Religious Practice in Prison & The Religious Land Use and Institutionalized Persons Act (RLUIPA):
Strict Scrutiny Properly Restored

By: Kelly Gower*

I. Introduction

[1] Prison inmates are subject to a closely regulated environment in which they are deprived of many freedoms and constitutional rights;[1] however, they continue to derive the protections of the First Amendment while incarcerated.[2] Religious observance that takes place within the prison setting often requires some governmental involvement, but the First Amendment guarantees, even to inmates, minimal government interference with the free exercise of religion.[3]

[2] The appropriate legal standard governing inmate religious claims remains a source of constant debate. During the past decade, the legal protection of prisoners' religious freedom has

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[1] *See Vitek v. Jones*, 445 U.S. 480, 493 (1980) (conviction and sentencing deprives person of right to freedom from confinement); *Hudson v. Palmer*, 468 U.S. 517, 524 (1984) (lawful imprisonment deprives citizens of freedom and other rights).

[2] The First Amendment of the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

[3] While imprisoned, inmates retain certain constitutional rights; however, such rights must be synonymous with the objectives of incarceration. *See, e.g.*, *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (prisoners retain limited First Amendment right to free exercise of religion); *Hudson*, 468 U.S. at 523 (prisoners retain those rights compatible with the objectives of incarceration; *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (prisoners retain right to due process, subject to restrictions imposed by nature of the penal system).

gone through a rather dramatic series of ebbs and flows.[4] Currently, inmate religious claims in both state and federal prisons are reviewed under a strict scrutiny "compelling interest" and "least restrictive means" test.[5] Despite the heightened level of scrutiny currently imposed, the applicable standard has fluctuated throughout the past fifteen years.[6]

[3] This note will examine the Religious Land Use and Institutionalized Persons Act ("RLUIPA" or "the Act")[7] and its impact on prisoners' free exercise claims. An examination of cases in which a RLUIPA claim is advanced demonstrates the Act's proper applicability in assessing inmate religious claims.[8] The Act properly restores a compelling interest standard and a least restrictive means analysis to any infringement upon a prisoner's exercise of religion.[9]

[4] Although this note will advocate that the standard advanced by RLUIPA is proper in assessing prisoners' free exercise claims, existing precedent that suggests otherwise will not be

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[4] *See* James Standish, *Freedom Behind Bars*, LIBERTY MAGAZINE, Aug. 30, 2003, *at* http://www.Libertymagazine.org/article/articleview/389/1/69.

[5] *See* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (2004).

[6] Two recent articles provide thorough discussions outlining the historical development of the legal standard for inmate religious claims: *In the Belly of the Whale: Religious Practice in Prison*, 115 HARV. L. REV. 1891, 1892-1893 (2002); Kris Banvard, *Exercise in Frustration? A New Attempt by Congress to Restore Strict Scrutiny to Governmental Burdens on Religious Practice*, 31 CAP. U. L. REV. 279, 292-309 (2003).

[7] The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-5 (2000).

[8] *See generally Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001) (applying RLUIPA's amendments to prisoner's RFRA claim); *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003); *Marria v. Broaddus*, 200 F. Supp. 2d 280 (S.D.N.Y. 2002); *Charles v. Verhagen*, 220 F. Supp. 2d 937 (W.D. Wis. 2002); *see also* The Becket Fund for Religious Liberty, *RLUIPA*, *at* http://www.rluipa.org (providing a wealth of frequently updated cases that include RLUIPA claims).

[9] *See* RLUIPA, *supra* note 5.

ignored.[10] Such consideration is especially relevant since this is a standard that has been in flux for almost 15 years and continues to yield heated debate. Moreover, the future impact of RLUIPA contributes to the analysis, specifically the detriment that will result if RLUIPA is declared unconstitutional by the Supreme Court. This note foregoes the opportunity to discuss the constitutionality of RLUIPA,[11] and instead focuses on the substantive importance of protecting the religious freedom of inmates.

II. The Evolving Legal Standard for Inmate Religious Claims

[5] To best understand why RLUIPA sets forth the proper standard for assessing prisoners' religious claims, a discussion of the evolving legal standards on the issue is warranted.[12] In 1964, the Supreme Court articulated the appropriate standard of review for free exercise claims in *Sherbert v. Verner*.[13] There, the Court held that free exercise claims were to be analyzed

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[10] *See Turner v. Safley*, 482 U.S. 78 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

[11] For a discussion of RLUIPA's constitutionality, *see e.g.*, Banvard, *supra* note 6, at 349 (arguing that "whether RLUIPA's drafters have found a way to thread the needle through the Court's narrowing construction of congressional powers to regulate commerce and enforce the Fourteenth Amendment is very much an open question."); Caroline R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361 (2002) (arguing that the enactment of RLUIPA is not a valid use of Congress' Section 5, Fourteenth Amendment power).

[12] *See* Standish, *supra* note 4. In this article, Standish provides an informative background regarding the level of judicial protection afforded to inmate religious claims in light of the fluctuating standards under the *Turner/O'Lone* test, RFRA, and RLUIPA.

[13] 374 U.S. 398 (1963) (upholding the right of a Seventh-Day Adventist to receive unemployment compensation that had been denied because of refusal to accept employment that required work on her religion's Sabbath).

under the "compelling state interest" test.[14] Such a test provides that when a government action or regulation imposes a substantial burden on a religious belief that is sincerely held, the action is unconstitutional unless it furthers a compelling government interest and is the least restrictive means of doing so.[15] Nine years later, that approach was validated in *Wisconsin v. Yoder*.[16] Thus, until the Supreme Court decided the series of restrictive cases that specifically addressed a prisoner's right to free exercise,[17] such a right could only be burdened by a compelling state interest.

[6] In *Turner v. Safley*,[18] the Supreme Court established a standard to determine the constitutionality of regulations promulgated by correctional facilities.[19] The *Turner* test stated

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[14] *Id*. at 406. "We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right." *Id.*

[15] *See* City of *Boerne v. Flores*, 521 U.S. 507, 533-534 (1997). Moreover, according to the Supreme Court, "[r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *Id.* at 534. *See also Sherbert*, 374 U.S. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945))("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, endangering paramount interests, give occasion for permissible limitation.'")

[16] 406 U.S. 205 (1972). The Court established a "highest order standard," stating that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

[17] *See* discussion *infra* notes 18-33, regarding *Turner v. Safley*, 482 U.S. 78 (1987) and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

[18] 482 U.S. 78 (1987).

[19] *See Turner*, 482 U.S. at 89. Specifically, the Court held that any correctional facility regulation that restricts inmates' constitutional rights must be balanced against the legitimate penological objectives of a correctional facility by applying a reasonableness standard. *Id.* Prior to *Turner* some courts required a level of scrutiny close to strict scrutiny in the prison context. *See e.g.*, *Shabazz v. Barnauskas*, 790 F.2d 1536, 1539 (11th Cir. 1986) (applying a "less

that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[20] In assessing the reasonableness of the correctional facility regulations, *Turner* requires a four-part analysis.[21]

[7] First, application of the *Turner* test requires "a 'valid rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[22] The second relevant factor in determining the reasonableness of a prison restriction is whether there are alternative means of exercising that right that remain open to the prison inmate.[23] Third, the court must consider the impact such an accommodation will have on guards and other inmates, and on the allocation of prison resources in general.[24] The final prong of the *Turner* analysis requires the court to look for the absence of ready alternatives available to the correctional facility officials to allow an inmate to exercise his right.[25]

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restrictive means test"); *Gallahan v. Hollyfield*, 670 F.2d 1345, 1346 (4th Cir. 1982) (analyzing prison regulation for "less restrictive alternatives").

[20] *Turner*, 482 U.S. at 89.

[21] *Id.* at 89-91. The regulations challenged in *Turner* consisted of a regulation restricting correspondence between inmates at correctional facilities and another regulation banning inmate marriages. *Id.* at 81-82. While the court found that the restriction on marriage was an "exaggerated response" to the prisons' goals of rehabilitation and security, and thus unconstitutional, the court upheld the restriction on inmate correspondence, noting that "the regulation was reasonably related to legitimate security interests." *Id.* at 91.

