 (10th Cir. 2001) (explaining government’s burden of proof under the analogous provisions of the RFRA).

199. *Agrawal v. Briley*, No. 02C6807, 2004 WL 1977581, at \*8 (N.D. Ill. Aug. 25, 2004).

means of advancing a compelling government interest will make it less likely than under *Turner/O'Lone* for prison administrators to prevail on a motion to dismiss or summary judgment.<sup>200</sup> Though in some instances this may result in cases going to trial, the additional leverage given to prisoners will increase the chances for cases to be resolved by settlement or even by the administrative process without the need for a trial.<sup>201</sup>

### *3. Prison Administrators Will Not Be Able to Rely on Merely Legitimate or Important Interests*

RLUIPA's strict scrutiny test narrows considerably the range of interests on which prisons may rely to burden religious exercise. Although prisons will still be able to invoke such compelling government interests as maintaining prison security and safety (by far the most frequently cited reason for denying religious accommodations), lesser interests that merely rise to the level of "important" or "legitimate" will not pass muster. One reason sometimes cited for refusing to accommodate a religious practice is that accommodation will lead to a flood of requests for similar accommodations.<sup>202</sup> that does not suffice as an interest of the highest order. Moreover, differential treatment for prisoners is commonly recognized based on such factors as age or medical condition. The fact that prisons make accommodations based on these factors casts doubt on the importance of an interest in avoiding envy over differential treatment to accommodate religious practice.<sup>203</sup> Furthermore, because all prisons accommodate at least some religious

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200. See, e.g., *Pounders v. Kempker*, No. 03-2054, 79 Fed. Appx. 941, 943, 2003 WL 22462034 (8th Cir. Oct. 31, 2003) (issue of whether prison's basis for denying inmate's requests for sweat lodge served a compelling interest and was the least restrictive means of advancing that interest presented factual questions that could not be resolved on a motion to dismiss).

201. See, e.g., *Cotton v. Fla. Dep't of Corr.*, No. 02-22760 (S.D. Fla. Mar. 11, 2003), <http://www.rluipa.com/cases/CottonMagistrateRpt.pdf>, resulting in a settlement (October 3, 2003) <http://www.rluipa.com/cases/CottonSettlement.pdf> (settlement provided Jewish plaintiff with a kosher diet after the court partially denied a motion to dismiss).

202. See, e.g., *Udey v. Kastner*, 805 F.2d 1218, 1221 (5th Cir. 1986) (finding that "the probable proliferation of claims" by other prisoners for religious diets was legitimate grounds for a prison's refusal to provide prisoner a diet that met the requirements of his faith); *Ben-Avraham v. Moses* 1 F.3d 1246 (table), no. 92-35604, 1993 WL 269611, at \*2 (9th Cir. July 6, 1993) (same).

203. See *Church of Lukumi Babalu v. City of Hialeah*, 508 U.S. 520, 547 (1993). ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in judgment))).

practices, making religious accommodations subject to the feelings of fellow-prisoners would essentially give to other prisoners a heckler's veto over what religions could be accommodated. The inevitable result would be to disparately impact less favored religions—the more unusual or disfavored the religion, the more opposition there would likely be to its accommodation.

Another reason frequently cited by prisons is the risk that other prisoners might be envious or jealous if a particular prisoner's religious exercise is accommodated.<sup>204</sup> Though this has been recognized as a legitimate penological interest,<sup>205</sup> that does not suffice as an interest of the highest order. Moreover, differential treatment for prisoners is commonly recognized based on such factors as age or medical condition. The fact that prisons make accommodations based on these factors casts doubt on the importance of an interest in avoiding envy over differential treatment to accommodate religious practice.<sup>206</sup> Furthermore, because all prisons accommodate at least some religious practices, making religious accommodations subject to the feelings of fellow-prisoners would essentially give to other prisoners a heckler's veto over what religions could be accommodated. The inevitable result would be to disparately impact less favored religions—the more unusual or disfavored the religion,

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204. See, e.g., *Holy Name Society v. Horn*, 2001 WL 959408, at \*12 (E.D. Pa. Aug. 21, 2001) (denying Catholic prisoners' free exercise claim seeking religious "fellowship meals" because allowing fellowship meals to Catholic plaintiffs "would cause resentment among . . . other Christian prisoners" who are not given fellowship meals) (citations and quotation marks omitted); *Hamilton v. Schriro*, 74 F.3d 1545, 1551 (8<sup>th</sup> Cir. 1996) (denying Native American free exercise claim seeking a sweat lodge because of prison's asserted interest in "possible resentment resulting from the erection of an exclusive religious facility"); *Ben-Avraham v. Moses*, 1 F.3d 1246 (9<sup>th</sup> Cir. 1993) (Table Decision available on Westlaw) (accepting as legitimate reason for burdening religious exercise prison's argument that accommodating prisoner's request for a religious diet "could lead . . . to resentment by other prisoners"); *Friend v. Kolodziejczak*, 923 F.2d 126, 128 (9<sup>th</sup> Cir. 1991) (denying Catholic prisoner's free exercise claim requesting use of rosaries and scapulars because "allowing plaintiffs to possess rosaries and scapulars could threaten jail security by creating an impression of favoritism toward Roman Catholic prisoners, thereby generating resentment, envy and intimidation. These are legitimate penological interests."); *Standing Deer v. Carlson*, 831 F.2d 1525, 1529 (9<sup>th</sup> Cir. 1987) (upholding ban on plaintiff's desire to wear Native American religious headgear on basis of prison's argument that "special arrangements for one group could create an appearance of favoritism that could generate resentment and unrest").

205. *Holy Name Society v. Horn*, 2001 WL 959408, at \*9 (E.D. Pa. Aug. 21, 2001) (prison's interest in "avoiding inmate jealousy" is a "legitimate penological concern" (emphasis added)).

206. See *Church of Lukumi Babalu v. City of Hialeah*, 508 U.S. 520, 547 (1993). ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.")

the more opposition there would likely be to its accommodation.

Finally, though the cost of implementing new regulations may in some limited circumstances be a legitimate grounds for continuing to burden religious exercise,<sup>207</sup> the Supreme Court has expressly rejected cost as a compelling government interest.<sup>208</sup> Lower courts have consistently followed suit in rejecting cost and other monetary consideration as a sufficient justification for the infringement of fundamental rights under the strict scrutiny standard.<sup>209</sup> Similarly, courts have held that a government may not deliberately budget in a way that will prevent it from meeting its civil rights obligations.<sup>210</sup> The overriding concern in these cases is that if cost is allowed to

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207. See, e.g., *Beerheide v. Suthers*, 82 F. Supp. 2d 1190, 1200 (D. Colo. 2000) *aff'd*, *Beerheide v. Suthers* 286 F.3d 1179 (10th Cir. 2002), (stating that “in the abstract, the impact on DOC Food Service’s budget [of providing a kosher diet] is a valid concern . . .”). Even in cases where courts have recognized that cost is a legitimate concern in settings, however, it has had to be more than de minimis to justify the imposition of burdens on the religious exercise rights of inmates. See, e.g., *Turner v. Safley*, 482 U.S. 78, 90–91 (1987); *Hammons v. Saffle*, 348 F.3d 1250, 1255, 1257 (10th Cir. 2003); *Beerheide*, 82 F. Supp. 2d at 1196. Though courts differ on what constitutes de minimis cost in prison situations, all courts agree that the religious exercise rights of prisoners cannot simply be denied outright in the absence of a significant financial concern on the part of prison officials. *Turner*, 482 U.S. at 90–91; *Hammons*, 348 F.3d at 1255, 1257; *Beerheide*, 82 F. Supp. 2d at 1196. In *Beerheide*, for instance, the court concluded that because providing kosher meals to inmates would consume a mere 0.158 percent of the prison food service’s annual budget, denying prisoners such meals would violate their First Amendment rights because the cost of these meals was so small. *Beerheide*, 82 F. Supp. 2d at 1200.

208. See *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974) (holding that “[t]he conservation of the taxpayers’ purse is simply not a sufficient state interest” to withstand strict scrutiny).

209. See, e.g., *Pederson v. Super Ct. of L.A.*, 130 Cal. Rptr. 2d 289, 298 (Cal. Ct. App. 2003) (holding that cost-shifting and “saving money” are not compelling state interests); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1186 (10th Cir. 2003) (government cannot satisfy strict scrutiny by citing an “increased need for resources”); *Finley v. Nat’l Endowment for the Arts*, 100 F.3d 671, 683 n.23 (9th Cir. 1996) (protecting taxpayers from “unwanted expenditures” is not a compelling interest); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1280 (10th Cir. 1996) (“A city or state’s desire for federal funds is not a compelling government interest.”); *Loder v. City of Glendale*, 34 Cal. Rptr. 2d 94, 105 (Cal. Ct. App. 1994) (holding that “controlling expenses” does not constitute “a compelling interest in securing a fundamental right”); *Mills v. Reynolds*, 837 P.2d 48, 54 (Wyo. 1992) (preventing “increased insurance costs” not a sufficient reason for violating fundamental right); *Boren v. Dep’t. of Employment Dev.*, 130 Cal. Rptr. 683, 690 (Cal. Ct. App. 1976) (“When a statutory classification is subject to strict scrutiny, the state must do more than show that the exclusion saves money”); *Hunter v. N. Mason High Sch.*, 539 P.2d 845, 850 (Wash. 1975) (“[W]e cannot uphold [the challenged] . . . statutes simply because they serve to protect the public treasury.”); *Smith v. Sullivan*, 553 F.2d 373, 378 (1977) (“[I]nadequate resources can never be an adequate justification for depriving any person of his constitutional rights.”) (quoting *Hamilton v. Love*, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971)).

210. See, e.g., *Acevedo-Garcia v. Vera-Monroig*, 368 F.3d 49 (1st Cir. 2004) (holding that municipality was required to include in its annual budget a sum sufficient to satisfy the judgment in a civil rights case).

suffice as a compelling governmental interest, virtually any government-sponsored rights infringement could be justified. Indeed, as the court in *Robinson v. City of Seattle* observed, “governments’ interest in cost and efficiency are all-encompassing. Virtually any intrusion could be justified if cost and efficiency were considered compelling interests in the constitutional sense.”<sup>211</sup>

To be sure, a few courts that have suggested in dicta that cost considerations might amount to a compelling government interest.<sup>212</sup> But these courts have simply ignored, let alone attempted to distinguish, the Supreme Court’s holding in *Memorial Hospital* and the vast weight of lower court precedent to the contrary. Additionally, in regards to cost, very little differentiates prisons from other governmental institutions operating on budgets, so there is no convincing reason to treat cost differently there than, for instance, in the police force or the school system. In short, allowing cost to be a compelling interest in the prison context lacks a strong legal justification and risks undermining the strict scrutiny standard as applied elsewhere.

*4. Prisoners can defeat assertions of a compelling government interest where the prison allow similar conduct that damages the asserted interest*

Even where prison administrators do cite a genuinely compelling government interest (such as prison security and safety) as grounds for burdening religious exercise, RLUIPA’s strict scrutiny test provides prisoners with a valuable means to rebut that showing. Specifically, a prisoner can show that a prison’s asserted compelling government interest is in fact “not compelling” by pointing to conduct that the prison permits that produces “substantial harm or alleged harm of the same sort” that the prison claims it is preventing by burdening the prisoner’s religious exercise.<sup>213</sup> This flows from the well-established principle of “strict scrutiny jurisprudence that a law

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211. *Robinson v. City of Seattle*, 10 P.3d 452, 469 (Wash. Ct. App. 2000).

212. See *Jenkins v. Angelone*, 948 F. Supp. 543, 548 (E.D. Va. 1996) (suggesting that “budgetary restraints” in prison administration could be a compelling interest); *Hamilton v. Schriro*, 863 F. Supp. 1019, 1024 (W.D. Mo. 1994) (noting in dicta that “cost concerns may be shown to be compelling governmental interests in the prison setting”).

213. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546–47 (1993) (“Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.”).



cannot be regarded as protecting an interest ‘of the highest order’ . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.”<sup>214</sup>

The facts of a recent case, *Ickstadt v. Dretke*,<sup>215</sup> illustrate how this principle should work. In *Ickstadt*, a group of five Orthodox Jewish prisoners sued pro se to challenge Texas’ prison policy forbidding them from having one-quarter beards. Because there was no real dispute that forbidding their beards substantially burdened their religious exercise, the case turned on whether Texas could satisfy RLUIPA’s strict scrutiny standard. In conclusory fashion, the court accepted Texas’ position that the no-beard policy served a compelling interest in maintaining prison safety by preventing contraband from being hidden in beards and that completely forbidding beards was the least restrictive means to serve that policy, even though prisoners with medical conditions were allowed to grow beards.<sup>216</sup> However, the court failed to properly apply the rigors of the strict scrutiny test. Allowing prisoners to grow beards for medical reasons, which also poses the potential of doing appreciable damage to the interest of preventing contraband from being hidden in facial hair, fatally undermines Texas’ assertion that denying the plaintiffs the ability to grow a quarter-inch beard serves a compelling interest.<sup>217</sup>

Another means that prisoners may use to undermine an asserted compelling interest in a particular policy is to introduce evidence demonstrating that another well-run prison accommodates the religious practice without appreciable damage to the supposed compelling interest. As the Supreme Court has pointed out, “[w]hile not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction.”<sup>218</sup> Thus, for example, a prisoner could

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214. *Id.* at 547.

215. No. H-02-1064 (S.D. Tex. Apr. 2, 2004), *available at* <http://www.pacer.psc.uscourts.gov>.

216. *Id.* slip op. at 20.

217. *See also* *F.O.P. v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (holding that police department’s enforcement of no beard policy that precluded Sikh officers from having beards for religious reasons failed “heightened scrutiny” under the Free Exercise Clause because city’s interests in having a no-beard policy were undermined by their allowance of beards for medical reasons).

218. *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974). *See also* *Turner v. Safley*, 482 U.S. 78, 97–98 (1987) (reasoning that the fact that Federal Bureau of Prisons generally allowed marriages suggested that there were alternatives to state prison’s prohibition of allowing inmates to marry).

respond to the claims made by the prison in *Wilson v. Moore*<sup>219</sup> that insuperable threats to security would be raised by allowing a Native American sweat lodge by pointing to the fact that other prison systems, e.g., Wisconsin's Department of Corrections,<sup>220</sup> allow sweat lodges. At the very least, such a demonstration that other prisons are able to accommodate the requested religious practice creates a genuine issue of material fact as to whether a prison's absolute ban of sweat lodges is the least restrictive means of achieving its interests. Naturally, the more specific evidence the prisoner offers of how the other prison accommodate the religious practice in question, the stronger the argument.<sup>221</sup>

### 5. *How Strict Is RLUIPA's Strict Scrutiny Standard?*

One final important issue to address in considering RLUIPA's strict scrutiny standard is the degree of deference that courts ought to give the judgment of prison officials when applying that standard. Put another way, how strict is the evaluation of the government's reasons for burdening religious exercise that RLUIPA codifies? The question is an important one given the history of the way in which courts answered that question when applying RFRA's strict scrutiny standard to prisoner claims.

As discussed above, prisoners lost the vast majority of RFRA claims, most often on substantial burden grounds because courts inserted compulsion and centrality requirements that made it more difficult for prisoners to establish a substantial burden. However, for the few claims that courts did allow to pass the substantial burden threshold, another challenge confronted prisoners—a decision by some courts to apply a watered down version of strict scrutiny that gave greater deference to the government than is typically given under strict scrutiny. Professor Lupu has accurately described this undercutting of RFRA's strict scrutiny requirement:

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219. *Wilson v. Moore*, 270 F. Supp. 2d 1328, 1353 (N.D. Fla. 2003) (rejecting plaintiff's First Amendment claim requesting a sweat lodge finding that prison's security concerns were rational under *Turner v. Safley* test, despite existence of sweat lodge in other state prisons).

220. *See Tainter v. State of Wis. Dep't of Health and Family Services*, 2003 WL 23200348 (W.D. Wis. Aug. 5, 2003) (noting that Wisconsin prisons provide access to sweat lodge ceremonies every other month).

221. *See, e.g., Farrow v. Stanley*, 2004 WL 224602, \*10 (D. N.H. Feb. 5, 2004) (noting "reasonableness" of plaintiff's argument that "the maintenance of sweat lodges at as many as thirty other[] prisons shows that Defendants' security concerns [for denying a sweat lodge at this prison] are overstated," but denying a preliminary injunction because plaintiff did not produce "substantial evidence" to support this argument).

The most common instrument of . . . weakening [RFRA's strict scrutiny test] . . . involved smuggling in some unspecified measure of expediency or practicality into the calculation of "least restrictive means." Rather than ask whether the state's means were least restrictive (and upholding RFRA claims when the means could not be so characterized), some courts asked whether the alternative, less-restrictive means were so expensive, cumbersome, or inconvenient that the state could not reasonably be expected to use them. If the alternative means failed this inquiry, these courts upheld the challenged practice, *even though it was demonstrably not the least restrictive*.<sup>222</sup>

Typical of this approach was *Arguello v. Duckworth*.<sup>223</sup> In that case, the court upheld a prison's absolute ban on a Native American prisoner accessing sacred herbs. Although the herbs themselves were not illegal, the prison prohibited them because the herbs were sometimes shipped in a form resembling marijuana. Notably, the court did not require the prison to explore less restrictive alternatives to an absolute ban such as requiring that the herbs be ordered and shipped to the prison from a pre-approved source not dealing in contraband, or that the herbs be ordered through the prison chaplain's office and brought into the prison through that office, or that the herbs be shipped to the prison only in a form that does not resemble marijuana. Instead, citing the discretion that should be given to prison administrators, the court simply accepted at face value the prison's conclusory statement that banning the herbs was necessary to effect its compelling interest in stopping contraband from entering the prison.<sup>224</sup> Other courts have taken a similarly lenient approach in applying the least restrictive means standard.<sup>225</sup>

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222. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 596 (1998) (internal citations omitted).

223. 1997 WL 14162 (7th Cir. Dec. 17, 1996).

224. *Id.* at \*2.

225. *See, e.g., Jenkins v. Angelone*, 948 F.Supp. 543, 547 (E.D. Va. 1996) (denying vegan diet in order to serve prison's asserted interest of maintaining nutritional standards and summarily rejecting less restrictive alternative of providing nutritional supplements); *Reimann v. Murphy*, 897 F. Supp. 398, 403 (E.D. Wis. 1995) (only requiring a showing that flat ban on receiving religious newspaper "further" compelling interest in quelling prison violence, not that it was least restrictive means of doing so); *George v. Sullivan*, 896 F. Supp. 895, 898 (W.D. Wis. 1995) (upholding ban on access to certain religious literature in order to further interest in prison safety without requiring exploration of less restrictive alternative to flat ban on access); *Best v. Kelly*, 879 F.Supp. 305, 309 (W.D.N.Y. 1995) (requiring a showing only that preventing plaintiff from attending religious services "legitimately furthered the needs of internal security and order," not that it was least restrictive means of doing so). A few courts dissented from the weakening of the strict scrutiny approach and engaged in more searching inquiries of the evidence submitted by prison administrators to meet their burden. *See, e.g., May v Baldwin*, 109

It is significant that courts never cited the text of RFRA itself when applying the “least restrictive means” standard to prisoner cases in such a way as to extend substantial discretion to prison officials. Instead, courts relied on a bit of legislative history found in a Senate committee report on RFRA, which stated, “the committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.”<sup>226</sup> Armed with this citation, courts were able to water down the least restrictive means test with an amorphous standard of deference divorced from the language of the statute and bound only by the predilections of the particular judges hearing the case. The predictable result was that courts hearing prisoner RFRA claims “substitut[e] the rhetoric of judicial deference for meaningful scrutiny.”<sup>227</sup>

RLUIPA, like RFRA, codifies the strict scrutiny standard. However, also like RFRA, statements in RLUIPA’s legislative history could be seized upon to water down the least restrictive means standard by extending prison administrators broad discretion and not requiring them to explore the full range of alternatives that are less

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F.3d 557, 564–65 (9th Cir. 1997) (holding that prison officials cannot “satisfy the demands of RFRA with mere assertions of unfulfilled security objectives. Where a prisoner challenges their justifications, prison officials must set forth detailed evidence, tailored to the situation before the court, that identifies the failings in the alternatives advanced by the prisoner.”); Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995) (“[T]he state must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health or safety in order to establish that its interests are of the highest order.”) (quoting Weaver v. Jago, 674 F.2d 116, 119 (6th Cir. 1982) (per curiam)).

226. See e.g., Diaz v. Collins, 114 F.3d 69, 73 (5th Cir. 1997) (quoting S.Rep. No. 111, 103d Cong., 1st Sess. 9–11, reprinted in 1993 U.S.C.C.A.N. 1892, 1900); Mack v. O’Leary, 80 F.3d 1175, 1180 (same); Harris v. Chapman, 97 F.3d 499, 501 (11th Cir. 1996) (same); Davie v. Wingard, 958 F.Supp. 1244, 1250–51 (S.D. Ohio 1997) (same); Hamilton v. Schriro, 74 F.3d 1545, 1554 (8th Cir. 1996) (citing Senate committee report and concluding based on RFRA’s legislative history, that “prison officials ordinarily must have wide latitude within which to make appropriate limitations to maintain institutional security.”).

