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# RLUIPA and Prisoner's Rights: Vindicating Liberty of Conscience for the Condemned by Targeting a State's Bottom Line

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# RLUIPA AND PRISONER'S RIGHTS: VINDICATING LIBERTY OF CONSCIENCE FOR THE CONDEMNED BY TARGETING A STATE'S BOTTOM LINE

## I. INTRODUCTION

Imagine shortly after your incarceration in South Greenwich State Prison your outlook on life is transformed by your conversion to Islam.[1] Every day for fifteen years in prison, you faithfully follow the tenets of your faith, and you feel that this is your only connection to the world that exists beyond your forbidding prison walls. During a daily prison inspection, you find yourself deep in prayer and are slow to comply with one of the prison official's mandates to vacate your cell. Upon inspection, prison officials discover your Koran, prayer rug, and prayer beads, which are confiscated and subsequently destroyed for security reasons.[2] Without the ability to utilize items integral to the practice of your faith, you experience severe depression and spend forty-five days in the prison's psychiatric unit.[3] Prison officials claim you lacked property papers for the prayer rug, misused your prayer beads by wearing them on your neck, and created a security risk with your Koran by using a piece of tape to keep its cover attached.[4] You know the real reason they confiscated your belongings was to punish you for possessing Muslim religious items and moving too slowly during the cell check.[5]

After pleading with prison officials to return your items to no avail, you look to the courts to vindicate your free exercise rights. The court denies the prison officials' motion to dismiss your claim and is concerned with South Greenwich's cavalier attitude toward a Muslim's rights to possess articles of faith.[6] Prison administrators consult with

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1 This hypothetical is loosely based on the facts from Shaw v. Norman, No. 6:07cv44, 2008 WL 5272601 (E.D. Tex. Dec. 19, 2008). The action subject to the complaint took place at the Beto Unit of the Texas prison system. *Id*. at *1.

2 *Id*. The prison warden testified that inmates were normally permitted to have a copy of the Koran and a prayer rug. *Id*.

3 *Id*. Shaw could not say his prayers without his prayer rug or beads, nor could he study the Koran. *Id*. at *13.

4 *Id*. at *6–7. In addition, the prison officials argued the confiscation of the religious articles was nothing more than "a simple state court claim for conversion" and the federal district court did not have jurisdiction to hear Shaw's claim. *Id*. at *6,*8.

5 *Id*. at *1. Because he had been incarcerated for over fifteen years, Shaw accumulated a large amount of property in his cell. *Id*. The facts indicated the prison officials took other forms of property than his religious articles. *Id*.

6 *Id*. at *8–*14. The court noted that the prison officials failed to show how a Koran with a piece of tape on its cover was altered property and how it was a security risk. *Id*. at *7.

their attorneys and determine that transferring you to another state facility will extinguish your claim. Still reeling from your latest victory, you greet the news of the transfer with optimism and look forward to a favorable outcome in the pending litigation. Upon your return to court, however, the judge informs you that your claim must be dismissed as South Greenwich prison officials cannot harm you where you are going. You implore the judge to reconsider, as the specter of future persecution in your new facility looms overhead. You start to believe that the law cannot help you and that there is no way to punish the officials for blatant violations of the Constitution.

Sadly, for many prisoners the scenario just described is a cruel reality they must live with every day. In 2000, dissatisfied with contemporary efforts to protect the religious liberties of prisoners, Senators Orrin Hatch and Ted Kennedy urged their fellow Senators to support the Religious Land Use and Institutionalized Persons Act ("RLUIPA" or "the Act").[7] In a joint statement they declared: It is well known that prisoners often file frivolous claims; it is less well known that prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways."[8] While "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution[,]" the free exercise rights of prisoners may be restricted when prison officials regulate under the auspices of advancing a legitimate penological interest.[9]

RLUIPA prohibits the government from imposing a substantial burden on a prisoner's religious exercise unless that burden is in furtherance of a compelling interest.[10] When a RLUIPA violation occurs, prisoners can bring suit against the government for injunctive or

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They also did not show a rational, valid connection between prison regulation and the security risks of wearing prayer beads around the neck. *Id*. Moreover, the Court found it inappropriate to take Shaw's prayer rug from him for not having property papers when it was established that he could keep it in his cell. *Id*.

7 *See* 42 U.S.C. § 2000cc-1(a) (2006).

8 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). Religiously associated claims in relation to other prisoner claims are relatively few and, on average, are more meritorious than other prisoner claims. *Id*.

9 Turner v. Safley, 482 U.S. 78, 84, 87 (1987). *See* Cutter v. Wilkinson, 544 U.S. 709, 723 (2005) (noting that Congress intended for the judiciary to give "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." (quoting 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy))).

10 42 U.S.C. § 2000cc-1(a). RLUIPA also applies to land use, but land use is not the subject of this Note. *See id*. § 2000cc(a).

declaratory relief, but the Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits are split on whether RLUIPA allows prisoners to seek monetary relief despite the states' traditional immunity under the Eleventh Amendment.[11] This Note argues that in its present form, RLUIPA allows prisoners to sue government officials in their official capacity and for monetary relief.[12]

First, Part II provides the history and events surrounding RLUIPA's enactment, chronicles the scope of the constitutional powers Congress relied on to enact RLUIPA, and discusses courts' differing interpretations concerning the availability of damages.[13] Next, Part III analyzes whether RLUIPA in its present form allows prisoners to sue states for monetary relief.[14] Finally, Part IV argues that key provisions of RLUIPA can be interpreted broadly to enable prisoners to sue states for monetary relief.[15]

## II. BACKGROUND

Incorporated through the Fourteenth Amendment, the First Amendment prevents state governmental inference with individuals' right to freely exercise their religion.[16] Since 1990, however, the

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11 *Id*. § 2000cc-2(a). RLUIPA authorizes a cause of action for "appropriate relief" against the government. *Id*. *See infra* Part II.C (discussing the circuit split).

12 *See infra* Part IV.A (proposing model judicial interpretation).

13 *See infra* Part.II.A (detailing the important Supreme Court Cases and relevant legislative history before Congress passed RLUIPA); Part II.B (explaining why Congress used its spending and commerce power to enact RLUIPA); Part II.B.1 (explaining the validity of RLUIPA under the Spending Clause); Part II.B.2 (providing the relevant Commerce Clause jurisprudence and exploring how it applies to RLUIPA); Part II.C (introducing the important distinctions between official and individual capacity claims); Part II.C.1 (explaining why a majority of courts do not award damages in official capacity claims under the Spending Clause); Part II.C.2 (discussing the scant case law concerning RLUIPA and damages in individual capacity claims under the Commerce Clause).

14 *See infra* Part III.A.1 (explaining why the statutory text of RLUIPA serves as a textual waiver to Eleventh Amendment immunity); Part III.A.2 (finding the catch-all provision of the Civil Rights Remedies Equalization Act ("CRREA") fails to be a textual waiver); Part III.B (finding that damages are available for individual capacity claims under the Commerce Clause, but in very limited circumstances); Part III.C (arguing that damages should be available to prisoners).

15 *See infra* Part IV (explaining that RLUIPA's terms are required to be interpreted broadly and discussing how Congress can establish a comprehensive scheme).

16 U.S. CONST. amend. I. The religion clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id*. *See* U.S. Const. amend XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."); Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding that the Free Exercise Clause is incorporated though the Fourteenth Amendment). *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 499–507 (3rd ed. 2006) (discussing the incorporation doctrine).

protection guaranteed by the Free Exercise Clause has not been to Congress's liking.[17] In 2000, after some trial and error, RLUIPA became Congress's newest attempt to protect religious rights.[18] First, Part II.A briefly explores the origins of RLUIPA by outlining Congress's struggle to restore strict scrutiny review in free exercise claims and the subsequent passing of RLUIPA.[19] Part II.A surveys the legal analysis of RLUIPA as valid Spending or Commerce Clause legislation and the availability of monetary relief.[20] Next, Part II.B examines RLUIPA's constitutionality under Congress's Article I powers.[21] Finally, Part II.C discusses the availability of monetary damages against state officials in both official and individual capacities.[22]

### *A. Restoring Strict Scrutiny Review in Free Exercise Claims*

The history of RLUIPA began in 1990, a decade before its passage, when the Supreme Court upheld an Oregon law prohibiting the consumption of peyote.[23] In *Employment Division v. Smith*, the Court rejected nearly thirty years of precedent by finding that the use of strict scrutiny as the standard of review to neutral laws of general applicability in First Amendment religious challenges was no longer appropriate.[24] In

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17 *See* Arnold H. Loewy, *Rethinking Free Exercise of Religion After* Smith *and* Boerne*: Charting a Middle Course*, 68 MISS. L.J. 105, 106 (1998) ("To put it mildly, Congress was not pleased with [*Employment Division v.*] *Smith*."). *See also infra* Part II.A (discussing *Smith*).

18 146 CONG. REC. S6687 (daily ed. July 13, 2000) (statement of Sen. Hatch) (mentioning that Congress spent three years debating RLUIPA).

19 *See infra* Part II.A.

20 *See infra* Part II.B.

21 *See id.* (discussing RLUIPA as valid Spending and Commerce Clause legislation).

22 *See infra* Part II.C.1 (discussing damages in official capacity claims and discussing whether RLUIPA clearly intended acceptance of federal funds as a waiver of a state's Eleventh Amendment immunity to monetary damages); Part II.C.2 (discussing damages in individual capacity claims under the Commerce Clause).

23 Employment Div. v. Smith, 494 U.S. 872, 890 (1990). The Oregon law prohibited the possession of any controlled substance, which included peyote, a hallucinogenic drug. *Id*. at 874. The plaintiffs ingested peyote for sacramental purposes of the Native American Church. *Id.* Ironically, a private drug rehabilitation organization subsequently fired them. *Id*. The State of Oregon denied them unemployment compensation because their discharge related to misconduct. *Id.* The Plaintiffs challenged the denial of benefits, claiming the controlled substance law violated the Free Exercise Clause. *Id*.

24 *Id*. at 884–85. "[I]f prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id*. at 878. The Court also noted that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (internal quotations omitted). The *Smith* Court overturned Sherbert v. Verner, 374 U.S. 398 (1963), which held that any burden on the freedom to exercise religion must be justified by a compelling

1993, Congress responded to *Smith* by using its Section Five power under the Fourteenth Amendment to pass the Religious Freedom Restoration Act ("RFRA") to restore the strict scrutiny standard of review in all free exercise claims.[25] The religious protections of RFRA did not last long, as the Supreme Court struck down RFRA in *City of Boerne v. Flores* in 1997.[26] According to the Court, Congress has the power to enforce rights under the Fourteenth Amendment, but the means adopted must be proportionate and congruent to the injury.[27] Requiring strict scrutiny review for neutral laws of general applicability failed the proportionate

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governmental interest, including laws of general applicability. *Id*. at 873, 885 (calling the compelling government interest requirement "benign"). In *Sherbert*, the Court invalidated a law that denied unemployment benefits to those who quit or were fired from their jobs for religious reasons. *Sherbert*, 374 U.S. at 409. *See also* Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 673 (1991) (calling the Court's holding in *Smith* "*very* surprising and *wholly* unexpected" considering recent Supreme Court decisions). Four years earlier, Justice Scalia, who wrote the majority opinion in *Smith*, joined the Court in its strong reaffirmation of strict scrutiny review. *Id*. at 674 n.143 (citing Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141–42 (1987)).

[25] S. REP. NO. 103-111, at 13–14 (1993); H.R. REP. NO. 103-88, at 9 (1993). *See* 42 U.S.C. § 2000bb (2006). The statute expressly states the purpose of RFRA was to overturn *Smith* and restore the application of *Sherbert* in all free exercise of religion claims. *Id*. *See also* CHEMERINSKY, *supra* note 16, at 1252–54 (summarizing the cases in which the Court applied strict scrutiny review before *Smith*). After *Sherbert*, however, the Court only invalidated laws for violating free exercise in two areas: those situations similar to *Sherbert* that denied benefits to those who quit their jobs for religious reasons and to enforce compulsory schooling to the Amish. *Id*. *See also* Choper, *supra* note 24, at 684–85 (arguing religious liberty would suffer greatly in lower federal and state courts). Although the Supreme Court did not invalidate many laws that burdened religious exercise, lower federal and state courts invalidated many laws that burdened religious exercise. *Id*.

[26] City of Boerne v. Flores, 521 U.S. 507, 536 (1997). The St. Peter Catholic Church applied for a building permit to expand its church to meet the demand of a growing congregation, but the local zoning authority ruled the church was a historical landmark and prohibited the construction. *Id*. at 512. Subsequently, the church sued the city for violating RFRA. *Id*. The city responded that RFRA was unconstitutional. *Id. See also* Sara Smolik, Note, *The Utility and Efficacy of the RLUIPA: Was it a Waste?*, 31 B.C. ENVTL. AFF. L. REV. 723, 728–30 (2004) (summarizing the facts and holding of *City of Boerne*).

[27] *City of Boerne*, 521 U.S. at 520. Congress can only prevent or remedy violations of rights recognized by the Court under the Fourteenth Amendment. *See id*. at 519–20. *See also* CHEMERINSKY, *supra* note 16, at 295–300 (providing arguments for whether *City of Boerne* is a desirable interpretation of Congress's Section Five powers). The decision is seen as the Court protecting its role as the ultimate arbiter of the Constitution. *See id*. at 298. Yet, criticism is warranted for denying Congress the ability to expand the scope of rights. *Id*. The Ninth Amendment invites government to expand rights by stating that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id*. (citing U.S. CONST. amend. IX). Determining the proper interpretation of Section Five is complicated, thus requiring analysis of the constitutional text, the intent of the Fourteenth Amendment framers, and basic policy questions surrounding the relationship of government with the separation of powers, federalism, and individual rights. *Id*. at 299.

and congruent standard, thereby exceeding Congress's Section Five power.[28]

Determined to protect free exercise rights, Congress moved quickly after *City of Boerne* by passing RLUIPA in 2000 to protect the constitutional right of institutionalized persons to worship without unnecessary governmental interference.[29] RLUIPA, compared to RFRA,

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[28] *City of Boerne*, 521 U.S. at 533–36. RFRA, by requiring strict scrutiny for all free exercise challenges, prohibited much activity that would be constitutional, and thus, it was not proportionate and congruent. *Id.* *See* CHEMERINSKY, *supra* note 16, at 229–30 (explaining that according to Section Five, Congress cannot expand or create new rights, but must only provide remedies for those rights recognized by the courts). *See also* Brunskill v. Boyd, 141 F. App'x 771, 775 (11th Cir. 2005) ("RFRA does not apply to state regulations or state actors"); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 167 (D.C. Cir. 2003) ("[W]ithout doubt the portion [of RFRA] applicable to the federal government . . . survived the Supreme Court's decision striking down the statute as applied to the States." (alteration in original) (quoting Henderson v. Kennedy, 265 F.3d 1072, 1073 (D.C. Cir. 2001))). Even though RFRA is unconstitutional as applied to the states, it still applies to the federal government. *Brunskill*, 141 F. App'x at 775; *Ashcroft*, 333 F.3d at 167.

[29] *See* 42 U.S.C. § 2000cc; 146 CONG. REC. S6688 (daily ed. July 13, 2000) (statement of Sen. Kennedy) ("[I]nstitutionalized persons are often unreasonably denied the opportunity to practice their religion, even when their observance would not undermine discipline, order, or safety in the facilities."); 146 CONG. REC. H7191 (daily ed. July 27, 2000) (statement of Rep. Canady) (explaining that considering their incarceration, institutionalized persons are particularly vulnerable to government regulation curtailing their ability to worship). *See also* Cutter v. Wilkinson, 544 U.S. 709, 720–21 (2005) (explaining that institutionalized persons are those in state-run "mental hospitals, prisons, and the like—in which the government exerts a degree of control unparalleled in civilian society"). *See generally* Enrique Armijo, *Belief Behind Bars: Religious Freedom in Prison, RLUIPA, and the Establishment Clause*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 297, 301 (2005). Moreover, a prisoner's First Amendment rights take on an added importance considering that:

> The prison administrator's power to circumscribe or even revoke the prisoner's right to read a book, write a letter, or attend a religious meeting, as well as the total uniformity of the prison atmosphere, can make rights that are otherwise entrenched in everyday life more meaningful to a prisoner whose capacity to exercise his constitutional rights is far more tenuous.