[22] *Id.* at 89 (citation omitted).

[23] *Id.* at 90.

[24] *Turner*, 482 U.S. at 90.

[25] *Id.* at 90-91.

[8] In 1987, the Supreme Court applied the *Turner* test to regulations that restrict an inmate's right to free exercise.[26] The Court in *O'Lone v. Estate of Shabazz*[27] held that a prisoner's right to free exercise could be infringed if the infringement related to a "legitimate penological interest."[28] Specifically, the Court determined that a prohibition against Muslim inmates attending a weekly service in another prison building was constitutional, because the prison administration determined that such attendance posed unacceptable security risks and administrative burdens.[29] Here, the prison restriction was deemed reasonable because it related to a legitimate penological interest.[30]

[9] The decisions in both *Turner* and *O'Lone* replaced the earlier standard governing prisoners' free exercise claims.[31] Rather than assess such claims under the compelling state interest test,[32] lower courts began to apply the rational-basis approach to the religious rights of prison inmates, as advocated in *O'Lone*.[33] Moreover, in 1990 the Supreme Court decided

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[26] *See O'Lone v. Estate of Shabazz*, 484 U.S. 342 (1987).

[27] *Id.*

[28] *Id.* at 351-352.

[29] *Id.* at 352-353.

[30] *Id.* at 350-51. In addition to the Court's finding that a prison restriction prohibiting Muslim inmates from attending weekly services was reasonable, the Court also found the restriction reasonable because inmates were not deprived of the ability to participate in other Muslim religious ceremonies. *Id.* at 352.

[31] The deferential standard applied in *Turner* and *O'Lone* replaced the previous "highest order standard" established by the Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[32] *See generally Sherbert v. Verner*, 374 U.S. 398 (1963); *Yoder*, 406 U.S. 205 (1972).

[33] *See e.g.*, *Siddiqi v. Leak*, 880 F.2d 904, 909 (7th Cir. 1989); *Mumin v. Phelps*, 857 F.2d 1055, 1056 (5th Cir. 1988).

Employment Division v. Smith,[34] which also established, in particular circumstances, the rational basis test as the appropriate standard for claims regarding a burden on religious practice.[35]

[10] In 1993, Congress passed the Religious Freedom and Restoration Act ("RFRA").[36] RFRA restored strict scrutiny as the standard for free-exercise claims, largely as a reaction to the Court's decision in *Smith*.[37] Congress passed RFRA to "restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[38] Congress based its authority to enact RFRA on Section 5 of the Fourteenth Amendment.[39] The RFRA balancing test provided that the government may "substantially burden a person's exercise of religion only if it demonstrates that the burden to the person (1) is in the furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[40] However, only

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[34] 494 U.S. 872 (1990). In *Smith*, the Court held that a neutral, generally applicable Oregon law criminalizing the smoking of peyote applied to Native Americans who smoked peyote for religious observance. *Id.* at 878-79, 890.

[35] The Court abandoned a heightened free-exercise standard and specified rational-basis as the test for neutral laws of general application that incidentally burden free exercise. *Id.* at 879.

[36] Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-4 (1994).

[37] RFRA codified the balancing test established by the Supreme Court in *Sherbert*, 374 U.S. at 404-06; *see also supra* notes 12-13 (explaining the *Sherbert* balancing test).

[38] 42 U.S.C. § 2000bb(b)(1),(2) (1994) (citations omitted).

[39] Section 5 of the 14th Amendment provides Congress with the power to pass legislation to enforce the constitutional guarantee that no state shall deprive any person of "life, liberty, or property, without due process of law," or deny any person "equal protection of the laws." U.S. CONST. amend. XIV. § 5.

[40] 42 U.S.C. § 2000bb-1(b) (1994). Unlike claims brought under the First Amendment's Free Exercise Clause in which prison administrators were given deference in their decision making that affected prisoners, *see supra* note 18 and accompanying text, claims arising under RFRA

four years after RFRA's enactment, the heightened level of scrutiny established by RFRA was held unconstitutional[41] by the Supreme Court in *City of Boerne v. Flores*.[42]

[11] Prior to the enactment of RLUIPA, the Religious Liberty Protection Acts of 1998[43] and 1999[44] ("RLPA") were introduced; however, they failed to pass congressional muster.[45] RLPA and RFRA shared the same underlying purpose: to restore the compelling interest test for state actions that substantially burden free exercise.[46] In the wake of *City of Boerne*, RLPA was not sufficiently narrow to gain the required congressional support.[47]

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were assessed according to the heightened standard of a compelling interest and least restrictive means analysis.

[41] *See e.g.*, *Jackson v. District of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) (citing *Alamo v. Clay*, 137 F.3d 1366, 1368 (D.C. Cir. 1998) (assuming, without deciding, that RFRA applies to the federal government, notwithstanding the Supreme Court's decision in *City of Boerne*.)

[42] 521 U.S. 507 (1997). Without specifically addressing the free-exercise issue, the Court ruled that Congress did not have the authority to enact RFRA. *Id.* at 536. Specifically, the Court held that although Congress has the power to enact legislation enforcing the constitutional right to free exercise of religion under Section 5 of the Fourteenth Amendment, its power is limited to enacting laws that will remedy violations of the Free Exercise Clause as the Court interprets the clause. *Id.* at 532. According to the Court, RFRA extended Congress' power to enforce constitutional rights; rather RFRA represented an attempt by Congress to assume the powers of the Court to define substantive rights. *Id.*

[43] Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong. (1998).

[44] Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999).

[45] *See generally City of Boerne*, 521 U.S. 507 (limiting the power of Congress in the area of religious liberty to the spending power, regulating interstate commerce, and remedying state infringements on due process, equal protections, or the privileges and immunities of citizenship). Despite the attempt to tailor RLPA to the limits imposed by *City of Boerne*, RLPA was never enacted.

[46] *See* H.R. REP. NO. 106-219 at 13 (1999) (stating that "while the means used by [RLPA] are different from those used by RFRA, the ends of each Act are the same: to restore the requirement that courts examine substantial government burdens on the exercise of religion to determine whether the offending state action is the 'least restrictive' means of furthering a 'compelling' government interest").

[12] The Religious Land Use and Institutionalized Persons Act was enacted in 2000.[48] Unlike the RLPA which failed to pass in both houses of Congress, the RLUIPA generated the necessary support to become law despite the fact that it advocated the same standard articulated in both RFRA and RLPA.[49] RLUIPA's focus, however, is limited: it only applies to burdens associated with land use regulation[50] and institutionalized persons.[51] In these two specific areas,

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[47] *See* Benjamin S. Fischer, Note, *Power to the Prisoner: The Importance of State Religious Freedom Acts in Preserving the Religious Liberties of Prisoners*, 10 J.L. & POL'Y 233, 251-52 (2001) (providing an explanation of RLPA's failure to pass both houses of Congress).

[48] After both houses of Congress passed RLUIPA, President Clinton signed the bill into law on September 22, 2000. *See* The White House, Office of the Press Secretary, *Statement by the President* (Sept. 22, 2000) *at* http://www.rluipa.com/generaldocs/Clinton.html:

> Today I am pleased to sign into law S. 2869, the 'Religious Land Use and Institutionalized Persons Act of 2000,' which will provide important protections for religious exercise in America. . . . the Religious Land Use and Institutionalized Persons Act will provide protection for one of our country's greatest liberties – the exercise of religion – while carefully preserving the civil rights of all Americans. Just as I fully supported the Religious Freedom and Restoration Act in 1993, I support Senator Kennedy's and Hatch's bill. Religious liberty is a constitutional value of the highest order, and the Framers of the Constitution included protection for the free exercise of religion in the very first Amendment. This Act recognizes the importance the free exercise of religion plays in our democratic society.

Id.

[49] *See* Jeffrey Shorba, *RLUIPA Seeks to Pick Up Where RFRA Left Off*, Corrections Today, Apr. 2001 at 24. A coalition of diverse interest groups, including the American Civil Liberties Union, Americans for Separation of Church and State, the Christian Legal Society and the Baptist Joint Committee, formed to help the passage of RLUIPA. *Id.*

[50] *See* 42 U.S.C. § 2000cc(a)(1) (2004). "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution . . . ."