227. Block v. Rutherford, 468 U.S. 576, 593 (1984) (Blackmun, J., concurring). See also Madison v. Riter, 240 F. Supp. 2d 566, 578 n.10 (W.D. Va. 2003), overruled on other grounds 355 F.3d 310 (4th Cir. 2003) (“Some courts, in examining prison regulations under RFRA and RLUIPA, have softened the compelling interest test to allow speculative administrative judgments concerning security and cost to suffice to allow the regulation to survive strict scrutiny . . . It is also an approach that is dangerous for the protection of the constitutional rights of individuals outside of prison. Watering down strict scrutiny in a result-oriented manner in the prison context could subvert its rigor in other fields where it is applied.”) (internal quotation and citation omitted).

burdensome on religious practice.<sup>228</sup> The issue then of how strict is RLUIPA's strict scrutiny standard comes down to whether courts will be willing to follow the normal rules of statutory interpretation. Those rules require that words in statutes are to be given their ordinary meaning and that legislative history is only examined where there is some genuine ambiguity.<sup>229</sup> Here, RLUIPA's text is clear—it unambiguously directs courts to apply strict scrutiny by choosing the language of “compelling interest” and “least restrictive means.”<sup>230</sup> Certainly, Congress could have chosen to codify a standard such as “intermediate scrutiny”<sup>231</sup> that would have given prison administrators more deference, yet also increased the level of protection for prisoner religious exercise beyond that of the *Turner/O'Lone* rational basis standard. But Congress did not do that, and RLUIPA must be enforced according to its terms.<sup>232</sup>

To be sure, the history of RFRA's application indicates that courts do not relish the task of closely examining the judgments of prison administrators and may feel that they lack the expertise to do it. It may also be fair to say that judges may not view a command to strictly scrutinize burdens on prisoners as having the same moral

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228. Senators Hatch and Kennedy approvingly cited the Senate Committee Report discussing RFRA's application to prisons:

What the Judiciary Committee said about that standard in its report on RFRA is equally applicable to This Act:

[T]he committee expects that courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources. 'At the same time, however, inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements. Senate Report 103-111 at 10 (1993).

146 CONG. REC. S7775 (daily ed. July 27, 2000).

229. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) (courts should “not resort to legislative history to cloud a legislative history to cloud a statutory text that is clear”).

230. *See Gordon v. Pepe*, No. Civ. A 00-10453, 2004 WL 1895134, \*4 (D. Mass. Aug. 24, 2004) (rejecting state's legislative history based argument that RLUIPA does not require strict scrutiny).

231. *See, e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (test under intermediate scrutiny is whether asserted government interest is “substantial” and whether there is “a [reasonable] fit between the legislature's ends and the means chosen to accomplish those ends.”) (emphasis added).

232. *See, e.g., Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1231–32 (9th Cir. 2003) (“[I]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.”) (quoting *Carson Harbor Village, Ltd. v. Unocal, Corp.*, 270 F.3d 863, 878 (9th Cir. 2001)).

imperative as strictly scrutinizing racial classifications,<sup>233</sup> content-based censorship of speech,<sup>234</sup> or burdens posed on the religious exercise of citizens who have not committed crimes.<sup>235</sup> Nevertheless, Congress has unambiguously declared in RLUIPA that strict scrutiny applies. A choice by courts to water down the strict scrutiny standard in this area would not only thwart Congress's intent as expressed in RLUIPA's plain language, but would also undermine the strength of that standard in other areas where it protects the incursion of the government on fundamental rights.

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In sum, then, where a plaintiff establishes a substantial burden on religious exercise, RLUIPA shifts the burden of production and persuasion on the government to satisfy strict scrutiny; this requires that the government build a record that proves that burdening religious exercise is the least restrictive means of advancing the government's compelling interests. Only interests of the highest order, such as maintaining prison safety and security, suffice. Interests such as cost or potential envy of other inmates are not compelling. To satisfy the least restrictive means test requires the government to prove that no alternative forms of regulation would combat the government's compelling interests without burdening religious exercise. Prisoners can undermine the government's showing by pointing to other conduct that the government allows that does damage to the asserted interest, or to the fact that other prisons allow the desired religious accommodation. Congress codified strict scrutiny in RLUIPA, not a lesser form of scrutiny that justifies giving extensive deference to the government's reasons for burdening religious exercise. Courts must enforce the standard that Congress actually codified.

#### D. *RLUIPA's Remedies*

RLUIPA provides that "[a] person may assert a violation of [the

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233. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984).

234. See, e.g., *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).

235. See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (strict scrutiny applies where religious exercise is substantially burdened pursuant to a system of individualized assessments); *Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) ("Just as we subject to the most exacting scrutiny laws that make classifications based on race . . . or on the content of speech, . . . so too we strictly scrutinize governmental classifications based on religion." (internal citations omitted)); 42 U.S.C. § 2000cc(1)(a) (strict scrutiny applies where a land use regulation is implemented in a way that substantially burdens religious exercise).

Act] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”<sup>236</sup> In the normal case, a prisoner is likely to be the plaintiff pursuing a claim. However, this provision also allows a prisoner to raise RLUIPA as a defense in judicial proceedings such as parole hearings where the state may seek to enforce parole conditions that substantially burden religious exercise.<sup>237</sup> Courts have unanimously held that RLUIPA has no retroactive application, so Plaintiffs may only recover for conduct that occurred after the Act’s passage.<sup>238</sup>

“Appropriate relief” under RLUIPA includes “equitable, declaratory, and monetary relief.”<sup>239</sup> In addition, at least one court has held that because intentional violations of federal law may serve as the basis for recovery of punitive damages under § 1983, intentional violations of RLUIPA may merit the award of punitive damages.<sup>240</sup> Because “the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,” injunctive relief should be generally available for prison regulations that substantially burden religious exercise.<sup>241</sup>

Money damages are likely to be especially difficult for prisoners to obtain due to the availability of immunity defenses. State department of correction systems are an arm of the state; therefore, while injunctive relief is available against a state department of corrections,<sup>242</sup> damages are foreclosed by the Eleventh Amendment.<sup>243</sup> Prisoners may still attempt to obtain damages by suing in their *individual* capacities officials who created or enforced the prison policy that burdened religious exercise.<sup>244</sup> However,

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236. 42 U.S.C. § 2000cc-2(a).

237. *Cf.* *United States v. Israel*, 317 F.3d 768 (7th Cir. 2003) (prisoner argued that parole condition enforced by federal government substantially burdened religious exercise in violation of RFRA).

238. *Ingram v. Canavan*, No. 01-11804, slip op. at 16 (D. Mass. Mar. 24, 2004), available at <http://www.pacer.psc.uscourts.gov> (holding that RLUIPA does not apply retroactively to conduct that occurred prior to its passage); *Alexander v. Roberts* (E.D. La. 2003) (same); *Orafan v. Goord*, 2003 WL 21972735, at \*8 (N.D.N.Y. Aug. 11, 2003) (same); *Cancel v. Mazzuca*, 2003 WL 1702011, at \*6 (S.D.N.Y. Mar. 28, 2003); *Wilson v. Moore*, 2002 WL 950062, at \*5 n.3 (N.D. Fla. Feb. 28, 2002) (same).

239. *Storzer & Picarello*, *supra* note 34, at 975 (collecting authority).

240. *See Ahmad v. Furlong*, No. 01-F-1164 slip op. at 49 (D. Col. Aug. 5, 2004) (holding that punitive damages are available for RLUIPA prisoner claim) (on file with the author).

241. *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976).

242. *See, e.g., Hale v. Arizona*, 993 F.2d 1387, 1398–99 (9th Cir. 1993) (holding that state department of corrections is arm of the state entitled to state sovereign immunity).

243. *Edelman v. Jordan*, 415 U.S. 651, 653 (1974).

244. *See, e.g., Orafan v. Goord*, 2003 WL 21972735, \*9 (N.D.N.Y. Aug. 11, 2003)

qualified immunity is likely to provide a sturdy defense in most cases. Qualified immunity protects government officials sued in their individual capacity from liability for performing discretionary responsibilities so long as they have not violated “clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>245</sup> Accordingly, officials may avoid liability under RLUIPA by showing either (1) that RLUIPA was not violated or (2) that it was not clearly established at the time the violation occurred that their actions violated RLUIPA.<sup>246</sup> Officials will frequently be able to prevail on the second part of the test because the fact intensive nature of the substantial burden and strict scrutiny standards is likely to make it sufficiently indeterminate that the law was clearly established that their conduct was unlawful at the time of the violation.<sup>247</sup> Finally, a prisoner’s claim to damages may also be weakened if the government takes advantage of RLUIPA’s safe harbor provision and remedies the substantial burden on religious exercise by changing its policies.<sup>248</sup>

Congress also provided that attorney fees are available for a prisoner who is a “prevailing party” in a RLUIPA action.<sup>249</sup> To be a “prevailing party” entitled to attorney fees, the prisoner must ordinarily obtain a judgment on the merits or a settlement agreement enforced through a consent decree.<sup>250</sup> In addition, any attorney fees

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(holding that RLUIPA allows suits for damages against prison officials in their individual capacities).

245. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

246. *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (holding that the first step in the qualified immunity analysis is to determine whether a violation of the statute or constitution occurred and the second is whether the right was clearly established at the time of the violation).

247. *See, e.g., Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc) (“For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed *in such a concrete and factually defined context* to make it obvious to all reasonable government actors, in the defendant’s place, that ‘what he is doing’ violates federal law”) (emphasis added).

248. *See* 42 U.S.C. § 2000cc-3(e). That safe harbor provision provides that “[a] government may avoid the preemptive force of any provision of this [Act] by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.”

249. *See* 42 U.S.C. § 1988(b) (“In any action or proceeding to enforce a provision of . . . the Religious Land Use and Institutionalized Persons Act of 2000 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs.”).

250. *See Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep’t of Health*, 532 U.S. 598, 604 (2001) (“enforceable judgments on the merits and court-ordered consent decrees create the ‘material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees” to a prevailing party).



for which a prisoner is eligible are subject to the limitations of the Prison Litigation Reform Act.<sup>251</sup>

#### IV. THE SUCCESS OF RLUIPA CLAIMS ON THE MERITS

Although a great deal of the litigation under RLUIPA thus far has focused on its constitutionality, there has also been a sufficient quantity of litigation on the merits of the claims that it is possible to evaluate whether RLUIPA is achieving its goals of enhancing the protection of prisoners' religious exercise. Specifically, research<sup>252</sup> has uncovered forty-six cases that have addressed, in some form,<sup>253</sup> the merits of RLUIPA claims. In examining the data of these prisoner RLUIPA cases, most of them fall into one of the following four general categories: (1) challenges to dietary restrictions; (2) challenges to grooming restrictions; (3) challenges to group worship restrictions; (4) challenges to restrictions on access to religious literature and devotional items.<sup>254</sup>

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251. See 42 U.S.C. § 1997e(d). That provision provides that fees shall not be awarded unless 1) the fee was "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" protected by a statute under which a fee may be awarded and 2) the amount of the fee is "proportionately related to the court ordered relief for the violation" or was "directly and reasonably incurred in enforcing the relief ordered for the violation." *Id.* Moreover, the fees cannot be greater than 150 percent of the hourly rate established under section 3006A of Title 18, which is a "rate not exceeding \$60 per hour for time expended in court or before a United States magistrate [United States magistrate judge] and \$40 per hour for time reasonably expended out of court, unless the Judicial Conference determines that a higher rate of not in excess of \$75 per hour is justified for a circuit or for particular districts within a circuit, for time expended in court or before a [United States magistrate judge] and for time expended out of court."

252. Most of these forty-six cases consist of reported cases. Some other unreported cases were either drawn from the PACER database, which provides access to some district court decisions, or from [www.rluipa.org](http://www.rluipa.org), which has links to details of some unreported cases.

253. This number includes cases that have ended in a judgment, cases addressing the merits of a RLUIPA claim in the context of resolving a motion for summary judgment, a motion to dismiss, or whether it would be futile to allow the complaint to be amended to include a RLUIPA claim, and cases that the parties have settled publicly.

254. A few of the reported RLUIPA claims brought thus far involve other refusals to modify prison practices to accommodate religious exercise that do not fit into any of the above categories. See, e.g., *Williams v. Bitner*, 285 F. Supp. 2d 593, 605 (M.D. Pa. 2003) (denying summary judgment to defendants on RLUIPA claim because requiring Muslim inmate to handle pork substantially burdened his religious exercise); *Steele v. Guilfoyle*, 76 P.3d 99, 102 (Okla. Civ. App. 2003) (requiring Muslim to share prison cell with non-Muslim does not pose a substantial burden on religious exercise); *Rogers v. Hellenbrand*, 2004 WL 433976, at \*6 (W.D. Wis. Mar. 4, 2004) (holding there is no substantial burden by prisoner merely being exposed to religious views that were not his own at a prison holiday party).

*A. Cases Challenging the Denial of a Religious Diet*

Several cases have involved challenges to prison policies refusing to accommodate kosher or other religious diets and have almost all met with success under RLUIPA. There has been little dispute in these cases that refusing to provide a diet that accords with the teachings of a prisoner's faith is a substantial burden.<sup>255</sup> Accordingly, the only real question has turned on whether the prison can satisfy strict scrutiny. Reasons cited by prisons for denying a religious diet have included the increased cost of food and preparation materials, the potential for creating the perception of favoritism by other inmates, and the risk of a flood of other religious diet requests.<sup>256</sup> Because, as discussed *supra*, none of these reasons amount to a "compelling government interest," it is not surprising that most RLUIPA diet cases have resulted in courts denying motions to dismiss or summary judgment by the prison<sup>257</sup> and/or ended in

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255. See, e.g., *Gordon v. Pepe*, No. Civ. A 00-10453-RWZ, 2004 WL 1895134, \*4 (D. Mass. Aug. 24, 2004) (denying prison officials summary judgment on their claim that they had not substantially burdened the religious exercise of a Rastafarian prisoner by denying him a religious diet); *Agrawal v. Briley*, No. 02 C 6807, 2003 WL 22839813, \*1 (N.D. Ill. Nov. 25, 2003) ("Denying Plaintiff a nutritious diet that he can consume while being faithful to his religious beliefs placed a substantial burden on the exercise of his religion."). *But see* *Washington v. County of Santa Barbara*, Civ. No. B168091, 2004 WL 1926131, at \*3 (Cal.App. 2 Dist. Aug. 31, 2004) (prisoner failed to establish a substantial burden because even "[a]ccepting as true the allegation that [prisoner] was sometimes presented with some food at dinnertime that would have violated his dietary proscriptions had he eaten it, he was routinely given a peanut butter sandwich substitute to accommodate his religious requirements"); *Holiday v. Giusto*, No. CIV.03-01385-AS, 2004 WL 1792466, at \*3-6 (D. Or. Aug. 10, 2004) (delay of 4-18 days to process religious diet request did not amount to a substantial burden). Though some cases under the Free Exercise Clause questioned whether a religious dietary practice must be mandated by the faith in order to be protected, see, e.g., *Eddy v. Norrish*, No. 95-15033, 1996 WL 468643, \*3 (9th Cir. Aug. 16, 1996), as discussed *supra*, RLUIPA's definition of religious exercise has removed that issue.

256. See, e.g., *Gordon v. Pepe*, No. Civ. A 00-10453-RWZ, 2004 WL 1895134, \*4 (D. Mass. Aug. 24, 2004); *Motion to Dismiss, Cotton v. Fla. Dep't of Corr.*, (S.D. Fla. 2002) (No. 02-22760) (on file with author).

257. *Madison v. Riter*, 240 F. Supp. 2d 566, 569 n.2 (W.D. Va. 2003) (holding that prison's denial of a kosher diet to Hebrew Israelite could not meet RLUIPA's strict scrutiny standard) *overruled on other grounds by* *Madison v. Ritter*, 355 F.3d 310 (4th Cir. 2003); *Goodman v. Snyder*, No. 00 C 0948, 2003 WL 715650, at \*5 (N.D. Ill. Feb. 27, 2003) (holding that prison's denial of lacto-vegetarian to Wiccan inmate could not meet RLUIPA's strict scrutiny standard); *Gordon v. Pepe*, No. Civ.A.00-10453, 2004 WL 1895134, at \*4 (D. Mass. August 24, 2004) (denying motion to dismiss plaintiff's RLUIPA claim seeking a vegetarian diet in accordance with his Rastafarian faith); *Lindell v. McCallum*, 352 F.3d 1107, 1109 (7th Cir. 2003) (finding that complaint alleging, among other things, denial of a diet in accordance with inmate's Wotanist faith, "states a claim under RLUIPA"). *Cf. Ulmann v. Anderson*, No. Civ. 02-405-JD, 2004 WL 883221, at \*7 (D.N.H. Apr. 26, 2004) (recognizing potential substantial burden from failing to provide kosher diet, but holding there was no RLUIPA violation under the circumstances where plaintiff was incarcerated for a year but only requested a kosher diet during his last 12

favorable judgments or settlements for the plaintiff.<sup>258</sup> RLUIPA even led one state to change its policy after settling one RLUIPA diet suit so as to ostensibly make a kosher diet available to all sincere adherents of Orthodox Judaism.<sup>259</sup> Without RLUIPA it is unlikely that Florida would have changed its policy, as the Eleventh Circuit (which has jurisdiction over Florida) had previously ruled that increased cost was a legitimate reason under the *Turner/O'Lone* test for denying a kosher diet.<sup>260</sup> RLUIPA, then, is having a substantial effect on the ability of prisoners to prevail on religious diet claims.<sup>261</sup>

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days of incarceration).

258. See *Agrawal v. Briley*, No. 02 C 6807, 2004 WL 1977581, \*4–10 (N.D. Ill. Aug. 25, 2004) (granting summary judgment to plaintiff on his claim that denying him a diet free of meat and eggs in accordance with the Vaishnava Hindu religious beliefs of plaintiff unless he secured documentation from a religious authority of his need for that diet violated RLUIPA); *Thompson v. Vilsack*, 328 F. Supp. 2d 974, 980 (S.D. Iowa 2004) (granting summary judgment in favor of Jewish prisoner on RLUIPA claim that prison had substantially burdened his religious exercise by requiring him to pay a “co-pay” in order to receive kosher meals); *Love v. Evans*, No. 2:00-CV-0091 (E.D. Ark. Nov. 20, 2001) (entering judgment after trial in favor of plaintiff on his RLUIPA claim seeking a kosher diet); *Cotton v. Fla. Dep’t of Corr.*, No. 02-22760 (S.D. Fla.) (settlement agreement providing plaintiff a kosher diet reached after court had earlier denied motion to dismiss plaintiff’s RLUIPA claim) (available at <http://www.rluipa.com/cases/CottonSettlement.pdf>); *Cooper v. California* No. C02-3712 (E.D. Cal.) (settlement agreement providing plaintiff a kosher diet reached after plaintiff brought RLUIPA claim) (on file with the author); *Hamilton v. Va. Department of Corr.*, No. 3:04CV262 (E.D. Va.) (on file with the author). Only one court, *Ickstadt v. Dretke*, No. H-02 1064 (S.D. Tex. Apr. 2, 2004) (S.D. Tex. Apr. 4, 2004), has held that RLUIPA does not require a prison to provide prisoners religious diets. In a case brought by five Jewish prisoners in Texas, the trial court accepted a prison official’s affidavit stating in general terms that it would cost too much to provide a kosher diet, even though the affidavit did not even say how much more it would cost or explain the basis for its cost determination. The court simply noted that the prisoners, who were proceeding pro se, had not put in any evidence to rebut that affidavit. Future cases litigating this issue in Texas would do well to put in evidence demonstrating that other prison systems are able to provide kosher diets at a reasonable cost, see, e.g., Expert Report of Gary Friedman (listing over 25 states, in addition to the Federal Bureau of Prisons, that provide a kosher diet) (on file with the author), and cite the litany of precedent rejecting cost as a compelling interest.

259. Charles Rabin, *Jewish inmates to get kosher meals; After a Jewish inmate is granted kosher meals, the Florida Department of Corrections says such meals will be offered to all Jewish inmates*, Miami Herald, Dec. 6, 2003. California has also agreed to provide a kosher diet to other Jewish inmates after settling one kosher case under RLUIPA. See Associated Press, *Inmate Wins Right to Kosher Meals*, Contra Costa Times, Dec. 14, 2003.

260. *Martinelli v. Dugger*, 817 F.2d 1499 (11th Cir. 1987). Florida repeatedly cited *Martinelli* as a reason for denying a kosher diet to Jewish prisoners who filed internal grievances.

261. A recent case decided by the Montana Supreme Court illustrates this. The Court applied the *Turner* reasonableness test and rejected the prisoner’s claim seeking religious meals. The Court expressly noted that the prisoner had not brought suit under RLUIPA, which would have required evaluating his claim under a more stringent standard. See *Cape v. Crossroads Correctional Center*, 99 P.3d 171, 177 n.1 (Mont. 2004).

### 1. Cases Challenging Prison Grooming and Clothing Policies

Prisoners from a variety of religious backgrounds—Muslim, Jewish, Rastafarian, Native American—have used RLUIPA to challenge policies forbidding them from having a beard, growing their hair longer than a certain length, or wearing certain religious headcoverings or other clothing. Significantly, unlike courts that addressed this question under RFRA's old definition of religious exercise, every court to address the question under RLUIPA's definition of religious exercise has held that such prohibitions do constitute a substantial burden on religious exercise, regardless of whether growing a beard or hair of a certain length is mandated by the plaintiff's religion.<sup>262</sup>

Accordingly, resolution of challenges to grooming regulations has focused exclusively on whether the prison can satisfy strict scrutiny. Prisons generally assert that limiting beard and hair length removes a hiding place for contraband and helps to prevent inmates from changing their appearance (which could aid their ability to escape). Thus far, the majority of cases to resolve this issue under RLUIPA have held that prisons have failed to carry their burden of proof on this issue. Although they have accepted that the prisons' asserted reasons may sometimes satisfy strict scrutiny, the majority of courts have held that that a flat prohibition on religious exemptions from grooming policies without regard to either (1) the length of the requested beard or haircut or (2) whether exemptions are allowed for medical reasons may not satisfy strict scrutiny.<sup>263</sup> Three courts

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262. *Collins-Bey v. Thomas*, No. 03 C 2779, 2004 WL 2381874, at \*2 (N.D. Ill. Oct. 25, 2004) (forcing plaintiff to cut his hair over his religious objection substantially burdened his religious exercise); *Mayweathers v. Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004) (ruling in favor of Muslim prisoners who desired to wear beards); *Hoevenaar v. Lazaroff*, 276 F. Supp. 2d 811, 817 (S.D. Ohio 2003) (ruling in favor of Native American prisoner seeking to wear hair in a sacred kouplock) *overruled on other grounds* *Hoevenaar v. Lazaroff*, No. 03-4119, 2004 WL 1664043 (6th Cir. July 23, 2004); *Toles v. Young*, No. 7:00-CV-210, 2002 WL 32591568, at \*9 (W.D. Va. Mar. 6, 2002) (requiring Hebrew Israelite prisoner to cut hair and beard over his religious objection substantially burdened his religious exercise). *Cf.* *Boles v. Neet*, 333 F. Supp. 2d 1005 (D. Colo. 2004) (Jewish prisoner's claim that prison substantially burdened his religious exercise by refusing to allow him to wear a yarmulke while being transported for medical treatment stated a claim under RLUIPA).