*Id.* *See also Cutter*, 544 U.S. at 721 n.10 (recognizing the importance of religion in prisoner rehabilitation); 146 CONG. REC. S6689 (daily ed. July 13, 2000) (statement of Sen. Kennedy). In addition to being a core constitutional right, worship can serve as an integral part of the rehabilitation process in correctional facilities. 146 CONG. REC. S6689 (daily ed. July 13, 2000) (statement of Sen. Kennedy). *See* Turner v. Safley, 482 U.S. 78, 89 (1987) (holding that First Amendment claims in the prison context must be reasonably related to the penological interests and that courts should be conscious of the great degree of judicial deference given to prison officials).

For a discussion about how Congress only lightly debated judicial deference and the implications on state sovereignty while considering to enact RLUIPA, see Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 341 (2003) (noting that Congress discussed

is narrower in scope, offering religious protection only to institutionalized persons and in land use, while RFRA applied to all free exercise claims.[30] Under RLUIPA, the government cannot impose a "substantial burden" on an institutionalized person's right to free exercise unless the imposition of that burden furthers a compelling government interest and is done by the least restrictive means.[31] When a

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RLUIPA only in the prison context, but courts have nonetheless applied it to all institutionalized persons). *See also* 146 CONG. REC. S7991 (daily ed. Sept. 5, 2000) (statement of Sen. Thurmond). Only Senator Strom Thurmond raised potential concerns that RLUIPA was inconsistent with federalism principles and could potentially lessen judicial deference to prison officials. *Id*. *See generally* Strutton v. Meade, No. 4:05CV02022 ERW, 2008 WL 4534015 (E.D. Mo. Sept. 30, 2008) (dismissing a RLUIPA claim against a sexual offender treatment center); Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1223 (11th Cir. 2005) (presenting a RLUIPA claim brought on behalf of Terry Schiavo while she was incapacitated and only kept alive by life support); Jennifer D. Larson, Note, *RLUIPA, Distress, and Damages*, 74 U. Chi. L. Rev. 1443, 1451 n.63 (2007) (noting that only one published opinion, *In re* L.A., 912 A.2d 977 (Vt. 2006), was brought on behalf of a person in a mental institution).

[30] *Compare* 42 U.S.C. § 2000cc (stating that RLUIPA applies to institutionalized persons), *with id*. § 2000bb(b)(1) (stating the purpose of RFRA is to apply to all free exercise claims). *See* 146 CONG. REC. S7778 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). Initially the House proposed much more sweeping legislation dubbed the Religious Liberty Protection Act ("RLPA"), but it stalled in the Senate because of constitutional fears. *Id*. RLPA was essentially the same as RFRA, but Congress used its authority under the Spending and Commerce Clauses as opposed to its Section Five power. *Id*. (citing Religious Liberty Protection Act, H.R. 1691, 106th Cong. § 2(a)(1)–(2) (1999)). RLPA raised concerns, however, that it would supersede certain civil rights, namely those related to employment and housing. *Id*. In addition, serious questions surrounded whether RLPA was valid under Congress's spending or commerce power considering RLPA's broad application. *Id*. *See also* Jennifer Dorton, Note, *The Religious Liberty Protection Act: The Validity of Using Congress Commerce and Spending Powers to Protect Religion*, 48 CLEV. ST. L. REV. 389, 394 (2000) (arguing that RLPA could have been in danger of being coercive because it applied to *any* program that received federal assistance) (emphasis added); Michael Paisner, Note, Boerne *Supremacy: Congressional Responses to* City of Boerne v. Flores *and the Scope of Congress's Article I Powers*, 105 COLUM. L. REV. 537, 545 (2005) (stating that RLUIPA, by not extending as far as RFRA and RLPA, was a political compromise to appease those concerned with the civil rights implications of RLPA while avoiding the constitutional flaws of RFRA.). Dorton, *supra*, at 395–96. Congress likely exceeded its commerce power by not limiting the application of RLPA to actions that substantially affected interstate commerce. *Id*. *See generally infra* Part II.B. (discussing the factors necessary for valid Spending and Commerce Clause legislation).

[31] 42 U.S.C. § 2000cc-1(a). The relevant provision of institutionalized persons reads:

> 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 1997 of this title, 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.

violation occurs, the plaintiff may obtain "appropriate relief" from the government.[32] The statutory language of RLUIPA is to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [its] terms . . . and the Constitution."[33] Before RLUIPA can protect the religious rights of institutionalized persons, however, it must first be a valid constitutional act of Congress.[34]

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*Id*. The burden on the government under RLUIPA is the exact same burden RFRA demands of the federal government. *Compare id*., *with id*. § 2000bb-1(b). *See generally* Aaron K. Block, Note, *When Money is Tight, is Strict Scrutiny Loose?: Cost Sensitivity as a Compelling Governmental Interest Under the Religious Land Use and Institutionalized Persons Act of 2000*, 14 TEX. J. C.L. & C.R. 237 (2009) (arguing that avoiding increased cost to accommodate religious practice should not qualify as a compelling government interest); Scott Budzenksi, Comment, *Tug of War: The Supreme Court, Congress, and the Circuits – The Fifth Circuit's Input on the Struggle to Define a Prisoner's Right to Religious Freedom in* Adkins v. Kaspar, 80 ST. JOHN'S L. REV. 1335 (2006) (noting that the circuits are split as to the exact standard of "substantial burden" in RLUIPA claims, and the Supreme Court has denied resolving the issue).

[32] 42 U.S.C. § 2000cc-2(a). *See* 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady). The report prepared by the House Committee on the Judiciary said:

> [RLUIPA's judicial relief] tracks RFRA, creating a private cause of action for damages, injunction, and declaratory judgment, and a defense to liability. These claims and defenses lie against a government, but the Act does not abrogate the Eleventh Amendment immunity of states. In the case of violation by a state, the Act must be enforced by suits against state officials or employees.

*Id*. *See also infra* Part II.C.1 (discussing whether "appropriate relief" is clear enough language to place a state on notice to subject it to claims of monetary damages by accepting federal funds).

[33] 42 U.S.C. § 2000cc-3(g). *See also* Walls v. Schriro, No. CV 05-2259-PHX-NVW, 2008 WL 2463671, at *4 (D. Ariz. June 16, 2008) (stating that RLUIPA is construed broadly in favor of prisoners); Starr v. Cox, No. 05-cv-368-JD, 2008 WL 1914286, at *7 (D.N.H. Apr. 28, 2008) (noting the phrase "religious exercise" is to be construed liberally).

[34] *See infra* Part II.B (discussing Congress's authority to pass RLUIPA). *See also Cutter*, 544 U.S. at 720–23. In *Cutter*, the Supreme Court reviewed RLUIPA under the Establishment Clause of the First Amendment, finding it constitutional; however the Court did not address the constitutionality of RLUIPA as a valid exercise of Congress's Spending or Commerce Clause authority. *Id*. The Court found RLUIPA to be compatible with the Establishment Clause because it alleviates government-created burdens on prisoners' rights to practice religion, and it does not differentiate between certain religions. *Id.* Moreover, RLUIPA does not place accommodating prisoners' religious beliefs over the need to maintain safety and order. *Id*. at 722–23. *See also* Michael Keegan, *The Supreme Court's "Prisoner Dilemma:" How* Johnson, *RLUIPA, and* Cutter *Re-Defined Inmate Constitutional Claims*, 86 Neb. L. Rev. 279, 306–12 (2007) (discussing the circuit split resolved by the *Cutter* decision); Morgan F. Johnson, Comment, *Heaven Help Us: The Religious Land Use and Institutionalized Persons Act's Prisoners Provisions in the Aftermath of the Supreme Court's Decision in* Cutter v. Wilkinson, 14 AM. U. J. GENDER SOC. POL'Y & L. 585, 599–601 (2006) (arguing that the Court's free exercise analysis under RLUIPA will only lead to excessive litigation and threats to institutional order).

*B. Congressional Authority to Enact RLUIPA*

Mindful of the constitutional shortcomings of RFRA, Congress used two Article I powers, the Spending[35] and Commerce[36] Clauses, to enact RLUIPA.[37] The religious liberty provisions of RLUIPA apply when a "substantial burden is imposed in a program or activity that receives Federal financial assistance" or when "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes."[38] All circuits

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[35] U.S. CONST. art. I, § 8, cl. 1. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." *Id*. *See* South Dakota v. Dole, 483 U.S. 203, 207–11 (1987) (outlining the requirements for valid spending clause legislation). The *Dole* requirements are: (1) the exercise of spending power must be done for the general welfare of the people; (2) the terms and conditions must be unambiguously stated; (3) the conditions must have some relationship to the federal spending; (4) the conditions cannot violate another constitutional provision; and (5) the conditions offered by Congress cannot be so coercive as to transform pressure into compulsion. *Id*.

[36] U.S. CONST. art. I § 8, cl. 1, 3. "The Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" *Id*. *See also* United States v. Morrison, 529 U.S. 598, 608–09 (2000). Under this power Congress may regulate three categories:

> First, Congress may regulate the use of the channels of interstate commerce. 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. Finally, Congress' 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 609 (quoting United States v. Lopez, 514 U.S. 549, 558–59 (1995)) (citations and quotations omitted). Only the final category is relevant to RLUIPA. *Id*.; Heather Guidry, Comment, *If at First You Don't Succeed . . . : Can the Commerce Clause and Spending Clause Support Congress's Latest Attempt at Religious Freedom Legislation?*, 32 CUMB. L. REV. 419, 434 (2001) (stating that "the activity regulated is not itself inherently commercial, but the statute's provisions limit it to regulation of specific policies that have a commercial effect").

[37] *See* 42 U.S.C. § 2000cc-1(b) (stating that RLUIPA applies to any program that receives Federal financial assistance or if the substantial burden would affect commerce among the States, with foreign nations, or with Indian tribes).

[38] *Id*. The first provision invokes the Spending Clause while the second invokes the Commerce Clause. *Id*. "[P]rogram or activity" is defined as "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government." *Id*. § 2000d-4a(1)(A). *Cutter*, 544 U.S. at 716 n.4. Every state accepts federal funding for its prisons, thus every state is subject to RLUIPA. *Id*. *See also* Ish Yerushalayim v. U.S. Dep't of Corr., 374 F.3d 89, 92 (2d Cir. 2004) (holding that RLUIPA cannot be enforced against the federal government because RLUIPA "does not create a cause of action against the federal government or its correctional facilities"); Wiley v. Glover, No. 1:05-cv-1156-MEF, 2009 WL 67657, at *1 (M.D. Ala. Jan. 9, 2009) (dismissing a prisoner's RLUIPA claim because he did not invoke the statute in his complaint or amended

that analyzed RLUIPA under the Spending Clause found it valid.[39] As a result, most courts chose not to review RLUIPA's Commerce Clause validity,[40] and only one court fully analyzed RLUIPA under the Commerce Clause.[41]

When the regulated activity is not an instrument of commerce or related to the channels of commerce, four factors are used to decide whether the regulated activity substantially affects interstate commerce: (1) is the activity at which the statute is directed commercial or economic

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complaint). In *Wiley*, the prisoner challenged the defendant's conduct under RFRA. *Id.* at *1 n.1. The court ruled that prison officials were state actors and, even if the complaint was construed to include RFRA, the prisoner had no basis for relief. *Id.* at *1.

[39] Madison v. Virginia, 474 F.3d 118, 124 (4th Cir. 2006); Cutter v. Wilkinson, 423 F.3d 579, 584–90 (6th Cir. 2005); Benning v. Georgia, 391 F.3d 1299, 1305–09 (11th Cir. 2004); Charles v. Verhagen, 348 F.3d 601, 607–11 (7th Cir. 2003); Mayweathers v. Newland, 314 F.3d 1062, 1066–70 (9th Cir. 2002). *See also* Keegan, *supra* note 34, at 317–324 (supporting RLUIPA as valid under the Spending Clause); Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 590–98 (2005) (same). *But see Cutter*, 544 U.S. at 727 n.2 (Thomas, J., concurring) (stating that RLUIPA may well exceed Congress's authority under the Spending or Commerce Clause); Benjamin D. Cramer, Comment, *Can Congress Buy RLUIPA's Way to Constitutional Salvation?*, 55 CASE W. RES. L. REV. 1073, 1085–86 (2005) (arguing that RLUIPA would fail the *Dole* test because the conditions are not sufficiently related to spending and it could be coercive).

[40] *See Madison*, 474 F.3d at 126 n.1 (recognizing that by holding RLUIPA a valid exercise of Congress's spending power, no need existed to decide whether Congress exceeded its commerce power); *Benning*, 391 F.3d at 1304 (finding the court did not need to resolve both a Spending Clause and Commerce Clause challenge to legislation "so long as Congress validly exercised either source of authority"); *Charles*, 348 F.3d at 609 (stating that the court does not need to involve itself with the Commerce Clause); *Mayweathers*, 314 F.3d at 1068 n.2 (finding RLUIPA valid under the Spending Clause and not deciding the issue under the Commerce Clause). *See also* Gerhardt v. Lazaroff, 221 F. Supp. 2d 827, 839 (S.D. Ohio 2002) (surpassing Commerce Clause analysis in favor of the Spending Clause due to the ensuing difficulty). "[T]he Commerce Clause issues are the more difficult, requiring substantial construction of the statutory language and raising serious questions about the relationship between the internal operation of state prisons and interstate commerce." *Id*. *See generally* Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 354 (2d Cir. 2007) (citing the use of the jurisdictional element that allows for a case-by-case analysis to determine if the activity in question affects interstate commerce). For the land use provision of RLUIPA, the Second Circuit concluded it was a valid exercise of congressional power under the Commerce Clause. *Id.* at 354.

[41] Daker v. Ferrero, 475 F. Supp. 2d 1325, 1342–47 (N.D. Ga. 2007). *See Cutter*, 423 F.3d at 582. According to the Sixth Circuit, if the only jurisdictional basis for RLUIPA is the Commerce Clause, prison officials would have the affirmative defense that the substantial burden imposed did not have a substantial effect on interstate commerce. *Id*. *See also* Lara A. Berwanger, Note, *White Knight?: Can the Commerce Clause Save the Religious Land Use and Institutionalized Persons Act?*, 72 FORDHAM L. REV. 2355, 2391–95 (2004) (noting that the relation of the Commerce Clause to the land use portion of RLUIPA has attracted more attention).

in nature?;[42] (2) does the statute have a jurisdictional element limiting applicability to only situations when it substantially affects interstate commerce?;[43] (3) what are the congressional findings regarding the effects of the prohibited activity on interstate commerce?;[44] and (4) is the link between the prohibited conduct and a substantial effect on interstate commerce attenuated?[45]

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[42] *See* United States v. Lopez, 514 U.S. 549, 551, 558–60 (1995) (holding that the activities regulated by the Gun Free School Zones Act ("GFSZA") were not commercial and did not substantially affect interstate commerce). The GFSZA did not regulate commerce or any other sort of economic enterprise as "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id*. at 567. *See* United States v. Morrison, 529 U.S. 598, 610–17 (2000) (holding that criminal, non-economic conduct cannot substantially affect interstate commerce through its aggregate effect). The Court struck down the civil remedy provision in the Violence Against Women Act ("VAWA"). *Id*. at 627. Gender-motivated crime certainly had a substantial effect on interstate commerce, but the activity regulated was purely criminal. *Id*. at 615. To allow Congress to regulate non-economic activity based on its aggregate affect would essentially allow Congress to regulate every violent crime. *Id*. *See also* Wickard v. Filburn, 317 U.S. 111, 117–18, 129 (1942) (holding that Congress can regulate all members of a class of activities economic in nature that substantially affects interstate commerce, even those members who have a trivial effect). The Court in Wickard considered the Agricultural Adjustment Act ("AAA") that regulated personal wheat production. *Id.*

[43] *See Lopez*, 514 U.S. at 561 (explaining that a jurisdictional element could have saved the GFSZA). Jurisdictional elements limit application only to situations that have a connection or effect on interstate commerce. *Id*. *See, e.g.*, United States v. Maxwell, 446 F.3d 1210, 1218 (11th Cir. 2006) ("[W]here a jurisdictional element is required, a meaningful one, rather than a pretextual incantation evoking the phantasm of commerce, must be offered.") (internal citation and quotation marks omitted); Jones v. United States, 529 U.S. 848, 859 (2000) (unanimously finding that a federal statute concerning arson that included a jurisdictional hook applied only in situations when the arson substantially affected interstate commerce); United States v. Rodia, 194 F.3d 465, 472–73 (3d Cir. 1999) (rejecting an absolute rule that a jurisdictional element preserves constitutionality).