[51] Section 2000cc-1(a) of the Religious Land Use and Institutionalized Persons Act pertains to prison inmates as follows: "No government 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

the Act forbids state and local governments from imposing a substantial burden on the exercise of religion unless they can demonstrate that imposition of such burden is the least restrictive means of furthering a compelling interest.[52] Unlike the standard articulated by the Supreme Court, which affords prison officials immense leeway in limiting the free exercise of prisoners under the First Amendment, RLUIPA restores the proper compelling interest/least restrictive means analysis.[53]

[13] Despite RLUIPA's limited application to the areas of land use regulation and institutionalized persons, the constitutionally tenuous nature of prior federal religious protection legislation suggests that the Act may have a short life span.[54] Although the constitutionality of RLUIPA has been challenged on a number of grounds, the statute has withstood these attacks.[55] In order to adequately protect prisoners' rights to free exercise the states must also provide

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person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a) (2000).

[52] *See* 42 U.S.C. § 2000cc(a)(1) (2000) and 42 U.S.C. § 2000cc-1(a) (2000).

[53] *Compare O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (holding that a prisoner's right to free exercise could be infringed if the infringement relates to a legitimate penological interest) *with* 42 U.S.C. § 2000cc(a)(1) *and* 42 U.S.C. § 2000cc-1(a) (establishing the compelling interest/least restrictive means analysis as the proper inquiry for assessing prisoner's free exercise claims).

[54] *See supra* notes 42, 43, 44, and accompanying text.

[55] Congress enacted RLUIPA under its section 5 enforcement powers under the Fourteenth Amendment, its Interstate Commerce powers and its Spending Clause powers. Courts have upheld the RLUIPA against various constitutional challenges. *See Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), *aff'g*, *Mayweathers v. Terhune*, 2001 WL 804140 (E.D. Cal. 2001) (holding that the RLUIPA is a legitimate exercise of Congressional spending power); *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827 (S.D. Ohio 2001) (finding RLUIPA to be a constitutional exercise of congressional power under the Spending Clause); *Freedom Baptist Church of Delaware County v. Twp. of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (upholding RLUIPA as a valid exercise of Congress' commerce powers and Fourteenth Amendment enforcement powers).

greater protection for religious liberties, especially since the constitutionality of RLUIPA is an issue that the Supreme Court is likely to address.

[14] Most of the language contained in RLUIPA mirrors the language that governed RFRA. However, application of RLUIPA's statutory criteria requires a determination of whether there was a "religious exercise," as expressly defined by the Act as "any exercise of religion, whether or not compelled by, or central, to a system of religious belief."[56] Under RFRA, the federal courts were divided over the issue of whether a religious practice needs to be "mandated" or "central" to a religious faith in order to be protected under the act.[57] RLUIPA codified a broader definition of "religious exercise," thereby discouraging the judiciary's involvement in determining the mandates of a particular religion.[58]

[15] After finding a "religious exercise," courts examine whether the restrictions imposed by the governmental entity created a substantial burden on that religious exercise.[59] Following the

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[56] 42 U.S.C. § 2000cc-5. The courts in the following cases addressed the issue of whether there was a "religious exercise" as defined by the RLUIPA. *See, e.g.*, *Murphy v. Zoning Com'n of Town of New Milford*, 148 F. Supp. 2d 173 (D. Conn. 2001) (finding that homeowners' weekly prayer meetings constituted a "religious exercise" within the meaning of the RLUIPA); *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001) (stating that prisoner plaintiff's desire to have a Methodist pastor give him pastoral visits was a "religious exercise" when applying RLUIPA's amendments to the RFRA, despite the fact that plaintiff had registered as a Buddhist to obtain a special diet).

[57] Under RFRA, correctional facilities argued that requests for religious items or practices were not entitled to RFRA protection because they were not central to an inmate's religion. *See, e.g.*, *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995) (finding that the California Department of Corrections had not imposed a substantial burden on an inmate's free exercise of religious when it deprived him of the opportunity to participate in a full Pentecostal service by denying him practices such as "speaking in tongues" and "laying hands on each other" because the inmate had not shown he could not meet the mandates of his religion without the benefit of such practices).

[58] *See supra* note 56.

[59] *See Marria v. Broaddus*, 200 F. Supp. 2d 280 (S.D.N.Y. 2002) (finding that the New York State Department of Corrections ban on Five Percenter Literature was a substantial burden on the

substantial burden inquiry, the court examines whether the government had a compelling state interest in regulating the religious activities in question.[60] Even when a compelling state interest is proven, the regulation imposed by the government must be the least restrictive means for furthering a compelling interest in order for the governmental regulation to be enforceable.[61]

III. RFRA & RLUIPA: Advocating the Proper Standard for Addressing Inmates' Free Exercise Claims

[16] In *Turner v. Safley* the Court gave deference to prison administrators, stating that "courts are ill equipped to deal with the increasingly urgent problems of prison administration

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plaintiff's religious exercise); *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003) (stating that a state prisoner met his burden of establishing that prison officials' prohibiting him from receiving a kosher diet mandated by his religion placed a substantial burden on his religious exercise); *Charles v. Verhagen*, 220 F. Supp. 2d 937 (W.D. Wis. 2002) (holding that the prison imposed a substantial burden by prohibiting a Muslim inmate from possessing oil allegedly needed for body cleansing prior to commencement of daily prayers); *but see Henderson v. Kennedy*, 265 F.3d 1072 (D.C. Cir. 2001) (finding that a Park Service regulation that prevented the plaintiff and his associates from selling religious T-shirts on the Washington Mall was not a substantial burden on religious exercise); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003) (holding that a church congregation's right to free exercise of religion was not substantially burdened by a zoning ordinance prohibiting religious institutions from conducting worship services within the district).

[60] *See, e.g.*, *Marria*, 200 F. Supp. 2d 280, 294 (finding that the New York State Department of Corrections had a compelling governmental interest in prison safety and security, but nevertheless denying the Department of Correction's motion for summary judgment); *Murphy*, 148 F. Supp. 2d 173 (holding that the zoning commission, which sought to limit the number of people attending a neighborhood prayer meeting, did have a compelling state interest in protecting the health and safety of a local community); *Elsinore Christian Center v. City of Lake Elsinore*, 270 F. Supp. 2d 1163 (C.D. Cal. 2003) (finding that the city failed to demonstrate that its denial of a conditional use permit was in furtherance of a compelling government interest).

[61] *See, e.g. Marria*, 200 F. Supp. 2d 280 (holding that the New York State Department of Corrections ban on Five Percenter Literature raised questions as to whether the ban was the least restrictive alternative in the furtherance of a compelling interest).

and reform."[62] This deferential standard imposed by the Court required lower federal courts to afford deference to prison officials and administrators.[63] As a result, the burden placed on prisoners' religious freedom did not require any substantial justification from the prison administrators and officials imposing such restrictions.[64] Such deference afforded to prison officials in matters concerning religious practice has given officials authority to deny inmates the right to participate in many of the most basic religious practices.[65] The legislative efforts of both RFRA and RLUIPA impose the proper standard that should be applied to prisoners' free exercise

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[62] *Turner v. Safley*, 482 U.S. 78, 84 (1987) (citations omitted). Additionally, the Court found that "running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislature and executive branches of government." *Id.* at 84-85.

[63] *See Turner*, 482 U.S. 78 (1897); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). The *Turner-O'Lone* standard is not without criticism. *See e.g.*, David L. Hudson Jr., *Prisoners' Rights,* First Amendment Center, *at* http://www.firstamendmentcenter.org (providing the opinion of several prison-rights advocates). David Fahti, staff counsel for the American Civil Liberties Union National Prison Project, comments that the *Turner-O'Lone* standard is too deferential. *Id.* He warns, "Oftentimes, in the lower courts prison officials do not provide any evidence that their regulation serves a legitimate prison interest but simply come up with a post-hoc, speculative reason to justify the restrictive policy. Prison officials often dream up plausible, and sometimes not very plausible, reasons for their actions." *Id.*

[64] As discussed *supra*, *Turner* and *O'Lone* replaced the highest order standard established in *Wisconsin v. Yoder*, which stated "that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. 205, 215 (1972). After the *Turner* and *O'Lone* decisions, a prisoner's right to free exercise could be infringed upon if the infringement related to a legitimate penological interest.