263. *Collins-Bey*, No. 03 C 2279, 2004 WL 2381874, at \*4 (denying prison's motion for summary judgment because prison failed to produce evidence that forced cutting of plaintiff's hair over his religious objection was "in furtherance" of its asserted interest in prison safety); *Mayweathers*, 328 F. Supp. 2d at 1095 (granting injunction against enforcement of grooming policy against Muslim inmates, because policy's prohibition of all beards, even those of only one-half inch or less, represented an "exaggerated response" to concern of inmates changing their appearance to enhance ability to escape and was not

deciding this issue under RLUIPA have applied what appears to be a relaxed form of strict scrutiny and have rejected challenges to grooming regulations on that basis.<sup>264</sup>

Given that prisoners almost universally lost challenges to grooming policies under the *Turner/O'Lone* test and RFRA,<sup>265</sup> the fact that prisoners have either been able to prevail or beat back summary judgment motions in several such challenges under RLUIPA suggests that the Act is having a positive impact on the religious exercise of prisoners for these types of claims. Moreover, RLUIPA has led some states to voluntarily change their grooming policies. For example, New York changed its rules after RLUIPA was passed to allow

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least restrictive means given availability of daily visual inspections of inmates); *Thompson v. Scott*, 86 Fed. Appx. 17, 19 (5th Cir. 2004) (fact that prisoner's hair was in accordance with Texas department of correction's general hair length policy created a genuine issue of material fact as to whether prison warden had a compelling government interest in imposing an even shorter hair length policy than the general policy); *Taylor v. Cockrell*, No. H-00-2809 (S.D. Tex. Sept. 25, 2002) (allowing exemptions to no-beard policy for one-quarter inch beards worn for medical reasons, but denying one-quarter inch beard sought by Muslim inmate for religious reasons failed strict scrutiny); *Hoevenaar*, 276 F. Supp. at 824 (enjoining "blanket application of the grooming regulation" without any religious exceptions is not the least restrictive means of advancing interest in preventing change of inmate appearance as applied to plaintiff's desire to grow a "kouplock," a "two-inch square of hair" that would not significantly change plaintiff's appearance were he to cut it off) *overruled on other grounds by* *Hoevenaar v. Lazaroff*, No. 03-4119, 2004 WL 166403 (6th Cir. July 23, 2004). *See also* *Young v. Goord*, 67 Fed. Appx. 638, 640 n.1 (2d Cir. 2003) (reversing dismissal of Rastafarian challenge to prison regulation limiting length of his beard because court failed to apply RLUIPA's strict scrutiny test); *People v. Peterson*, No. 7687/01, 2002 WL 31387540, at \*4 (N.Y. Sup. Sept. 5, 2002) (stating in dicta that it was doubtful that requiring Rastafarian prisoner to shave his beard was the least restrictive means to advance a compelling government interest in preventing prisoners from easily changing their appearance in light of availability of "computer imaging" technology, but dismissing claim because state court was not the "proper" place to resolve questions about RLUIPA's constitutionality); *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003) (remanding case to district court to allow Rastafarian inmate to amend his complaint to plead a RLUIPA claim challenging hair length regulations).

264. *Ickstadt v. Dretke*, No. H-02 1064 (S.D. Tex. Apr. 2, 2004) (rejecting challenge by Orthodox Jewish prisoners to policy forbidding religiously motivated quarter-inch beards, even though such beards were allowed for medical reasons without harm to prisoner's asserted safety concerns); *Limbaugh v. Thompson*, No. 93-D-1404-N, slip op. at 2 (M.D. Ala. Sept. 29, 2003) (Native American religious adherents' challenge to hair length regulations failed under modification of strict scrutiny test which did not require a showing of least restrictive means but merely required defendants to "articulate[] legitimate reasons based on compelling interest in prison safety and security."); *Toles v. Young*, No. Civ.A. 7:00-CV-210, 2002 WL 32591568, at \*10 (W.D. Va. Mar. 6, 2002) (allowing Hebrew Israelite prisoner the choice of forced cutting of his hair and beard or being kept in segregated administrative confinement was least restrictive means of advancing compelling government interests in prison security, reducing gang activity, identifying inmates, and sanitation).

265. *See, e.g.,* *Diaz v. Collins*, 114 F.3d 69 (5th Cir. 1997) (ruling in favor of prison in RFRA challenge to grooming standards); *May v. Baldwin*, 109 F.3d 557 (9th Cir. 1997); *Harris v. Chapman*, 97 F.3d 499 (11th Cir. 1996); *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996); *Davie v. Wingard*, 958 F. Supp. 1244 (S.D. Ohio 1997); *Clark v. Stotts*, No. 93-3258-DES, 1996 WL 583454 (D. Kan. Sept. 9, 1996).

exemptions for inmates who are members of “a religion which has an established tenet against the trimming of beards.”<sup>266</sup>

*B. Cases Challenging Restrictions on Group Worship and Special Ceremonies*

Very few religions, if any, are solitary activities. Rather, most involve regular services or special ceremonies in which fellow members of the religion gather to participate in corporate worship, rituals and sacraments, fellowship, counseling with a spiritual leader and other activities in which they meet to encourage one another in their shared faith. Prison walls, of course, do not allow for the exact replication of all the activities of a fully functioning church, temple, or mosque, but the desire of religious prisoners to gather with fellow members of their faiths is still strong, and most prisons in the United States seek to make at least some allowance for members of a common religion to assemble. Some prisons have gone even further and established faith-based wings for members of particular faiths. Nonetheless, prisons also frequently place restrictions on group worship for some religious groups, and those policies have been challenged under RLUIPA.

Most challenges to prison restrictions on inmate participation in group worship activities fall into one of the following two categories: (1) the prison offers the religious service the prisoner desires to attend (e.g., the prison provides space for a Muslim Jumu'ah service), but the prison does not allow the prisoner to attend for some reason (e.g., attendance would require exempting the prisoner from a work schedule), or (2) the prison completely prohibits the particular religious service (e.g., a Native American sweat lodge ceremony, a dedicated time of group worship for members of a religion, or a separate service for Shiite Muslims) that prisoners request as part of their religion. RLUIPA's more expansive definition of religious exercise is having a very significant effect on the ability of plaintiffs to prevail on both of these two types of claims.

Under the Free Exercise Clause, courts often denied challenges to group worship restrictions on the reasoning that prisoners had other

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266. See *Young v. Goord*, 67 Fed. Appx. 638, 641 n.1 (2d Cir. 2003) (discussing change in prison policy concerning beard lengths implemented in 2001 after RLUIPA was passed). The existence of New York's policy allowing religious exemptions from its grooming policies may also be a vehicle for prisoners challenging grooming policies in other states to use to undermine a prison's policy that a no exemption policy is the least restrictive means of advancing its interests. See *supra* note 262 and accompanying text.

means to exercise their faith (often ones of the solitary kind like prayer, meditation, or scripture reading).<sup>267</sup> Courts applying RFRA also frequently rejected challenges to group worship restrictions by strictly applying a requirement that prisoners show that the particular service or ceremony was mandated or central to their faith.<sup>268</sup> RLUIPA's protection of any discrete act of religious exercise and removal of the compulsion and centrality requirement from the definition of religious exercise removes these obstacles and makes a showing of substantial burden on these types of claims relatively straightforward. Accordingly, nearly every court to address the issue thus far under RLUIPA has held that a flat prohibition on the ability of prisoners to attend or participate in a particular religious service or ceremony of their faith is a substantial burden, because it completely prevents them from engaging in that religious conduct in a way that is greater than a mere inconvenience.<sup>269</sup> Moreover, where the prisoner's religion has beliefs and practices that distinguish it from other denominations of his or her religion, it is a substantial burden to give the prisoner the choice of worshipping with those who do not share

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267. See, e.g., *O'Lone*, 482 U.S. at 351–52 (denying Muslim prisoner claim seeking right to attend Ju'muah services on the basis, in part, that Muslim prisoners had other means available to them of practicing their religion).

268. See *supra* Part II.B.iii.

269. *Mayweathers v. Terhune*, No. S-96-1582, slip op. at 9–11 (E.D. Cal. July 5, 2001), available at <http://www.pacer.psc.uscourts.gov> (denying Muslims ability to attend Jum'u'ah services imposed a substantial burden on religious exercise); *Fenelon v. Riddle*, No. S-95-954, slip op. 16–18 (E.D. Cal. Apr. 29, 2003), available at <http://www.pacer.psc.uscourts.gov>; *Marria v. Broadus*, No. 97 Civ.8297, 2003 WL 21782633 (S.D.N.Y. July 31, 2003) (ban on group assembly for worship for plaintiffs' religion was substantial burden); *Limbaugh v. Thompson*, No. 93-D-1404-N, slip op. at 2–3 (M.D. Ala. Sept. 29, 2003) (denial of sweat lodge for Native American prisoners was a substantial burden); *Farrow v. Stanley*, No. Civ. 02-567-B, 2004 WL 224602, at \*10 (D. N.H. Feb. 5, 2004); *Pounders v. Kempker*, 79 Fed. Appx. 941, 943 (8th Cir. 2003); *Coronel v. Paul*, 316 F. Supp. 2d 868, 876 (D. Ariz. 2004) (finding that it would be a substantial burden if Dianic pagan prisoner was not allowed to attend worship service of other pagan religions, but holding question of sincerity remained as to whether plaintiff had a sincere religious motivation for desiring to attend services, or merely wanted to attend extra services). See also *Holiday v. Giusto*, No. Civ. 03-01385-AS, 2004 WL 1792466, \*7–8 (D. Or. Aug. 10, 2004) (Muslim prisoners who were denied ability to meet in a group to pray stated a claim under RLUIPA sufficient to withstand defendants' motion for summary judgment); *Cardew v. New York State Dep't of Correctional Services*, No. 01-Civ-3669, 2004 WL 943575, at \*4 (S.D.N.Y. Apr. 30, 2004) (prisoner who was denied ability to attend Jehovah's Witness service unless he "pledged allegiance" to the faith stated a claim under RLUIPA); *Pugh v. Goord*, 345 F.3d 121, 125–26 (2d Cir. 2003) (remand to allow Shiite Muslim plaintiffs to amend complaint to add RLUIPA claim for infringement on ability to practice religion caused by refusal to provide separate worship services for Shiites and Sunni Muslims). But see *Charles v. Verhagen*, 220 F. Supp. 2d 937, 949 (W.D. Wis. 2002) (prison's limitation of one religious feast a year for Muslim inmate held to be enough under RLUIPA).

his beliefs or foregoing group worship entirely.<sup>270</sup> Of course, for either type of group worship claim, the plaintiff still bears the burden of producing evidence concerning his religious beliefs and how denial of the particular group religious exercise sought impacts those beliefs.<sup>271</sup>

Thus, RLUIPA claims challenging restrictions on group worship have turned on (and are likely to continue to turn on) whether the restrictions can withstand strict scrutiny. Claims of the first type, where the prison already allows the particular service but does not allow a particular prisoner to attend the service, are often unlikely to satisfy strict scrutiny. That the prison already allows the particular service or ceremony removes any argument for the prison that there is something about the service itself that poses some danger to some compelling interest. Instead, the prison must show that it has a compelling interest in not allowing the particular prisoner to attend the service. Where the prison's refusal rests on interests in not providing exemptions from prison work schedules and assignments, courts addressing this issue thus far under RLUIPA have been particularly unsympathetic to either finding that such interests are compelling or that the least restrictive means have been used when the prison allows exemptions from work assignments for other reasons.<sup>272</sup>

Whether claims of the second type—*i.e.*, where the prison refuses to allow the particular religious service at all—satisfy strict scrutiny depends on the nature of the religious service request and whether means less restrictive than a complete ban on the religious service are available to the prison. The more closely the requested religious

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270. *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) (“We have stated that a substantial burden to free exercise rights may exist when a prisoner’s sole opportunity for group worship arises under the guidance of someone whose beliefs are significantly different from his own.”) (internal quotation marks and citation omitted).

271. *See Greybuffalo v. Bertrand*, No. 03-C-559-C, 2004 WL 2473250, at \*5 (W.D. Wis. Nov. 1, 2004) (defendants granted summary judgment on plaintiff’s claim that failure to revive the Seven Fires Indian Council constituted a substantial burden because plaintiff did not present “facts regarding his religious beliefs and why existence of the council is an exercise of those beliefs.”).

272. *Fenelon v. Riddle*, No. S-95-954, slip op. 18–20 (E.D. Cal. Apr. 29, 2003), available at <http://www.pacer.psc.uscourts.gov> (substantial burden on Muslim religious exercise from threatening discipline for attending Jumu’ah service violated RLUIPA because asserted interests of promoting work ethic and preventing mobility were not compelling interests and fact that inmates were entitled to miss work assignments for non-religious reasons demonstrated that disciplinary action for missing for religious reasons was not the least restrictive means); *Mayweathers v. Terhune*, No. S-96-1582, slip op. at 9–11 (E.D. Cal. July 5, 2001), available at <http://www.pacer.psc.uscourts.gov>.



service resembles a group religious service that the prison allows for members of other religions or denominations, the more likely that faithful application of the strict scrutiny test will lead to striking the prison's policy.<sup>273</sup> One court followed this rationale after a trial on the RLUIPA claim, holding that a ban on any group assembly that applied uniquely to the plaintiff's particular denomination (but allowed similar group assembly of other denominations) failed strict scrutiny.<sup>274</sup> The Eighth Circuit recently reached a similar result in a nearly identical case, holding that the prison would have to prove at trial that there was some special threat posed by the particular religious group assembling that could not be met by any means less restrictive than a complete ban on group worship.<sup>275</sup>

In other cases, of course, the prohibited religious service or ceremony may look quite different from other types of group assembly the prison permits. For example, a request by Native American religious adherents for a sweat lodge looks quite different from a request by Methodist prisoners to gather in a room for Sunday worship service. In these types of cases, the prison may invoke compelling interests that validly distinguish the prohibited service from those it permits—*e.g.*, the Methodists are able to assemble in a pre-existing prison room, but the sweat lodge requires special construction and supervision that raise institutional security issues. Here again, though, strict scrutiny requires that the prison's interest be proven, not just asserted, and that less restrictive alternatives be explored. Accordingly, courts applying RLUIPA have thus far been reluctant to conclude without resolution of factual issues that a complete ban on these types of distinctive group assemblies is the least restrictive means; instead, courts have ruled that it is necessary to consider such issues as whether other prisons follow less restrictive

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273. This is because "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal citation omitted). Thus, the fact that a prison regularly allows prisoners in some religions to assemble undermines the argument that there is some compelling interest in not allowing prisoners of another religion to also assemble.

274. *Marria v. Broaddus*, No. 97 Civ. 8297, 2003 WL 21782633, at \*14–18 (S.D.N.Y. July 31, 2003). The court also rejected the argument that allowing this group to assemble was inherently dangerous because some members of plaintiff's religion advocated violence. Such an argument, the court reasoned, could lead to bans on Christians, Jews, or Muslims assembling for worship because some members of these religions have sometimes advocated violence. The court also found that there was no showing that members of the faith in question would use the opportunity of group worship and fellowship to plan or engage in violence.

275. *Murphy*, 372 F.3d at 989.

practices with regard to this religious ceremony and whether aspects of the ceremony or its preparation can be modified in any way that do not affect its religious nature but do reduce its impact on prison security interests.<sup>276</sup>

In sum, the effect of RLUIPA on the success of prisoners challenging policies limiting group worship opportunities as compared to their success under *Turner/O'Lone* and RFRA<sup>277</sup> is striking. Plaintiffs have consistently prevailed in establishing that prison restrictions on group worship are substantial burdens. In addition, prisoners have either outright succeeded in defeating attempts to show that prison restrictions have withstood strict scrutiny, or raised disputed issues of fact requiring a trial as to whether there are means less restrictive than an absolute ban on the requested group worship opportunities.

### *C. Cases Challenging Limits on access to Religious Literature and Devotional Items*

A final common category of claims under RLUIPA has concerned challenges to policies restricting prisoners' access to religious literature and items used for religious worship and devotion. Such claims were commonly screened out under RFRA with courts finding possession of the particular religious text or devotional item was not central or mandated by the religion. As with the other categories of claims, RLUIPA's rejection of the compulsion and centrality tests has led to an increased ability of prisoners to establish that complete denials of access to sacred texts and items is a substantial burden.<sup>278</sup>

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276. See e.g., *Pounders v. Kempker*, 79 Fed. Appx. 941, 943 (8th Cir. 2003) (issue of whether prison's basis for denying inmate's requests for sweat lodge served compelling interest and was least restrictive means of advancing that interest presented fact questions that could not be resolved on motion to dismiss); *Farrow v. Stanley*, No. Civ. 02-567-B, 2004 WL 224602, \*10 (D. N.H. Feb. 5, 2004) ("further development of the record on . . . whether there are less restrictive alternatives to complete denial of access" to Native American prisoner's request for a sweat lodge was necessary, particularly in light of argument that 30 other prisons allow sweat lodges). See also *Limbaugh v. Thompson*, No. 93-D-1404-N, slip op. at 2-3 (M.D. Ala. Sept. 29, 2003).

277. See, e.g., *Weir v. Nix*, 114 F.3d 817, 820-21 (8th Cir. 1997) (fundamentalist separatist Christian prisoner was not entitled to religious advisor whose beliefs were congruent with his own); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995) (failure to provide Pentecostal Christian service did not substantially burden Pentecostal Christian plaintiff's free exercise rights).

278. See *Charles v. Verhagen*, 220 F. Supp. 2d 937, 948-49 (W.D. Wis. 2002) *aff'd* 348 F.3d 601 (7th Cir. 2003) (ban on Islamic prayer oil substantially burdened religious exercise); *Marrisa v. Broaddus*, No. 97 Civ.8297, 2003 WL 21782633 (S.D.N.Y. July 31, 2003) (complete ban of prisoners' religious Five Percenter literature substantially burdened religious exercise); *Lindell v. McCallum*, 352 F.3d 1107, 1109 (7th Cir. 2003)

Nonetheless, courts have not opened the door so broadly that any limit on items sought by prisoners amounts to a substantial burden. Instead, courts have drawn sensible distinctions, recognizing that some restrictions on access do not rise beyond the level of inconvenience<sup>279</sup> and that prisoners must provide some explanation of how not having the particular piece of literature or item is a concrete burden on religious exercise.<sup>280</sup> In addition, given the past history of some items that prisoners requested as part of their religious exercise, sincerity is also likely to come into play in evaluating these types of claims.<sup>281</sup>

For the claims in which the prisoner has established a substantial burden, application of the strict scrutiny test has followed a familiar pattern: courts have been more willing to uphold the prison's policies on access to religious texts or devotional items when the prison imposes restrictions that stop short of a flat ban. For example, courts have not accepted general arguments focusing on the need to limit inmate property to advance such interests as security and prevention

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(complete ban of prisoner's Wotanist literature stated a substantial burden claim); Borzych v. Frank, No. 04-C-632-C, 2004 WL 2359999, at \*10 (W.D. Wis. Oct. 14, 2004) (complete ban of prisoner's Odinist literature that rendered prisoner "unable to attain his religious goal of achieving 'godhead'" stated a claim of substantial burden under RLUIPA); Borzych v. Frank, No. 03-C-0575-C, 2004 WL 67642, at \*2, 5 (W.D. Wis. Jan. 5, 2004) (complete ban of prisoner's Odinist literature stated a substantial burden claim); Leishman v. Holland, No. 01-CV-926 (D. Utah May 28, 2004) (complete ban of prisoner's Asatru religion runes substantially burdened religious exercise); Goodman v. Snyder, No. 00 C 0948, 2003 WL 715650, at \*5 (N.D. Ill. Feb. 27, 2003) (complete ban of Wiccan's tarot cards substantially burdened religious exercise); Ulmann v. Anderson, No. Civ. 02-405-JD, 2004 WL 883221, at \*8 (D. N.H. Apr. 26, 2004) (prohibiting prisoner's use of a glass and candle menorah substantially burdened Jewish prisoner's religious exercise); Charles v. Frank, No. 04-1674, 2004 WL 1303403, at \*2 (7th Cir. June 9, 2004) (restrictions on prisoner's wearing Muslim prayer beads substantially burdened religious exercise).

279. See *Dunlap v. Losey*, 40 Fed. Appx. 41 (6th Cir. 2002) (inconvenience to prisoner of confiscation of his hardcover Bible did not amount to substantial burden in light of availability of a soft cover Bible); *Charles v. Verhagen*, No. 01-C-253-C, 2004 WL 420148, at \*1 (W.D. Wis. Feb. 27, 2004) (although ban on Islamic prayer oil does constitute a substantial burden, refusing to allow prisoner to specify his preferred brand of prayer oil is not); *Lindell v. Frank*, No. 02-C-21-C, 2003 WL 23198509 (W.D. Wis. May 5, 2003) (no substantial burden in denying Wotanist blank paper sent to him in the mail when the prison provided him with free sheets of paper each week that he could use for religious exercise of writing religious poetry).