[44] *Lopez*, 514 U.S. at 561–62. In situations where Congress does not establish a jurisdictional element, the Court is to look to congressional findings for a potential link between the regulated action and interstate activity. *Id*. When the *Lopez* Court looked, it found nothing. *Id*. at 562. *See Morrison*, 529 U.S. at 615. Like the GFSZA, VAWA had no jurisdictional element, but unlike the situation in *Lopez*, Congress made numerous findings pertaining to the adverse effects on interstate commerce by gender-motivated violence. *Id*. In *Morrison*, the Court appeared to place emphasis on the first and fourth factors because congressional findings alone were not enough to sustain the constitutionality of Commerce Clause legislation. *Id*. at 611–13.

[45] *Lopez*, 514 U.S. at 567. The Court had no interest "to pile inference upon inference" to find a substantial effect. *Id*. *See* United States v. Patton, 451 F.3d 615, 629 (10th Cir. 2006) (finding that possession of body armor was more attenuated than the circumstance in *Lopez* because it was not a threatening act affecting commerce, but was used in self-defense). *Lopez*, 514 U.S. at 567. The *Lopez* Court continued, "[a]dmittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action." *Id*. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (stating that Congress need only "a rational basis for finding that racial discrimination by motels

The *Daker* court examined whether RLUIPA regulated an activity that substantially affects interstate commerce and answered the first factor in the negative, determining that the activity was non-economic and thus its aggregate effect on interstate commerce could not be considered.[46] The court reasoned that RLUIPA protected free exercise of religion by prohibiting unjustifiable interference with the religious practice of institutionalized persons, and did not regulate economic activity.[47] Even with a jurisdictional hook, the *Daker* court found the

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affected commerce"). *See also Morrison*, 529 U.S. at 614. Congressional findings is one method to find a rational basis, but the *Morrison* Court seemingly ended such practice by stating that "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question." *Id*. (quoting *Heart of Atlanta Motel*, 379 U.S. at 273 (Black, J., concurring) (alteration in original) (internal quotations omitted)). *See* generally Arthur B. Mark III, *Currents in Commerce Clause Scholarship Since* Lopez*: A Survey*, 32 CAP. U. L. REV. 671 (2004) (detailing the Supreme Court's Commerce Clause jurisprudence and scholarship since *Lopez*); Ronald D. Rotunda, *The Implications of the New Commerce Clause Jurisprudence: An Evolutionary or Revolutionary Court?*, 55 ARK. L. REV. 795 (2003) (debating whether the curtailing of congressional power under the Commerce Clause is desirable or not and the larger implications concerning federalism by doing so).

[46] *Daker*, 475 F. Supp. 2d at 1345. *See* United States v. Guzman, 582 F. Supp. 2d 305, 315 (N.D.N.Y. 2008) (finding the Sex Offender Registration and Notification Act ("SORNA") unconstitutional under the Commerce Clause); Karen S. Schuller, Note, North Carolina v. Bryant*: Paving the Way for a Comprehensive National Sex Offender Registry*, 30 N.C. CENT. L. REV. 75, 93–96 (2007) (discussing the requirements of SORNA and praising it for establishing a uniform, comprehensive requirement for sex offenders to register). SORNA, 42 U.S.C. § 16913 (2006), creates a federal duty for a registered sex offender to update information about where the offender resides, is employed, and is a student. Schuller, *supra*, at 93. An offender who travels in interstate commerce and knowingly fails to update the registry can face ten years in prison. *Id*. at 95; *Guzman*, 582 F. Supp. 2d at 312. In finding SORNA unconstitutional, the *Guzman* court first noted that it did not regulate activity that was economic in nature nor could the duty to register be construed as a commercial activity as its stated purpose was to "protect the public from sex offenders and offenders against children." *Id.* at 312 (quoting 42 U.S.C. § 16901 (2006). In addition, SORNA lacked any jurisdictional hook and did not provide any congressional findings about the affect of sex offender registration on interstate commerce. *Id*. Lastly, like *Lopez*, the criminal activity had too tenuous a connection to substantially affect interstate commerce. *Id*. at 312. *See* United States v. Thomas, 534 F. Supp. 2d 912, 920 (N.D. Iowa 2008) (finding SORNA unconstitutional under the Commerce Clause because unlike Section 2250(a), SORNA applies to sex offenders that cross and never cross state lines); United States v. Powers, 544 F. Supp. 2d 1331, 1335 (M.D. Fla. 2008) (holding that the jurisdictional hook was insufficient because it failed to establish a nexus between the crime and interstate commerce). *But see* United States v. Hinen, 487 F. Supp. 2d 747, 757–58 (W.D. Va. 2007) (reading Section 2250(a) to act as a jurisdictional hook to limit the applicability of SORNA to only those sex offenders who crossed state lines, and thus was constitutional).

[47] *Daker*, 475 F. Supp. 2d at 1345. By its terms, RLUIPA, according to the court, had nothing to do with commerce. *Id*. Interestingly, the court offered hypothetical versions of RLUIPA that would constitute a regulation of economic activity:

> [A]n affirmative obligation imposed by RLUIPA, such as requiring prison officials to make an accommodation to prisoners with religious

conduct regulated by RLUIPA did not have a substantial effect on interstate commerce and suggested its effect would be attenuated.[48] The

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> dietary requests, could be potentially viewed as compelling an "economic" activity—*i.e.*, the purchasing of specialty foods. Or, . . . a restriction on the mailing of a religious publication may arguably be characterized as "economic," by restricting or giving effect to an interstate transaction in religious material.

*Id*. at 1345 n.10. The court noted that its focus was on the activity directly regulated by the statute and that it should not decide the matter by hypothesizing certain situations. *Id*. *See* Baranowski v. Hart, 486 F.3d 112, 125–26 (5th Cir. 2007). The financial impact of dietary requests can be quite substantial, such that prisons officials have a substantial interest in denying them in order to control costs because no alternative or lesser means exist to keep budgets low. *Id*. *See also* Adams v. Mosley, No. 2:05cv352-MHT, 2008 WL 4369246, at *10–12 (N.D. Ala. Sept. 25, 2008) (Native American required the smoking of tobacco); Jones v. Rieben, No. 2:04cv1029-MHT, 2008 WL 4080360, at *6–7 (M.D. Ala. Sept. 2, 2008) (requesting a religious feast); Johnson v. Martin, 223 F. Supp. 2d 820, 829 (W.D. Mich. 2002) (holding that RLUIPA regulated the free exercise of religion, which was objectively an interstate activity).

Many RLUIPA claims have commercial undertones, while the *Johnson* court further noted the economic impact of religion:

> [F]ree 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.

*Johnson*, 223 F. Supp. 2d at 829. The *Johnson* court relied on the principle that religious organizations engage in and affect interstate commerce. *Id*. (citing Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 584–86 (1997) (holding that non-profit agencies were major participants in interstate markets and were significant contributors)). *But see* Longoria v. Dretke, 507 F.3d 898, 904 (5th Cir. 2007) (upholding the prison's grooming policy that forced inmates to cut their hair to a certain length for safety purposes); Marr v. Foy, No. 1:07-cv-908, 2008 WL 5111849, at *1 (W.D. Mich. Dec. 3, 2008) (rejecting prisoner's request to have his Kosher diet exclusively prepared in another room); Muhammad v. Crosby, No. 4:05cv193-WS, 2008 WL 2229746, at *15–16 (N.D. Fla. May 29, 2008) (rejecting/allowing prisoner's requests for Islamic clothing and a Qibla compass and granting/denying permission to un-tuck his shirt from his pants and take showers outside of the cell).

[48] *Daker*, 475 F. Supp. 2d at 1346–47. The court rejected any rational basis for finding that the behavior regulated by RLUIPA alone could substantially affect interstate commerce because of the nature of the regulated activity. *Id*. at 1346–48. *See* Mayweathers v. Terhune, No. CIVS961582LKKGGHP, 2001 WL 804140, at *8 (E.D. Cal. July 2, 2001) ("The jurisdictional element . . . thereby ensures that Congress' Commerce Clause power is only exercised in those cases where interstate commerce is directly affected by the prison regulation at issue."). *But see generally* Guidry, *supra* note 36, at 425–49 (arguing that RLUIPA regulates non-economic activity, but the jurisdictional hook limits its scope to economic-affecting activity). According to Guidry, situations concerning requests for religious diet, religious articles, and religious literature will be able to employ the aggregate effects test. *Id*. at 441–46. However, requests for growth of hair and beards will not, and religious ceremonies and interstate travel by family members are gray areas. *Id*. at 446–49.

*Daker* court made no mention of congressional findings because no specific findings existed.[49] Next, the court determined RLUIPA was not part of a larger, comprehensive market.[50] Aside from the Commerce

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[49] *See* 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). Congress never made specific findings, but envisioned the jurisdictional hook to apply in situations when the burden prevents economic transactions in commerce, such as construction projects, purchase or rental of a building, or an interstate shipment of religious goods. *Id*. Congress stated that the aggregate of such transactions was "obviously substantial." *Id*. *See also* Paisner, *supra* note 30, at 577–78 (suggesting that Congress did not make any specific findings because it assumed the jurisdictional element would ensure conformity within the limits of its commerce power).

[50] *Daker*, 475 F. Supp. 2d at 1344–45. "RLUIPA stands alone—enacted out of concern for the protection of religious expression on federal land and in prison institutions—and not as part of a greater scheme to regulate the sale of a commercial good or service." *Id*. at 1346. *See* Gonzales v. Raich, 545 U.S. 1, 9 (2005) (holding that Congress can constitutionally regulate the intrastate medicinal use of marijuana). Congress, according to the Court, possesses the ability to regulate "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id*. at 26. In addition, the *Raich* Court opened the door for the regulation of non-economic activity that does not substantially affect interstate commerce if the activity is part of a larger, more comprehensive market, such as the national market. *Id*. at 17. The Court distinguished *Raich* from *Lopez* and *Morrison* by arguing that the CSA directly regulated "quintessentially" economic and commercial activity while those cases addressed non-economic activity that was not part of a larger regulatory scheme. *Id*. at 25. The determining factor is whether the larger, comprehensive scheme is economic, not whether the regulated intrastate activity is economic in nature. *Id*. *See* Jonathan H. Adler, Symposium, *Federalism After* Gonzalez v. Raich, *Is* Morrison *Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 764 (2005) (explaining that *Raich* relied heavily on *Wickard*, but not even *Wickard* employed such an expansive approach).

*See* John T. Parry, Symposium, *Federalism After* Gonzalez v. Raich, "*Society Must be [Regulated]": Biopolitics and the Commerce Clause in* Gonzales v. Raich, 9 LEWIS & CLARK L. REV. 853, 859–60 (2005). The *Raich* Court relied heavily on the precedent established in *Wickard* and, in the process, renewed faith in the *Wickard* test while casting serious doubts as to the holdings of *Lopez* and *Morrison*:

> *Wickard* is the heart of Commerce Clause doctrine, while *Lopez* and *Morrison* are, if not outliers, at least cases that merely police the outer boundaries of the doctrine to ensure that Congress is regulating economic activity in the broad sense defined by *Raich*, which includes production, distribution, possession, or consumption of a commodity that moves in interstate commerce or that either effects interstate commerce or effects the regulation of interstate commerce.

*Id*. As a result, Congress may not constitutionally regulate a certain activity standing alone, but Congress may regulate that activity through the larger comprehensive regulatory scheme. *Id*. at 862. In other words, "the more Congress regulates, the more it can regulate." *Id*. *See also* Adler, *supra*, at 764–65. For example:

> A comprehensive federal regulatory scheme governing commercial day-care services could justify regulating childcare in the home. A comprehensive regulatory scheme governing prepackaged frozen dinners could justify regulating domestic food preparation. A comprehensive regulatory scheme governing land sales could justify the complete displacement of local zoning.

Clause analysis, another question raised in *Daker*, which is at the heart of RLUIPA challenges and has yet to be definitively answered, concerns the type of damages that are available to prevailing plaintiffs.

*C. Availability of Damages*

RLUIPA's legislative history suggests that Congress intended to create a private cause of action against state officials or employees, but did not wish to abrogate the states' Eleventh Amendment immunity by opening them to suit.[51] Nonetheless, numerous plaintiffs have sought damages in RLUIPA challenges against state officials in their official or individual capacities.[52] Here, determining whether RLUIPA is

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*Id*. Home childcare and domestic food preparation are not economic activities. *Id*. at 764. *But see* Douglas F. Kmiec, Gonzales v. Raich*:* Wickard v. Filburn *Displaced*, 2005 CATO SUP. CT. REV. 71, 72 , 92 (2005) (arguing that *Raich* has pushed *Wickard* to the "outer limit" of federal power by giving too much deference to Congress).

[51] 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady). *See* U.S. CONST. amend. XI. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id*. *See Hans v. Louisiana*, 134 U.S. 1, 10–11 (1890). Since *Hans v. Louisiana*, states have been immune from suits by both their own citizens and citizens from other states. *Id*. *See Ex parte* Young, 209 U.S. 123, 149 (1908). The *Ex parte Young* exception allows state officers to be sued for injunctive relief that will enjoin official state action, but does not allow for monetary damages. *Id*. *See also* CHEMERINSKY, *supra* note 16, at 201 n.122 (noting that several cases in the Nineteenth Century held that the Eleventh Amendment did not preclude suits against state officials). Exceptions exist, however, that allow a citizen to sue a government official in federal court. *Id*. at 201–03. Another way to circumvent the Eleventh Amendment is to sue a state official in his or her individual capacity. *Id*.

[52] *See* Yates v. Painter, 306 F. App'x 778, 779 (3d Cir. 2009) (asking for $50,000 in punitive damages and $10,000 in compensatory damages from each of the thirteen defendants); Porter v. Jones, No. 5:06cv178-MTP, 2009 WL 198945, at *1 (S.D. Miss. Jan. 27, 2009) (requesting compensatory and punitive damages in the amount of $2000 from each defendant); Rust v. Neb. Dep't of Corr. Servs. Religion Study Comm., No. 4:08CV3185, 2008 WL 5109763, at *1 (D. Neb. Dec. 1, 2008) (seeking $10,000 for RLUIPA violations). *See also* 42. U.S.C. § 1997e(e) (2006).

Also, limiting the availability of damages is the Prison Litigation Reform Act of 1995 ("PLRA"), which bars claims of damages for mental and emotional distress without physical injury. *Id*. *See also* Larson, *supra* note 29 (arguing that PLRA should not bar claims for compensatory damages for the loss of free exercise rights). Before PLRA, First Amendment violations allowed recovery of compensatory damages, but the judicial application of PLRA has nearly eliminated the availability of damages for violations of those rights. *Id*. at 1470. According to Larson, even though RLUIPA creates a statutory right, a RLUIPA deprivation should be treated as a First Amendment loss of free exercise. *Id*. RLUIPA plaintiffs bring claims for the deprivation of their free exercise rights that cause actual injury, such as the loss of opportunity, or the deprivation of the right of free exercise. *Id*. For such injuries, PLRA should not bar damages because claims of mental and emotional distress are connected or identifiable to the free exercise loss. *Id*. While the Supreme Court does not allow damages to be awarded for the loss of abstract rights, it does

allow damages of specific losses, such as the loss of worship services or sacred objects. *Id*. Moreover, if PLRA is read to prohibit damages when no physical injury occurs, then isolated RLUIPA violations that are not likely to recur will have no remedy. *Id*. at 1471. Predictably, the circuits are split on the issue of PLRA as applied to RLUIPA. *Id*. at 1455–59; Corbett H. Williams, Note, *Evisceration of the First Amendment: The Prison Litigation Reform Act and Interpretation of 42 U.S.C. § 1997e(e) in Prisoner First Amendment Claims*, 39 LOY. L.A. L. REV. 859, 864–81 (2006) (describing the circuit split of PLRA to First Amendment claims in general). *See also* Mayfield v. Tex. Dep't of Criminal Justice, 529 F.3d 599, 605 (5th Cir. 2008) (finding that PLRA prohibits damages under RLUIPA claims unless physical injury is shown); Koger v. Bryan, 523 F.3d 789, 804 (7th Cir. 2008) (holding that PLRA limits the availability of compensatory and punitive damages, but nominal damages could be available); Smith v. Allen, 502 F.3d 1255, 1271 (11th Cir. 2007) (same). *But see* Porter v. Caruso, No. 1:05-cv-562, 2008 WL 3978972, 9–10 (W.D. Mich. Aug. 22, 2008) (finding that punitive damages can be appropriate for mental or emotional injury). *See, e.g.*, Thomas v. Parker, No. CIV-07-599-W, 2008 WL 2894842, at *20 (W.D. Okla. July 25, 2008).