[65] *See Kane v. Muir*, 725 N.E. 2d 232, 233 (Mass. 2000) (finding that a prisoner's complaint alleging confiscation of his rosary beads failed to state a cause of action); *Rich v. Woodford*, 210 F.3d 961 (9th Cir. 2000) (allowing the State of California to execute a man without allowing him to participate in a sweat lodge ceremony, an American-Indian equivalent of a last rites ceremony); *Young v. Lane*, 922 F.2d 370, 375-76 (7th Cir. 1991) (upholding an Illinois prison regulation that restricted the wearing of yarmulkes).

claims.[66] An analysis of some of the decisions handed down under both RFRA and RLUIPA establish RLUIPA as advocating the correct judicial standard for assessing inmate religious claims.

(A) RFRA Analysis

[17] Despite RFRA's short-lived existence, several cases demonstrate the statute's positive impact on quelling the substantial burden that prison officials had placed on prisoners' free exercise rights.[67] In *Jolly v. Coughlin*, the Second Circuit held that a prison's mandatory tuberculosis testing program violated the religious rights of Muslim inmate who refused to participate in the testing for religious reasons.[68] Applying RFRA, the Court held that the policy of sequestering those inmates who refused the tuberculosis test was not narrowly tailored to the objective of preventing the spread of the disease.[69] Here, the Court specifically dictated how

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[66] RFRA specifically provided that the government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1(b)(1)-(2) (1994). Similarly, RLUIPA restored strict scrutiny to laws or regulations that impose a substantial burden on the religious exercises of a person residing in or confined to an institution and land use regulations that impose a substantial burden on the religious exercise of a person, including a religious assembly, or institution. 42 U.S.C. § 2000cc(a)(1) (2000).

[67] During RFRA's tenure, prisoners did utilize the statute as a means of enforcing their religious rights. *See infra* text discussing *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996); *see also Jihad v. Wright*, 929 F. Supp. 325, 330-331 (N.D. Ind. 1996).

[68] 76 F.3d 468 (2d Cir. 1996). *Jolly* was one of the first cases to demonstrate the effect that RFRA may have on prison administration. *Id.*

[69] *Id.* at 477, 479. Specifically, the Court noted that despite keeping the plaintiff in "medical lockup," plaintiff was not kept in 'respiratory isolation' from the general prison population. Therefore, the court found that the isolation of the plaintiff did not and could not further the state's compelling interest in protecting other inmates and prison staff from contracting tuberculosis, especially when the disease could be detected by periodic submission to chest x-rays and sputum samples. *Id.* at 477.

prison administration should operate in its protection of inmates from the spread of a communicable disease.[70]

[18] Prior to the enactment of RFRA, the court would have granted deference to prison administrators because this regulation was enacted to promote health among the inmate population.[71] A regulation such as mandatory tuberculosis testing would have easily met the prior standard because it was reasonably related to a legitimate penological interest.[72] However, the decision in *Jolly* suggested that RFRA may successfully be utilized as a tool for prisoners to enforce and protect their religious rights.[73] The decision also emphasized the Second Circuit's

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[70] In *Jolly*, the Second Circuit undermined a rule of general applicability relating to the health of prison inmates. RFRA allows for such judicial action by providing that the government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability. 42 U.S.C. § 2000bb-1(a). The court's least restrictive means analysis offered alternatives to the prison's medical keeplock program. Specifically, the court found that its suggested accommodations represented a least restrictive alternative that the prison administration was required to pursue. *Jolly*, 76 F.3d at 479.

[71] *See O'Lone*, 482 U.S. at 349 (establishing the previous deferential standard for assessing prisoners' religious claims).

[72] According the Court's decision in *O'Lone*, a prison regulation is considered valid if it is rationally related to a legitimate penological interest. 482 U.S. at 348. The legitimate penological interest standard was essentially a rational basis test which allowed the courts to avoid an in-depth analysis of the alternatives available to prison administration as long as officials could justify such regulations as being related to a legitimate penological interest. *See id.* at 352.

[73] Similarly, the Northern District of Indiana in *Jihad v. Wright* followed the lead of the Second Circuit. 929 F. Supp. 325, 331 (N.D. Ind. 1996). In *Jihad*, the court examined a prison regulation requiring Muslim inmates who refused to acquiesce to a tuberculosis test to be placed on restrictive medical separation and housed in very restricted conditions with tuberculosis positive inmates. *Id.* at 327, 331. Finding that the prison's policy was not the least restrictive method of preventing the spread of disease, the court suggested that prison officials could have treated the plaintiff as an inmate at risk of developing tuberculosis by requiring the inmate to submit to periodic chest x-rays or sputum samples to determine active tuberculosis. *Id.* at 331.

willingness to more closely examine the burden that many prison restrictions placed on prisoners' rights since the restrictive decisions of *Turner* and *O'Lone*.[74]

[19] Not all courts have proven as deferential to prisoner's religious beliefs as the Second Circuit.[75] Even if an inmate proved a substantial burden, correctional facility officials had several avenues open to them to justify an alleged substantial burden.[76] RFRA case law suggests that the security and order of correctional facilities was consistently held to be a compelling governmental interest.[77] Moreover, several courts also recognized prison budgetary concerns as

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[74] *See supra* note 20 and accompanying text.

[75] *See Diaz v. Collins*, 114 F.3d 69 (5th Cir. 1997); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995); *McNair-Bey v. Bledsoe*, 1998 WL 879503 at *2 (7th Cir. Dec. 9, 1998); *Jackson v. District of Columbia*, 89 F. Supp. 2d 48, 63-69 (D.D.C. 2000). *See also Developments of the Law The Law of Prisons: In the Belly of the Whale: Religious Practice in Prison*, 115 HARV. L. REV. 1891, 1894 (2002) (suggesting that "heightened scrutiny during the RFRA period did not produce any particular inmate-friendly trend in the courts – judges continued generally to defer to the asserted penological interests of correctional administrators").

[76] Under RFRA, courts still consistently recognized the need to give "due deference to the expert judgment of prison administrators." *See Abordo v. Hawaii*, 938 F. Supp. 656, 660 (D. Haw. 1996) (quoting *Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996); *see also Mack v. O'Leary*, 80 F.3d 1175, 1180 (7th Cir. 1996) (citing *Hamilton*, 74 F.3d at 1552) (stating that "[a]lthough once a substantial burden on the plaintiff's practice of the religion is shown the burden shifts to the defendant to show that the state has a compelling interest in imposing the burden and could not protect that interest by some less burdensome means, we find nothing in this formulation, or in the history of the statute, to suggest that Congress intended to undermine the judicial policy of deference to prison authorities on issues of prison discipline.")

[77] *See Mack*, 80 F.3d at 1180 (stating that "[RFRA's] legislative history is explicit in recognizing that the interest in maintaining order in prisons is a compelling governmental interest and one that frequently requires and so justifies limitations on freedom of religious conduct."); *see also Best v. Kelly*, 879 F. Supp. 305, 309 (W.D.N.Y. 1995) (suggesting that correctional facility officials have a compelling interest in maintaining order and security in the institution); *Davie v. Wingard*, 958 F. Supp. 1244, 1249 (S.D. Ohio 1997) (noting that in a prison setting safety and security constitute compelling government interests under RFRA); *Woods v. Evatt*, 876 F. Supp. 756, 769 (D.S.C. 1995) (quoting RFRA legislative history S. REP. NO. 101-11, at 9 (1993), "that the interests of the States in the orderly and secure administration of their prison systems was a compelling governmental interest.")

compelling governmental interests.[78] Such compelling interests are required, even those pertaining to budgetary concerns and security to be narrowly tailored in order to pass muster.[79] Contrary to the belief that RFRA and RLUIPA encourage a flood of litigation that only contributes to increased workload and burden for prison management and staff, these statutes encourage the judiciary to take a closer look at inmate religious claims, rather than merely upholding them on the basis of a legitimate penological interest.