280. See *Piscitello v. Berge*, No. 02-C-0252-C, 2003 WL 23095741, at \*5 (W.D. Wis. Apr. 17, 2003) ("one sentence" statement in plaintiff's brief arguing that prison violated RLUIPA by denying him access to a biblical correspondence course study fails to meet plaintiff's evidentiary burden of showing "how the inability to take a biblical correspondence course substantially burdens the exercise of his religious beliefs.").

281. See *Therault v. Silber*, 453 F. Supp. 254, 260 (W.D. Tex. 1978) (inmates claimed their religion required Chateaubriand and Harveys Bristol Cream every other Friday); *Doty v. Lewis*, 995 F. Supp. 1081, 1085 (D. Ariz. 1998) (prisoner claimed that his religion required that he consume a fifth of whiskey every week).

of illegal activity (e.g., gambling or gang violence) that do not focus on how a ban on the particular religious item at issue is the least restrictive means of advancing those interests.<sup>282</sup> Similarly, while willing to entertain a prison's assertion that some religious literature could be incendiary if widely disseminated in a prison, courts have been appropriately skeptical of policies that claim it is necessary to completely ban any access to the literature by the aggrieved prisoners under all circumstances.<sup>283</sup> The two RLUIPA cases that did uphold prison restrictions on access to religious items suggest a prison may meet strict scrutiny by either allowing the prisoner some limited access to the devotional item<sup>284</sup> or offering the prisoner his religious item in circumstances or a form that poses less danger than it would have in the way he had requested it.<sup>285</sup>

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282. See *Charles v. Verhagen*, 220 F. Supp. 2d 937, 948–49 (W.D. Wis. 2002), *aff'd*, 348 F.3d 601 (7th Cir. 2003) (ban on Islamic prayer oil not justified by general need to limit the amount of property inmates can possess because “Defendants’ security concerns [we]re not related to any specific difficulties presented by the possession of prayer oil”); *Leishman v. Holland*, No. 01-CV-926 (D. Utah May 28, 2004) (complete ban on possession of runes by Asatru prisoner fails strict scrutiny because restrictions could be placed on plaintiff’s use of the runes so that they would not be diverted for gambling); *Goodman v. Snyder*, 2003 WL 715650, at \*5 (N.D. Ill. Feb. 27, 2003) (ban on tarot cards fails strict scrutiny where cards that do not contain possible gang symbols may be available). *Cf.* *Neal v. Lucas*, 75 Fed. Appx. 960 (5th Cir. 2003) (reversing dismissal of RLUIPA claim arising out of prison denying inmate access to religious publications and remanding for further proceedings); *Aiello v. Frank*, 2003 WL 23277415, at \*1 (W.D. Wis. June 3, 2003) (granting Jewish plaintiff leave to amend his complaint to add a RLUIPA claim for enforcing a policy against him of “forbidding inmates in segregation from having a Tallith, yarmulke and Siddurim.”).

283. See *Marria v. Broaddus*, 2003 WL 21782633, at \*15 (S.D.N.Y. July 31, 2003) (prisoners prevailed in challenge to prison’s complete ban on their Five Percenter religious literature where banned literature was “facially innocuous” and where the religion’s “law-abiding existence outside prison for the better part of 40 years” foreclosed a finding that their religion was a security threat group); *Borzych v. Frank*, 2004 WL 67642, at \*2 (W.D. Wis. Jan. 5, 2004) (prisoner stated claim under RLUIPA where prison banned prisoner’s Odinist religious texts based on general concerns that they advocated racism, ethnic supremacy, hatred or violence). *Cf.* *Lindell v. McCallum*, 352 F.3d 1107, 1109 (7th Cir. 2003) (remanding to trial court because prison’s complete ban on prisoner’s Wotanist literature stated claim under RLUIPA).

284. See *Charles v. Frank*, 2004 WL 1303403, at \*2 (7th Cir. 2004) (upholding prison’s refusal to allow prisoner to openly wear religious prayer beads in common areas of prison based on interest in suppressing potential gang symbols where the prison did allow the prisoner to wear the beads under his shirt in common areas of the prison and openly in his cell as a less restrictive alternative).

285. *Ulmann v. Anderson*, 2004 WL 883221, at \*8 (D. N.H. Apr. 26, 2004) (upholding prison’s refusal to allow plaintiff use of his preferred menorah composed of glass and candles (whose materials could be converted into weapons) where prison proposed alternative of a rabbi lighting an electric menorah).

*D. General Observations On the Record of Merits Claims Under  
RLUIPA In Its First Four Years*

Based on how prisoner RLUIPA claims have fared in the four categories discussed above, it is possible to make some more general observations. First, prisoners are generally having more success than they did under RFRA in establishing a substantial burden on religious exercise. Whereas over seventy-five percent<sup>286</sup> of prisoner RFRA claims were dismissed for failing to establish substantial burdens in the three and one half years before *Boerne* ruled RFRA unconstitutional as applied to the states, only seven<sup>287</sup> of the forty-six prisoner RLUIPA claims discussed previously have been dismissed for failing to establish a substantial burden. Given that an overwhelming number of RFRA claims were dismissed because the prisoner could not establish that the particular religious practice at issue was either mandated or central to his faith,<sup>288</sup> the increased success of prisoners in establishing substantial burdens under RLUIPA can be attributed to the Act's removal of these requirements from its definition of protected religious exercise.

Second, because more prisoners are succeeding in establishing a substantial burden, it appears that most RLUIPA claims will be resolved by evaluating whether the prison has demonstrated that the

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286. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 607–17 (1998).

287. *Dunlap v. Losey*, 40 Fed. Appx. 41 (6<sup>th</sup> Cir. 2002) (inconvenience to prisoner of confiscation of his hardcover Bible did not amount to substantial burden in light of availability of a soft cover Bible); *Lindell v. Frank*, 2003 WL 23198509, at \*61 (W.D. Wis. May 5, 2003) (no substantial burden in denying Wotanist blank paper sent to him in the mail when the prison provided him with free sheets of paper each week that he could use for religious exercise of writing religious poetry); *Piscitello v. Berge*, 2003 WL 23095741, at \*5 (W.D. Wis. Apr. 17, 2003) (“one sentence” statement in plaintiff’s brief arguing that prison violated RLUIPA by denying him access to a biblical correspondence course study fails to meet plaintiff’s evidentiary burden of showing “how the inability to take a biblical correspondence course substantially burdens the exercise of his religious beliefs”). *Steele v. Guilfoyle*, 76 P.3d 99, 102 (Okla. Civ. App. 2003) (requiring Muslim to share prison cell with non-Muslim does not pose a substantial burden on religious exercise); *Rogers v. Hellenbrand*, 2004 WL 433976, at \*6 (W.D. Wis. Mar. 4, 2004) (no substantial burden by prisoner merely being exposed to religious views that were not his own at a prison holiday party); *Washington v. County of Santa Barbara*, 2004 WL 1926131, at \*3 (Cal. App. Aug. 31, 2004) (recognizing potential for substantial burden if prisoner had been denied a religious diet, but finding no burden in this case because substitute meal that complied with prisoner’s dietary restrictions was made available in circumstances where prisoner was offered food forbidden by his religion); *Ulmann v. Anderson*, 2004 WL 883221, at \*7 (D. N.H. Apr. 26, 2004) (recognizing potential substantial burden from failing to provide kosher diet but holding there was no RLUIPA violation under the circumstances where plaintiff was incarcerated for a year and only requested a kosher diet during his last 12 days of incarceration).

288. See *supra* pp. 522, 531.

burden is the least restrictive means of achieving a compelling government interest. Accordingly, how successful prisoner claims are under RLUIPA will ultimately turn on whether courts are willing to faithfully apply the strict scrutiny standard that the Act's language requires or if they instead choose to follow the approach that many courts took under RFRA<sup>289</sup> of applying a watered-down version of strict scrutiny that gave greater deference to the government than is typically given under strict scrutiny.<sup>290</sup> Thus far, courts have generally been skeptical of prison claims that policies that completely forbid the particular religious activity at issue or impose a flat ban on access to a devotional item or religious literature are the least restrictive means of advancing a compelling government interest. Conversely, courts appear more likely to uphold prison policies that do not impose such a flat prohibition but instead provide at least some avenues for the prisoner's desired religious expression.<sup>291</sup>

Finally, based on the number of RLUIPA prisoner claims in the first four years of the Act's existence, it appears that the assertions of a flood of claims predicted by the Act's critics has simply not materialized. My research has uncovered 60 discrete prisoner RLUIPA cases that have had either some decision on the merits of the claim or a ruling on the constitutionality of the Act.<sup>292</sup> Sixty cases in

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289. See *supra* p. 553.

290. A few courts, as discussed *supra*, have failed to follow the Act's plain text and have instead applied a watered down version of strict scrutiny in order to reach their result of ruling in favor of the prison. See, e.g., *Ickstadt v. Dretke*, No. H-02 1064 (S.D. Tex. Apr. 2, 2004) (rejecting challenge by Orthodox Jewish prisoners to policy forbidding religiously motivated quarter-inch beards even though such beards were allowed for medical reasons without harm to prisoner's asserted safety concerns); *Limbaugh v. Thompson*, No. 93-D-1404-N, slip op. at 2 (M.D. Ala. Sept. 29, 2003) (Native American religious adherents' challenge to hair length regulations failed under modification of strict scrutiny test which did not require a showing of least restrictive means but merely required defendants to "articulate[] legitimate reasons based on compelling interest in prison safety and security.").

291. See, e.g., *Charles v. Frank*, 2004 WL 1303403, at \*2 (7th Cir. June 9, 2004) (upholding prison's refusal, based on interest in suppressing potential gang symbols, to allow prisoner to openly wear religious prayer beads in common areas of prison where the prison did allow, as a less restrictive alternative, the prisoner to wear the beads under his shirt in common areas of the prison and openly in his cell).

292. See *Greybuffalo v. Bertrand*, No. 03-C-559-C, 2004 WL 2473250, at \*5 (W.D. Wis. Nov. 1, 2004); *Collins-Bey v. Thomas*, 2004 WL 2381874, at \*2 (N.D. Ill. Oct. 25, 2004); *Toles v. Young*, No. 7:00-CV-210, 2002 WL 32591568, at \*9 (W.D. Va. Mar. 6, 2002); *Borzych v. Frank*, No. 04-C-632, 2004 WL 2359999, at \*10 (W.D. Wis. Oct. 14, 2004); *Glick v. Norris*, No. 5:03CV00160 (E.D. Ark. Aug. 11, 2004); *Holiday v. Giusto*, 2004 WL 1792466 (D. Or. Aug. 10, 2004); *Hamilton v. Va. Dep't of Corr.*, No. 3:04CV262 (E.D. Va.); *In re Change of Name of Terrence James Shaw*, 2004 WL 2359994 (Wis. App. Oct. 21 2004); *Williams v. Bitner*, 285 F. Supp. 2d 593 (M.D. Pa. 2003); *Gordon v. Pepe*, No. Civ. A 00-10453, 2004 WL 1895134 (D. Mass. Aug. 24, 2004); *Agrawal v. Briley*, 2004 WL 1977581 (N.D. Ill. Aug. 25, 2004); *Madison v. Riter*,

four years is hardly a flood. Indeed, by contrast, Professor Lupu's study revealed 94 reported RFRA prisoner cases with decisions on the merits in the first three-and-a-half years of RFRA's existence prior to *Boerne*.<sup>293</sup> Thus, contrary to the dire warnings of its critics, RLUIPA has actually resulted in fewer prisoner cases than RFRA. Moreover,

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240 F.Supp.2d 566 (W.D. Va. 2003), *overruled in part by* *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003); *Goodman v. Snyder*, 2003 WL 715650, at \*5 (N.D. Ill. Feb. 27, 2003); *Lindell v. McCallum*, 352 F.3d 1107, 1109 (7th Cir. 2003); *Thompson v. Vilsack*, 328 F. Supp. 2d 974, 980 (S.D. Iowa 2004); *Love v. Evans*, No. 2:00-CV-0091 (E.D. Ark. Nov. 20, 2001), available at <http://www.pacer.psc.uscourts.gov>; *Cotton v. Fla. Dep't of Corr.*, No. 02-22760 (S.D. Fla. Oct. 2003) (settlement agreement and denial of motion to dismiss available at <http://www.rluipa.com/cases/CottonSettlement.pdf>); *Cooper v. California*, No. C02-3712 (E.D. Cal.) (notice of settlement agreement available at <http://www.pacer.psc.uscourts.gov>); *Mayweathers v. Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004) (ruling in favor of Muslim prisoners who desired to wear beards); *Hoevenaer v. Lazaroff*, 276 F. Supp. 2d 811, 817 (S.D. Ohio 2003), *overruled* 2004 WL 1664043 (6th Cir. July 23, 2004); *Boles v. Neet*, 333 F. Supp. 2d 1005 (D. Colo. Aug. 20, 2004); *Thompson v. Scott*, 86 Fed. Appx. 17, 19 (5th Cir. 2004); *Taylor v. Cockrell*, No. H-00-2809 (S.D. Tex. Sept. 25, 2002); *Young v. Goord*, 67 Fed. Appx. 638, 640 n.1 (2d Cir. 2003); *People v. Peterson*, 2002 WL 31387540, at \*4 (N.Y. Sup. Sept. 5, 2002); *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003) (remanding case to district court to allow Rastafarian inmate to amend his complaint to plead a RLUIPA claim challenging hair length regulations); *Mayweathers v. Terhune*, No. S-96-1582, slip op. at 9-11 (E.D. Cal. July 5, 2001), available at <http://www.pacer.psc.uscourts.gov>; *Fenelon v. Riddle*, No. S-95-954, slip op. 16-18 (E.D. Cal. Apr. 29, 2003), available at <http://www.pacer.psc.uscourts.gov>; *Marria v. Broaddus*, 2003 WL 21782633 (S.D.N.Y. July 31, 2003); *Farrow v. Stanley*, 2004 WL 224602, at \*10 (D. N.H. Feb. 5, 2004); *Farrow v. Stanley*, 2004 WL 224602, at \*10 (D. N.H. Feb. 5, 2004); *Pounders v. Kempker*, 79 Fed. Appx. 941, 943 (8th Cir. 2003); *Coronel v. Paul*, 316 F. Supp. 2d 868, 876 (D. Ariz. 2004); *Cardew v. New York State Dep't of Corr. Services*, No. 01-Civ-3669, 2004 WL 943575, at \*4 (S.D.N.Y. Apr. 30, 2004); *Pugh v. Goord*, 345 F.3d 121, 125-26 (2d Cir. 2003); *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004); *Charles v. Verhagen*, 220 F. Supp. 2d 937, 948-49 (W.D. Wis. 2002), *aff'd*, 348 F.3d 601 (7th Cir. 2003) (ban on Islamic prayer oil substantially burdened religious exercise); *Leishman v. Holland*, No. 01-CV-926 (May 28, 2004 D. Utah); *Goodman v. Snyder*, 2003 WL 715650, at \*5 (N.D. Ill. Feb. 27, 2003); *Neal v. Lucas*, 75 Fed. Appx. 960 (5th Cir. 2003); *Aiello v. Frank*, 2003 WL 23277415, at \*1 (W.D. Wis. June 3, 2003); *Marria v. Broaddus*, 2003 WL 21782633, at \*15 (S.D.N.Y. July 31, 2003); *Borzycz v. Frank*, 2004 WL 67642, at \*2 (W.D. Wis. Jan. 5, 2004); *Lindell v. McCallum*, 352 F.3d 1107, 1109 (7th Cir. 2003); *Steele v. Guilfoyle*, 76 P.3d 99, 102 (Okla. Civ. App. 2003); *Rogers v. Hellenbrand*, 2004 WL 433976, at \*6 (W.D. Wis. Mar. 4, 2004); *Washington v. County of Santa Barbara*, 2004 WL 1926131, \*3 (Cal.App. Aug. 31, 2004); *Ickstadt v. Dretke*, No. H-02 1064 (S.D. Tex. Apr. 2, 2004); *Limbaugh v. Thompson*, No. 93-D-1404-N, slip op. at 2 (M.D. Ala. Sept. 29, 2003); *Charles v. Verhagen*, 220 F. Supp. 2d 937, 949 (W.D. Wis. 2002) (prison's limitation of one religious feast a year for Muslim inmate held to be enough under RLUIPA); *Ulmann v. Anderson*, 2004 WL 883221, \*7 (D. N.H. Apr. 26, 2004); *Lindell v. Frank*, 2003 WL 23198509, at \*61 (W.D. Wis. May 5, 2003); *Piscitello v. Berge*, 2003 WL 23095741, \*5 (W.D. Wis. Apr. 17, 2003); *Ahmad v. Furlong*, No. 01-F-1164 (D. Colo. Aug. 5, 2004); *Jones v. Toney*, No. 5:02CV00415 (E.D. Ark. Mar. 29, 2004); *Benning v. Georgia*, No. 602-CV-139 (S.D. Ga. Jan. 8, 2004); *Al Ghashiyah v. Wis. Dep't of Corr.*, 250 F.Supp.2d 1016 (E.D. Wis. 2003), *overruled by* *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Johnson v. Martin*, 223 F.Supp.2d 820 (W.D. Mich. 2002) (same); *Gerhardt v. Lazaroff*, 221 F.Supp.2d 827 (S.D. Ohio 2002) (same), *overruled sub nom.* *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003).

<sup>293</sup> See generally C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575 (1998).

since almost all of the plaintiffs who have pursued RLUIPA claims have also pleaded a Free Exercise claim in their complaint, RLUIPA is not adding to the volume of prisoner cases since prisoners were free to bring Free Exercise claims even before RLUIPA.

#### V. RLUIPA IS A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL POWER

One of the main areas of litigation under the statute thus far has focused on its constitutionality. The Fourth,<sup>294</sup> Seventh,<sup>295</sup> and Ninth Circuits,<sup>296</sup> as well as at least twelve district courts,<sup>297</sup> have rejected all constitutional challenges to RLUIPA's prisoner provisions. The Sixth Circuit<sup>298</sup> created a circuit split by accepting the argument of two overruled district court decisions that RLUIPA violates the Establishment Clause. Because of the Circuit split, the Supreme Court recently agreed to decide this term the question of whether RLUIPA is a violation of the Establishment Clause.

The states that have challenged RLUIPA's constitutionality have raised six major issues: (1) whether RLUIPA violates the Establishment Clause; (2) whether RLUIPA is a constitutional exercise of Congress's Spending Clause power; (3) whether RLUIPA

294. See *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) (rejecting Establishment Clause challenge to RLUIPA § 3).

295. See *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003) (rejecting Establishment Clause, Spending Clause, and Tenth Amendment challenges to RLUIPA § 3).

296. See *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002) (same), *cert. denied sub nom. Alameida v. Mayweathers*, 540 U.S. 815 (2003) (rejecting Establishment Clause, Spending Clause, Tenth Amendment, Eleventh Amendment, and Separation of Power challenges to RLUIPA § 3).

297. See *Glick v. Norris*, No. 5:03CV00160 (E.D. Ark. Aug. 11, 2004); *Ahmad v. Furlong*, No. 01-F-1164 (D. Colo. Aug. 5, 2004) (rejecting constitutional challenges to RLUIPA § 3) (on file with the author); *Ickstadt v. Dretke*, No. H-02 1064 (S.D. Tex. Apr. 2, 2004), *Jones v. Toney*, No. 5:02CV00415 (E.D. Ark. Mar. 29, 2004) (same); *Benning v. Georgia*, No. 602-CV-139 (S.D. Ga. Jan. 8, 2004); *Williams v. Bitner*, 285 F.Supp.2d 593 (M.D. Pa. 2003); *Sanabria v. Brown*, No. 99-4699 (D. N.J. June 5, 2003) (same); *Gordon v. Pepe*, No. 00-10453, 2003 WL 1571712 (D. Mass. Mar. 6, 2003) (same); *Johnson v. Martin*, 223 F. Supp.2d 820 (W.D. Mich. 2002) (same), *overruled by Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003); *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827 (S.D. Ohio 2002) (same), *overruled by Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003); *Taylor v. Cockrell*, No. H-00-2809 (S.D. Tex., Sept. 25, 2002) (rejecting constitutional challenge to RLUIPA Section 3), *vacated on other grounds*, *Taylor v. Groom*, No. 02-21316 (5th Cir. Aug. 26, 2003); *Love v. Evans*, No. 2:00-CV-91 (E.D. Ark., Aug. 8, 2001) (same); *Mayweathers v. Terhune*, 2001 WL 804140, at \*6 (E.D. Cal. 2001) (same).

298. *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003) (holding RLUIPA § 3 violates the Establishment Clause, relying on *Al Ghashiyah v. Wis. Dep't of Corr.*, 250 F.Supp.2d 1016 (E.D. Wis. 2003), *overruled by Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003), and *Madison v. Riter*, 240 F.Supp.2d 566 (W.D. Va. 2003), *overruled by Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003)).



is a constitutional exercise of Congress's Commerce Clause; (4) whether RLUIPA violates the Tenth Amendment; (5) whether RLUIPA violates the Eleventh Amendment and (6) whether RLUIPA violates Separation of Power principles. Each of these arguments is assessed below, beginning with the question before the Supreme Court now of whether RLUIPA offends the Establishment Clause.

*A. RLUIPA Section 3 Does Not Violate the Establishment Clause.*

The only credible argument that RLUIPA is unconstitutional is that legislative accommodations of religious exercise (like RLUIPA) are forbidden by the Establishment Clause if they accommodate religious exercise without also providing benefits for other rights. This argument, however, is premised on an extreme view of the Establishment Clause held by only one sitting Justice of the Supreme Court.<sup>299</sup> Moreover, this argument has been rejected *in every single case* in which it was raised against RFRA, RLUIPA's broader predecessor, both before and after RFRA as applied to the states was struck down on other grounds.<sup>300</sup> All but one court has rejected the argument in cases challenging the constitutionality of RLUIPA Section 3.<sup>301</sup> Likewise, every court to address the issue has rejected an

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299. See *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 n.20(11th Cir. 2004) (describing rejection of Justice Stevens' Establishment Clause view by the majority of Justices in *Boerne*).