Often RLUIPA claims are accompanied by Section 1983 claims for damages against officials in their individual capacities for violations of the First Amendment right to free exercise. *Id*. *See* 42 U.S.C. § 1983 (2006) (barring any person acting under the color of state law to cause a person's deprivation of any of the rights guaranteed by the Constitution and its laws). RLUIPA, however, forecloses Section 1983 claims because it creates its own remedial scheme. *Thomas*, 2008 WL 2894842, at *20 n.34 (citing City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005)) (stating that where Congress created a separate statutory remedy, recovery under Section 1983 was normally precluded). *See* West v. Atkins, 487 U.S. 42, 48 (1988). In addition, Section 1983 claims require a different constitutional standard than claims under RLUIPA. *Id*. "To state a claim under [Section] 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *Id*. *See* Lovelace v. Lee, 472 F.3d 174, 186 (4th Cir. 2006). A claim under Section 1983 requires First Amendment analysis, while the same claim under RLUIPA requires a more stringent standard as set forth in the statute. *Id*. RLUIPA requires a "more searching standard of review of free exercise burdens than the standard used in parallel constitutional claims: strict scrutiny instead of reasonableness." *Id*. (internal citations omitted). First Amendment claims in the prison context must be reasonably related to the penological interests and are analyzed under the *Turner* test:

> (1) whether there is a "valid, rational connection" between the prison regulation or action and the interest asserted by the government, or whether this interest is "so remote as to render the policy arbitrary or irrational"; (2) whether "alternative means of exercising the right . . . remain open to prison inmates," an inquiry that asks broadly whether inmates were deprived of all forms of religious exercise or whether they were able to participate in other observances of their faith; (3) what impact the desired accommodation would have on security staff, inmates, and the allocation of prison resources; and (4) whether there exist any "obvious, easy alternatives" to the challenged regulation or action, which may suggest that it is "not reasonable, but is [instead] an exaggerated response to prison concerns.

*Lovelace*, 472 F.3d at 200 (quoting Turner v. Safley, 482 U.S. 78, 89–92 (1987)) (alteration in original). If prison officials fail to produce evidence that a policy or action stemmed from a legitimate penological justification, the court will rule in favor of the inmate. *Id*. *See* Salahuddin v. Goord, 467 F.3d 263, 275 (2d Cir. 2006) (explaining that prison officials could not justify forcing Shi'ite and Sunni Muslims to conduct Ramadan ceremonies jointly for the legitimate penological concerns of security, space, fiscal concerns, and staffing

applicable to the states through the Commerce or Spending Clauses and whether the statute contains a sovereign immunity waiver dictates what types of damages are available.[53] Thus, alternative views towards damages in official capacity claims are discussed first followed by the almost universally accepted bar against damages in individual capacity claims.[54]

1. Damages in Official Capacity Claims

Judicial decisions concerning the availability of monetary damages under RLUIPA in official capacity claims lack consistency.[55] On one hand, the majority of courts, including the Third, Fourth, Fifth, Sixth, and Seventh Circuits, hold the language of RLUIPA is ambiguous and does not unequivocally condition acceptance of federal funds as a waiver of a state's consent to suit for monetary damages.[56] On the other, those in the minority, including the Eleventh Circuit, hold the phrase "appropriate relief" to clearly condition a state's waiver of Eleventh

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limitations without presenting evidence that separate ceremonies would implicate these penological interests). *See also* Mitchell v. Dep't of Corr., No. CV-07-0107-LRS, 2008 WL 4527863, at *4 (E.D. Wash. Oct. 3, 2008) (stating that an action that passed constitutional muster may not pass under RLUIPA, but if the action was valid under RLUIPA it must be constitutionally valid). *See generally supra* Part II.A (discussing the strict scrutiny standard established by RLUIPA).

53 *See supra* Part II.A (discussing congressional authority under the Spending and Commerce Clauses).

54 *See infra* Part II.B.1 (discussing current positions towards damages in the official capacity); Part II.B.2 (discussing damages in the individual capacity).

55 Smith v. Allen, 502 F.3d 1255, 1270 (11th Cir. 2007) ("To put it mildly, 'there is a division of authority' on this question." (quoting Madison v. Virginia, 474 F.3d 118, 130 n.3 (4th Cir. 2006))). *See also Caruso*, 2008 WL 3978972, at *3 (noting "no consensus" among the circuits on whether accepting federal prison funds amounts to a waiver); Farrow v. Stanley, No. Civ.02-567-PB, 2005 WL 2671541, at *11 n.13 (D.N.H. Oct 20, 2005) (observing that "[t]here is substantial uncertainty, however, as to whether this language even provides a right to money damages"); Sisney v. Reisch, 533 F. Supp. 2d 952, 967 (D.S.D. 2008) (noting "wide division" on the issue).

56 Nelson v. Miller, 570 F.3d 868, 883–85 (7th Cir. 2009); Cardinal v. Metrish, 564 F.3d 794, 798–801 (6th Cir. 2009); Sossamon v. Texas, 560 F.3d 316, 329–31 (5th Cir. 2009); Scott v. Beard, 252 F. App'x 491, 492–93 (3d Cir. 2007); *Madison*, 474 F.3d at 129–31; Sokolsky v. Voss, No. 1:07 CV-00594 SMM, 2009 WL 2230871, at *4–6 (E.D. Cal. July 24, 2009); *Caruso*, 2008 WL 3978972, at *7; Grady v. Holmes, No. 07-cv-02251-EWN-CBS, 2008 WL 3539274, at *2–3 (D. Colo. Aug. 12, 2008); Pugh v. Goord, 571 F. Supp. 2d 477, 506–09 (S.D.N.Y. 2008); Sharp v. Johnson, No. 00-2156, 2008 WL 941686, at *19 (W.D. Pa. Apr. 7, 2008); Agrawal v. Briley, No. 02 C 6807, 2006 WL 3523750, at *6–9 (N.D. Ill. Dec. 6, 2006); James v. Price, No. 2:03-CV-0209, 2005 WL 483443, at *2 (N.D. Tex. Mar. 2, 2005) (stating that the State of Texas, by statute, refused to waive immunity from monetary claims). *See generally Sisney*, 533 F. Supp. 2d at 969–70 (listing courts that ruled the Eleventh Amendment barred damages); Larson, *supra* note 29, at 1464 (noting that courts are finding that states only waive immunity to suit, but not monetary damages).

Amendment immunity upon acceptance.[57] RLUIPA authorizes a person to "obtain appropriate relief against a government[.]"[58] On its face, RLUIPA creates a private cause of action against state officials.[59] In a claim against a state official in his or her official capacity, the official can assert defenses available to the state, including Eleventh Amendment immunity.[60] Most important to plaintiffs, damages are paid by the State

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[57] *Allen*, 502 F.3d at 1276; Garrison v. Dutcher, No. 1:07-CV-642, 2008 WL 4534098, at *5 (W.D. Mich. Sept. 30, 2008) (allowing damages in official capacity claims for summary judgment purposes); Jones v. Rieben, No. 2:04cv1029-MHT, 2008 WL 4080360, at 4 (M.D. Ala. Sept. 2, 2008) (following *Allen*); Morris v. Newland, No. CIV S-00-2794 GEB GGH P, 2008 WL 3892103, at *10 (E.D. Cal. Aug. 21, 2008) (suggesting that a bar of monetary relief against individuals is not adequately supported in the case law, but finding that no monetary relief is available when RLUIPA is retroactively applied). Some courts award nominal damages, but no compensatory damages. *See, e.g.,* Fegans v. Norris, 537 F.3d 897, 907 (8th Cir. 2008) (affirming the award of $1,500 in nominal damages); *Mayfield*, 529 F.3d at 606 (allowing only nominal damages); Subil v. Sheriff of Porter County, No. 2:04-CV-0257 PS, 2008 WL 4690988, at *8 (N.D. Ind. Oct. 22, 2008) (finding that damages in the official capacity were available, but only nominal damages in absence of physical injury stating that "if he wins, all he'll get is a dollar"); Shidler v. Moore, No. 3:05-CV-804 RM, 2008 WL 1924910, at 1 (N.D. Ind. Apr. 28, 2008) (allowing individual capacity claims for nominal damages of $1); Shabazz v. Norris, No. 5:03CV00401-WRW/BD, 2007 WL 2819517, at *7–8 (E.D. Ark. Sept. 26, 2007) (allowing claims for monetary damages to proceed but finding that PLRA limited recovery to nominal damages).

[58] 42 U.S.C. § 2000cc-2(a) (2006). *See also id*. § 2000cc-5(4)(A). The term "government" is defined as "(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[.]" *Id*.

[59] *Id*. *See also Madison*, 474 F.3d at 129–31 (finding that the issue of whether the state consented to suit was not the question; rather, the correct inquiry was what forms of relief were available to the plaintiff); Benning v. Georgia, 391 F.3d 1299, 1306 (11th Cir. 2004) ("[The State] was on clear notice that by accepting federal funds for its prisons, [it] waived its immunity from suit under RLUIPA."); Ketzner v. Williams, No. 4:06-CV-73, 2008 WL 4534020, at *28 (W.D. Mich. Sept. 30, 2008) (assuming arguendo that RLUIPA authorized a cause of action for damages).

[60] *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (holding that a suit against a state official in the official capacity was "no different from a suit against the State itself"). *See also* Kentucky v. Graham, 473 U.S. 159, 165–66 (1985). Thus, an official can use Eleventh Amendment immunity in the official capacity, but not in the individual capacity. *Id*.

*See generally* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001) (criticizing the doctrine of sovereign immunity). The origin of sovereign immunity is derived from English law that held "the King can do no wrong" and has long been strictly construed in favor of the sovereign. *Id*. at 1201. *See also* Schillinger v. United States, 155 U.S. 163, 166 (1894). This principle, however, seems to conflict with American jurisprudence that no one, including the government, is above the law. Chemerinsky, *supra*, at 1202. In addition, sovereign immunity violates basic constitutional principles and is often criticized. *Id*. at 1211–12; Marcia L. McCormick, *Federalism Re-Constructed: The Eleventh Amendment's Illogical Impact on Congress' Power*, 37 IND. L. REV. 345 (2004) (arguing that the Court's approach to the Eleventh Amendment makes it difficult for Congress to protect individuals from improper state action). *But see* Roderick M. Hills, Jr., *The Eleventh*

in official capacity claims if RLUIPA serves as a waiver for Eleventh Amendment immunity to monetary relief.[61] The voluntary acceptance of a federal spending program can be a waiver provided that Congress expressed "a clear intent to condition participation . . . on a State's consent to waive its constitutional immunity" ("clear statement doctrine" or "the doctrine").[62] The statute must explicitly include the waiver because consent cannot be given through implication or ambiguous language. [63] Conversely, Congress cannot use its Article I powers, such as its commerce power, to abrogate Eleventh Amendment immunity.[64]

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*Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1225 (2001) (arguing that Eleventh Amendment immunity preserves accountability of government to taxpayers). Damages against the state are not usually paid by or subtracted from the offending program's budget, but are paid through general state funds. *Id.* With injunctions, the agency must decide how to comply, thus reallocating its existing resources. *Id.*

[61] *See* Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1178–84 (2003) [hereinafter *Waivers of Sovereign Immunity*] (explaining the four exceptions to Eleventh Amendment immunity). States have no immunity, however, from suits brought by other states or by the federal government. *Id.* at 1181.

[62] *Madison*, 474 F.3d at 129 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985)). The *Atascadero* Court stated that the clarity needed for a state to waive its immunity had to be "by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." 473 U.S. at 239–40. The Court held that the states did not consent to federal jurisdiction for violations of the Rehabilitation Act by accepting federal funds because the statute's terms were unclear. *Id.* at 240. *See also* Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking about Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 158 (2004) (explaining that this doctrine enjoys virtually unanimous support and even staunch federalists support it).

[63] *Madison*, 474 F.3d at 130 (citing Lane v. Pena, 518 U.S. 187, 192 (1996)). In *Lane*, the Court held that Congress did not draft the Rehabilitation Act with enough clarity to constitute a waiver of the federal government's sovereign immunity against awards of monetary relief and set forth the clarity needed in such a situation:

> A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign. To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims. A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text."

518 U.S. at 192 (citations omitted). In *Lane*, the petitioner sued the United States Merchant Marine Academy for disqualifying him due to his diabetic condition. *Id.* at 189. The damages provision in question stated that the remedies available for violations in Title VI would also be available for violations "by any recipient of Federal assistance or Federal provider of such assistance." *Id.* at 192. The Court found the term "Federal Provider"

The Fourth Circuit, in *Madison v. Virginia*, found that RLUIPA failed to adhere to the clear statement doctrine.[65] In *Madison*, the Fourth Circuit strictly construed the scope of any ambiguities to the benefit of the sovereign.[66] The term "appropriate relief," the Fourth Circuit concluded,

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ambiguous because it could refer to federal funding agencies or other executive agencies that were subject to monetary liability. *Id*. *See also* Richard H. Seamon, *Damages for Unconstitutional Affirmative Action: An Analysis of the Monetary Claims in* Hopwood v. Texas, 71 TEMP. L. REV. 839, 873–77 (1998) (discussing in greater detail the facts and holding of *Lane*).

*See generally* California v. Deep Sea Research, Inc., 523 U.S. 491, 506 (1998) (recognizing that although waiver of federal sovereign immunity is not a waiver of Eleventh Amendment immunity, cases of federal sovereign immunity provide guidance in Eleventh Amendment jurisprudence); United States v. Nordic Vill., Inc., 503 U.S. 30, 33 (1992) (holding that decisions concerning federal sovereign immunity were not binding on Eleventh Amendment immunity issues and vice versa).

64 *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55–57, 59 (1996) (holding that Congress may abrogate Eleventh Amendment immunity through section Five of the Fourteenth Amendment, but not through other federal powers such as the Commerce Clause). The Court in *Seminole Tribe* stated:

> Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

*Id.* at 72–73. *See also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001) (listing examples where courts have rejected Congress's ability to open non-consenting states to suit in federal courts through Article I); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 79 (2000) ("Under our firmly established precedent then, if the [Age Discrimination in Employment Act of 1967] rests solely on Congress' Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers.").

65 474 F.3d at 118–19. In *Madison*, the plaintiff was a Hebrew Israelite and member of Temple Beth El, which required the eating of a kosher diet and the celebration of Passover. *Id*. at 123. Legal action ensued after the local prison officials approved Madison's request for a kosher diet, but the Virginia Department of Corrections overruled the approval citing that the regular, vegetarian, and non-pork prison menus served as adequate alternatives and questioned the sincerity of Madison's religious beliefs. *Id*.

66 *Id.* at 131. The *Madison* court also noted that RLUIPA did not mention monetary relief nor the Eleventh Amendment generally. *Id*. Moreover, the consent to suit is not the same as the consent to monetary damages. *Id*. *See Nordic Vill*., 503 U.S. at 37 (denying recovery of damages under the Bankruptcy Act). "[L]egislative history has no bearing on the ambiguity point . . . [because] the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report." *Id*. *See* S. Elizabeth Gibson, *Congressional Response to* Hoffman *and* Nordic Village*: Amended Section 106 and Sovereign Immunity*, 69 AM. BANKR. L.J. 311, 312–21 (1995) (discussing the events leading to *Nordic Village*). *But see Nordic Vill*., 503 U.S. at 39–46 (1992) (Stevens, J., dissenting) (criticizing the majority's approach of ignoring the legislative history in its analysis of the statutory waiver to sovereign immunity). "The congressional purpose to waive sovereign immunity is pellucidly clear. The Court evaded this conclusion by hypothesizing 'plausible' alternative constructions of the statute, by refusing to consider its legislative history, and by reiterating

was ambiguous in the sense that it could potentially include all forms of relief, but could also be interpreted to exclude monetary damages.[67] Had Congress desired to provide monetary damages, it could have easily expressed that intention.[68]

Shortly after the Fourth Circuit concluded that RLUIPA failed the clear statement doctrine, the Eleventh Circuit found damages available

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the Court's view that waivers of sovereign immunity must be strictly construed." *Id* at 41–42. The majority in *Nordic Village* also recognized this was not an absolute rule considering that the Court had read the "sweeping language" of the Federal Tort Claims Act ("FTCA") to waive sovereign immunity for monetary relief consistent with Congress's clear intent. *Id*. at 34. *See generally* Gibson, *supra*, at 325–47 (discussing the legislative history of the amendment and the constitutionality of the statute in question in *Nordic Village*). After *Nordic Village*, Congress amended the Bankruptcy Act to explicitly abrogate sovereign immunity. *Id*. at 325.