[20] Although the standard for assessing prisoners' religious claims under both RFRA and RLUIPA is that of the compelling interest/least restrictive means approach, case law under RFRA reveals a difference between the two statutes.[80] Under both RFRA and RLUIPA provisions, an inmate is required to demonstrate that his religious practices have been substantially burdened.[81] Prior decisions demonstrate the difficulty involved in determining

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[78] *See Luckette v. Lewis*, 883 F. Supp. 471, 480 (D. Ariz. 1995) ("[T]wo of the most compelling penological interests are budgetary concerns and safety concerns."); *Jenkins v. Angelone*, 948 F. Supp. 543, 548 (E.D. Va. 1996) (noting that correctional officials have compelling interests in maintaining the security of the facility, managing budgetary constraints, and deflecting administrative difficulties).

[79] *See Luckette*, 883 F. Supp. At 480 (quoting *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 358 (1986) (Brennan, J., dissenting)). To satisfy the least restrictive alternative prong, correctional facility officials must demonstrate that "the limitations on freedoms occasioned by the restrictions are no greater than necessary to effectuate the governmental objective involved."

[80] *See Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (requiring the burden to be mandated or central to the religious faith in question).

[81] *See, e.g., Woods v. Evatt*, 876 F. Supp. 756, 762 (D.S.C. 1995) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981)) (finding a substantial burden under RFRA "where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs"). Specifically, in order for a burden to be considered substantial, "[t]he burden must be more than mere inconvenience or a less desirable situation." *Id.*

what constitutes a substantial burden.[82] Under RFRA case law, however, many courts required the burden to be mandated or central to a religious faith to be protected under the Act.[83] The "central tenet" requirement calls for an extremely narrow definition of religion.[84] Courts applying RFRA were able to dismiss any practice not considered absolutely obligatory to the religion in question.[85] By contrast, RLUIPA expressly dispelled the notion that religious practice needed to be "mandated" or "central" to a religious faith to be protected under the Act.[86] Under

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[82] *Compare Jolly*, 76 F.3d at 477 (holding that religious exercise had been substantially burdened when pressure had been utilized to encourage an individual to alter or modify his beliefs) *with Diaz v. Collins*, 114 F.3d 69, 72 (5th Cir. 1997) (finding that the plaintiff did not demonstrate that his religion was substantially burdened because "it is not necessarily a tenet of [the plaintiff's] religion that a medicine pouch or headband be worn at all times.") *See also* Daniel J. Solove, *Faith Profaned: The Religious Freedom Restoration Act and Religion in Prisons*, 106 YALE L. J. 459, 475 (1996). ("Determining whether a regulation substantially burdens religion has been, and continues to be, a task of excruciating difficulty. Judges have long recognized that making substantive judgments about religious matters is not within the proper function or competence of the judiciary.")

[83] *See* Jeffrey Shorba, *RLUIPA Seeks to Pick Up Where RFRA Left Off*, CORRECTIONS TODAY Apr. 2001 at 26. Many correctional systems were able to successfully argue that requests for religious items or practices were not entitled to RFRA protection because they were not central to an inmate's religion. *Id.* For example, in *Bryant*, 46 F.3d at 949, the 9th Circuit found that the California Department of Corrections had not imposed a substantial burden on inmate Bryant's free exercise of religion when it deprived him of the opportunity to participate in a full Pentecostal service by denying him practices such as "speaking in tongues" and "laying hands on each other." The inmate's religious exercise was not substantially burdened because he failed to show that he could not accomplish the mandates of his religion through the means that the prison did provide. *Id.*

[84] *See* Solove, *supra* note 82. Solove argues that the central tenet approach incorrectly views religion as a sect of clear commands and injunctions suggesting that in contrast, sacred texts are often ambiguous and subject to a myriad of interpretations; leaders and practitioners of the same religious group often disagree about what practices are essential. For example, Solove notes that American Jews observe Jewish laws, practices, and rituals in a variety of combinations while also noting that Muslims differ widely about religious doctrines and practices.

[85] *See supra* note 80.

[86] *See* 42 U.S.C. § 2000cc-5 (2000).

RLUIPA, religious exercise is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs."[87] This more inclusive definition is necessary since many religious practices may not be considered mandatory, yet a denial of such practices would, in fact, result in a curtailment of religious liberty.[88] In addition, the approach adopted in RLUIPA requires the court to determine which religious practices are important to their practitioners "without having to determine who in the religion is authorized to lay down dogma and what the content of that dogma is," rather than making judges the arbiters of religious law.[89] Unlike the "central tenet" test employed by many courts under RFRA, RLUIPA encourages an effort that values religious experience, requiring that the judiciary engage in a balancing test that considers the perspective of the religious adherent.

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[87] 42 U.S.C. § 2000cc-5(7)(A). RLUIPA essentially codified the approach adopted in *Mack v. O'Leary*, decided under RFRA. 80 F.3d 1175 (7th Cir. 1996). The Seventh Circuit held that a substantial burden on free exercise of religion 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, or compels conduct or expression that is contrary to those beliefs." *Id.* at 1179. The court's holding suggests that it was not appropriate for the judiciary to get involved in determining the "mandates" of any particular religion. Other decisions under RFRA case law also suggested such an approach. S*ee, e.g.*, *Muslim v. Frame*, 891 F. Supp. 226, 231 (E.D. Pa. 1995) (holding that a substantial burden is one that affects "a practice motivated by a sincere religious belief"); *Phipps v. Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995) (deciding the case only on the compelling state interest prong stating that "the court is not in a position to judge the centrality of this religious belief to [the prisoner's] free exercise of religion").

[88] It can be problematic for the court to make a determination as to which beliefs are central to a faith. *See Mack*, 80 F.3d at 1179. Many religious practices that are not mandatory, such as praying the rosary, in the case of Roman Catholics, or wearing yarmulkes, in the case of Orthodox Jews, are important to their practitioners, who would consider the denial of them a grave curtailment of their religious liberty. *Id.*

[89] *See id.* Under the 27-year regime overturned in *Smith* the courts did not encounter insuperable difficulties in determining the importance of the various practices the burdening of which is claimed to be substantial. *Id. See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 215-19 (1972); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988); *Young v. Lane*, 922 F.2d 370, 376-77 (7th Cir. 1991).

[21] This note advocates that RLUIPA strikes an appropriate balance. Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.[90] As stated in *Procunier v. Martinez*, "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."[91] However, it is also well-recognized that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."[92] In contrast to the standard set forth in *Turner* and *O'Lone*, RLUIPA formulates the proper standard of review for prisoners' religious exercise claims, responding to both the policy of deference to prison administrators and the need to protect prisoners' religious rights. The standard set forth in RLUIPA still encourages "prison administrators . . . , and not the courts to make the difficult judgments concerning institutional operations."[93] Subjecting the judgments of prison officials to the strict scrutiny

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[90] *Turner*, 482 U.S. at 84. For example, prisoners retain the constitutional right to petition the government for the redress of grievances, *Johnson v. Avery*, 393 U.S. 483 (1969); they are protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment, *Lee v. Washington*, 390 U.S. 333 (1968); and they enjoy the protection of due process, *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Haines v. Kerner*, 404 U.S. 519 (1972). *Id.*

[91] 416 U.S. 396, 405-406 (1974).

[92] *Id.* at 405. The *Turner* Court noted that "running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 84-85.