300. See, e.g., *In re Young*, 141 F.3d 854, 863 (8th Cir. 1998) ("RFRA fulfills each of the elements presented in the *Lemon* test, and we conclude that Congress did not violate the Establishment Clause in enacting RFRA."); *Mockaitis v. Harclerod*, 104 F.3d 1522, 1530 (9th Cir.), *vacated on other grounds*, 521 U.S. 507, 117 S.Ct. 2157 (1997); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) (same) *vacated on other grounds*, 521 U.S. 1114, 117 S.Ct. 2502 (1997); *E.E.O.C. v. Catholic Univ. of America*, 83 F.3d 455, 470 (D.C. Cir. 1996) (same); *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996) (same), *rev'd on other grounds*, 521 U.S. 507, 117 S.Ct. 2157 (1997); *Jama v. United States Immigration and Naturalization Service*, WL 2538275, at \*25 (D. N.J. Nov. 10, 2004) (same).

301. See *Madison v. Riter*, 355 F.3d 310 (4<sup>th</sup> Cir. 2003) (rejecting Establishment Clause challenge to RLUIPA Section 3); *Charles v. Verhagen*, 348 F.3d 601 (7<sup>th</sup> Cir. 2003) (same); *Mayweathers v. Newland*, 314 F.3d 1062 (9<sup>th</sup> Cir. 2002) (same), *cert. denied sub nom. Almeida v. Mayweathers*, 124 S.Ct. 66 (2003) (same); *Benning v. Georgia*, No. 602-CV-139 (S.D. Ga. Jan. 8, 2004); *Williams v. Bitner*, 285 F. Supp. 2d. 593 (M.D. Pa. 2003) (same); *Jones v. Toney*, No. 5:02CV00415 (E.D. Ark. Mar. 29, 2004) (same); *Sanabria v. Brown*, No. 99-4699 (D. N.J. June 5, 2003) (same); *Gordon v. Pepe*, No. 00-10453, 2003 WL 1571712 (D. Mass. Mar. 6, 2003) (same); *Johnson v. Martin*, 223 F.Supp.2d 820 (W.D. Mich. 2002) (same), *overruled by Cutter v. Wilkinson*, 349 F.3d 257 (6<sup>th</sup> Cir. 2003); *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827 (S.D. Ohio 2002) (same), *overruled by Cutter v. Wilkinson*, 349 F.3d 257 (6<sup>th</sup> Cir. 2003); *Love v. Evans*, No. 2:00-CV-91 (E.D. Ark., Aug. 8, 2001) (same); *Mayweathers v. Terhune*, 2001 WL 804140, at \*6 (E.D. Cal. 2001) (same). *But see Cutter v. Wilkinson*, 349 F.3d 257 (6<sup>th</sup> Cir. 2003) (holding RLUIPA § 3 violates the Establishment Clause, relying on *Al Ghashiyah v. Wis.*

Establishment Clause challenge to the analogous land-use provisions of RLUIPA Section 2.<sup>302</sup>

Courts so consistently uphold RLUIPA and similar laws because they satisfy all three requirements of the *Lemon* test: (1) RLUIPA has a secular purpose, to minimize government interference with religious exercise; (2) it does not have the primary effect of advancing religion because alleviating substantial burdens on religious exercise—even exclusively, as religious accommodation laws do—does not involve the government *itself* advancing religion; and (3) the statute does not excessively entangle government with religion because its purpose and effect are exactly the opposite—to *diminish* government interference with religious exercise.<sup>303</sup> In other words, RLUIPA does not entail “sponsorship, financial support, and active involvement of the sovereign in religious activity,”<sup>304</sup> but instead “follows the best of our traditions” by relieving substantial regulatory burdens on religious exercise.<sup>305</sup>

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Dep’t of Corr., 250 F.Supp.2d 1016 (E.D. Wis. 2003), *overruled by* Charles v. Verhagen, 348 F.3d 601 (7<sup>th</sup> Cir. 2003), and Madison v. Riter, 240 F. Supp. 2d 566 (W.D. Va. 2003), *overruled by* Madison v. Riter, 355 F.3d 310 (4<sup>th</sup> Cir. 2003)).

302. For other rejections of Establishment Clause challenges to RLUIPA Section 2, see *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11<sup>th</sup> Cir. 2004) (rejecting Establishment Clause challenge to RLUIPA Section 2); *Congregation Kol Ami v. Abingdon Township*, No. 01-1919, 2004 WL 1837037 (E.D. Pa. Aug. 17, 2004); *Williams Island Synagogue, Inc. v. City of Aventura*, No. 04-20257-CV, 2004 WL 1059798 (S.D. Fla. May 06, 2004); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149, 2004 WL 546792 (W.D. Tex., Mar. 17, 2004); *United States v. Maui County*, 298 F. Supp. 2d 1010 (D. Haw. 2003); *Murphy v. New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003); *Westchester Day Sch. v. Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003); *Guru Nanak Sikh Society v. County of Sutter*, No. S-02-1785 (E.D. Cal. Nov. 19, 2003); *Life Teen, Inc. v. Yavapai County*, No. Civ. 01-1490-PCT (D. Ariz. Mar. 26, 2003); *Christ Universal Mission Church v. Chicago*, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917 (N.D. Ill. Sept. 11, 2002), *vacated on other grounds* 2004 WL 595392 (7<sup>th</sup> Cir. Mar. 26, 2004); *Freedom Baptist Church v. Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). *See also* *Cottonwood Christian Ctr. v. Cypress*, 218 F. Supp. 2d 1203, 1221 n.7 (C.D. Cal. 2002) (noting that “RLUIPA would appear to have avoided the flaws of its predecessor RFRA, and be within Congress’s constitutional authority”). *Cf.* *Ehlers-Renzi v. Connelly School of the Holy Child*, 224 F.3d 283, 291 (4<sup>th</sup> Cir. 2000) (upholding county zoning ordinance exempting from special exception requirement parochial schools located on land owned by religious organization); *Boyajian v. Gatzunis*, 212 F.3d 1 (1<sup>st</sup> Cir. 2000) (upholding state law and town by-law prohibiting municipal authorities from excluding religious uses of property from any zoning area); *Cohen v. Des Plaines*, 8 F.3d 484 (7<sup>th</sup> Cir. 1993) (upholding zoning ordinance that allowed churches to operate day-care centers in single-family residential districts, while requiring other operators of day-care centers to obtain special use permits).

303. *See* *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

304. *Walz v. Tax Comm’n*, 397 U.S. 664, 668.

305. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

### 1. RLUIPA Has a Secular Purpose

First, RLUIPA was passed for the secular government purpose of “protect[ing] the free exercise of religion from unnecessary government interference.”<sup>306</sup> As the Supreme Court made clear in *Corporation of Presiding Bishop v. Amos*, it is a “proper purpose [to] lift[] a regulation that burdens the exercise of religion.”<sup>307</sup> Indeed, it has been a consistent refrain of the Court’s Establishment Clause jurisprudence that it is a permissible government purpose to limit government interference with the exercise of religion.<sup>308</sup>

These cases simply emphasize the Supreme Court’s admonition that the requirement of a secular purpose “does not mean that the law’s purpose must be unrelated to religion—that would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted.”<sup>309</sup> Thus, “the government may (and sometimes must) accommodate religious practice and . . . it may do so without violating the Establishment Clause.”<sup>310</sup> As Justice Douglas famously stated, statutes that accommodate religious exercise “follow[] the best of our traditions. For [the government] then respects the religious nature of our people and accommodates the public service to their spiritual needs.”<sup>311</sup>

Indeed, legislation like RLUIPA that has the permissible purpose of lifting burdens on religious exercise is all the more common—and necessary—since the Supreme Court’s decision in *Smith* made clear that people of faith should turn in the first instance to the legislative and executive branches, rather than the courts, for the protection of religious liberty:

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306. 146 CONG. REC. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady); *Madison*, 355 F.3d at 317; *Mayweathers v. Newland*, 314 F.3d 1062, 1068 (9th Cir. 2002).

307. 483 U.S. 327, 338 (1987) (emphasis added); *id.* at 339 (identifying the “permissible purpose of limiting governmental interference with the exercise of religion”).

308. *See, e.g.*, *Gillette v. United States*, 401 U.S. 437 (1971) (holding that exemption from military draft that lifts burden imposed on religious exercise of conscientious objectors does not violate the Establishment Clause); *Walz*, 397 U.S. at 680 (excepting religious organizations from neutral property tax laws does not violate Establishment Clause); *Zorach*, 343 U.S. at 314 (1952) (excepting religious students from mandatory public school attendance during certain hours of the day to obtain religious instruction does not violate Establishment Clause); *Larkin v. Grendel’s Den*, 459 U.S. 116, 123–24 (1982) (finding secular purpose in regulating liquor sales in manner to protect disruption of church activities).

309. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

310. *Id.* at 334.

311. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also *a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation* as well.<sup>312</sup>

Thus, for example, while *Smith* rejected the claim that the Free Exercise Clause mandated an exemption to drug laws, the Court noted with approval that accommodations of peyote use for religious use (and only religious use) have been made by legislation.<sup>313</sup> Such accommodations are constitutional, even though others wishing to use peyote for secular reasons are not offered the exemption.<sup>314</sup>

Accordingly, RLUIPA Section 3's purpose of alleviating government burdens on prisoners' religious exercise is a permissible secular purpose.<sup>315</sup> Moreover, as the Supreme Court emphasized in *Board of Education v. Mergens*, courts should "not lightly second-guess such legislative judgments" when reviewing the policy reasons for an accommodation.<sup>316</sup> Moreover, government action has failed the "secular purpose" test only when "there was *no question* that the statute or activity was motivated *wholly* by religious considerations."<sup>317</sup>

In addition, there is at least one other secular purpose for RLUIPA's alleviating burdens on religion in the prison context: the promotion of rehabilitation.<sup>318</sup> The permissible purpose of promoting

312. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (emphasis added).

313. *Id.* (noting that "[ ] a number of States have made an exception to their drug laws for sacramental peyote use.").

314. *See Lee v. Weisman*, 505 U.S. 577, 628–29, 112 S.Ct 2649, 2677 (1992) (Souter, J., concurring) ("[I]n freeing the Native American Church from federal laws forbidding peyote use, *see* . . . 21 C.F.R. § 1307.31 (1991), the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans."); *Peyote Way Church v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (exemptions from peyote laws for religious use do not violate Establishment Clause).

315. *See, e.g., Madison*, 355 F.3d at 310 (Section 3 has secular purpose of alleviating burdens on religious exercise); *Charlesv. Verhagen*, 348 F.3d 601, 610 (7th Cir. 2003) (same); *Mayweathers*, 314 F.3d at 1068 (same). *See also Midrash*, 2004 WL 842527, at \*23 (finding purpose of RLUIPA § 2(b)(1) was "to alleviate significant government interference with the exercise of religion," and that this "purpose does not violate the Establishment Clause.").

316. 496 U.S. 226, 251 (1990).

317. *Lynch v. Donnelly*, 465 U.S. 668, 680 (emphasis added).

318. *See Charles*, 348 F.3d at 607 (identifying rehabilitation of prisoners as one of RLUIPA's purposes).

rehabilitation was also a primary reason for extending the protection of RFRA to prisoners.<sup>319</sup>

In sum, there is little question that RLUIPA's two secular purposes—lifting burdens on religious exercise and promoting rehabilitation—satisfy the secular purpose prong.

## 2. *RLUIPA Does Not Have the Primary Effect of Advancing Religion.*

*a. RLUIPA does not cause the government to advance religious exercise itself, but rather to avoid interference with private religious actors as they advance religious exercise.*

RLUIPA satisfies the second *Lemon* factor, because alleviating burdens on religious exercise does not have the principal or primary effect of advancing religion. RLUIPA merely reduces intrusion and oversight by the government into how religious individuals carry out their missions. While this may better enable those *individuals* to advance *their* religious purposes, the Supreme Court has held this to be a permissible effect:

A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden “effects” under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence. As the Court observed in *Walz*, “for the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.”<sup>320</sup>

Here, like the Title VII exemption approved in *Amos*, RLUIPA does not involve the *government itself* advancing religion. Instead, RLUIPA simply permits prisoners some latitude to practice and

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319. See *Kikumura v. Hurley*, 242 F.3d 950, 961 (10th Cir. 2001) (discussing how RFRA's lifting of substantial burdens on the religious exercise of *federal* prisoners relates to permissible Congressional purpose of rehabilitating prisoners). See also 139 Cong. Rec. S14,465 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch) (“[E]xposure to religion is the best hope we have for rehabilitation of a prisoner. . . . We should accommodate efforts to bring religion to prisoners.”); *id.* at S14,466 (statement of Sen. Dole) (“[I]f religion can help just a handful of prison inmates get back on track, then the inconvenience of accommodating their religious beliefs is a very small price to pay.”); *id.* (statement of Sen. Hatfield) (“Mr. Colson’s prison ministries group, which has successfully rehabilitated many prisoners, has been denied access to prisoners in Maryland . . . who did not identify themselves as [P]rotestants . . . . [This is an] example[ ] of the need for us to pass this bill without this amendment [which would exclude prisons from RFRA].”).

320. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987) (emphasis in original) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668, (1970)).

define their own religious exercise by limiting government interference. Put another way, RLUIPA's lifting of any non-compelling, state-imposed regulations that substantially burden religious exercise is an example of "benevolent neutrality" that "permit[s] religious exercise to exist without sponsorship and without [government] interference."<sup>321</sup> By passing RLUIPA, "Congress has simply lifted government burdens on religious exercise and thereby facilitated free exercise of religion for those who wish to practice their faiths."<sup>322</sup>

It also bears mentioning that, contrary to the suggestion of the Sixth Circuit in *Cutter*,<sup>323</sup> *Amos* cannot be distinguished on the grounds that the Title VII accommodation at issue was somehow required by the Religion Clauses whereas RLUIPA was not. With regard to the Free Exercise Clause, the Court in *Amos* expressly *declined* to rest its decision on the ground that Title VII's applicability to religious groups, prior to the enactment in 1972 of the legislative accommodation for religious organizations challenged in *Amos*, violated the Free Exercise Clause so that the 1972 amendment was constitutionally mandated. As the Court stated, "[w]e may assume for the sake of argument that the pre-1972 exemption was adequate in the sense that the Free Exercise Clause required no more."<sup>324</sup> Moreover, the Court took pains to point out that "[i]t is well established . . . that the limits of permissible state accommodation to religion are by no means co-extensive with noninterference mandated by the Free Exercise Clause."<sup>325</sup>

The argument that the accommodation in *Amos* was required in order to avoid an Establishment Clause violation is equally infirm. None of the opinions of the Justices in *Amos* make (or even suggest) such a holding, and courts have held that the government is not generally prohibited from regulating the hiring decisions of religious organizations.<sup>326</sup> If the Establishment Clause permits the government to interfere with a religious organization's hiring of at least some

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321. *Amos*, 483 U.S. at 334.

322. *Madison v. Riter*, 355 F.3d 310, 318 (4<sup>th</sup> Cir. 2003).

323. *See Cutter v. Wilkinson*, 349 F.3d 257, 263 (6<sup>th</sup> Cir. 2003) (suggesting that the accommodation in *Amos* was necessary to avoid violating First Amendment).

324. *Amos*, 483 U.S. at 336.

325. *Id.* at 334.

326. *See, e.g., E.E.O.C. v. Roman Catholic Diocese*, 213 F.3d 795 (4<sup>th</sup> Cir. 2000) (holding that the "ministerial exception" doctrine does not completely exempt hiring decisions of all employees (*e.g.*, building custodians) of a religious organization from anti-discrimination laws).

employees, then the exemption approved in *Amos*—which involved the Title VII exemption’s application to all employees of a religious organization—could not have been required by the Establishment Clause.

*b. None of the rationales suggested by the Sixth Circuit and RLUIPA’s critics distinguish RLUIPA from the myriad accommodations of religious exercise by the political branches that follow the best of our traditions.*

RLUIPA’s critics—relying primarily on the Sixth Circuit’s anomalous opinion in *Cutter*—have invoked essentially three rationales to escape the controlling analysis of *Amos*. As set forth below, none is persuasive as binding precedent forecloses all three.

*i. The Establishment Clause Does Not Prohibit Law Passed Solely to Accommodate Religious Exercise.*

Rather than even attempting a showing that RLUIPA involves the “government itself” advancing religion. *Amos*, 483 U.S. at 337, the Sixth Circuit held that RLUIPA is unconstitutional because it accommodates religious exercise without *also* accommodating other fundamental rights.<sup>327</sup> But the Supreme Court has expressly rejected this rule, holding instead that where “government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.”<sup>328</sup> Legion other courts have rejected arguments this argument over and over again in upholding Sections 2 and 3 of RLUIPA.<sup>329</sup> This near unanimity is not surprising as the

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327. *Cutter*, 349 F.3d at 265–66.

328. *Amos*, 483 U.S. at 338.

329. See, e.g. *Midrash*, 2004 WL 842527, \*23 (“[A] (a law does not violate the Establishment Clause simply because it lifts burdens on religious institutions without affording similar benefits to secular entities”); *Madison*, 355 F.3d at 318–19 (holding that under *Amos* “[t]he Establishment Clause’s requirement of neutrality does not mandate that when Congress relieves the burdens of regulation on one fundamental right, that it must similarly reduce government burdens on all other rights.”); *Mayweathers*, 314 F.3d at 1069 (holding that under *Amos*, RLUIPA “does not violate the Establishment Clause just because it seeks to lift burdens on religious worship in institutions without affording corresponding protection to secular activities or to non-religious prisoners.”); *Charles*, 348 F.3d at 610 (same); *Sanabria*, slip op. at 35 (same); *Johnson*, 223 F.Supp.2d at 826 (“[I]t does not follow, as Defendants argue, that merely because Congress has acted to provide religious activity with special protection and has not done the same for secular activity, that Congress has advanced religion.”); *Gerhardt*, 221 F.Supp.2d at 847 (“Finally, the [*Amos*] Court rejected the notion that a law which singles out religions for the benefit it confers is *per se* unconstitutional.”); Cf. *In re Young*, 141 F.3d at 863 (rejecting reasoning

Sixth Circuit's theory in *Cutter* is fraught with problems on many levels.

*First*, there is a conceptual problem. The Establishment Clause certainly *does* require some form of “neutrality,” but that neutrality is “between religion and religion, and between religion and nonreligion,”<sup>330</sup>—*not* between religious exercise *rights* and all other fundamental *rights*, as the Sixth Circuit would have it. Certainly government cannot prefer the religious over the nonreligious: the state cannot imprison those who refuse to believe in a Creator, or withhold welfare checks from the atheist. But the government can—and often does—protect a *single* fundamental right in a particular piece of legislation or regulation, and the right to free religious exercise is no exception.<sup>331</sup> Such government actions do not “prefer” religion over irreligion; instead, they simply protect or reinforce the *right* to religious exercise, just as they would any other right.<sup>332</sup> As the Fourth Circuit recently held, “[i]t was reasonable for Congress to seek to reduce the burdens on religious exercise for prisoners without simultaneously enhancing, say, an inmate’s First Amendment rights to access pornography.”<sup>333</sup> This is because the Supreme Court has never held or even suggested “that legislative protections for fundamental rights march in lockstep.”<sup>334</sup> Moreover, not only would “a requirement of symmetry of protection for fundamental liberties” ignore Supreme Court precedent, “but it would also place prison administrators and other public officials in the untenable position of calibrating burdens and remedies with the specter of judicial second-

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of Justice Stevens’ solitary concurrence in *Boerne* that RFRA is impermissible because it accommodates the religious without also providing a benefit for atheists as a viewpoint “in direct contradiction to the declaration of a majority of the Supreme Court in” *Amos*.)

330. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

331. *See, e.g.*, Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa *et seq.* (reacting to *Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S.Ct. 1970 (1978), and providing journalists with greater protection against searches and seizures); Department of the Interior and Related Agencies Appropriations Bill, 1989, H.R. Rep. No. 713, 100th Cong., 2d Sess. 72 (1988) (reacting to statement in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 454, (1988), that “[t]he Government’s rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents” (emphasis added), and defunding the project at issue in *Lyng* that would have destroyed government land used by Indians for religious exercise); Exemption Act of 1988, 26 U.S.C. § 3127 (reacting to *United States v. Lee*, 455 U.S. 252 (1982), that declined to recognize Amish free exercise of religion claim, and providing a special Social Security tax exemption for employers and their employees who are members of “a recognized religious sect” whose “established tenets” oppose participation in Social Security); National Defense Authorization Act, 10 U.S.C. § 774.

332. *In re Young*, 141 F3d 854, 863 (8th Cir. 1998).

333. *Madison*, 355 F.3d at 319.

334. *Id.* at 318.



guessing at every turn.”<sup>335</sup> And following the Sixth Circuit’s logic in *Cutter* to its conclusion leads to other absurdities. For example, if protecting religious exercise rights alone reflects impermissible *favor* for religion, then protecting any fundamental right alone *other than* religious exercise would reflect impermissible *disfavor* for religion.

*Second*, this reasoning defies logic. If the purpose of the Establishment Clause really were to preclude laws that *single out* religious exercise for protection from government interference, then the Establishment Clause would squarely contradict the Free Exercise Clause, which does precisely that. As the Supreme Court has observed, “[n]or does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>336</sup>

*Third*, there are practical problems. Under the Sixth Circuit’s view, the Establishment Clause would run amok, invalidating wholesale the legion acts of the political branches—legislative and executive, federal, state, and local—whose *sole* purpose and effect is to accommodate religious exercise.<sup>337</sup> This includes, among many others, the *federal statutory* accommodations of religious peyote use and headwear in the military discussed above; *state constitutional* provisions that provide stronger protections for religious exercise (and only religious exercise) than the federal Free Exercise Clause;<sup>338</sup> *state*

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335. *Id.* at 319.