*See* Ruckelshaus v. Sierra Club, 463 U.S. 680, 683 (1983) (defining the term "appropriate" when determining available relief to mean "specially suitable: fit, proper"). The respondents challenged standards promulgated by the Environmental Protection Agency ("EPA"). *Id*. at 681. Even though the respondents lost the challenge, they argued it was appropriate for them to be awarded fees for their contribution towards the goals of the Clean Air Act. *Id*. Under Section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f) (2006), attorney's fees can be awarded "whenever [the court] determines that such an award is appropriate." *Id*. at 681–82 (alteration in original). Awarding fees to the losing party is inconsistent with the normal rules of fee-shifting and doing so would enlarge appropriate relief "beyond what a fair reading of the language of the section requires." *Id*. at 685–86.

[67] *Madison*, 474 F.3d at 132 (labeling "appropriate relief" as "open-ended"); Porter v. Caruso, No. 1:05-cv-562, 2008 WL 3978972, at *5 (W.D. Mich. Aug. 22, 2008) (stating that RLUIPA's text is susceptible to multiple reasonable interpretations); Agrawal v. Briley, No. 02 C 6807, 2006 WL 3523750, at *6–9 (N.D. Ill. Dec. 6, 2006) (holding that RLUIPA did not contain explicit language to waive sovereign immunity). *See Nordic Vill.*, 503 U.S. 30, 34–35 (1992) (holding that the provision in question did not create an unequivocal textual waiver because it allowed for two plausible interpretations: injunctive and declaratory relief or monetary damages); Gary A. v. New Trier High Sch. Dist. No. 203, 796 F.2d 940, 942–43 (7th Cir. 1986) (per curiam) (rejecting the claim that a statute authorizing courts to "grant such relief as the court determines is appropriate" served as a textual waiver for states to consent to suit in federal court); Seamon, *supra* note 63, at 884 (criticizing the requirement for Congress to speak in "crystalline clarity" because it hampered the ability of the courts to protect individuals). *See also* Webman v. Fed. Bureau of Prisons, 441 F.3d 1022, 1026 (D.C. Cir. 2006). So far the D.C. Circuit is the only circuit to confront a similar question concerning the provision in RFRA that allowed for "appropriate relief" against the federal government, concluding the language was "open-ended and equivocal." *Id.*

[68] *Madison*, 474 F.3d at 132. The Fourth Circuit also looked to the Civil Rights Act of 1991 that permitted an aggrieved party "[to] recover compensatory . . . damages." *Id*. at 132 (quoting 42 U.S.C. § 1981a(a)(2) (2006)) (alteration in original). *See* Joseph H. Bredehoft, Note, *Religious Expression and the Penal Institution: The Role of Damages in RLUIPA Enforcement*, 74 MO. L. REV. 153, 162–63 (2009) (summarizing the Fourth Circuit's examination of CRREA as applied to RLUIPA). *See also Agrawal*, 2006 WL 3523750, at *7 (finding that the Seventh Circuit grants a textual waiver only when the federal statute explicitly declares "[a] State shall not be immune" (citing Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Kelly E., 207 F.3d 931, 935 (7th Cir. 2000) (alteration in original))).

against officials in their official capacity in *Smith v. Allen*.[69] First, the *Allen* court found that "appropriate relief" was a clear textual waiver and that by accepting RLUIPA's terms, the state consented to suit.[70] Next, the *Allen* court considered what remedies "appropriate relief" encompassed.[71] The Eleventh Circuit relied heavily upon the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*, which resolved the question of what remedies are available in a private right of action for a sex discrimination claim under Title IX.[72] The Title IX statute did not address what remedies or even if a private right of action was available, but the *Franklin* Court found it appropriate to "presume the availability of all appropriate remedies unless Congress had expressly indicated otherwise."[73] Applying the reasoning in *Franklin* to the

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[69] 502 F.3d 1255, 1270 (11th Cir. 2007). Smith, the Plaintiff, practiced Odinism, an ancient pre-Christian religion also known as Asatru. *Id*. at 1261. Odinists strive to follow the "Nine Noble Virtues": courage, truth, honor, fidelity, discipline, hospitality, industriousness, self-reliance, and perseverance. *Id*. Attaining these virtues requires practicing members to communicate with ancient Norse gods through the study of ancient runes, practicing certain rites on specified days, and observing holidays. *Id*. As a result, Smith made numerous requests, most of which were granted, such as a spot to worship, the ability to wear a Thor's hammer necklace, a small fire in the form of a candle, and formal recognition of Odinism as a valid religion. *Id*. at 1263. The only request denied to Smith was the possession of a small quartz crystal. *Id*. *See also* Odinic Rite: Odinism for the Modern World, Questions and Answers about the OR and Odinism, http://www.odinic-rite.org/qa.htm (last visited Aug. 19, 2009). The Odinic Rite also has a Prison Affair Bureau offering a link to the RLUIPA statute. Odinic Rite, Prison Affairs Bureau, http://www.odinic-rite.org/PAB/ (last visited Aug. 19, 2009).

[70] *Allen*, 502 F.3d at 1275–76. The *Allen* court reaffirmed an earlier Eleventh Circuit decision that found RLUIPA waived Eleventh Amendment immunity. *Id*. at 1276. *See also* Hankins v. N.Y.S. Dep't of Corr. Servs., No. 9:07-CV-0408 (FJS/GHL), 2008 WL 2019655, at *7 (N.D.N.Y. Mar. 10, 2008) ("It appears that, after the enactment of RLUIPA in 2000, states could accept federal funds for prison activities or programs only on the condition that they comply with RLUIPA, which effectively constituted a waiver of their sovereign immunity under the Eleventh Amendment.").

[71] *Allen*, 502 F.3d at 1269–71. *See also* Benning v. Georgia, 391 F.3d 1299, 1305–06 (11th Cir. 2004). *Benning*, decided before *Allen*, did not address what "appropriate relief" entails, only that states waive their immunity to suit for appropriate relief. *Id*.

[72] *See Allen*, 502 F.3d at 1270–71; Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 65 (1992) (finding an implied right of action in Title IX claims included monetary damages). In *Franklin*, the Court discussed the general rule "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." 503 U.S. at 66 (citing Bell v. Hood, 327 U.S. 628, 684 (1946)). *See also* Kelly S. Terry, Note, Franklin v. Gwinnett County Public Schools*: Reviving the Presumption of Remedies Under Implied Rights of Action*, 46 ARK. L. REV. 715, 726–32 (1993) (explaining the emergence, disappearance, and the full-fledged revitalization of the presumption of remedies in *Franklin*).

[73] *Allen*, 502 F.3d at 1270 (quoting *Franklin*, 503 U.S. at 66). The *Franklin* Court also noted that "absent clear direction to the contrary by Congress," federal courts have the ability to award any appropriate relief for a cause of action established by federal statute. 503 U.S. at 70–71. *See* Sisney v. Reisch, 533 F. Supp. 2d 952, 972 (D.S.D. 2008) (agreeing with the

"appropriate relief" provision of RLUIPA, the Eleventh Circuit determined that the lack of any congressional intent to the contrary should allow for both injunctive and compensatory relief because it was "broad enough to encompass the right to monetary damages."[74] Moreover, the Eleventh Circuit assumed that Congress could have easily limited the remedy to injunctive relief and that Congress was well aware of the *Franklin* presumption of all appropriate remedies to the prevailing party.[75] Therefore, the court could award monetary damages in official capacity suits.[76]

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Eleventh Circuit that "appropriate relief" encompasses all forms of relief, but disagreeing on the issue of Eleventh Amendment immunity). *See also* Mack v. O'Leary, 80 F.3d 1175, 1177 (7th Cir. 1996), *vacated, sub nom.* O'Leary v. Mack, 522 U.S. 801 (1997). The Seventh Circuit allowed for damages against the state official because RFRA "says nothing about remedies except that a person whose rights under the Act are violated 'may assert that violation as a claim or defense in a judicial proceeding and obtain *appropriate* relief against a government.'" *Id*. *See also* Reich v. Cambridgeport Air Sys., Inc., 26 F.3d 1187, 1191 (1st Cir. 1994) (holding that the Occupational Safety and Health Act ("OSHA") encompassed all forms of relief, including monetary damages). The First Circuit interpreted "all appropriate relief" to include monetary damages as well as other forms of relief normally available. *Id*.

[74] *Allen*, 502 F.3d at 1270. *See* Barnes v. Gorman, 536 U.S. 181, 185 (2002). The Court in *Barnes*, unlike in *Franklin*, described the scope of appropriate relief. *Id*. Gorman brought a private cause of action under Title VI of the Civil Rights Act of 1964. *Id*. Although Title VI does not expressly create a private cause of action, the Court has found that it is implied, but the extent of those remedies is not clear. *Id*. The Court relied on the contract theory to determine the scope of damage remedies:

> [A] remedy is "appropriate relief," only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature. A funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract. Thus we have held that under Title IX, which contains no express remedies, a recipient of federal funds is nevertheless subject to suit for compensatory damages and injunction forms of relief traditionally available in suits for breach of contract.

*Id*. at 187 (internal citations omitted). When a federal recipient violates the conditions of spending legislation, the wrong amounts to a breach of contract and is only rectified when the recipient compensates the Federal Government or the third party beneficiary for the loss caused. *Id*. at 189. Moreover, the *Barnes* Court held its decision was within the "well settled" rule of *Bell* that so long as a cause of action existed under the Constitution or federal statute, it is within the federal courts power to award appropriate relief. *Id*. (citing *Bell*, 327 U.S. at 684). *But see* Williams v. Beltran, 569 F. Supp. 2d 1057, 1061–62 (C.D. Cal. 2008) (finding that the presumption of the availability of all damages does not presume a waiver of Eleventh Amendment immunity); *Sisney*, 533 F. Supp. 2d at 972 n.2 (same).

[75] *Allen*, 502 F.3d at 1270. The *Allen* court found that Congress by making all appropriate remedies available, in conjunction with the waiver to suit, allowed for recovery of damages against officials in their official capacity:

> Congress expressed no intent to the contrary within RLUIPA, even though it could have, by, for example, explicitly limiting the remedies set forth in [Section] 2000cc(a) to injunctive relief only. Instead,

Considering the Fourth and Eleventh Circuits' approaches to the clear statement doctrine under RLUIPA, the District Court of Connecticut in *El Badrawi v. Department of Homeland Security* found flaws in each analysis.[77] First, the court found the Eleventh Circuit's reliance on *Franklin* to be flawed because *Franklin* involved a municipal defendant, which had no Eleventh Amendment protection.[78] Next, the *El Badrawi* court criticized the Fourth Circuit for not considering a provision of RLUIPA that allows the United States to "bring an action for injunctive or declaratory relief to enforce compliance with this Act."[79] Thus, the court found that the use of "appropriate relief," while granting the federal government the right to seek injunctive or declaratory relief, also suggests that appropriate relief could include monetary damages or

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> Congress used broad, general language in crafting the remedies section of RLUIPA, stating that a prevailing party could obtain "appropriate relief." We assume that, when Congress acted, it was aware of *Franklin*'s presumption in favor of making all appropriate remedies available to the prevailing party.

*Id*. *But see* Pugh v. Goord, 571 F. Supp. 2d 477, 507–09 (S.D.N.Y. 2008) (noting that after considering both the analysis of the Fourth and Eleventh Circuits, many courts have sided with the Fourth Circuit's finding that no damages are available in the official capacity).

[76] *Allen*, 502 F.3d at 1270.

[77] 579 F. Supp. 2d 249, 258–61 (D. Conn. 2008).

[78] *Id*. at 256. *See Franklin*, 503 U.S. at 63–64 (1992); N. Ins. Co. of N.Y. v. Chatham County, 547 U.S. 189, 193–94 (2006) (refusing to extend Eleventh Amendment immunity to state counties); Jinks v. Richland County, 538 U.S. 456, 466–67 (2003) (holding that an unmistakably clear statement is not required by Congress to establish a municipality liability for monetary damages). *See also* Gregory J. Wong, Note, *Intent Matters: Assessing Sovereign Immunity for Tribal Entities*, 82 WASH. L. REV. 205, 213–219 (2007) (explaining that the courts defer to the state legislature's intent to decide if Eleventh Amendment immunity extends to state-created entities).

[79] *Compare El Badrawi*, 579 F. Supp. 2d at 261 (citing 42 U.S.C. § 2000cc-2(f) (2006)), *with* 42 U.S.C. § 2000cc-2(a) (2006) (establishing a private right of action for "appropriate relief against the government"). *See Waivers of Sovereign Immunity*, *supra* note 61, at 1181. One exception to Eleventh Amendment immunity is a suit brought by a state or by the federal government. *Id*. *See* Jonathan R. Siegel, *Congress's Power to Authorize Suits Against States*, 68 GEO. WASH. L. REV. 44, 67–70 (1999) [hereinafter *Suits Against States*]. The federal government may bring suit for monetary damages, even choosing to distribute awarded damages to the victims of the violations. *Id*. "Espousal of private claims is a perfectly legitimate use of the federal government's power to sue states; it is not regarded, even by those partial to state sovereign immunity, as an inappropriate attempt to evade the ban on private suits against states." *Id*. at 70. For example, under the federal Fair Labor Standards Act ("FLSA"), the Secretary of Labor can bring suit against a state employer to recover lost wages and distribute those to employees who suffered lost wages. *Id*. at 69 (citing Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health. & Welfare, 411 U.S. 279, 285–86 (1973). *See also* Alden v. Maine, 527 U.S. 706, 759–60 (1999). In *Alden*, the Court did not allow state probation officers to recover lost wages under the FLSA, but in dicta, the Court noted a difference between "a suit by the United States on behalf of the employees and a suit by the employees . . . and the structure of the Constitution make clear that . . . the States have consented to suits of the first kind but not of the second." *Id*.

at the very least encompass more than just injunctive or declaratory relief.[80] Even so, the court found that the ambiguity of "appropriate relief" still does not create a clear condition that participation is consent to waive a state's Eleventh Amendment immunity, thereby precluding any recovery of monetary damages.[81]

In addition to courts considering RLUIPA's textual waiver, the Civil Rights Remedies Equalization Act of 1986 ("CRREA") may also contain an unequivocal waiver of state sovereign immunity.[82] The CRREA waives Eleventh Amendment immunity for violations of specific enumerated acts of Congress.[83] Also included in CRREA is a catch-all

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[80] *El Badrawi*, 579 F. Supp. 2d at 261. The court posed this interesting dilemma:

> This prompts an important question: if the phrase "appropriate relief" in subsection (a) refers only to injunctive or declaratory relief, why does subsection (f) expressly specify that the federal government may sue for "injunctive and declaratory relief?" Why does it not instead say that the federal government can sue for "appropriate relief" if that same phrase in subsection (a) means "injunctive and declaratory relief?"

*Id*. Moreover, if the court was not considering RLUIPA as a waiver of Eleventh Amendment immunity, it would "easily" determine that RLUIPA allowed for monetary damages. *Id*.

[81] *Id*. at 261. The *El Badrawi* court also found that the history of RLUIPA supports ambiguity in the phrase "appropriate relief." *Id*. By enacting RLUIPA, Congress stated its desire to restore religious protection in the pre-*Smith* era. *Id*. Before *Smith*, the Eleventh Amendment prohibited monetary damages from states for religious violations. *Id*. at 262. *But see* Larson, *supra* note 29, at 1444–49 (explaining that before *Smith*, actual injury, including the loss of the constitutional right, resulted in compensatory damages, but if no injury, then the court could award punitive or nominal damages or an injunction if the injury was likely to be repeated).

[82] 42 U.S.C. § 2000d-7 (2006). *See* Lane v. Pena, 518 U.S. 187, 200 (1996) (stating in dicta that in CRREA, "Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity"); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (stating that Congress must manifest a clear intent to condition funds on the state's waiver of Eleventh Amendment immunity); Alfred Hill, *In Defense of Sovereign Immunity*, 42 B.C. L. REV. 485, 538 (2001) (explaining the Court has taken this rigid stance on Eleventh Amendment waiver because it upsets federalism between the states and federal government). *See also* Barbour v. Wash. Mem'l Area Transit Auth., 374 F.3d 1161, 1164 n.1 (D.C. Cir. 2004) (listing circuit court opinions that have found CRREA to be unambiguous). All circuits, except for the Federal Circuit, which has yet to address the issue, have found CRREA to be an unambiguous textual waiver of the Eleventh Amendment. *Id*.