[93] *Jones v. N.C. Prisoners' Union*, 433 U.S. 119, 128 (1977). This quote from *Jones*, however, advocated the standard set forth in *Turner* and *O'Lone*: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. Similarly, such a quote can also be used to advocate the standard implemented by RLUIPA. RLUIPA's higher level of scrutiny does not lessen or undermine the authority of prison administration and prison officials to make judgments concerning institutional operations. It simply heightens the standard of review holding prison official accountable in those instances in which inmates' religious rights are substantially burdened.

analysis set forth in RLUIPA does not seriously hamper the ability of prison administration to anticipate security risks and problems.[94] Courts will not inevitably become the primary arbiters of what constitutes the best solution to every administrative problem that is raised because it remains clear through the legislative history of both RFRA and RLUIPA and the corresponding case law that the courts will continue to give appropriate deference to prison administrators and prison officials.[95] RLUIPA will, however, hold those officials and administrators accountable in the appropriate situation.[96]

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[94] The implementation of RLUIPA does not challenge the calculus established by particular prison administrations. A notable change in the review of prisoners' free exercise claims should have no bearing on the way prison administration assesses and controls its security and safety concerns. *See, e.g.*, Jeffrey Shorba, *RLUIPA Seeks to Pick Up Where RFRA Left Off*, Corrections Today, Apr. 2001 at 27. "As with any new statute, correctional administrators should be certain the decisions they make are in careful consideration of the provisions of the law. The best advice: Move slowly on any decision about inmate religious requests while case law under RLUIPA is being developed. Chaplains, legal counsel and security should be consulted before making decisions." *Id.*

[95] *See e.g.*, Harvard Law Review, *In the Belly of the Whale: Religious Practice in Prison*, 115 HARV. L. REV. 1891, 1894 (2002) (explaining that a study of reported RFRA cases showed that, among inmate religious claims that reached trial, inmates were granted relief on nine occasions and denied relief on ninety others). Even with the heightened protection implemented by RFRA, administrators in many cases continued to meet RFRA's compelling interest prong and courts generally avoided imposing the least restrictive means requirement. *See also* 139 CONG. REC S14,465 (1993) (statement of Sen. Hatch) ("[P]rison officials clearly have a compelling interests in maintaining order, safety, security, and discipline.").

[96] The importance of affording deference to prison administration and officials is severely undermined when there is no sense of accountability imposed on such individuals. Despite our recognition that prison officials possess the requisite expertise to determine the issues concerning prisoner's daily experiences while incarcerated, we must assess religious claims under a high level of scrutiny. *See, e.g.*, *Iron Eyes v. Henry*, 907 F.2d 810, 821-22 (8th Cir. 1990) (Heaney, J., dissenting) (stating that: "prison officials often do not feel that their primary obligation is the illumination or enforcement of constitutional rights. It is for this reason that our review cannot be passive.").

(B) RLUIPA

[22] Since the passage of RLUIPA, several courts addressed the issue of whether there was a "religious exercise" as expressly defined by the Act as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[97] An examination of both a case in the prison context and the land use context highlights the proper, less stringent approach taken by RLUIPA (as compared to RFRA).[98] These cases exemplify the attempt by RLUIPA to broaden the definition of what constitutes religious exercise.[99]

[23] In *Murphy v. Zoning Com'n Town of New Milford*[100] the court held that the homeowners' weekly prayer meetings constituted a "religious exercise" within the meaning of RLUIPA.[101] The court stated that the Act was broadened to include protections to the exercise of religious beliefs not compelled by, or central to, a particular faith, but that scrutiny only extends to whether a claimant sincerely holds a particular belief and whether the belief is religious in

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[97] 42 U.S.C. § 2000cc-5 (2000).

[98] *See* Standish, *supra* note 4. RLUIPA's definition of religious exercise not only provides protection for all religious practices, but also eliminates the necessity for courts to struggle to determine which actions are compelled and/or central to a petitioner's religious faith. The involvement of courts attempting to determine which beliefs are central to a specific faith is problematic. RLUIPA eliminated this issue. Such a broad definition of religious exercise is necessary to encompass not only mandated actions, but all actions that are part of a religious faith. *Id.*

[99] *See supra* note 97.

[100] 148 F. Supp. 2d 173 (D. Conn. 2001).

[101] *Id.* at 181. In this case, the plaintiffs held weekly prayer meetings at their home that the town zoning commission attempted to limit through a cease and desist order because of concern over traffic and safety problems in the neighborhood. *Id.* at 187.

nature.[102] Following the decision in *Murphy*, the Sixth Circuit in *Dilaura v. Ann Arbor Charter Townshi.*[103] also held that the gathering of individuals for the purposes of prayer is a land use constituting religious exercise.[104]

[24] In the prison context, the Tenth Circuit, in *Kikumura v. Hurley*[105] applied RLUIPA's amendments to a prisoner's RFRA claim stating that the prisoner plaintiff's desire to have a Methodist pastor, who had been a missionary to Japan, gave him pastoral visits and was a religious exercise under the RFRA.[106] Prison officials previously denied the plaintiff's requests for pastoral visits because the plaintiff had registered with the prison as a Buddhist to obtain a special diet.[107] Despite registration with the prison as a Buddhist for the special diet the plaintiff was not required to register any specific religious belief for pastoral visits.[108] According to the plaintiff, his religious beliefs incorporated elements of both Buddhism and Christianity and the denial of pastoral visits frustrated his search for spiritual guidance.[109] Despite the fact that the plaintiff never stated whether his beliefs compelled pastoral visits, the court in applying the

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[102] *Id.* at 188. Ultimately, the court enjoined the zoning commission from enforcing the cease and desist order finding that it placed a substantial burden on the plaintiffs' religious exercise. *Id.* at 176.

[103] 30 Fed. Appx. 501 (6th Cir. 2002).

[104] *Id.* at 509.

[105] 242 F.3d 950 (10th Cir. 2001).

[106] *Id.* at 961. *See also Henderson v. Kennedy*, 265 F.3d 1072, 1074 (D.C. Cir. 2001) (noting that the definition of religious exercise in RLUIPA expanded upon the protection established under RFRA).

[107] *Kikumura*, 242 F.3d at 954.

[108] *Id.*

[109] *Id.*

definition of religious exercise under RLUIPA held that such pastoral visits were a religious exercise protected by the Act.[110]

[25] Once the court determines that there is a religious exercise in question the analysis then turns to whether the restrictions set forth by prison officials created a substantial burden on such religious exercise.[111] The fairly recent application of RLUIPA in *Marria v. Broaddus*[112] illustrates the manner in which some courts analyze whether a substantial burden is found under the Act. In *Marria*, the plaintiff, a member of the Nation of Gods and Earths, also known as the Five Percenters, challenged the ban of the Department of Corrections on his receipt of Nation literature including the newspaper the "The Five Percenter."[113] The defendants, prison officials, asserted that the ban did not substantially burden the exercise of plaintiff's religious beliefs and further asserted that the regulations were in furtherance of a compelling governmental interest in prison security.[114] According to defendants, the ban on Five Percenter literature was "the least restrictive means of controlling security threat group behavior."[115]

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[110] *Id.* at 961. Of course, the plaintiff was still required to prove that visits from the Methodist pastor would provide him with unique counseling not obtainable from others. Thus, the Tenth Circuit remanded the case so that the plaintiff could present evidence as to whether the denial of the visits constituted a substantial burden on his beliefs.

[111] *See* 42 U.S.C. § 2000cc-1(a) (2000).

[112] 200 F. Supp. 2d 280 (S.D.N.Y. 2002).

[113] *Id.* at 282.

[114] *Id.* at 298.

[115] *Id.*

[26] The court, however, was not persuaded by defendants' argument that plaintiff had not demonstrated a substantial burden on his religious exercise.[116] Rather, the plaintiff had demonstrated a substantial burden because the newspaper he wished to study provided lessons of the beliefs of the Nation of Gods and Earth, which were deemed an integral part of the daily practice of the plaintiff's beliefs.[117] The denial of such materials created a substantial burden on the plaintiff to modify his beliefs, thus triggering the protection of RLUIPA.[118]

[27] A substantial burden was also found in the more recent case *Madison v. Riter*,[119] which concerned a prisoner's request for a kosher diet. The State prisoner met his burden by establishing that prison officials who prohibited him from receiving a kosher diet, mandated by his religion, placed a substantial burden on his religious exercise.[120] Moreover, the defendants failed to prove, as a matter of law, that there was a rational reason for denying the diet, let alone a compelling one.[121]

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[116] *Id.*

[117] *Marria*, 200 F. Supp. 2d at 298. More specifically, Marria maintained throughout the litigation that the study of the Supreme Mathematics, the Supreme Alphabet, the 120 Degrees, and other lessons found in the "The Five Percenter" both by himself and with other Nation members is an integral part of the daily practice of Nation beliefs. *Id.* The court found that under the Department of Correctional Services' regulations plaintiff was denied the opportunity to possess those material and study them with other inmates. *Id.*

[118] *Id.* The Supreme Court has defined a substantial burden as "[w]here the state . . . denies [an important benefit] because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981) (citations omitted).