336. See *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

337. See *Madison*, 355 F.3d at 320 (holding that RLUIPA had an invalid purpose that “would throw into question a wide variety of religious accommodation laws”).

338. See *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (“state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution”). Since the Supreme Court’s *Smith* decision, the courts of at least *eleven* states have held that their state constitutions provide broader protection for religious exercise (and only religious exercise). See, e.g., *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994) (*Sherbert* strict scrutiny test applies to free exercise claims under Alaska Constitution); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992) (Maine constitution requires compelling interest/least restrictive means test); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (test of “least restrictive alternative for protecting public safety” applies to Free Exercise claims under Minnesota constitution); *St. John’s Lutheran v. State Comp. Ins. Fund*, 830 P.2d 1271 (Mont. 1992) (under Montana constitution “[T]he state may regulate affairs impacting religious activity when there is an overriding governmental interest in so doing.”); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000) (Ohio constitution requires compelling state interest/least restrictive means test); *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (Under Washington constitution, “[a] facially neutral, evenhandedly enforced statute that does not directly burden free exercise may, nonetheless, violate [the state constitution], if it indirectly burdens the exercise of religion.”); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996) (Wisconsin constitution requires compelling state interest/least restrictive alternative test when free exercise of religion burdened); *State v. Evans*, 796 P.2d 178, 14 Kan. App. 2d 591 (Kan.1990) (under Kansas constitution, “[o]nly

*statutes* that provide broader protection to religious exercise (and only religious exercise) than required by the federal or state constitution;<sup>339</sup> *government chaplaincy programs* in Congress, the armed forces, and in prisons that facilitate religious exercise (and only religious exercise);<sup>340</sup> and even *particular prison regulations* adopted by the Federal Bureau of Prisons that accommodate religious exercise (and only religious exercise).<sup>341</sup>

Another strange consequence of the Sixth Circuit's reasoning is that, if legislative and executive officials would merely tack on to each protection of religious exercise the protection of another fundamental right, then the entire (allegedly grievous) constitutional problem would disappear. The Establishment Clause does not exist to require government actors to undertake such formalistic (and completely unprecedented) exercises.<sup>342</sup>

Indeed, the Supreme Court has squarely rejected that argument when it explained that it:

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those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”); Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994) (although *Smith* “substantially altered” federal constitutional standard, Massachusetts constitution requires strict scrutiny when religious exercise burdened); *In re Browning*, 476 S.E.2d 465, (N.C. 1996) (requiring “compelling state interest in the regulation of a subject within the [North Carolina’s] Constitutional power to regulate”); *Rourke v. N.Y. Dep’t of Corr.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993) (New York constitution requires least restrictive means for serving compelling state interest when laws burden religious exercise), *aff’d*, 615 N.Y.S.2d 470 (N.Y. App. Div. 1994). See also Gary S. Gildin, *Coda to William Penn’s Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. PA. J. CONST. L. 81, 125–26 & nn.200–10 (2001).

339. Since the Supreme Court’s *Smith* decision, the political branches of at least *twelve* states have, either by statute or constitutional amendment, provided stronger protection for religious exercise (and only religious exercise). Those twelve states are Alabama, see ALA. CONST. amend. 622; Arizona, see ARIZ. REV. STAT. ANN. §§ 41-1493 *et seq.* (West 2003); Connecticut, see CONN. GEN. STAT. ANN. § 52-571b (West 2003); Florida, see FLA. STAT. ANN. §§ 761.01-761.04 (West 2003); Idaho, see IDAHO CODE §§ 73-401 *et seq.* (Supp. 2002); Illinois see 775 ILL. COMP. STAT. ANN. §§ 35/1 -35/99 (West 2002); New Mexico, see N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (Michie 2002); Oklahoma, see OKLA. STAT. ANN. tit. 51, §251 (West 2003); Pennsylvania, 71 PA. CONS. STAT. ANN. §§ 2401 *et seq.*; Rhode Island, see R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2001); South Carolina, see S.C.CODE.ANN. § 1-32-10 (Law. Co-op. 1999); and Texas, see TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 *et seq.* (West 2003).

340. See, e.g., *Mockaitis*, 104 F.3d at 1530 (holding that RFRA does not impermissibly promote religion anymore than “[t]he creation of chaplaincies in Congress and in the armed forces [which are] particularly striking promotions of religion.”).

341. See, e.g., Federal Bureau of Prisons Policy Statement at 15 (providing religious prisoners accommodation for religious use of wine, an otherwise contraband substance in prison); *id.* at 10–11 (providing religious prisoners relief from generally applicable work duties in order to observe religious holidays); *id.* at 11–12 (providing religious prisoners accommodation to allow visits by outside religious advisors that do not count against the limit otherwise posed on social visits from outsiders) (on file with the author).

342. See *Madison*, 355 F.3d at 320 (noting “[t]he byzantine complexities that such compliance would entail”).

has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause. Where, as here, government acts with the purpose of lifting a regulation that burdens the exercise of religion, *we see no reason to require that the exemption come packaged with benefits to secular entities.*<sup>343</sup>

*Fourth*, lacking *any* Supreme Court authority for its position, the Sixth Circuit rests its anomalous holding on a hypothetical. If two white supremacist prisoners—one secular and the other a religious adherent to the Church of Jesus Christ Christian, Aryan Nation (“CJCC”)—want to challenge a prison’s decision not to let them possess white supremacist literature. According to the hypothetical, assuming the showing of a substantial burden on religious exercise, the religious prisoner would be able to challenge the prison’s failure to accommodate his religious beliefs under RLUIPA’s strict scrutiny standard, but the secular prisoner could bring free speech and association claims against the policy, but only under the more deferential standard of *Turner v. Safley*.<sup>344</sup> Thus, the *Cutter* court concludes, the “primary effect of RLUIPA is not simply to accommodate the exercise of religion by individual prisoners, but to advance religion generally by giving religious prisoners rights superior to those of nonreligious prisoners.”<sup>345</sup>

But applying the reasoning of this hypothetical to factual circumstances actually addressed by the Supreme Court reveals starkly that the Court has already rejected that reasoning repeatedly. For example, in *Zorach*, the Supreme Court rejected an Establishment Clause challenge to a “release-time” program that permitted students to leave public school grounds for religious—but not secular—instruction.<sup>346</sup> Thus, under the very program already approved by the Court in *Zorach*, if there were two white supremacist students, the one seeking instruction from CJCC would be excused, but the one seeking instruction from a secular supremacist group would not. Similarly, in *Amos*, the Supreme Court approved a provision of Title VII that exempted religious organizations—and only religious organizations—from the statute’s general prohibition of religious discrimination in employment. Thus, under the very exemption approved by the Court

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343. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987) (emphasis added).

344. 482 U.S. 78 (1987).

345. *Cutter*, 349 F.3d at 266 (citations and quotation marks omitted).

346. *Zorach v. Clauson*, 343 U.S. 306, 308 (1952).

in *Amos*, if there were two white supremacist employers, a religious one such as CJCC could hire based on religion, but the secular one could not.<sup>347</sup>

And why has the Supreme Court (and faithful lower courts) so consistently rejected Establishment Clause challenges to these laws? In short, government must be free to specially deregulate religious exercise, because it is a category of private activity in which government interference is uniquely misplaced. To quibble with that is to quibble with the Religion Clauses themselves. The same principle applies to RLUIPA—it lifts burdens only on religious exercise in order to minimize government interference with a human phenomenon that the Constitution itself recognizes to be uniquely sensitive to government interference.<sup>348</sup> Thus, notwithstanding the superficial appeal of a single hypothetical, the overwhelming weight of authority required a conclusion that RLUIPA does not offend the Establishment Clause by lifting burdens on religious exercise.

*Fifth*, there is an historical problem. Laws that exist solely to accommodate religious exercise are numerous because they represent a time-honored American tradition.<sup>349</sup> And, as discussed *supra*, accommodations by the political branches are all the more imperative since *Employment Division v. Smith* narrowed the role of the judiciary in this area. In other words, if the Sixth Circuit’s theory were accepted, then the *Smith* Court’s invitation to enact religious accommodations<sup>350</sup> would appear to be an inducement to violate the Establishment Clause. Notably, the *Smith* Court, in encouraging the political branches to take responsibility for providing for accommodation of religious exercise, did not even *suggest* that those accommodations would be permissible only if packaged with other

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347. See also *Madison*, 355 F.3d at 319 (*Amos* “does not at all indicate that Congress must examine how or if any other fundamental rights are similarly burdened.”).

348. Of course, the First Amendment and laws like RLUIPA seek only to minimize government involvement in private religious conduct, not to eliminate it altogether. Even under these laws, whenever the specific religious practice of white supremacists (or any other prisoner) would create a demonstrable threat to the safety of other inmates or to prison security, prison administrators could still forbid the practice.

349. See, e.g., *Kiryas Joel v. Grumet*, 512 U.S. 687, 705, (1994) (“Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.”); *Walz*, 397 U.S. at 676–77 (“Few concepts are more deeply embedded in the fabric of our national life . . . than for the government to exercise *at the very least* this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.”) (emphasis added).

350. See *Smith*, 494 U.S. at 890.

“secular” rights.

Accordingly, application of the Supreme Court’s instruction in *Amos*,<sup>351</sup> requires rejection of the Sixth Circuit’s holding that accommodations of religious exercise alone impermissibly advance religion.

*ii. RLUIPA Does Not Have Any Impermissible Effects on the Religious Freedoms of Others.*

As an alternative argument under *Lemon*’s effect prong, RLUIPA’s critics assert that RLUIPA has impermissible third-party effects on state prison officials. This argument is unsound as a matter of both law and fact.

The argument relies primarily on *Estate of Thornton v. Caldor, Inc.*<sup>352</sup> administrators. There, the Court struck down a statute imposing an *absolute* condition that employers retain employees who refused to work on the Sabbath. In contrast to the “unfettered right [given] to persons with certain religious practices [in *Caldor*] regardless of the countervailing interests of other entities,” RLUIPA (like RFRA) “addresses the countervailing interests of prison administrators by allowing the government to burden inmates’ religious freedom, provided this burden serves as the least restrictive means to achieve a compelling government interest.”<sup>353</sup> The statute in *Caldor* is also distinguishable from RLUIPA because, unlike the absolute mandate imposed on private employers in *Caldor*, states have “voluntarily committed [themselves] to lifting government-imposed burdens on the religious exercise of publicly institutionalized persons in exchange for federal” funds.<sup>354</sup>

Nor does *Texas Monthly v. Bullock*,<sup>355</sup> support the proposition that a statute may not benefit the religious if that benefit also burdens non-believers. In *Texas Monthly*, a fractured Court struck down a statute that exempted certain religious publications from a state sales tax. Even if that plurality opinion were the law, it distinguished the case before it from one involving “remov[al of] a significant state-imposed

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351. 483 U.S. at 338.

352. 472 U.S. 703 (1985).

353. *Bitner*, 285 F.Supp.2d at 600 n.7; see also *Sanabria*, slip op. at 32 (RLUIPA is distinguishable from *Caldor* because it “invests prisoners with no absolute rights”) and *Gerhardt*, 221 F.Supp.2d at 848–49 (same).

354. *Madison*, 355 F.3d at 321.

355. 489 U.S. 1(1989).

deterrent to the free exercise of religion.”<sup>356</sup> In contrast, RLUIPA alleviates just such a deterrent to religious exercise, by generally relieving substantial burdens on prisoners’ religious exercise. Moreover, unlike the absolute exemption for the religious publications in *Texas Monthly*, RLUIPA does not give an unfettered right to religious exercise, but accounts for countervailing interests.

The policy argument advanced by RLUIPA’s critics—that the Act will impose intolerable costs by making it impossible for prisons to combat problems of religiously motivated gang violence—also fails to rise to the level of a cognizable Establishment Clause violation. First, far from removing a prison’s ability to address issues of prison security implicated by gang violence, RLUIPA’s provisions expressly grant prisons leeway to burden religious exercise where a compelling interest—like security—is actually implicated.

Moreover, the empirical evidence contradicts this “sky will fall” claim. In passing RLUIPA, Congress had before it a letter *supporting* RLUIPA’s passage from the authorities overseeing federal prisons. The letter reported that, in the six years that the Bureau of Prisons had been required to apply RFRA, the BOP had not been overwhelmed by frivolous prisoner lawsuits.<sup>357</sup> Far from supporting second-guessing of Congress’s policy judgment, the evidence only confirms “that RLUIPA should not hamstring [a state’s] ability” to maintain safety and order in its prisons.<sup>358</sup>

The Sixth Circuit’s *Cutter* opinion is equally unfounded in asserting that RLUIPA will improperly affect third parties by “induc[ing] prisoners to adopt or feign religious belief in order to receive the statute’s benefits,” as a reason for invalidating the Act.<sup>359</sup> Even if RLUIPA would produce that effect, RLUIPA (like RFRA) does not prevent prison administrators from inquiring, as courts also may, into the sincerity of the religious beliefs of prisoners seeking relief from burdens on religious exercise. As discussed at *supra* Part

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356. *Id.* at 15, (plurality opinion).

357. See 146 CONG. REC. S7776 (daily ed. July 27, 2000) (July 19, 2000 letter of Robert Raben) (“Since enactment of RFRA in 1994, Federal inmates have filed approximately 65 RFRA lawsuits in Federal court naming the Bureau of Prisons (or its employees) as defendants. Most of these suits have been dismissed on motions by the defendants . . . RFRA has not . . . significantly burdened the operation of Federal prisons.”). See also *Developments in the Law—Religious Practice in Prison*, 115 HARV.L.REV. 1891, 1894 (2000) (finding that federal officials overwhelmingly prevail in RFRA cases).

358. *Madison*, 355 F.3d at 321.

359. *Cutter*, 349 F.3d at 266.

II.B.1.a.ii, just as sincerity of belief is a “threshold requirement” for a Free Exercise claimant,<sup>360</sup> so too is it a threshold showing for a RLUIPA or RFRA claimant.<sup>361</sup> Thus, even assuming that RLUIPA produces a flood of religion-faking, claim-filing prisoners—and there is absolutely no evidence that it has—prison administrators retain the means to address the issue of feigned belief.

In addition, the Sixth Circuit’s opinion in *Cutter* assumes that the religious exercise to be accommodated is typically desirable to the average prisoner. But this assumption has no basis in the record before Congress or elsewhere. Acts of religious faith, though deeply meaningful to an adherent, often appear irrational or baffling to a non-adherent, thus inviting derision rather than envy. Similarly, religious rituals and observances frequently demand rigorous attention to detail and form (*e.g.*, keeping a kosher diet) that only a true religious adherent would ever want to perform. The facts of the Seventh Circuit’s decision in *O’Bryan* provide a good illustration. There, a Wiccan prisoner sued under RFRA for the right to cast spells.<sup>362</sup> It is unlikely that many non-Wiccans would find spell-casting so desirable that they would pretend to be Wiccan in order to obtain the “benefit” of the right to do so.

Finally, even where the activity permitted by a religious accommodation may be desirable outside a particular faith (*e.g.*, wine may be consumed in the religious context of communion, but is also desirable on its own), that fact alone would hardly render an accommodation unconstitutional. If it did, then all sorts of accommodations for religious exercise in numerous contexts (even those required under the more deferential *Turner v. Safley* test) would be at risk of violating the Establishment Clause by creating some incentive, no matter how minimal, to feign religious belief. For example, an inducement to feign religious belief would presumably arise from a statute that provided a religious exemption from the general criminal prohibition against peyote use. Indeed, if peyote is indeed a desirable (yet dangerous) hallucinogenic substance, as those who have outlawed it believe,<sup>363</sup> then the inducement to feign

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360. See, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 215–19 (1972); *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002).

361. See, *e.g.*, *Coronel v. Paul*, 316 F. Supp. 2d 868, 876 (D. Ariz. 2004) (RLUIPA requires a showing that the desired conduct is “motivated by sincere religious belief”); *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001) (sincerity a required showing under RFRA).

362. *O’Bryan v. Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003).

363. See 21 U.S.C. § 812 (2004) (listing peyote as a schedule 1 controlled substance).

religious devotion in order to obtain the benefit of the religious accommodation would seem to be particularly strong. Nonetheless, in explaining that the legislature, rather than the courts, would be the appropriate place to provide an exemption for religious use of peyote, the Supreme Court in *Smith* did not suggest that any inducement to false piety created by the exemption would violate the Establishment Clause.<sup>364</sup>

*iii. The Mandates of the Free Exercise Clause Are Not a Ceiling On Permissible Accommodation of Religious Exercise.*

Another argument advanced by RLUIPA's critics is that RLUIPA impermissibly advances religion because its accommodation of religious exercise exceeds what the Supreme Court has required under the Free Exercise Clause in the prison setting under the deferential test of *Turner v. Safley* and *O'Lone v. Estate of Shabazz*. But this argument proves too much. On this theory, *any* accommodation of prisoner religious exercise that is not mandated by the Free Exercise Clause would violate the Establishment Clause.

Once again, this argument ignores the nation's long history of specially accommodating religious exercise, would invalidate wholesale numerous federal and state laws that accommodate religion beyond what the Free Exercise Clause requires, and ignores *Smith's* specific invitation to the political branches to provide that additional measure of accommodation. Most importantly, however, this argument is foreclosed by *Amos*, in which the Court held that "[i]t is well established . . . that the limits of permissible accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause."<sup>365</sup>

*3. RLUIPA Does Not Foster Excessive Entanglement With Religion*

With regard to whether RLUIPA creates excessive entanglement, RLUIPA's critics have asserted that the Act causes entanglement by forcing states to become knowledgeable about the religious practices of their inmates.<sup>366</sup> Once again, the argument proves too much; if it were correct, government could never take account of religious belief

364. See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

365. See *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (internal quotation marks omitted).

366. See, e.g., Brief of Appellants at 35–36, *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004) (Nos. 04-10979-cc and 04-11044) (hereinafter "Georgia Br.").



for the purpose of accommodation, even under the more deferential *Turner v. Safley* test.<sup>367</sup> Indeed, an identical argument was rejected concerning the application of RFRA in the prison setting.<sup>368</sup> Finding excessive entanglement here would contradict not only common sense, but the Supreme Court’s statement that “[t]here is ample room under the Establishment Clause for ‘benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.’”<sup>369</sup>

Indeed, RLUIPA is designed precisely to *minimize* government entanglement in religious exercise; RLUIPA’s deregulation of religion is the *exact opposite* of entanglement. As in *Amos*, “[i]t cannot be seriously contended that [the statutory accommodation of religious exercise] impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief” that the Constitution prohibits.<sup>370</sup>

Similarly, far from increasing entanglement, RLUIPA’s definition of “religious exercise” tends to decrease it. As discussed at length *supra*, the Act defines “religious exercise” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief,”<sup>371</sup> precisely tracking Supreme Court precedent. RLUIPA thus entails no greater entanglement problem than the ordinary application of Free Exercise doctrine. That doctrine, moreover, is designed to minimize entanglement by precluding inquiry into the rationality of a belief or its centrality within a religious system.<sup>372</sup> Like Free Exercise doctrine itself, RLUIPA’s definition of religious exercise tends to avoid—not create—entanglements.

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367. Notably, even the *Cutter* court was unwilling to swallow this argument. See *Cutter v. Wilkinson*, 349 F.3d 257, 267 (6th Cir. 2003) (“we question whether RLUIPA requires any greater interaction between government officials and religion than exists under present law.”).

368. See, e.g., *Mockaitis*, 104 F.3d at 1530 (“Of course, application of RFRA, like the application of the First Amendment itself and any objection made under this amendment, requires a court to determine what is a religion and to define an exercise of it. There is no excessive entanglement.”).

369. *Amos*, 483 U.S. at 334.

370. *Id.* at 339.

371. 42 U.S.C. § 2000cc-5(7)(A) (2004).

372. See, e.g., *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”); *Thomas v. Review Bd. of Ind.*, 450 U.S. 707, 714 (1981) (“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”).

In sum, because RLUIPA—like so many other religious accommodations—satisfies all three elements of the *Lemon* test, it does not violate the Establishment Clause.<sup>373</sup>

*B. RLUIPA Section 3 Is a Constitutional Exercise of Congress's Spending Power Under Article I*

RLUIPA specifically limits application of its substantial burden test to circumstances in which the burden is “imposed in a program or activity that receives Federal financial assistance.”<sup>374</sup> Thus, RLUIPA invokes congressional authority under the Spending Clause, which empowers Congress to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.”<sup>375</sup> “Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.”<sup>376</sup> “When Congress acts pursuant to its spending power, it generates legislation much in the nature of a contract: in return for federal funds, the state agrees to comply with federally imposed conditions.”<sup>377</sup> In this way, Congress may achieve indirectly through the spending power what it could not achieve directly otherwise.<sup>378</sup>

Since *Steward Machine Co. v. Davis*,<sup>379</sup> the Supreme Court has consistently respected the power of Congress to attach conditions to federal spending. Although Congress's power to attach such conditions is not unlimited, a party attacking them bears a heavy burden to show that they are invalid.<sup>380</sup> Specifically, conditions on federal funds are permitted so long as they satisfy the four requirements set out in *South Dakota v. Dole*.<sup>381</sup>

373. Because RLUIPA satisfies the *Lemon* test, it cannot reasonably be viewed as endorsing religion. See *Mitchell v. Helms*, 530 U.S. 793, 835 (2000).

374. RLUIPA § 3(b)(1). So long as a prisoner can point to the receipt of federal funds by the state department of corrections that has incarcerated him, that prisoner may invoke RLUIPA's Spending Clause jurisdictional hook.

375. U.S. CONST. art. I, § 8, cl. 1.

376. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (internal quotation marks omitted).

377. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999) (internal quotation marks omitted).

378. See *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

379. 301 U.S. 548 (1937).