[83] 42 U.S.C. § 2000d-7. The relevant section of the statute reads in full:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . , title IX of the Education Amendments of 1972 . . . , the Age Discrimination Act of 1975 . . . , title VI of the Civil Rights Act of 1964 . . . , or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

provision waiving immunity for "provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."[84] The Fourth Circuit in *Madison* first considered RLUIPA's textual waiver under CRREA, finding that RLUIPA was different than the enumerated acts included in CRREA because it did not prohibit discrimination.[85] Other courts disagree with the Fourth Circuit, finding that the objective of RLUIPA to prevent discrimination is enough to fall under CRREA.[86]

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*Id*. For any violation by the State, remedies both in law and in equity are available. *Id*. The specific statutes mentioned use similar language in prohibiting discrimination. *See* Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2006) (prohibiting persons with a disability by the sole reason of their disability to "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination"); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006) (using the same language, but prohibiting discrimination based on gender in educational programs); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006) (using the same language, but prohibiting discrimination based on race, color, or national origin); Age Discrimination Act of 1975, 42 U.S.C. § 6101 (2006) (stating "[i]t is the purpose of this chapter to prohibit discrimination on the basis of age").

[84] 42 U.S.C. § 2000d-7. The catch-all provision has not found much success. *See, e.g*, Cronen v. Tex. Dep't of Human Servs., 977 F.2d 934, 937–38 (5th Cir. 1992) (holding that the catch-all applied only to federal statutes with the stated purpose of prohibiting discrimination); Grillo v. California, No. C 05-2559 SBA, 2006 WL 335340, at *10 (N.D. Cal. Feb. 14, 2006) (finding that a statute preventing unlawful retaliation did not fit under the catch-all provision); Brum v. West Virginia, No. 6:04-cv-1014, 2005 WL 6147735, at *1 (S.D. W.Va. Sept. 12, 2005) (holding that the catch-all did not apply because the plaintiff did not allege he was discriminated against nor did he indicate which federal anti-discriminatory statute protected him); Clemes v. Del Norte County United Sch. Dist., No. C-93-1912, 1996 WL 331096, at *6 (N.D. Cal. May 28, 1996) (finding that the specific FTCA section in question was meant to protect those who assist in uncovering fraud, not discrimination, and to fall under the catch-all provision the federal statute must contain a provision that specifically prohibits discrimination); Ohta v. Muraski, No. 3:93 CV 00554 (JAC), 1993 WL 366525, at *4–5 (D. Conn. Aug. 19, 1993) (explaining that the broad and unspecific language of the catch-all provision did not serve as an unequivocal textual waiver to anti-discriminatory statutes outside of the four specifically enumerated in Section 2000d-7).

[85] Madison v. Virginia, 474 F.3d 188, 132–33 (4th Cir. 2006). The Fourth Circuit found that RLUIPA did not contain definitive language against discrimination, and it needed to "be like" the statutes listed in CRREA. *Id*. at 133. Specifically, nowhere in the statutory text does RLUIPA outlaw "discrimination" like those statutes enumerated in CRREA. *Id*. at 132–33. Instead, RLUIPA prohibits unjustified substantial burdens on prisoners' rights to exercise religion. *Id*. at 133. In addition, ambiguity exists whether RLUIPA is a federal statute prohibiting discrimination, thus preventing states from knowingly consenting to damages in actions brought against them. *Id*. *See also* Kaimowitz v. Bd. of Trs. of the Univ. of Ill., 951 F.2d 765, 768 (7th Cir. 1991) (holding that Section 1983 did not specifically prohibit discrimination and thus did not meet the catch-all provision in CRREA); Miraki v. Chicago State Univ., 259 F. Supp. 2d 727, 731 (N.D. Ill. 2003) (finding that Section 1981 did not fall in the catch-all provision of CRREA because it did not specifically prohibit discrimination).

[86] *See* Garrison v. Dutcher, No. 1:07-CV-642, 2008 WL 4534098, at *5 (W.D. Mich. Sept. 30, 2008) (finding that for the purposes of summary judgment, monetary damages were assumed against the state under RLUIPA by CRREA's waiver); Sisney v. Reisch, 533 F.

2. Damages in the Individual Capacity

Compared to official capacity suits, individual capacity suits differ in two key ways.[87] First, in individual capacity suits, plaintiffs seek damages from the individual and not from the State treasury.[88] Second, defendants in individual capacity suits can assert personal immunities, such as qualified immunity, while in official capacity suits defendants can assert defenses available to the sovereign entity.[89] Similar to official capacity suits, the availability of damages in individual capacity suits changes if the RLUIPA claim is under the Spending or Commerce

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Supp. 2d 952, 971–72 (D.S.D. 2008) (analyzing the applicability of the CRREA's waiver to RLUIPA). The *Sisney* court relied heavily on the Seventh Circuit, which quoted the Ninth Circuit by saying, "RLUIPA 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.'" *Id*. at 972 (quoting Charles v. Verhagen, 348 F.3d 601, 607 (7th Cir. 2003) (quoting Mayweathers v. Terhune, 314 F.3d 1062, 1066–67 (9th Cir. 2002))). *See generally* Bredehoft, *supra* note 68, at 165–68 (summarizing the *Sisney* decision).

87 *See supra* Part II.C.1 (discussing damages in official capacity suits).

88 *See* Alden v. Maine, 527 U.S. 706, 757 (1999) ("[A] suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally."). *See also* FED R. CIV. P. 25(d). "An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party." *Id*. *See generally* Kentucky v. Graham, 473 U.S. 159, 166 n.11 (1985). In an individual capacity suit, if the official dies the plaintiff can continue the action against the official's estate. *Id.* In an official capacity suit, however, in the event of the official's death or replacement, the plaintiff can continue the action against the successor in office. *Id*.

89 *Graham,* 473 U.S. at 166–67. *See* Salahuddin v. Goord, 467 F.3d 263, 273 (2d Cir. 2006). The qualified immunity defense applies in individual capacity suits when officials sued for actions while performing their discretionary responsibilities did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). *See also* Saucier v. Katz, 533 U.S. 194, 201 (2001). A proper qualified immunity analysis requires two steps. *Id*. First, the court examines whether the plaintiff's allegations establish that an official's conduct violated a constitutional right. *Id*. If no violation is found, the court grants defendant summary judgment, but if the court finds that a violation can be shown, the next step is to find whether the right was clearly established. *Id*. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987) (stating that a clearly established right "is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent [to the official]") (internal quotations omitted); Gaubatz, *supra* note 39, at 556 (explaining that officials who establish that they did not know their actions violated RLUIPA at the time the challenged conduct occurred avoid individual liability). *But see* Charles v. Verhagen, 220 F. Supp. 2d 937, 954 (W.D. Wis. 2002) (holding that the defendant violated RLUIPA, but qualified immunity barred damages); Larson, *supra* note 29, at 1464 (explaining that most early RLUIPA suits were dismissed on qualified immunity grounds).

Clauses.[90] Initially, courts allowed monetary damages in individual capacity suits under the Spending Clause because "government" was defined by RLUIPA to include all government officials or "any other person acting under the color of State law," thus holding officials liable in their individual capacities.[91] The Eleventh Circuit, however, uncovered a flaw in this logic, holding that Congress cannot subject a non-recipient of federal funds to private liability of monetary damages.[92] Alternatively, individual capacity suits might be available if RLUIPA is valid Commerce Clause legislation.[93] It is not clear if RLUIPA is valid under the Commerce Clause, and according to the *Daker* court,

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[90] *See* Rotunda, *supra* note 45, at 829–34 (detailing the relationship of the Commerce Clause and the Eleventh Amendment). In legislation that applies to state action, the actions of state officials are considered state action. *Id*. at 831. However, those officials are not considered state actors in light of the Eleventh Amendment. *Id*. at 831–32. Thus, state officials can be individually liable and forced to pay damages out of their own pockets. *Id*. *See supra* Part II.C.1 (discussing the jurisdictional requirements of official capacity suits).

[91] 42 U.S.C. § 2000cc-5(4)(A)(ii–iii) (2006). *See* Boretsky v. Corzine, No. 08-2265 (GEB), 2008 WL 5047939, at *6 n.5 (D.N.J. Nov. 20, 2008) (allowing claims of individual liability to continue because the controlling circuit had yet to address the issue); Agrawal v. Briley, No. 02 C 6807, 2006 WL 3523750, at *12 (N.D. Ill. Dec. 6, 2006 (interpreting the plain language of RLUIPA to include individual liability); Marsh v. Granholm, No. 2:05-cv-134, 2006 WL 2439760, at *10–11 (W.D. Mich. Aug. 22, 2006) (same); Orafan v. Goord, No. 00CV2022(LEK/RFT), 2003 WL 21972735, *9 (N.D.N.Y. Aug. 11, 2003) (same). *But see* Boles v. Neet, 402 F. Supp. 2d 1237, 1240 (D. Colo. 2005) (permitting claims against the government and officials in their official capacities, not in their individual capacities); Smith v. Haley, 401 F. Supp. 2d 1240, 1246 (M.D. Ala. 2005) (using a respondeat superior theory to find that the RLUIPA statute could be read to include damages in the official capacity, but nothing in the statute suggested government employees were liable for damages in their individual capacities).

[92] Smith v. Allen, 502 F.3d 1255, 1272–75 (11th Cir. 2007). The *Allen* court used previous circuit decisions concerning Title IX that prohibited private causes of actions against defendants in their individual capacities because they are not recipients of federal funds. *Id*. at 1273–74. The receipt of federal funds creates a contract between the government and the recipient. *Id*. at 1273 (citing Gebster v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998). Thus, the Eleventh Circuit reasoned that the contracting party was the state prison institution that received the federal funds and not their individual employees. *Id*. at 1274–75. To find otherwise would raise serious constitutional concerns. *Id*. at 1275. As a result, many district courts have found *Allen* persuasive and ruled that RLUIPA did not create a private right of action against state employees in their individual capacities through the Spending Clause. *See* Garrison v. Dutcher, No. 1:07-CV-642, 2008 WL 4534098, at *4 (W.D. Mich. Sept. 30, 2008); Jones v. Rieben, No. 2:04cv1029-MHT, 2008 WL 4080360, at *4 (M.D. Ala. Sept. 2, 2008); Porter v. Caruso, No. 1:05-cv-562, 2008 WL 3978972, at *8 (W.D. Mich. Aug. 22, 2008); Grady v. Holmes, No. 07-cv-02251-EWN-CBS, 2008 WL 3539274, at *3 (D. Colo. Aug. 12, 2008); Pugh v. Goord, 571 F. Supp. 2d 477, 507–09 (S.D.N.Y. 2008); Sharp v. Johnson, No. 00-2156, 2008 WL 941686, at *19 (W.D. Pa. Apr. 7, 2008); Sisney v. Reisch, 533 F. Supp. 2d 952, 968 (D.S.D. 2008). *But see* Horacek v. Burnett, No. 07-11885, 2008 WL 4427792, at *1 (E.D. Mich. Oct. 3, 2008).

[93] *See Allen*, 502 F.3d at 1274 n.9 (recognizing RLUIPA's Commerce Clause underpinnings, but finding that the legislation hinged on the Spending Clause).

construing the statute as Commerce Clause legislation raises "serious question[s]" and would "unmoor RLUIPA from its firm grounding in the Spending Clause . . . and engender debate about whether it regulates localized, non-economic conduct that does not substantially affect interstate commerce."[94]

Even with Congress's apparent desire to create a private cause of action for damages, plaintiffs seeking monetary relief under RLUIPA have not been very successful. For damages to exist under the Spending Clause, RLUIPA must serve as a textual waiver to Eleventh Amendment immunity.[95] The Fourth Circuit finds RLUIPA does not contain a waiver, while the Eleventh Circuit holds otherwise.[96] Plaintiffs may be able to find relief under the Commerce Clause, but the majority of courts do not entertain the issue.[97] Yet, no matter how plaintiffs attempt to collect damages, uncertainty continues.[98]

## III. ANALYSIS

As discussed above, uncertainty remains about the availability of damages under RLUIPA.[99] The discussion below attempts to find answers by asking whether a textual waiver to state sovereign immunity under the Eleventh Amendment for monetary damages can be found under RLUIPA or CRREA.[100] The next section determines if RLUIPA is valid under the Commerce Clause.[101] The last section addresses whether courts, as a matter of public policy, should award damages for RLUIPA violations.[102]

### *A. Resolving the Ambiguity*

Under the clear statement doctrine, the Supreme Court disregards legislative history as a source to determine congressional intent by

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94 Daker v. Ferrero, 475 F. Supp. 2d 1325, 1347 (N.D. Ga. 2007).

95 *See supra* Part II.C.1 (explaining the requirements for a textual waiver of Eleventh Amendment immunity).

96 *See supra* Part II.C.1 (describing the split between the Fourth and Eleventh Circuit).

97 *See supra* note 40 and accompanying text (explaining reasons why courts often choose to analyze RLUIPA under the Spending Clause and not the Commerce Clause).

98 *See supra* Part III (analyzing the availability of damages under RLUIPA).

99 *See supra* Part II (discussing the legal background to RLUIPA monetary claims).

100 *See infra* Part III.A.1 (analyzing the textual waiver in RLUIPA); Part III.B (analyzing the textual waiver in CRREA).

101 *See infra* Part III.B (analyzing if RLUIPA is valid under the Commerce Clause and if monetary damages are available).

102 *See infra* Part III.C (answering public policy questions about awarding damages to prisoners for RLUIPA violations).

requiring intent to derive solely from the statutory text.[103] As a result, satisfaction of the clear statement doctrine occurs when the statutory text unambiguously conditions the voluntary acceptance of federal funds on the state waiving its Eleventh Amendment immunity.[104]

1. Searching for Statutory Guidance

For RLUIPA to satisfy the clear statement doctrine, all ambiguity must be removed from the phrase "appropriate relief."[105] By applying *Franklin*, which held that all forms of relief were available absent contrary congressional intent, the Eleventh Circuit found that "appropriate relief" satisfied the clear statement doctrine.[106] Applying *Franklin* to RLUIPA does not cure the ambiguity of "appropriate relief," as the Eleventh Circuit asserts, because the resolution is derived from case law and not statutory text.[107] To presume the availability of all

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[103] *See* Lane v. Pena, 518 U.S. 187, 192 (1996) ("[L]egislative history cannot supply a waiver that does not appear clearly in any statutory text."); United States v. Nordic Vill., Inc., 503 U.S. 30, 37 (1992) (explaining that the legislative history had no weight when trying to decipher statutory ambiguity). *See also supra* Part II.C.1 (discussing the textual requirements for a statutory waiver). *But see Nordic Vill.*, 503 U.S. at 34 (recognizing that the Court waived sovereign immunity in the FTCA because the Court found the sweeping language of the Act consistent with congressional intent). Justice Stevens, in his dissent, criticized the majority for ignoring the legislative history. *Id*. at 39–46 (Stevens, J., dissenting); *supra* note 66 (discussing Stevens' criticism of the majority). *See also* United States v. Yellow Cab Co., 340 U.S. 543, 550–51 (1951) (discussing the legislative history of the FTCA).

[104] *See supra* notes 62–64 and accompanying text (explaining that according to Supreme Court precedent, the clear statement doctrine must be expressed in the statutory text). *See also* Smith v. Allen, 502 F.3d 1255, 1270 (11th Cir. 2007). The Eleventh Circuit argued that Congress could have easily limited RLUIPA's remedies. *Id*. Instead, Congress used broad language. *Id*. at 1271. *Contra* Madison v. Virginia, 474 F.3d 118, 132 (4th Cir. 2006) (arguing that when Congress desired to make damages available, it used clear language). The *Madison* court cited the Civil Rights Act of 1991, which permits a "complaining party [to] recover compensatory . . . damages from . . . government actors." *Id*. (quoting 42 U.S.C. § 1981a(a)(2) (2006)) (alteration in original).

[105] *See Madison*, 474 F.3d at 131–32 (finding "appropriate relief" as "open ended" because it could be read to limit relief to injunctive and declaratory relief or to encompass all forms of relief including monetary damages); Webman v. Fed. Bureau of Prisons, 441 F.3d 1022, 1026 (D.C. Cir. 2006) (concluding the same when it analyzed the same phrase in RFRA). *See also supra* note 56 (listing the courts that have found the Eleventh Amendment bars damages because "appropriate relief" is an ambiguous term).

[106] *Allen*, 502 F.3d at 1270. RLUIPA contained no language limiting available remedies; therefore "appropriate relief" included all remedies. *Id*. *See supra* notes 69–76 and accompanying text (discussing the Eleventh Circuit's decision). *But see* Williams v. Beltran, 569 F. Supp. 2d 1057, 1061 (C.D. Cal. 2008) (finding that applying *Franklin* is "inapposite to the narrow question" of determining the availability of monetary relief).