[119] 240 F. Supp. 2d 566 (W.D. Va. 2003).

[120] *Id.* at 569, n. 2.

[121] *Id.*

[28] Recent cases emphasize the stark contrast that may result when inmates' religious claims are brought only under the U.S. Constitution, as opposed to those that include an additional claim asserting a violation under RLUIPA.[122] The possibility of such strikingly different outcomes should encourage inmates to include RLUIPA claims in the appropriate circumstances.[123] Fortunately, several recent cases demonstrate that some courts are, in fact, receptive to the standard emphasized by RLUIPA.[124]

[29] For example, in May 2000, Kelvin Ray Love filed a complaint with the U.S. District Court for the Eastern District of Arkansas, seeking to require state correctional officials to provide him with a kosher diet.[125] After a Magistrate Judge recommended that Love's complaint be dismissed, the District Judge rejected those findings and recommendations and found that

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[122] *See e.g., Williams v. Morton*, 343 F.3d 212 (3d Cir. 2003). In *Williams*, the crux of prisoners' claims was that prison official violated their constitutional right by failing to provide them with meals that conformed to their religious beliefs. *Id.* at 215. Prisoners' did not include a claim under RLUIPA. Under the *Turner* analysis, the 3rd Circuit agreed with the New Jersey Department of Corrections officials and rejected the prisoners' free exercise claim. *Id.* at 221.

[123] For example, in *Charles v. Verhagen*, 220 F. Supp. 2d 937 (W.D. Wis. 2002) the court held that officials violated RLUIPA by prohibiting possession of oil used for cleansing prior to prayer. However, the court also held that the oil possession prohibition did not violate the inmates First Amendment rights. *Id.* Such findings reflect the inherent differences between the RLUIPA standard and the standard observed when inmates only assert their rights under the First Amendment.

[124] *See Love,* 38 Fed. Appx. 355 (affirming that Love was entitled to relief under RLUIPA); *Marria*, 200 F. Supp. 2d at 282 (denying defendant, Department of Correction's motion for summary judgment on plaintiff's RLUIPA claims); *Charles v. Verhagen*, 220 F. Supp. 2d 937 (W.D. Wis. 2002) (holding that prison officials violated RLUIPA by prohibiting possession of oil used for cleansing prior to prayer).

[125] *See* The Becket Fund for Religious Liberty, *RLUIPA: Court Cases, Love v. Evans*, *at* http: //www. rluipa. com/cases/ Love. html. Love is serving two life sentences for first-degree murder, and is incarcerated by the Arkansas Department of Correction in a one-man cell. *Id.* All of his meals are eaten there. *Id.*

Love was entitled to a jury trial.[126] At trial, the judge found that "the Arkansas Department of Correction's refusal to provide [Love] any accommodation other than a pork-free diet substantially burden[ed] Love's First Amendment rights," and that "Arkansas Department of Correction's arguments fall far short of meeting the strict scrutiny standard for analyzing claims under RLUIPA."[127] Although, the judge found that the Arkansas Department of Correction "has a compelling interest in providing a cost-effective, stream-lined delivery of food to its inmate population," it did not provide the evidence "to permit the Court to find that its refusal to provide any accommodation to Love (other than a pork-free diet) is in furtherance of that interest."[128] Thus, Love was entitled to relief under both the RLUIPA and the First Amendment.[129]

[30] In another example, on September 19, 2002, Alan Cotton, a prisoner in Florida, "filed suit against the State's Department of Corrections, arguing that the department's refusal to provide him with kosher food illegally burden[ed] his religious exercise."[130] His suit requested

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[126] *See id.* It should also be noted that state correctional officers moved for summary judgment, arguing that RLUIPA was unconstitutional and that the strict scrutiny standard of review in prisoner cases required by the statute should not be applied. *Id.* However, the district judge issued an order stating: "[T]his Court finds that Congress did not exceed its authority under the Spending Clause, . . . or Section 5 of the 14th Amendment when it enacted RLUIPA." Accordingly the judge decided "Plaintiff's claim will be evaluated under the strict scrutiny requirements of RLUIPA." *Id.*

[127] *See id.* Specifically, in issuing findings of fact and conclusions of law, the judge noted that the correctional officials appeared "to view Judaism through the narrow lens of a fundamental Christian viewpoint rather than a stand alone religion rich in its own history and tradition. Religious intolerance of this sort is inconsistent with the free exercise of religion established by the First Amendment, which guarantees to individuals the right to choose and practice their own spiritual beliefs." *Id.*

[128] *Id.*

[129] *See id.*

[130] *See* The Becket Fund For Religious Liberty, *RLUIPA: News Release, Jewish Prisoner Sues Florida Department of Corrections*, *at* http://www.rluipa.com/media/TBF091902.html. (last

that "the U.S. District Court for the Southern District of Florida order the department to provide him with a 'nutritionally sufficient kosher diet,' and to issue a declaration that failure to provide such kosher foods violated RLUIPA, . . . and the U.S. and Florida constitutions."[131] After three years of litigation, the Florida Department of Correction agreed to his request and he is now provided kosher food.[132] Suits such as this demonstrate that RLUIPA can be utilized as a powerful tool when prison officials deprive those incarcerated of the religious freedoms that they are entitled.[133]

[31] In a similar suit, two New Jersey inmates claimed that prison officials violated their constitutional rights by failing to provide them with Halal meat meals in conformity with their religious beliefs.[134] Unlike *Love* and *Cotton*, these New Jersey inmates failed to include a

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visited Sept. 19, 2002). According to the news release, Alan Cotton is incarcerated at Florida's Everglades Correctional Institution. *Id.* According to his complaint, he "was born and raised in the Jewish faith, and is a sincere adherent to Orthodox Judaism" who "believes he is required to keep a kosher diet" in order to "conform to the divine will of God as expressed in the Torah." *Id.*

[131] *Id.* While "the Florida Department of Corrections officially provides three different meal plans for prisoners, none qualify as kosher." *Id.* Cotton's complaint alleged that correctional officials "have never identified any compelling government interest for denying kosher meals or explained how the failure to provide kosher meals is the least restrictive means of advancing any such compelling government interest." *Id.*

[132] *See* The Becket Fund for Religious Liberty, *RLUIPA: News Release, Florida Department of Corrections Will Provide Kosher food to Jewish Prisoner, at* http: //www.rluipa.com/media/2003/TBF102803.html. Florida State "prison officials signed a settlement agreement, and started providing [Alan Cotton] with kosher food." *Id.* "The agreement provides that any question as to whether a particular food item is Kosher may be resolved through [Florida Department of Correction's] chaplaincy services, which shall consult a rabbi." *Id.*

[133] The Becket Fund's David Gaubatz, the litigator in that case, stated, "After this settlement, the Florida Department of Corrections has no justification for denying kosher food to any inmate similarly situated. [Florida Department of Corrections] would be well advised to change its rules now to reflect this fact, and to avoid future litigation." *Id.*

[134] *Williams*, 343 F.3d at 215.