380. See, e.g., *Kansas v. United States*, 214 F.3d 1196, 1200 (10th Cir. 2000).

381. 483 U.S. at 207–08.

*First*, the conditions must serve “the general welfare,” rather than a purely private or local interest.<sup>382</sup> *Second*, they must be imposed “unambiguously. . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>383</sup> *Third*, grants “might be illegitimate” if they do not bear some reasonable or minimal relationship “to the federal interest in particular national projects or programs.”<sup>384</sup> *Fourth*, the conditions must not violate any independent constitutional provisions.<sup>385</sup>

Every court to address the issue,<sup>386</sup> including the Seventh and Ninth Circuits, has held that RLUIPA Section 3 readily meets all of these requirements and so is a legitimate exercise of the spending power.

### *I. RLUIPA Is in Pursuit of the General Welfare*

For the purposes of better “protect[ing] prisoners’ religious rights and to promote the rehabilitation of prisoners,”<sup>387</sup> RLUIPA imposes conditions on the use of federal funds received by state prisons, such as the federal grants that all states receive for their departments of corrections.<sup>388</sup> These purposes “fall[] squarely within Congress’s pursuit of the general welfare.”<sup>389</sup> “[P]rotecting religious worship in institutions from substantial and illegitimate burdens *does* promote the general welfare. . . . [B]y fostering non-discrimination, RLUIPA

382. *Id.* at 207 (internal citation omitted).

383. *Id.* (internal quotation marks omitted); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999) (“In interpreting language in spending legislation, we thus insis[t] that Congress speak with a clear voice, recognizing that [t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.”) (internal quotation marks omitted).

384. *Dole*, 483 U.S. at 207–08, 107 S.Ct. at 2796 (internal quotation marks and citations omitted); see *New York v. United States*, 505 U.S. 144, 167, 112 S.Ct. 2408, 2423 (1992) (conditions must “bear some relationship to the purpose of the federal spending”).

385. *Dole*, 483 U.S. at 208 (internal citations omitted).

386. See *supra* nn. 294–98.

387. *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003).

388. RLUIPA’s legislative history confirms that all states receive federal money for prisons. See *The Need for Federal Protection of Religion Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105<sup>th</sup> Cong. (1998) (testimony of Isaac M. Jaroslawicz, Dir. of Legal Affairs, the Aleph Institute), available at <http://www.house.gov/judiciary/222356.htm> (“all state criminal justice systems obtain federal funding of one kind or another.”). Additionally, state and local correctional facilities were budgeted \$258 million by the Office of Justice Programs for fiscal year 2000, as well as \$426 million for State prison drug treatment programs for that same year. See Federal Aid to States for Fiscal Year 2000 Table IV, Appendix A, U.S. Census Bureau (2001), available at <http://www.census.gov/prod/2001pubs/fas-00.pdf>.

389. *Charles*, 348 F.3d at 607.

follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms.”<sup>390</sup> This congressional judgment is especially secure because “courts should defer substantially to the judgment of Congress” in this regard.<sup>391</sup>

## 2. RLUIPA Places Unambiguous Conditions on the Receipt of Federal Funds

RLUIPA imposes its conditions “clearly and unambiguously,” giving states notice of the regulatory burdens they undertake when accepting federal funds for their prison programs.<sup>392</sup> Specifically, RLUIPA’s plain language conditions a state’s receipt of federal money upon that state’s refraining from imposing substantial burdens on prisoners’ religious exercise, unless the burdens represent the least restrictive means to advance a compelling government interest. Thus, by expressly conditioning “the receipt of federal money in such a way that each State is made aware of the condition and is simultaneously given the freedom to tailor compliance according to its particular penological interests and circumstances,”<sup>393</sup> RLUIPA amply satisfies *Dole*’s “clear and unambiguous” requirement. Though a state may complain about a court reviewing its decisions under the compelling interest and least restrictive means test, “it certainly could have refused federal funding.”<sup>394</sup>

Notwithstanding RLUIPA’s plain language, some state prison systems have asserted that they were somehow not “unambiguously apprised” of RLUIPA’s conditions.<sup>395</sup> This argument is a nonstarter, since “[b]y its plain language, RLUIPA clearly communicates that any institution receiving federal funds must not substantially burden the exercise of religion absent a showing that the burden is the least restrictive means of serving a compelling government interest.”<sup>396</sup> Not

390. *Mayweathers v. Newland*, 314 F.3d 1062, 1066–67 (9th Cir. 2002) (emphasis in original).

391. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

392. *Charles*, 348 F.3d at 608; *Mayweathers*, 314 F.3d at 1067 (“RLUIPA unequivocally states that it applies to any ‘program or activity that receives Federal financial assistance.’ 42 U.S.C. § 2000cc-1(b)(1).”).

393. *Charles*, 348 F.3d at 608.

394. *Id.* Nor does the argument that the least restrictive means test is “amorphous” and “unworkable” in the prison environment pass muster. This argument boils down to impermissible second-guessing of Congress’s policy judgment.

395. *Georgia Br.* at 14.

396. *Mayweathers*, 314 F.3d at 1067; accord *Charles*, 348 F.3d at 608. Moreover, any assertion that RLUIPA lacks any relationship because it does not target any specific State

only is the *existence* of RLUIPA's conditions unambiguous, but so are the *contours* of those conditions: the substantial burden standard is well-developed and familiar as the result of years of free exercise litigation, both before and after *Employment Division v. Smith*.<sup>397</sup>

Similarly infirm is the claim that the compelling interest and least restrictive means standard is too ambiguous for a state to make an "informed choice" about what conditions are being attached to federal funds. This standard is hardly novel; rather, it is familiar to any first-year law student as the "strict scrutiny" test that applies to states under the Fourteenth Amendment in a wide variety of circumstances.<sup>398</sup>

The fact that application of RLUIPA's strict scrutiny standard may yield different outcomes under different factual circumstances does not somehow create a fatal ambiguity in RLUIPA's conditions. To the contrary, the Supreme Court in *Pennhurst State School and Hospital v. Halderman*<sup>399</sup> "held that conditions may be 'largely indeterminate' so long as that statute 'provid[es] clear notice to States that they, by accepting funds under the Act, would indeed be obligated to comply with [the conditions].'"<sup>400</sup> In this regard, RLUIPA's condition on federal funds is indistinguishable from those upheld under the Spending Clause as a part of other civil rights legislation, such as Title IX's general language proscribing school toleration of severe student-on-student sexual harassment.<sup>401</sup>

A final argument that has been raised by RLUIPA's critics<sup>402</sup> is the

action, *see, e.g.*, Georgia Br. at 10, simply ignores the Act's plain language, which specifies that it applies when a State engages in the specific action of imposing a substantial burden on a prisoner's religious exercise.

397. 494 U.S. 872 (1990).

398. *See, e.g., Smith*, 494 U.S. at 886 n.3 ("Just as we subject to the most exacting scrutiny laws that make classifications based on race, . . . or on the content of speech, . . . so too we strictly scrutinize governmental classifications based on religion."); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004) (noting "least restrictive means" as part of strict scrutiny test, both before and after *Smith*).

399. 451 U.S. 1 (1981).

400. *Mayweathers*, 314 F.3d at 1067 (quoting *Pennhurst*, 451 U.S. at 24–25 (emphasis added)).

401. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650–51 (1999) (Title IX's general language proscribing school toleration of severe student-on-student sexual harassment satisfied *Pennhurst's* notice requirement, even though question of "whether gender-oriented conduct rises to level of actionable harassment . . . depends on a constellation of surrounding circumstances, expectations, and relationships.") (internal citations and quotation marks omitted). *See also Lau v. Nichols*, 414 U.S. 563, 568–69 (1974) (upholding condition that public schools receiving federal funds comply with Title VI of Civil Rights Act of 1964), *overruled on other grounds*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

402. *See, e.g., Charles v. Verhagen*, 348 F.3d 601, 607–08 (7th Cir. 2003) (discussing argument raised by the state); Georgia Br. at 15.

assertion that *Pennhurst* held that the words “least restrictive” are too ambiguous to give a state notice of the conditions attached to funds. But as the Seventh Circuit recognized in *Charles*,<sup>403</sup> this argument completely mischaracterizes *Pennhurst*’s holding. The issue in *Pennhurst* was whether a particular federal act included the requirement that States provide “appropriate treatment” to disabled residents in the “least restrictive environment” as a condition of federal funding.<sup>404</sup> As a matter of statutory interpretation, the Court held that the act did not impose that condition. Specifically, the Court found that the words “least restrictive environment” appearing in a stand alone section of the act—separate from other sections of the act that expressly set forth conditions on receipt of federal money—simply “reflected Congress’s *justification, or policy goals*, for appropriating federal money to the States through the Act, *not conditions* associated with the receipt of federal funds.”<sup>405</sup> Nowhere in *Pennhurst* did the Court hold that if Congress had explicitly made giving treatment in the “least restrictive environment” a condition of receiving federal funds, the “least restrictive” language would have been too ambiguous. Thus, *Pennhurst* does not provide a basis for striking down the Act, because RLUIPA, unlike the statute in *Pennhurst*, *expressly* makes application of the least restrictive means test a condition of receipt of federal funds.

### 3. RLUIPA’s Conditions Relate to a Legitimate Federal Interest

The Supreme Court has repeatedly made clear that there is no requirement of a highly particularized relationship between the conditions imposed on a State pursuant to the Spending Power and the purposes of the spending programs. Instead, the Supreme Court has said that “conditions on federal grants *might* be illegitimate if they are *unrelated* to the federal interest,”<sup>406</sup> and need only possess “*some* relationship to the purpose of the federal spending.”<sup>407</sup> The threshold of relatedness required by this test is a “low” one.<sup>408</sup> In other words, “[t]he required degree of . . . relationship is one of *reasonableness* or

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403. 348 F.3d at 608.

404. *Pennhurst*, 451 U.S. at 18.

405. *Charles*, 348 F.3d at 608 (citing *Pennhurst*, 451 U.S. at 19, 23) (emphasis added).

406. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quotation marks omitted) (emphasis added).

407. *New York v. United States*, 505 U.S. 144, 167 (1992) (emphasis added).

408. *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002).

*minimum rationality.*”<sup>409</sup>

RLUIPA more than satisfies this standard. Regardless of the particular federally funded program at issue, the conditions of RLUIPA always relate to the same federal purpose: that public funds “not be spent in any fashion which encourages, entrenches, subsidizes, or results”<sup>410</sup> in substantial burdens on, or discrimination against, religious exercise. As the Seventh Circuit held, “Congress has an interest in allocating federal funds to institutions that do not engage in discriminatory behavior or in conduct that infringes impermissibly upon individual liberties.”<sup>411</sup>

Just as Congress has prohibited federal money from being used for race discrimination (Title VI), gender discrimination (Title IX), or disability discrimination (Section 504 of the Rehabilitation Act) even where such discrimination is not otherwise barred by the Constitution, RLUIPA’s restrictions ensures that federal funds are not used for purposes Congress believes are contrary to the public welfare. In this regard, RLUIPA simply “follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is ‘designed to guard against unfair bias and infringement on fundamental freedoms.’”<sup>412</sup>

Moreover, in light of the reasonable perception that religious exercise has rehabilitative qualities, Congress “can rationally seek to insure that states receiving federal funds targeted at rehabilitating prisoners are not simultaneously using those funds or other federal

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409. *Kansas v. United States*, 214 F.3d 1196, 1199 (10th Cir. 2000) (emphasis added). Other Spending Clause cases also demonstrate that there need only be a rational connection (rather than any particularized nexus) between the imposed conditions and the purpose of the funds. *See, e.g., Oklahoma v. United States Civil Service Comm’n*, 330 U.S. 127, 129 (1947) (upholding a provision of the Hatch Act prohibiting state employees “whose principal employment is in connection with any activity which is financed in whole or in part” by the United States from taking “any active part in political management or in political campaigns,” even though this exercise of the Spending Power was not attached to any particular spending program); *Salinas v. United States*, 522 U.S. 52, 60–61 (1997) (upholding application of a federal bribery statute covering entities receiving more than \$10,000 in federal funds); *United States v. Dierckman*, 201 F.3d 915, 922–23 (7th Cir. 2000) (upholding Spending Clause legislation conditioning receipt of federal farm benefits on a farmer’s willingness not to cultivate wetlands, even though the benefits farmers lost for violating conditions were not limited to those relating to wetlands preservation); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 344 F.3d 1288, 1293 (11th Cir. 2003) (per curiam) (holding that a state university’s acceptance of federal funds effectuated a valid waiver of its Eleventh Amendment immunity from suit under the Rehabilitation Act); *Jim C. v. United States*, 235 F.3d 1079, 1081–82 (8th Cir. 2000) (en banc) (upholding application of section 504 of the Rehabilitation Act to a state agency).

410. *Lau v. Nichols*, 414 U.S. 563, 569 (1974).

411. *Charles v. Verhagen*, 348 F.3d 601, 608 (7th Cir. 2003).

412. *Id.* at 607 (quoting *Mayweathers v. Newland*, 314 F.3d at 1067).

money to impede prisoners' exercise of religion and its perceived rehabilitative effects.<sup>413</sup> Here, there is an unmistakable relationship between federal funding of correctional institutes to assist in the rehabilitation of prisoners, and RLUIPA's conditions designed to protect prisoners' religious exercise, which may have rehabilitative benefits.<sup>414</sup> As one court has noted, "if Congress can restrict highway funds, used to build and repair roads, with a condition mandating a minimum drinking age, Congress can certainly restrict prison funds, used to support rehabilitation and education programs, with a condition mandating accommodation of religious activity."<sup>415</sup>

Finally, there is no basis for any argument that the Act reaches too far by regulating *all* programs or activities of the state department of corrections that received the federal money, even if the particular program about which a prisoner complains did not receive any federal money directly.<sup>416</sup> Again, RLUIPA's conditions follow in the footsteps of other federal civil rights acts like Title VI,<sup>417</sup> Title IX,<sup>418</sup> and Section 504 of the Rehabilitation Act,<sup>419</sup> each of which limit all of the activities of the state agency that receives federal funds, even if those agency activities do not directly receive federal money. Congress's imposition of a condition on all the operations of a state agency in RLUIPA and other civil rights legislation ensures that federal funds, which are fungible,<sup>420</sup> are not used to support conduct that Congress believes is injurious to the public welfare.<sup>421</sup> Indeed, in

413. *Charles v. Verhagen*, 220 F.Supp.2d 955, 963 (W.D. Wis. 2002).

414. *See, e.g., Charles*, 348 F.3d at 609 ("[T]he goal of federal corrections funding and the conditions imposed by RLUIPA, with respect to the protection of prisoners' religious rights, share the goal of rehabilitation.")

415. *Johnson v. Martin*, 223 F.Supp.2d 820, 831 (W.D. Mich. 2002).

416. *See* 42 U.S.C. § 2000cc-5(6) (2000) ("The term 'program or activity' means all of the operations of any entity as described in paragraph(1) or (2) of section 2000d-4a of this title [section 606 of the Civil Rights Act of 1964].")

417. 42 U.S.C. § 2000d (2000) (prohibiting discrimination on the basis of "race, color, or national origin" in "any program or activity receiving Federal financial assistance").

418. 20 U.S.C. § 1681(a) (2000) (prohibiting discrimination on the basis of sex in any "education program or activity receiving Federal financial assistance").

419. 29 U.S.C. § 794(a) (2000) (prohibiting discrimination on the basis of disability in "any program or activity receiving Federal financial assistance").

420. *See Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 175-76 (3d Cir. 2002) (rejecting Spending Clause challenge to Rehabilitation Act), *cert. denied*, 537 U.S. 1232 (2003); *United States v. Grossi*, 143 F.3d 348, 350 (7th Cir. 1998) ("[M]oney is fungible and its effect transcends program boundaries."), *cert. denied*, 525 U.S. 879 (1998).

421. *See* Brief for Appellee United States of America, at 18, *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004) (Nos. 04-10979-CC and 04-11044-CC). In addition, Congress's decision to impose RLUIPA's conditions on all operations of the State department of corrections that receives federal funds reflects a decision "to be guided by



upholding a constitutional challenge to Title VI, the Supreme Court held that it is Congress's prerogative "to fix the terms on which its money allotments to the States shall be disbursed."<sup>422</sup>

Furthermore, a State has a simple solution at its disposal to conditions that it believes reach too far in proportion to the benefit of the offered money—it may decline the federal money.<sup>423</sup> To be sure, the Supreme Court has mentioned in passing that "that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"<sup>424</sup> But the Court has also been quick to hold that coercion does not arise merely because the prospect of a large influx of federal funds into the state coffers is too tempting to refuse. Recognizing that any federal spending statute is "in some measure a temptation," the Court stated that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties."<sup>425</sup> Thus, even where the scope of the federal grant at issue may make the State's voluntary decision not to accept the funds "an unrealistic option," compliance with the conditions placed on the federal funds "is the price a federally funded [entity] must pay."<sup>426</sup> In short, if a State wishes to receive any federal funding for its prisons, "it must accept [RLUIPA's] related, unambiguous conditions in their entirety."<sup>427</sup>

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each State's own governmental structure in determining" the breadth of the Act's coverage. *Id.* at 23. Each State "establishes the allocation of operations and functions among departments of the state government. Congress reasonably may presume, however, that States normally place related operations with overlapping goals, constituencies, and resources in the same department. That level of coverage, broader than simply the discrete program that nominally receives the funds, but narrower than the entire state government, is an appropriate means of achieving the legitimate and entirely constitutional goal of ensuring that no federal money supports or facilitates the imposition of unnecessary burdens on religious exercise." *Id.*

422. *Lau v. Nichols*, 414 U.S. 563, 569 (1974).

423. *See Board of Education of Westside Community School v. Mergens*, 496 U.S. 226, 241 (1990) (noting that a State "seeking to escape the statute's obligations could simply forgo federal funding"); *Charles v. Verhagen*, 220 F.Supp.2d 955, 964 (W.D. Wis. 2002) ("If the conditions imposed by the federal government are so out of proportion to the size of the funding stream on offer, a rational state will decline the funds and remain free of the onerous conditions.").

424. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

425. *Dole*, 483 U.S. at 211 (quoting *Steward Machine*, 301 U.S. at 589–90).

426. *Mergens*, 496 U.S. at 241. *See also Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981) (rejecting the argument that the size of Medicaid grants that states could be required to forego made federal conditions coercive, because it "is not the size of the stake that controls, but the rules of the game"); *Nevada v. Skinner*, 884 F.2d 445, 446–50 (9th Cir. 1989) (holding that the risk of losing approximately ninety-five percent of State's highway funds does not make federal conditions coercive).

427. *Charles v. Verhagen*, 348 F.3d 601, 609 (7th Cir. 2003).

#### 4. RLUIPA Does Not Violate Any Independent Constitutional Requirement

Finally, RLUIPA does not violate any other constitutional provision, such as the Establishment Clause<sup>428</sup> or Tenth Amendment.<sup>429</sup>

In sum, if a particular state would rather not comply with RLUIPA's unambiguous conditions imposed on the use of federal prison funds, it has been free since the passage of that Act—and remains free to this day—simply to decline that funding.<sup>430</sup> A State is *not* free, however, to have its cake and eat it too, to accept federal funds while disregarding the federal conditions associated with them. To allow a State that additional latitude would be to allow a *State* to dictate to *Congress* how federal funds shall be used, which flies in the face of the constitutional structure of federalism developed from the Supremacy Clause.<sup>431</sup> Thus, in passing RLUIPA Section 3, Congress acted within its authority under the Spending Clause.

#### C. RLUIPA Section 3 Is a Constitutional Exercise of Congress's Commerce Clause Power Under Article I

Commerce Clause legislation is entitled to the same judicial deference and strong presumption of constitutionality as are other Acts of Congress: “In reviewing an act of Congress passed under its Commerce Clause authority, we apply the rational basis test as interpreted by the [Supreme] Court.”<sup>432</sup> By including a jurisdictional element in the Act—*i.e.*, Section 3(b)(2), which makes the Act applicable where “the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes”<sup>433</sup>—Congress ensured that RLUIPA falls well within the confines of Congress's Commerce Clause power.

RLUIPA's inclusion of a jurisdictional element sets the Act apart

428. See U.S. CONST. amend. I.

429. See U.S. CONST. amend. X.

430. See *New York v. United States*, 505 U.S. 144, 168 (1992) (“[T]he residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.”).

431. See U.S. CONST. art. VI, par. 2 (“[T]he Laws of the United States . . . shall be the supreme Law of the Land.”).

432. See *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 203 (5th Cir. 2000).

433. 42 U.S.C. § 2000cc-1(b)(2) (2000).

from the statute struck down by the Supreme Court in *United States v. Lopez*.<sup>434</sup> In *Lopez*, the Court explained that a jurisdictional element allows a court to determine through “case-by-case inquiry, that the [regulated activity] in question affects interstate commerce,”<sup>435</sup> Where a statute contains such a jurisdictional element, courts are quick to hold that the statute withstands constitutional scrutiny under the Commerce Clause.<sup>436</sup> Accordingly, the presence of jurisdictional element in RLUIPA Section 3(b)(2) suffices alone to reject a *facial* challenge to the Act as falling outside the bounds of the Commerce power: by its own terms, RLUIPA applies only to conduct affecting “commerce with foreign nations, among the several States, or with Indian tribes.”<sup>437</sup>

The jurisdictional element also precludes *as-applied* challenges under the Commerce Clause. If the conduct at issue in a particular case satisfies the jurisdictional requirement of RLUIPA Section 3(b)(2), then the conduct also falls within the sweep of the commerce power and may be regulated constitutionally. But if the facts do not satisfy the jurisdictional element, then the statute does not even *reach* the conduct under the commerce power. Thus, RLUIPA respects constitutional limits by not regulating conduct outside the scope of the Commerce power.<sup>438</sup> In other words, the Act applies either

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434. 514 U.S. 549 (1995).