[107] *See Allen*, 502 F.3d at 1269–72. *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 66 (1992) (discussing the general rule that when a right has been violated and a federal

remedies against the state, the statutory text, not an outside source, must provide guidance mandating a broad interpretation of the cause of action.[108]

A possible solution within RLUIPA's text is Section 2000cc-2(f), which allows the federal government to bring an action for injunctive or declaratory relief to force RLUIPA compliance.[109] As a result, Congress created two causes of action: (1) by the government for injunctive or declaratory relief or (2) a private cause of action in which a person can obtain appropriate relief.[110] This dichotomy between the two causes of action suggests "appropriate relief" encompasses monetary damages; otherwise, Congress would not have limited the federal government's relief.[111] With sovereign immunity strictly construed in favor of the sovereign, suggesting damages are available will not hurdle the clear statement doctrine because the availability of damages is only implied.[112] Therefore, the Eleventh Circuit's reliance on *Franklin* and Section 2000cc-

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statute provides the ability to sue for the violation, federal courts can use any remedy available to cure the violation). *Franklin* presumed all remedies against municipalities; however, municipalities cannot assert Eleventh Amendment immunity. *Id.*; *supra* notes 72–74 and accompanying text (explaining the *Franklin* decision in more detail). *See also* Alden v. Maine, 527 U.S. 709, 756 (1999) (stating that the Eleventh Amendment protects the State, but not its lesser entities or any governmental entity that is not the arm of the state); Wong, *supra* note 78, at 213–18 (discussing how courts decide if Eleventh Amendment immunity extends to state-created entities).

108 *See* Library of Congress v. Shaw, 478 U.S. 310, 318 (1986) (holding that the Court cannot "enlarge the waiver beyond what the language requires") (internal quotations omitted); Atascadero St. Hosp. v. Scanlon, 473 U.S. 234, 239–40 (1985) (requiring express language or language that has no other reasonable construction).

109 42 U.S.C. § 2000cc-2(f) (2006). *See Suits Against States*, *supra* note 79, at 69–70. Congress included this provision in RLUIPA because it was necessary to prevent the federal government from seeking monetary relief from states for violating RLUIPA. *Id*. (explaining that the federal government can bring suit against the state for monetary damages and distribute the damages to victims of the violations). *See also Waivers of Sovereign Immunity*, *supra* note 61, at 1178–84 (outlining the two other exceptions to the Eleventh Amendment—the *Ex parte Young* exception and abrogation by Congress through Section Five of the Fourteenth Amendment).

110 *Compare* 42 U.S.C. § 2000cc-2(f) ("The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter."), *with id*. § 2000cc-2(a) ("A person may . . . obtain appropriate relief . . . .").

111 *See* El Badrawi v. Dep't of Homeland Sec., 579 F. Supp. 2d 249, 261 (D. Conn. 2008) (stating that if the court was not deciding whether RLUIPA waived Eleventh Amendment immunity, it could easily determine RLUIPA allowed monetary relief).

112 *See* Barnes v. Gorman, 536 U.S. 181, 187 (2002) (stating that "appropriate relief" occurred when the state was on notice for liability by accepting federal funding to the remedies explicitly identified). *See also supra* note 60 (explaining that sovereign immunity has always been strictly construed in favor of the sovereign even though the principle of sovereign immunity is against the basic premise of American jurisprudence that no one person or government is above the law).

2(f) only implies a broad reading of "appropriate relief" as other reasonable interpretations exist.[113]

While an implied understanding of all available relief will not satisfy the clear statement doctrine, clarity and an instruction to broadly interpret "appropriate relief" to encompass monetary damages will satisfy the doctrine.[114] Section 2000cc-3(g) serves this purpose by stating: "This chapter shall be construed in favor of a broad protection of religious exercise, *to the maximum extent permitted by the terms* of this chapter and the Constitution."[115] With this language, the statute requires a broad understanding of "appropriate relief."[116] Courts find two possible interpretations in construing the meaning of the phrase: (1) injunctive and declaratory relief; or (2) monetary, injunctive, and declaratory relief.[117] Awarding only injunctive and declaratory relief requires a narrow reading of RLUIPA, which is inconsistent with Section 2000cc-3(g) because a broader interpretation of "appropriate relief" exists.[118] The phrase "appropriate relief" never lacked the ability to include monetary damages; it stumbled because of its ambiguity.[119] Moreover, reliance on the D.C. Circuit's decision in *Webman v. Federal Bureau of Prisons*, which interpreted RFRA's "appropriate relief"

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[113] *See El Badrawi*, 579 F. Supp. 2d at 260–61. The reasoning of the *El Badrawi* court is sound because Section 2000cc-2(f) only suggests a broad interpretation, rather than an intention through clear expression. *Id*. *See also supra* notes 77–81 and accompanying text (discussing the *El Badrawi* court's decision to reject Section 2000cc-2(f) as a clear textual waiver).

[114] *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239–40 (1985) (emphasizing that a state is on notice if the language expresses an overwhelming implication that leaves no room for any other reasonable interpretation). *See generally supra* Part II.C.1 (discussing the requirements for a state to waive its Eleventh Amendment immunity).

[115] 42 U.S.C. § 2000cc-3(g) (2006) (emphasis added). Section 2000cc-3(g) is labeled "Broad Construction." *Id*.

[116] *See id*. *See* Ruckelshaus v. Sierra Club, 463 U.S. 680, 683 (1983) (defining "appropriate" as "specially suitable: fit, proper"). In addition, "appropriate relief" should not be expanded beyond a fair reading or be used inconsistent with standard practice. *Id*. at 686. *See also supra* note 33 (listing examples of courts broadly construing the terms of RLUIPA).

[117] *See* Madison v. Virginia, 474 F.3d 118, 131–32 (4th Cir. 2006) (construing the phrase to include monetary relief as well as injunctive and declaratory relief, but ignoring Section 2000cc-3(g)); Smith v. Allen, 502 F.3d 1255, 1270 (11th Cir. 2007) (stating "appropriate relief" is broad enough to encompass the right to monetary damages). *See also supra* note 67 (discussing the ambiguity to the phrase "appropriate relief").

[118] *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 70–71 (1992) (employing a hierarchy of damages with monetary relief at the top). *See also* Reich v. Cambridgeport Air Sys., Inc., 26 F.3d 1187, 1190–95 (1st Cir. 1994) (determining what forms of relief the phrase "all appropriate relief" includes). In *Reich*, which was decided shortly after *Franklin*, the First Circuit found the phrase included all forms of relief. *Id.* at 1191.

[119] *See, e.g.*, Sisney v. Reisch, 533 F. Supp. 2d 952, 972 n.2 (D.S.D. 2008) (noting that the presumption of all available damages was not a presumption of a waiver to Eleventh Amendment immunity).

provision, is erroneous because RLUIPA's statutory text is significantly different from RFRA.[120] Unlike RLUIPA, RFRA does not include an analogous provision to Section 2000cc-3(g), and the absence of such a provision significantly alters the analysis of "appropriate relief."[121] As a result, the language of Section 2000cc-3(g) cures the ambiguity by requiring each term to be construed to its "maximum extent."[122]

In addition to resolving the ambiguity, the waiver must be unequivocally expressed in the statutory text.[123] The driving force behind the Supreme Court's rigid sovereign immunity jurisprudence is clarity, but the Court does not require the expression to be in the clearest possible form or to be understood in isolation from the rest of its statutory text.[124] In addition, the Supreme Court has not mandated Congress to use specific boilerplate language; it requires only an unambiguous waiver.[125] When reading the statutory text of RLUIPA, each term must be understood in its "maximum extent," and the "maximum extent" of appropriate relief, as a result, includes monetary damages.[126] Even if the Court rejects this proposition for lacking clarity, RLUIPA's statutory text left "no room for any other reasonable construction."[127] Therefore, reading "appropriate relief" with Section 2000cc-3(g) meets the clear statement doctrine by placing the State on

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120 *See* Webman v. Fed. Bureau of Prisons, 441 F.3d 1022, 1026 (D.C. Cir. 2006) (finding the provision in RFRA that allowed for "appropriate relief" against the federal government was "open-ended and equivocal").

121 *Compare* 42 U.S.C. § 2000cc-1(2006) *with id.* § 2000bb.

122 42 U.S.C. § 2000cc-3(g) (2006). *See* Merriam-Webster Online, http://www.merriam-webster.com/dictionary/maximum (last visited Aug. 29, 2009). Merriam-Webster defines "maximum" as "an upper limit allowed (as by a legal authority) or allowable (as by the circumstances of a particular case)." *Id.* An alternative definition states: "the greatest quantity or value attainable or attained." *Id.*

123 Lane v. Pena, 518 U.S. 187, 192 (1996). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied . . . . [The] elimination of sovereign immunity . . . is an expression in statutory text." *Id.* (internal citation omitted).

124 *See* United States v. Nordic Vill., Inc., 503 U.S. 30, 37 (1992) (insisting that only clarity is needed in the statutory text).

125 *See Lane*, 518 U.S. at 192 (stating that the statutory language must "extend unambiguously to such monetary claims"); Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983) (holding that statutory language should not be extended beyond what the language requires).

126 *See supra* note 114–25 and accompanying text (explaining that understanding each term of RLUIPA to the "maximum extent" requires "appropriate relief" to include monetary relief because the other interpretation is narrower).

127 Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 240 (1985). *See also* Galle, *supra* note 62, at 157 (criticizing the clear statement doctrine because it creates overly rigid statutes). As a result, courts have no opportunity to interpret the statute for changed events or novel issues. *Id.*

notice that it waives its Eleventh Amendment immunity from monetary relief by accepting federal funds.[128]

2. CRREA's Catch-All Provision as a Textual Waiver

In its present form, RLUIPA contains the unequivocal language required for the clear statement doctrine, but the catch-all provision of CRREA may also serve that purpose.[129] CRREA's provision applies to any federal statute prohibiting discrimination by recipients of Federal financial assistance and possibly allows for monetary damages against officials in their official capacities.[130] Doubts remain, however, whether RLUIPA is an anti-discriminatory statute making CRREA applicable because RLUIPA seeks to prevent the overburdening of institutionalized persons' religious free exercise.[131] Compared to the enumerated federal statutes in CRREA, RLUIPA does not offer language that its stated purpose is to prohibit discrimination.[132] Thus, absent a stated anti-discriminatory purpose, it is misguided to rely on the Seventh and Ninth Circuits' characterization of RLUIPA as "follow[ing] in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination."[133] For example, federal statutes not enacted for the sole

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128 *See infra* Part III.C (discussing why prisoners should receive damages for free exercise violations); Part IV.A (discussing the implications of awarding damages to prisoners).

129 *See supra* part III.A.1 (analyzing RLUIPA's statutory text for a waiver of damages).

130 42 U.S.C. § 2000d-7 (2006). The catch-all provision of CRREA states:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . , title IX of the Education Amendments of 1972 . . . , the Age Discrimination Act of 1975 . . . , title VI of the Civil Rights Act of 1964 . . . , or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

*Id*. (internal citations omitted).

131 146 CONG. REC. S7991 (daily ed. Sept. 5, 2000) (statement of Sen. Thurmond). While expressing his concerns about RLUIPA, Senator Thurmond stated:

> I first wish to note what this bill is not. It is not directed at laws that intentionally discriminate against a particular religion or even all religions . . . .Rather, this bill is directed at laws that apply to everyone equally, but have the effect of burdening someone's exercise of his or her religion.

*Id*.

132 *See supra* note 83 (providing the anti-discriminatory purposes of the enumerated statutes in CRREA).

133 Charles v. Verhagen, 348 F.3d 601, 607 (7th Cir. 2003). *See* Mayweathers v. Newland, 314 F.3d 1062, 1067 (9th Cir. 2002) (stating RLUIPA "foster[s] non-discrimination"). Both circuits cited the prohibition of religious discrimination as one reason to satisfy the general welfare requirement in Spending Clause analysis. *Charles*, 348 F.3d at 607; *Mayweathers*, 314

purpose of preventing discrimination, but to prohibit some form of discrimination, are not considered anti-discriminatory statutes.[134]

Despite Congress's desire to protect prisoners from religious discrimination through RLUIPA, the Act falls short of being an anti-discriminatory statute because it lacks a stated anti-discriminatory purpose.[135] The land use portion of RLUIPA specifically bars discrimination in land use regulations, while the institutionalized persons section of RLUIPA prohibits only a substantial burden against a person's free exercise of religion.[136] Discrimination claims require comparisons, but substantial burden analysis focuses on the prisoner's *own* ability to practice religion.[137] As a result, free exercise discrimination claims are best answered by the Equal Protection Clause

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F.3d at 1067. *See also* Part II.B.1 (discussing RLUIPA's constitutionality under the Spending Clause).

134 Cronen v. Tex. Dep't of Human Servs., 977 F.2d 934, 937–38 (5th Cir. 1992). The issue in *Cronen* was the Food Stamp Act, 7 U.S.C. § 2020(c) (2006), which provided that "[i]n the certification of applicant households for the food stamp program, there shall be no discrimination by reason of race, sex, religious creed, national origin, or political beliefs." *Id.* at 937. Nonetheless, the court found that the statute was a comprehensive federal entitlement program that happened to prohibit the discriminatory issuance of food stamps. *Id*. at 938. *See supra* note 83 (listing other courts that have found certain federal statutes not to be anti-discriminatory absent the specifically stated purpose to do so).

135 *See* 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (citing a major impetus for Congress to pass RLUIPA was to prevent religious discrimination in prison). One case cited for the need of RLUIPA, *Sasnett v. Sullivan*, 197 F.3d 290 (7th Cir. 1999), found that prison officials' refusal to allow prisoners to wear religious jewelry, such as religious crosses, amounted to discrimination against Protestants. *Id*.

136 42 U.S.C. § 2000cc(b)(2) (2006). The statute reads: "No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." *Id*. *See* 146 CONG. REC. E1564–67 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde) (offering many examples of land use discrimination based on religion or religious denomination). In addition, the legislative history appears to distinguish discrimination from substantial burden by establishing different objectives for the land use provision and the institutionalized persons provision. *Id*. at S7776 (joint statement of Sen. Hatch and Sen. Kennedy) (stating "[t]he state may eliminate the discrimination or burden in any way it chooses, so long as the discrimination or substantial burden is actually eliminated").

137 *See, e.g.*, Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004). The standard used by the Fifth Circuit to determine if a government regulation substantially burdened religious exercise was "if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." *Id*. (following Supreme Court precedent, the Fifth Circuit held a governmental regulation to be significant when it somehow influenced the adherent to violate his religious beliefs and forced the adherent to choose between either following his religious beliefs or rejecting a generally available, non-generic benefit).

and not RLUIPA.[138] Moreover, without a clearly stated anti-discriminatory purpose, courts will not extend CRREA to RLUIPA cases because sovereign immunity is strictly construed in favor of the sovereign.[139] Therefore, CRREA's catch-all provision fails to satisfy the clear statement doctrine because the catch-all provision does not apply to RLUIPA.[140]

### *B. Is RLUIPA Valid Under the Commerce Clause and Are Damages Available?*

For monetary relief in official capacity claims under RLUIPA, the Act must meet the clear statement doctrine to eliminate Eleventh Amendment immunity.[141] Congress cannot abrogate a state's Eleventh Amendment immunity to create an official capacity suit under the Commerce Clause, but Congress can create a private cause of action in individual capacity suits using its commerce power.[142] Before Congress can do so, the regulation must be valid under the Commerce Clause, and the legislation must fit into one of the three identified categories of commerce.[143] Of these categories, the one relevant to RLUIPA is Congress's ability to regulate activities that substantially affect commerce.[144] To determine if the regulated activity does so, the activity

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[138] *See* U.S. Const. amend. XIV § 1 ("No State shall . . . deny to any persons within its jurisdiction the equal protection of the laws."); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (holding that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike").

[139] *See generally* Ohta v. Muraski, No. 3:93 CV 00554 (JAC), 1993 WL 366525, at *4–5 (D. Conn. Aug. 19, 1993) (explaining that the broad and unspecific language of the catch-all provision did not serve as an unequivocal textual waiver to anti-discriminatory statutes outside of the four specifically enumerated in 42 U.S.C. § 2000d-7 (2006)).

[140] *See supra* note 84 (listing decisions that found the catch-all provision not to apply); *supra* notes 129–139 and accompanying text (finding that RLUIPA's discriminatory purpose is ambiguous, thus, RLUIPA does not apply to CRREA because sovereign immunity is construed in favor of the sovereign).

[141] *See supra* Part II.B.1 (discussing textual waivers).

[142] *See supra* note 64 and accompanying text (explaining that Congress cannot use its commerce power to abrogate a state's Eleventh Amendment immunity).

[143] *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995). Congress can regulate: (1) channels of interstate commerce, (2) instrumentalities of interstate commerce, and (3) activities that substantially affect interstate commerce. *Id*. *See also supra* Part II.B.2 (discussing valid Commerce Clause legislation).