RLUIPA claim. Consequently, unlike the results obtained in the previously discussed cases, the Third Circuit held that the New Jersey State Prison does not have to provide its Muslim inmates with meals containing meat prepared according to Islamic dietary law.[135] Despite that the overall outcome may be the same regardless of whether the Third Circuit applied RLUIPA or the *Turner* test, it remains clear that the *Turner* analysis presents an inadequate way to assess inmates' religious claims because it focuses on legitimate penological interests as opposed to RLUIPA's strict scrutiny standard.[136] The Third Circuit's application of the *Turner* test, especially compared with those opinions addressing suits that include RLUIPA claims, emphasizes the insignificant amount of justification required by prison officials in cases decided under *Turner*.[137]

[32] However, it is important to not only recognize cases that succeed under that standard, but also cases that fail. In other words, even cases that fail under RLUIPA indicate that the standard is appropriate. For example, in November 2001, Anthony Steele, a Muslim inmate, in a

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[135] *Id.* at 221. The Third Circuit determined that the prison's practice of not providing Halal meat meals is reasonable under *Turner*. *Id.* First, the decision to provide a vegetarian meal, rather than one with Halal meat, is rationally related to legitimate penological interests, namely simplified food service, prison security, and budgetary constraints. *Id.* at 220. Second, providing a vegetarian meal rather than a meal with meat is a reasonable alternative means for those inmates to express his or her religious beliefs. *Id.* Third, providing Halal meat meals to hundreds of prisoners would have a marked effect on the prison community. *Id.* at 220-221. And fourth, providing Halal meat meals cannot be provided at a *de minimis* cost. *Id.* at 221.

[136] In other words, the legitimate penological interest standard employed under *Turner* provides too much deference to prison administration and prison officials. For example, in *Williams*, the Third Circuit, under its legitimate penological interest assessment, devotes an entire paragraph to such deference. *Williams*, 343 F.3d at 218-19. This standard invites an analysis based on mere conjecture rather than hard facts.

[137] *See* Solove, *supra* note 82, at 470 (stating that *Turner* and *O'Lone* cases "crystallized the degree of scrutiny at the lowest level . . . a scrutiny so meager and deferential that it approximated the 'hands off' doctrine.")

prison operated by the Oklahoma Department of Corrections, filed suit charging "that by housing him in a cell with a non-Muslim, the Department placed a 'substantial burden' on his exercise of religion in violation of . . . RLUIPA."[138] In this instance, the court granted the state's motion for summary judgment and that decision was upheld on appeal.[139] The appellate court held that Steele had "failed to demonstrate that the Department of Correction's policy of randomly assigning cellmates substantially burdens his right to exercise his religion."[140] This decision emphasizes that the substantial burden standard is not easily met. Many critics of RLUIPA suggest that the standard is too lenient and that requiring a compelling interest once there is a substantial burden is too high a standard for prison officials. However, it is urged that these critics keep in mind that in order to reach the compelling interest assessment, the inmate must demonstrate a substantial burden. Therefore, many of the cases that would be of concern to such critics will be disposed of due to the lack of a substantial burden as exemplified by this particular case.

[33] To fully develop this argument in favor of the standard imposed by RLUIPA, it is essential to consider *Charles v. Verhagen*[141] because it includes both a successful RLUIPA claim

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[138] *See* The Becket Fund for Religious Liberty, *Court Cases: Steele v. Guilfoyle*, *at* http://www.rluipa.com/cases/Steele.html (last visited Jan. 24, 2005).

[139] *See id.*

[140] *See id.* Specifically the court explained: "The policy does not inhibit or constrain Plaintiff's religious conduct; it does not curtail Plaintiff's ability to express adherence to his faith; and it does not deny Plaintiff a reasonable opportunity to engage in those activities that are fundamental to his religion. We hold such a policy merely has an incidental effect upon Plaintiff in that it makes it more difficult for him to practice his religion; however, it does not place a 'substantial burden' on Plaintiff's right to exercise his beliefs." *Id.*

[141] 220 F. Supp. 2d 937 (W.D. Wis. 2002).

and a failed First Amendment claim.[142] Such an analysis best demonstrates the contrasting standards and inconsistent results that govern inmates' religious exercise claims. Most notably, however, this case provides the best argument as to why the RLUIPA standard is appropriate for assessing prisoners' religious claims.

[34] Plaintiff Jerry Charles, a Wisconsin prisoner and practicing Muslim, "contend[ed] that the enforcement of a prison Internal Management Procedure restricting his access to Islamic prayer oil . . . violat[ed] his rights under both the free exercise clause of the First Amendment and [RLUIPA]."[143] Although the court found the defendants were entitled to summary judgment on the plaintiff's claim under the First Amendment's free exercise clause, it also found that defendants violated the plaintiff's rights under RLUIPA.[144] The inmate's claim under the First Amendment was rejected because that standard allows for "prison restrictions that infringe on an inmate's exercise of religion if they are reasonably related to a legitimate penological interest."[145] Under the rational basis standard applied to prisoners' claims under the First Amendment's free exercise clause, the defendants articulated legitimate interests in preserving scarce prison resources and enhancing prison security.[146]

[35] On the other hand, the inmate's claim under RLUIPA was not disposed of so quickly, and after the in-depth analysis required by that standard, the court found that the Department of

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[142] *Id.* at 952, 953.

[143] *See id.* at 938. Charles also contended that preventing him from celebrating more than one annual religious feast violated both the free exercise clause of the First Amendment and RLUIPA.

[144] *See id.* at 952-53.

[145] *See id.*

[146] *See id.* at 953.

Corrections violated RLUIPA.[147] First, the court found that plaintiff's "inability to possess prayer oil forced him to 'refrain from religiously motivated conduct,' and thus, imposed a substantial burden on the exercise of his religion."[148] Next, the court addressed the compelling interest/least restrictive means test required by RLUIPA.[149] The court noted defendants' arguments in support of the prohibition dealing with religious property, but found that "[e]ven assuming that these security and administrative concerns are compelling governmental interests, [the court] cannot find that defendants have employed the least restrictive means of furthering those interests."[150] In concluding that the restriction, as applied to plaintiff, violates RLUIPA because it does not "represent[] an approach to controlling administrative costs and preserving prison resources that is least restrictive of plaintiff's exercise of his religion,"[151] the court even noted that "Congress has chosen to raise the bar for prison administrators when it comes to the balancing of security and resource concerns against the rights of institutionalized persons to practice their faith."[152]

IV. Conclusion

[36] This note should not be confused as a platform for championing prisoner's rights. Its goal is to advocate for a particular standard of assessment –- that standard set forth in RLUIPA.

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147 *Charles*, 220 F. Supp. 2d at 952.

148 *Id.* at 948.

149 *See id.*

150 *Id.*

151 *Id.* at 950.

152 *Id.* at 951.

Security concerns obviously necessitate a certain amount of deference towards prison administration and prison officials. In fact, it is because our system affords such deference to the prison administration and prison officials, that it becomes inevitable that many prison regulations will, and should, continue to be questioned.

[37] There is a certain tension that is derived from balancing the assessment of inmates' religious claims. On the one hand, there is the utmost concern for security and on the other hand, there is the religious freedom retained by those incarcerated. It is always a difficult task to interpret the correct amount of government interference in an area that traditionally is not inhibited by government action, as in the context of religious freedom within the prison population. The search for the proper balancing in the context of religion within our prison system has continually evolved and remains a source of constant debate. That debate should, however, begin to subside because the enactment and application of RLUIPA has implemented the proper standard for evaluating prisoners' religious claims.

[38] RLUIPA considers that prison officials lack direct accountability to the public -- a general public that is largely unfamiliar with the internal workings of America's prison systems. Some people may assert that the debate regarding the appropriate standard governing inmate religious claims is of small significance because regardless of the test employed, the majority of cases will come out the same way. Even if such a proposition is true, RLUIPA still imposes important societal benefits. No longer can prison administrators merely cite security and budgetary concerns to immediately quash any inquiry concerning inmates' religious rights. Prison administrators occupy powerful positions within our society and RLUIPA requires their accountability.

[39] Under RLUIPA, correctional administrators and officials will not lose their ability to argue that restrictions on the free exercise of religion further a compelling governmental interest in the context of prison safety and security. When dealing with religious freedom, even in the context of America's prisons, it is essential to require such a heightened level of scrutiny. The legitimate penological interest standard represented a *de minimis* hurdle for prison administrators requiring little, if any, accountability. Under RLUIPA, courts will, in the majority of cases, find compelling government interests in efficiency and cost-effectiveness arguments made by correctional administrators. However, RLUIPA's standard encourages prison officials to adopt a more sensitive approach to inmates' religious requests; correctional administrators will be required to ensure that compelling interests are met through the least restrictive means possible. RLUIPA establishes an appropriate standard that counsels against the outright denial of all inmate religious requests.