435. *Id.* at 561. *See also* *United States v. Morrison*, 529 U.S. 598, 611–12 (2000) (holding a statute unconstitutional statute because it lacked an “express jurisdictional element which might limit its reach” to activities that “have an explicit connection with or effect on interstate commerce.”).

436. *See, e.g., Lopez*, 514 U.S. at 561–62 (noting that a jurisdictional element “ensure[s], through case-by case inquiry, that the [activity] in question affects interstate commerce”); *United States v. Green*, 350 U.S. 415, 420–21 (1956) (upholding the constitutionality of the Hobbs Act, 18 U.S.C. § 2332a(a)2, which prohibits the use, without lawful authority, of a weapon of mass destruction where the results of such use “affect interstate or foreign commerce”); *United States v. Cunningham*, 161 F.3d 1343, 1346 (11th Cir. 1998) (“[A] statute regulating noneconomic activity *necessarily satisfies Lopez* if it includes a jurisdictional element . . .”) (quotation marks omitted) (emphasis in original); *United States v. Sorrentino*, 72 F.3d 294, 296 (2d Cir. 1995) (“The statute before us avoids the constitutional deficiency identified in *Lopez* because it requires a legitimate nexus with interstate commerce” by means of a jurisdictional element.); *United States v. Chesney*, 86 F.3d 564, 568–69 (6th Cir. 1996) (concluding the “presence of the jurisdictional element defeats [defendant’s] facial challenge”); *United States v. Bishop*, 66 F.3d 569, 588 (3d Cir. 1995) (“[T]he jurisdictional element in [the federal carjacking statute] independently refutes appellants’ arguments that the statute is constitutionally infirm.”).

437. RLUIPA § 3(b)(2), 42 U.S.C. § 2000cc-1(b)(2) (2000). *Cf.* U.S. CONST. art. I., § 8, cl. 3.

438. *See United States v. Odom*, 252 F.3d 1289, 1296 (11th Cir. 2001) (“The presence of a jurisdictional element may preserve the constitutionality of the statute so long as a case-by-case analysis requires sufficient proof of a connection to interstate commerce.”);

constitutionally, or not at all.<sup>439</sup>

Because the presence of a valid jurisdictional element dooms any challenge to the Act's constitutionality under the Commerce Clause, opponents of RLUIPA have advanced two main arguments to try and show that the jurisdictional element is insufficient. Both lack merit. First, they make the hypertechnical assertion that the jurisdictional element is invalid because it uses the language "affects . . . commerce" instead of "substantially affects commerce."<sup>440</sup> This argument ignores, however, that the Supreme Court in *Lopez* specifically cited the language "affects interstate commerce" as an appropriate jurisdictional element.<sup>441</sup> Specifically, the Court cited a statute making it a federal crime "for a felon to 'receiv[e], posses[s], or transpor[t] in commerce or *affecting* commerce . . . any firearm."<sup>442</sup> Lower courts have also held that that a jurisdictional element using the language "affects commerce" is sufficient.<sup>443</sup>

Second, opponents have argued that RLUIPA Section 4(g) is a separate jurisdictional provision that establishes "presumptive federal jurisdiction," thereby rendering Section 3(b)(2) ineffective as a constitutional jurisdictional element.

Section 4(g) of RLUIPA provides that

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*see also* United States v. Grassie, 237 F.3d 1199, 1211 (10th Cir. 2001) ("[B]y making interstate commerce an element of the crime under [the Church Arson Prevention Act] . . . to be decided on a case-by-case basis, constitutional problems are avoided."); United States v. Harrington, 108 F.3d 1460, 1465 (D.C. Cir. 1997) ("Indeed, the Court specifically suggested that a jurisdictional element could justify the application of the commerce power to a single firearm possession, despite the inevitable insubstantiality of such a one-time, small-scale event from the perspective of interstate commerce.").

439. *See* Hale O Kaula Church v. Maui Planning Comm'n, 229 F.Supp.2d 1056, 1072 (D. Hi. 2002) (concluding that the "jurisdictional element" of § 2(a)(2)(B) precludes a Commerce Clause challenge); Johnson v. Martin, 223 F.Supp.2d 820, 828 (W.D. Mich. 2002) ("RLUIPA is saved by its jurisdictional requirement which establishes the requisite nexus to interstate commerce to satisfy the Commerce Clause."); Freedom Baptist Church of Del. Township v. Middletown, 204 F.Supp.2d 857, 867 (E.D. Pa. 2002) (upholding RLUIPA's land use provisions and noting that "subsection (a)(2)(B) on its face has an interstate commerce jurisdictional element"); Mayweathers v. Terhune, No. Civ. S-96-1582 LKK/GGH P, 2001 WL 804140, at \*7-8 (E.D. Cal. July 2, 2001) ("The jurisdictional element in § 3(b)(2) thereby ensures that Congress's Commerce Clause power is only exercised in those cases where interstate commerce is directly affected by the prison regulation at issue").

440. Brief for the State of Georgia, at 19, Benning v. Georgia, 391 F.3d 1299 (11th Cir. 2004) (Nos. 04-10979-CC and 04-11044-CC).

441. *Lopez*, 514 U.S. at 561 n.3.

442. *Id.* at 561-62 (quoting United States v. Bass, 404 U.S. 336, 337 (1971)) (emphasis added).

443. *See, e.g.*, United States v. Cunningham, 161 F.3d 1343, 1345 (11th Cir. 1998) (rejecting a challenge to a jurisdictional element restricting statutory application to conduct "in or affecting commerce"); Johnson, 223 F.Supp.2d at 830 (rejecting the argument that omission of the word "substantially" in a jurisdictional element invalidates RLUIPA).

If the only jurisdictional basis for applying a provision of this [Act] is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.<sup>444</sup>

On its face, § 4(g) does not create presumptive federal jurisdiction, but is instead an additional affirmative defense that applies *after* a plaintiff has met his burden of establishing commerce clause jurisdiction under § 3(b)(2).<sup>445</sup> That is, in a case where jurisdiction is predicated on the commerce power, § 4(g) allows a State, to *defeat* jurisdiction if the State can show that the burdens at issue “would not lead in the aggregate to a substantial effect on commerce.”<sup>446</sup> In practical effect, therefore, RLUIPA does require a substantial effect on commerce have occurred *before* § 3(b)(2) can be invoked successfully. Thus, far from exceeding the commerce power, § 4(g) provides a double assurance that RLUIPA’s reach will not exceed Congress’s Commerce Clause authority.<sup>447</sup>

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444. 42 U.S.C. § 2000cc-2(g) (2000).

445. *See Johnson*, 223 F.Supp.2d at 829 (RLUIPA § 4(g) is “an additional defense *after* the complaining party has met its burden.”) (emphasis in original).

446. 42 U.S.C. § 2000cc-2(g) (2000).

447. To be sure, a plaintiff may not be able to establish in every case that the substantial burden on religious exercise does affect interstate commerce. For example, a prisoner who is not allowed to grow a beard may have difficulty in establishing how such a restriction affects interstate commerce. *But see Johnson*, 223 F.Supp.2d at 829 (holding that

RLUIPA covers regulation of the free exercise of religion, an objectively interstate activity . . . . [T]he free exercise of religion affects interstate commerce in a multitude of ways including: use of the airwaves to advertise various religions and to seek charitable donations for domestic and international concerns; use of the interstate highway system for traveling choirs and missionary groups; and, use of the mail system to buy and sell ceremonial items and religious literature.)

It is equally clear, however, that the operation of a prison involves a wide array of commercial and economic activities and that in many cases these operations will provide the basis for a prisoner to establish that the burden these operations place on religious exercise do affect interstate commerce. For example, a prisoner seeking a religious diet will easily be able to establish that denying him such a diet affects interstate commerce. Everyday in the course of administering a prisons, a State engages in numerous commercial transactions in order to feed thousands of prisoners. And everyday, a prisoner seeking a religious diet requests that the State engage in a slightly different set of commercial transactions to accommodate his request for a religious diet, and so to avoid substantially burdening his religious exercise. Any argument that commerce is *never* implicated by the avoidance of substantial burdens simply lacks merit.

*D. RLUIPA Section 3 Does Not Violate the Tenth Amendment.*

The Tenth Amendment is implicated only when Congress acts outside the scope of its enumerated powers.<sup>448</sup> “If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.”<sup>449</sup> Accordingly, because RLUIPA, as discussed *supra*, is a valid exercise of Congress’s power under both the Spending Clause and the Commerce Clause, the Act does not violate the Tenth Amendment.<sup>450</sup>

Nonetheless, critics of the Act have asserted that RLUIPA impermissibly “commandeers” States by mandating that they implement a federal regulatory regime.<sup>451</sup> This argument fails both factually and legally. First, it is simply incorrect as a matter of *fact* to assert that RLUIPA requires the States to implement any particular federal regulatory regime. To the contrary, RLUIPA merely requires that States not substantially burden religious exercise but then respects federalism by leaving to each individual State and prison system the means of implementing that standard. Indeed, this decision to extend to States the discretion to choose the means to alleviate a substantial burden is expressly codified in § 5(e) of the Act.<sup>452</sup> In this regard, RLUIPA is similar to the Acts upheld in *South Carolina v. Baker*<sup>453</sup> and *Reno v. Condon*,<sup>454</sup> both of which created a federal standard but did not involve the federal government conscripting state officials to implement the standard or require the States to adopt any particular means to implement the standard. In both of those cases, the Court held that that “any federal regulation demands

448. See *New York v. United States*, 505 U.S. 144, 156 (1992).

449. *Id.*

450. *Charles v. Verhagen*, 348 F.3d 601, 609 (7th Cir. 2003) (holding that RLUIPA does not violate the Tenth Amendment because it is a valid exercise of Congress’s Spending power); *Mayweathers v. Newland*, 314 F.3d 1062, 1069 (9th Cir. 2002) (same).

451. *Georgia Br.* at 31–32.

452. Section 5(e), entitled “Governmental discretion in alleviating burdens on religious exercise” and codified at 42 U.S.C. § 2000cc-3(e) (2000), provides:

A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

453. 485 U.S. 505, 513–15 (1988) (upholding a statute that prohibited States from issuing unregistered bonds).

454. 528 U.S. 141, 143–44 (2000) (upholding the Driver’s Privacy Protection Act, which restricted the ability of States to disclose a driver’s personal information without the driver’s consent).

compliance,”<sup>455</sup> and that the mere fact that a State “must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.”<sup>456</sup> Under RLUIPA, “prison officials remain free to run their prisons as they see fit. RLUIPA just prohibits prison officials from unduly burdening inmates’ free exercise of religion in the process.”<sup>457</sup>

The argument that RLUIPA impermissibly commandeers the States resources is also foreclosed as a matter of law. In *New York*, the Court made clear that no commandeering occurs when the State is required to comply with federal requirements as a condition of the State receiving federal funds.<sup>458</sup> The Tenth Amendment does not “limit the range of conditions legitimately placed on federal grants.”<sup>459</sup> In other words, “[w]hile Congress may not have authority to commandeer the management of state prisons, it ‘does have power to fix the terms upon which its money allotments to states shall be disbursed.’”<sup>460</sup> Accordingly, because RLUIPA does not require states to administer a federal regulatory regime but merely limits certain local government actions *once they tread into federal territory*, RLUIPA does not violate the Tenth Amendment.

#### *E. RLUIPA Section 3 Does Not Violate the Eleventh Amendment*

The general rule of the Eleventh Amendment is that it divests federal courts of subject matter jurisdiction over suits brought by private parties against a state. However, three exceptions to this constitutional rule exist. First, pursuant to *Ex Parte Young*, suits against state officials seeking prospective equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment.<sup>461</sup> Second, individuals may sue a state directly, including for damages, if Congress has abrogated the state’s immunity from suit through an unequivocal expression of its intent to do so and pursuant to a valid exercise of its power.<sup>462</sup> Third,

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455. *Baker*, 485 U.S. at 514.

456. *Condon*, 528 U.S. at 151 (quoting *Baker*, 485 U.S. at 515).

457. *Mayweathers v. Newland*, 314 F.3d 1062, 1069 (9th Cir. 2003).

458. *New York v. United States*, 505 U.S. 144, 171–73 (rejecting a Tenth Amendment challenge statutory conditions on federal grants).

459. *Mayweathers v. Newland*, 314 F.3d at 1069 (quoting *South Dakota v. Dole*, 483 U.S. 203, 210 (1987)).

460. *Id.*

461. See *Ex parte Young*, 209 U.S. 123, 159–60 (1908).

462. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54–56 (1996).

individuals may sue a state directly, including for damages, where a state has properly waived its sovereign immunity and consented to suit in federal court.<sup>463</sup>

Suits brought under RLUIPA for prospective injunctive relief against state officials in their official capacity fall squarely within the *Ex parte Young* exception to sovereign immunity and do not violate the Eleventh Amendment.<sup>464</sup> Although the argument has been made by at least two states that *Ex Parte Young* should not apply because it is a statute that “uniquely implicates special state sovereignty interests” in the administration of prisons,<sup>465</sup> this argument simply proves too much. To accept that argument would be to immunize prison officials from *Ex parte Young* actions not only under RLUIPA, but under 42 U.S.C. § 1983, because § 1983 affords prisoners a vastly broader (and, therefore, more “intrusive”) remedy against unconstitutional action than does RLUIPA. Nor is RLUIPA comparable to the situation presented in *Idaho v. Coeur d’Alene Tribe of Idaho*<sup>466</sup> where suit against state officials “would diminish, even extinguish, the State’s control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory.”<sup>467</sup> “While the management of state prisons is indeed an important state interest, it is not tied in a unique way to sovereignty as the waters and submerged lands were in *Coeur d’Alene*.”<sup>468</sup>

Whether the Eleventh Amendment bars suits brought against a state directly (or state officials in their official capacity) for damages is a different issue. RLUIPA does not contain any unequivocal statement abrogating sovereign immunity as required by *Seminole Tribe*, so the second of the three exceptions to the Eleventh Amendment does not apply here. With regard to third exception, an argument can be made that where jurisdiction is founded upon the Spending Clause, that the State has voluntarily consented to suit for damages by accepting federal funds.<sup>469</sup> The fact that RLUIPA extends a cause of action to

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463. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (“A state may effectuate a waiver of its constitutional immunity by . . . waiving its immunity to suit in the context of a particular federal program.”).

464. See *Mayweathers v. Newland*, 314 F.3d at 1070.

465. See *Goodman v. Snyder*, No. 00-C-0948, 2003 WL 22765047, at \*2 (N.D. Ill. Nov. 20, 2003) (describing and rejecting an Eleventh Amendment argument raised by Illinois); *Sanabria v. Brown*, No. 99-4699, slip. op. at 39 (D. N.J. June 9, 2003) (same).

466. 521 U.S. 261 (1997).

467. *Id.* at 282.

468. *Sanabria*, slip op. at 39.

469. See *Koslow v. Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002) (“Congress may require a waiver of state sovereign immunity as a condition for receiving federal funds,



“obtain appropriate relief,”<sup>470</sup> which could include damages, lends support to an argument that Congress intended to signal to states that they would be on the hook for damages under RLUIPA if they accept federal funds.<sup>471</sup> Indeed, some courts have held that “a State waives Eleventh Amendment immunity by accepting federal funds.”<sup>472</sup> However, other courts have been reluctant to find that a state has consented to damages in the absence of “a clear intent” to condition receipt of federal funds on a state’s consent to waive its sovereign immunity,<sup>473</sup> and it is possible that courts may find the language “obtain appropriate relief” too ambiguous to support a finding of a clear intent to subject a State to suit for damages. In light of the Supreme Court’s discussion in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,<sup>474</sup> which expressly distinguished Congress’s exercise of its power under the Commerce Clause from its power under the Spending Clause to impose conditions on states,<sup>475</sup> the view that a State *does* waive sovereign immunity by accepting federal funds seems to be the better view. In any event, the Eleventh Amendment would not pose any barrier to a suit brought against individual prison officials in their individual capacities, since the Eleventh Amendment may only be invoked by the State or officials sued in their official capacities.

#### *F. RLUIPA Does Not Violate Separation of Powers Principles*

Finally, opponents of RLUIPA have argued that RLUIPA violates separation of power principles by erroneously revising a ruling of the Supreme Court to apply strict scrutiny to burdens on prisoners’ religious exercise instead of the rational basis scrutiny that would otherwise apply under *Turner v. Safley*, *O’Lone v. Shabazz*, and

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even though Congress could not order the waiver directly.”) (quoting *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc)).

470. 42 U.S.C. § 2000cc-2(a) (2000).

471. See *Sanabria*, slip op. at 37–38 (finding state waived sovereign immunity because “RLUIPA was validly enacted pursuant to Congress’s powers under Spending Clause and finds that in accepting federal grants, the state of New Jersey necessarily accepted all of the conditions Congress attached to those grants,” including the condition that a prison may bring a claim for “appropriate relief.”).

472. *Phiffer v. Columbia River Correctional Institute*, 384 F.3d 791, 793 (9th Cir. 2004) (citing *Vinson v. Thomas*, 288 F.3d 1145, 1151 (9th Cir. 2002)).

473. See, e.g., *Barbour v. Wash. Metropolitan Area Transit Authority*, 374 F.3d 1161, 1163 (D.C. Cir. 2004); *Doe v. Nebraska*, 345 F.3d 593, 597 (8th Cir. 2003).

474. 527 U.S. 666 (1999).

475. *Id.* at 686 (“Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions.”).

*Employment Div. v. Smith*.<sup>476</sup> As an initial matter, it is noteworthy that the identical argument against application of RFRA to the *federal* government and its officials has been rejected by every single court to address the issue, both before and after RFRA was ruled unconstitutional as applied to state government.<sup>477</sup> The reasoning of those courts applies equally to any separation of powers to RLUIPA: it is well-established that Congress, so long as it acting pursuant to an enumerated power such as the Spending or Commerce power, can use its authority to provide stronger civil rights protections than the constitution would provide alone.<sup>478</sup> Thus, Congress's decision to provide greater protection for the religious exercise rights of prisoners than the Constitution requires merely accepts the Supreme Court's repeated invitations to adopt heightened legislative protection for religious exercise<sup>479</sup> and does not violate separation of powers principles.

## VI. CONCLUSION

In conclusion, RLUIPA is a constitutional use of congressional authority to remove government-imposed substantial burdens on religious exercise.<sup>480</sup> Moreover, RLUIPA has, at least in its first four years, achieved more success than RFRA did in expanding the ability of prisoners to prevail in religious exercise claims.<sup>481</sup> This appears to be due to the care Congress took in setting the scope of the Act to protect *any* religious exercise, not just that which a court deems to be

476. See, e.g., *Mayweathers v. Newland*, 314 F.3d 1062, 1070 (9th Cir. 2002) (describing the separation of powers argument raised by California).

477. See *O'Bryan v. Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003) (rejecting separation of powers challenge to RFRA and finding it applicable to prisoner's claim against the federal bureau of prisons); *Guam v. Guerrero*, 290 F.3d 1210, 1220 (9th Cir. 2002) (rejecting separation of powers challenge to RFRA); *Kikumura v. Hurley*, 242 F.3d 950, 959–60 (10th Cir. 2001) (same); *In re Young*, 141 F.3d 854, 861 (8th Cir. 1998) (same); *Jama v. United States Immigration and Naturalization Service*, 2004 WL 2538275, at \*24 (D. N.J. Nov. 10, 2004) (same).

478. See *Mayweathers v. Newland*, 314 F.3d at 1070 (“RLUIPA does not erroneously review or revise a specific ruling of the Supreme Court . . . . Rather, RLUIPA provides additional protection for religious worship, respecting that *Smith* set only a constitutional floor—not a ceiling—for the protection of personal liberty.”); *United States v. Marengo Cy. Comm'n*, 731 F.2d 1546, 1562 (11th Cir. 1984), cert. denied, 469 U.S. 976 (1984) (“[C]ongressional disapproval of a Supreme Court decision does not impair the power of Congress to legislate a different result, as long as Congress had that power in the first place.”).

479. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

480. See *supra* § IV.

481. See *supra* §§ II(B)(1)(b) & III(E).

mandated by or central to the prisoner's faith.<sup>482</sup> The success of prisoner claims under RLUIPA over the long-term will ultimately depend on whether courts are willing to faithfully apply the strict scrutiny standard that the Act's language requires.<sup>483</sup>

Courts tempted to rule against prisoners by applying a watered-down version of strict scrutiny to prisoner claims would do well to remember the commitment to religious liberty that motivated RLUIPA's passage and how RLUIPA fits into this nation's historical dedication to that ideal. What is most important about RLUIPA is that it signals a humble commitment by one of the world's most powerful nations to use its strength not to coerce, but to *protect* the conscience of the members of our society who are seemingly the least worthy of such protection: prisoners. RLUIPA recognizes that although it is proper for the State to punish individuals who have violated the laws of our society by imprisoning them, the State does not have the right to seek to bind and control the religious beliefs and acts of conscience of those individuals. Instead, it is the role of the State to preserve their fundamental rights to religious exercise.

RLUIPA's protection of the religious exercise rights of prisoners is thus an important reaffirmation of the traditional American view of government, reflected from the very birth of the Nation in the Declaration of Independence, that each individual is important because God created him and endowed him with certain inalienable rights—including the fundamental right to free exercise of religion and conscience. The role of the State in this view is an important but humble one. Because the source of individual rights precedes the State and is an authority higher than the State, the State's role is to *protect* and *preserve* those rights. (This view, of course, is in sharp contrast with the notion that the State is the source of all rights. History and reason have demonstrated that rights are less secure in this exalted view of the nature and role of the State—for if rights are a gift of the State, the State is free to repeal these rights at will).

By protecting the right to religious freedom and conscience of those who might be viewed as the least deserving members of our society, Congress's passage of RLUIPA "follows the best of our traditions" by "respect[ing] the religious nature of our people and accommodate[ing] the public service to their spiritual needs."<sup>484</sup>

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482. See III(E).

483. See *supra* § II(C)(5).

484. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