[144] *See supra* note 36 (explaining that Congress can regulate channels of commerce or instrumentalities of commerce under its commerce power). *But see* Charles v. Verhagen, 348 F.3d 601, 609 n.3 (7th Cir. 2003). The court noted that the Wisconsin Department of Corrections sent approximately four thousand of its inmates to out-of-state facilities to alleviate overcrowding. *Id*. "That fact, in our view, lends validity to RLUIPA's constitutionality under the Commerce Clause." *Id*. The Seventh Circuit implied the

is analyzed under the four factors articulated in *United States v. Morrison*.[145]

1. Is RLUIPA Directed at Regulating Commercial or Economic Activity?

If the activity at which the statute is directed is commercial or economic in nature, a heavy presumption exists that Congress can regulate the activity.[146] *Raich* expanded the definition of commerce to include the consumption of commodities as well as their production and distribution.[147] RLUIPA, however, regulates the substantial burden created by the government on an incarcerated person's free exercise of religion.[148] The regulated activity is the conduct of state actors, not the consumption of commodities.[149] Thus, RLUIPA is similar to GFSZA and VAWA in that it does not regulate a "quintessentially economic" activity even though, in certain occasions, the activity can have a substantial effect on interstate commerce.[150] Concluding that RLUIPA does not regulate commercial activity does not end the analysis; rather, this

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transferred prisoners were instrumentalities of commerce, but declined to further discuss the issue. *See id*.

145 *See* United States v. Morrison, 529 U.S. 598, 609–13 (2000). The *Morrison* factors are: (1) is the activity the statute regulates economic or commercial in nature?, (2) does a jurisdictional element exist?, (3) what are the congressional findings concerning the regulated activity?, and (4) is the link between the prohibited conduct and substantial effect on interstate commerce attenuated? *Id*. *See supra* notes 42–45 and accompanying text (explaining the *Morrison* factors).

146 *See supra* note 42 and accompanying text (explaining the first inquiry in determining whether Congress can regulate the activity in question is whether or not that activity is economic).

147 Gonzales v. Raich, 545 U.S. 1, 25 (2005) (defining economics as "the production, distribution, and consumption of commodities") (internal quotations omitted). *See* Adler, *supra* note 50, at 763 (noting that the expansive definition used by the Court in *Raich* easily encompasses non-commercial, intrastate activity).

148 *See* 42 U.S.C. § 2000cc-1(a) (2006). *See also Charles*, 348 F.3d at 609 n.3. In dicta the *Charles* court stated that "[t]he [Wisconsin Department of Corrections] certainly engages in interstate commerce to properly handle the requests for religious and other personal property from inmates housed outside Wisconsin." *Id*. The court did not discuss if the DOC engaged in interstate commerce by handling requests for inmates housed in-state. *Id*.

149 *See* Daker v. Ferrero, 475 F. Supp. 2d 1325, 1345 (N.D. Ga. 2007). The *Daker* court found that RLUIPA prevented interference of religious activity by the government. *Id*. Although the court hypothesized many situations in which the activity regulated by RLUIPA could be commercial activity, the job of the court was to decide the issue in front of them. *Id*. at 1345 n.10.

150 *See supra* note 42 (explaining the type of conduct prohibited by GFSZA and VAWA).

finding channels the analysis to determine if the regulated activity substantially affects interstate commerce.[151]

2. Does the Activity RLUIPA Regulates Substantially Affect Interstate Commerce?

By not directly regulating commercial activity, RLUIPA will, at times, regulate activities that substantially affect interstate commerce, while at others it will regulate non-commercial intrastate activities.[152] In this way, RLUIPA, GFSZA, and VAWA, are similar, sometimes constitutional, sometimes not.[153] Each Act needs a limiting factor to remain constitutional, but the inclusion of a jurisdictional element does not automatically extinguish all constitutional doubt as it must have an explicit connection to interstate commerce.[154] Among them, RLUIPA is the only statute that possesses a sufficient jurisdictional element restricting its application to conduct that substantially affects interstate commerce while prohibiting it from applying to specific conduct that does not.[155] With a sufficiently restricting jurisdictional element, RLUIPA will survive a facial constitutional challenge.[156]

The inclusion of a jurisdictional element lessens the need for specific findings by allowing a case-by-case inquiry; however, Congress must

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[151] *See* United States v. Patton, 451 F.3d 615, 625 (10th Cir. 2006). *See also* Nathaniel Stewart, Note, *Turning the Commerce Clause Challenge "On its Face": Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 CASE W. RES. L. REV. 161, 171–72 (2004) (explaining that answering one of the *Morrison* factors in the negative does not end the analysis); *infra* Part III.B.2 (analyzing the activities regulated by RLUIPA and questioning whether those activities substantially affect interstate commerce).

[152] *See* United States v. Morrison, 529 U.S. 598, 613 (2000). Without a comprehensive, regulatory scheme, Congress cannot regulate a non-commercial intrastate activity. *Id*.

[153] *See* Rotunda, *supra* note 45, at 800–02 (explaining that *Lopez* and *Morrison* simply held that Congress cannot regulate intrastate activity that has no substantial effect on interstate commerce).

[154] *Morrison*, 529 U.S. at 611–12. *See Patton*, 451 F.3d at 632 (stating that a jurisdictional element is not "a talisman that wards off constitutional challenges"); Stewart, *supra* note 151, at 209–10 (arguing that satisfying the jurisdictional element guides courts to conduct appropriate facial analysis); *supra* note 43 (discussing the requirements of a valid jurisdictional element).

[155] *See* 42 U.S.C.§ 2000cc-1(b)(2) (2006). RLUIPA applies through the Commerce Clause only when "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." *Id*. Also, the government may challenge any claims made under the Commerce Clause by arguing that the burden in question does not, in its aggregate substantially affect commerce. *Id*. § 2000cc-2(g).

[156] *See* Stewart, *supra* note 151, at 204–11. A facial challenge requires the challenged statute to be constitutional in every situation and is much harsher than an as-applied challenge. *Id*. at 205. *See also* Gonzales v. Raich, 545 U.S. 1, 22 (2005) (stating that the Court must determine if Congress had a rational belief).

have a rational belief that the regulated activity substantially affects interstate commerce.[157] Courts give considerable deference to congressional findings, but they are not a necessity and cannot singlehandedly sustain the constitutionality of Commerce Clause legislation.[158] RLUIPA's legislative history contains no congressional findings; thus, the courts have no choice but to rely on the evidence presented and employ a case-by-case approach.[159]

Determining whether there is an attenuated link between the regulated activity and the substantial effect is the most critical step in the analysis.[160] Prisons routinely make large commercial transactions to purchase food for inmates and accommodate specific religious diets requiring additional food purchases.[161] In addition, purchased devotional items and literature likely cross state lines.[162] Other situations, such as requests for certain food preparations or requests for possession of religious articles absent commercial transactions, will likely not be covered.[163] The situation is the same for claims concerning

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157 *See supra* note 43 (discussing jurisdictional elements).

158 *See Morrison*, 529 U.S. at 614. The *Morrison* Court invalidated the Commerce Clause section of VAWA despite the numerous congressional findings that violence against women affects interstate commerce. *Id*. *See also supra* note 44 (explaining the importance of congressional findings).

159 Guidry, *supra* note 36, at 436–38 (noting that the legislative history has numerous findings concerning the land use provision of RLUIPA, but none related to institutionalized persons). *See also Patton*, 451 F.3d at 630. Congressional findings facilitate a court's inquiry into the effects of the challenged activity on interstate commerce, as courts give congressional findings substantial deference. *Id*

160 *See* Adler, *supra* note 50, at 760–61 (stating that the first and fourth *Morrison* factors provided the "core" to the *Morrison* decision).

161 Gaubatz, *supra* note 39, at 537 n.150. Refusal to accommodate specific religious diets restricts a number of transactions. *Id*. *See* Paige Dickerson, North Olympic Peninsula Jails, Clallam Bay Prison Struggle with Soaring Food Prices, PENINSULA DAILY NEWS, July 5, 2008, http://www.peninsuladailynews.com/article/20080706/NEWS/807060306 (last visited Aug. 19, 2009). For example, the Clallam Bay Correction Facility (WA) has an annual food budget of $1.2 million with occupancy of eight hundred and fifty inmates. *Id.* A county jail with about fifty inmates spends up to $67,000 on food annually, and a jail that houses around one hundred and seventeen prisoners daily has an annual budget of $160,000. *Id*.

162 *See* Gaubatz, *supra* note 39, at 537 n.151. *See also* Katzenbach v. McClung, 379 U.S. 294, 300–01 (1964) (admitting that the food purchased from out-of-state vendors would be insignificant, but still allowed the *Wickard* test to be used); Charles v. Verhagen, 348 F.3d 601, 605 (7th Cir. 2003) (overturning the prohibition on possession of Islamic prayer oil); Adams v. Mosley, No. 2:05cv352-MHT, 2008 WL 4369246, at *10–12 (N.D. Ala. Sept. 25, 2008) (Native American required the smoking of tobacco); Jones v. Rieben, No. 2:04cv1029-MHT, 2008 WL 4080360, at *6–7 (M.D. Ala. Sept. 2, 2008) (requesting a religious feast).

163 *See* Marr v. Foy, No. 1:07-cv-908, 2008 WL 5111849, at *1 (W.D. Mich. Dec. 3, 2008) (rejecting prisoner's request to have his Kosher diet exclusively prepared in another room). *See also* United States v. Lopez, 514 U.S. 549, 560–61 (1995) (rejecting the argument that the possession of firearms substantially affects interstate commerce).

grooming.[164] For example, facial hair grooming is done individually with purchased materials, but the effect of those purchased materials on interstate commerce is likely attenuated.[165] In situations such as these, the court must "pile inference upon inference," which is a task the Court is unwilling to do.[166]

The jurisdictional element limits the applicability only to those substantial burdens that affect interstate commerce.[167] As a result, RLUIPA is constitutional, but many claims will not substantially affect interstate commerce.[168] These same claims, however, might find jurisdiction under the Commerce Clause if the activity at issue is a larger, comprehensive scheme created by RLUIPA.[169]

3. Does RLUIPA Create a Comprehensive Economic Scheme?

RLUIPA can regulate non-commercial intrastate activities, if it contains a comprehensive economic scheme.[170] Compared to the CSA that regulated drug trafficking in *Raich* and to the Agricultural Adjustment Act ("AAA") that regulated personal wheat production in *Wickard*, RLUIPA lacks any comprehensive economic market.[171] The

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164 *See* Guidry, *supra* note 36, at 447 (explaining that claims for growing facial hair and requirements for haircuts do not involve any commercial elements). *See, e.g.* Longoria v. Dretke, 507 F.3d 898, 902–04 (5th Cir. 2007) (upholding the prison's grooming policy that forced inmates to cut their hair to a certain length for safety purposes). In addition, personal grooming claims under RLUIPA are rarely successful due to the substantial deference given to prison officials when prison safety is the reason for the forced grooming. *Id*.

165 *See* Guidry, *supra* note 36, at 446–47. The argument can be made, however, that grooming materials substantially affect interstate commerce because prisoners continually need supplies for grooming such as soap and safety razors. *See id.*

166 *See supra* note 45 (explaining that before *Lopez*, the Supreme Court was willing to make multiple inferences to find a substantial effect). *See also* CHEMERINSKY, *supra* note 16, at 254 (noting that from 1937 to 1995 the Supreme Court did not find Congress exceeded its commerce power).

167 *See* United States v. Maxwell, 446 F.3d 1210, 1218 (11th Cir. 2006) (explaining that the jurisdictional element must limit application, rather than be a meaningless insertion of statutory language).

168 *See generally Lopez*, 514 U.S. at 561 (explaining that the Court would have found the GFSZA constitutional if the statute contained a jurisdictional element that sufficiently limited it under the Commerce Clause).

169 *See infra* Part III.B.3 (analyzing if RLUIPA established a comprehensive, regulatory scheme).

170 *See* Gonzalez v. Raich, 545 U.S. 1, 26 (2005) (prohibiting the access of certain intrastate articles is a common way to regulate commerce of that product). *See also* Parry, *supra* note 50, at 860. Through the inverse of the *Raich* holding, ensuring the access of certain intrastate articles would also serve as a method to regulate commerce in that product. *Id*.

171 *Compare* Cutter v. Wilkinson, 544 U.S. 709, 715 (2005) (finding RLUIPA targeted religious exercise by institutionalized persons), *with Raich*, 545 U.S. at 26 ("[T]he CSA is a

CSA prohibited the possession of marijuana as a means to regulate the interstate distribution of the drug, and the AAA regulated intrastate production of wheat as a means to increase consumer demand.[172] RLUIPA's regulated activity will, at times, negatively affect the supply and demand of certain commodities, but RLUIPA is similar to SORNA because it fails to establish a regulatory scheme with economic qualities.[173] Through SORNA, Congress created a national registry requirement for sex offenders, but prosecuting sex offenders who fail to register and fail to engage in intrastate travel is unconstitutional.[174] The regulated activity, sex offender registration, lacks economic qualities and fails to create a nexus between the regulated activity and interstate commerce.[175]

Ultimately, Congress cannot regulate non-commercial intrastate activities under RLUIPA because it failed to establish a sufficiently expansive economic regulatory scheme.[176] As a result, the majority of RLUIPA claims, especially those related to religious ceremony, possession of religious materials, and grooming will not fall under

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statute that directly regulates economic, commercial activity."). The CSA makes "it unlawful to manufacture, distribute, dispense, or possess any controlled substance." *Raich*, 545 U.S. at 13 (citing 21 U.S.C. § 841(a)(1), 844(a) (2006)).

172 *See* Adler, *supra* note 50, at 764 (explaining that so long as a statute defines the regulated activity in broad economic terms, Congress has no limit in regulating non-commercial interstate activity through a comprehensive regulatory scheme).

173 *Compare* 42 U.S.C. § 2250(a) (2006) (punishing a sex offender who travels interstate, but not one who travels intrastate) and *id*. § 16913(a) (requiring a sex offender to register where he or she resides), *with id*. § 2000cc-1(b) (prohibiting the government from imposing substantial burdens on religious exercise of prisoners). *See also* United States v. Vardaro, 575 F. Supp. 2d 1179, 1186 (D. Mont. 2008) (holding that a sex offender can never be a felon under SORNA for conducting purely intrastate travel).

174 *See* 42 U.S.C. § 2250(a) (requiring sex offenders to register pursuant to the Commerce Clause). *See also* Schuller, *supra* note 46, at 92–96 (outlining the requirements of SORNA); *supra* note 46 (discussing court decisions that found Section 16913 of SORNA unconstitutional absent interstate travel).

175 *See* United States v. Powers, 544 F. Supp. 2d 1331, 1335 (M.D. Fla. 2008) (holding that the jurisdictional hook was insufficient because it failed to establish a nexus between the crime and interstate commerce).

176 *See* Daker v. Ferrero, 475 F. Supp. 2d 1325, 1346–47 (N.D. Ga. 2007) (holding that RLUIPA did not establish a comprehensive regulatory scheme of the sale of commercial goods). *See, e.g.*, Jones v. Rieben, No. 2:04cv1029-MHT, 2008 WL 4080360, at *6–7 (M.D. Ala. Sept. 2, 2008) (denying the prisoner's request for the use of music during religious services); Muhammad v. Crosby, No. 4:05cv193-WS, 2008 WL 2229746, at *15–16 (N.D. Fla. May 29, 2008) (denying prisoner's request to wear Islamic clothing, permission not to tuck his shirts into his pants, the use of a Qibla compass to determine which direction is Mecca, and taking showers outside of the cell).

Commerce Clause jurisdiction.[177] If RLUIPA had defined its regulated activity in broad, economic terms it might have been able to regulate these activities with the establishment of a comprehensive regulatory scheme.[178]

### *C. Should Damages Be Awarded to Inmates?*

Prisoners' rights are limited by their incarceration, but those limited rights possessed by prisoners should be vigorously protected.[179] Prisoners seeking monetary damages in any claim face a difficult task before they enter the courtroom with PLRA limiting the availability of damages for claims of mental and emotional distress absent physical injury.[180] In the prison context, however, the loss of the ability to exercise one's religion should be treated differently than mental or emotional injury.[181] A prisoner's loss of the physical right to worship should be compensated.[182] Moreover, Congress passed PLRA to eliminate frivolous lawsuits, not legitimate constitutional claims.[183]

Often prisoners bring free exercise or RLUIPA claims while incarcerated, but by the time the claims are heard or the appeal is answered, the prisoners have either been transferred to another institution or released.[184] If courts are unwilling to award monetary damages, claims for injunctive or declaratory relief will be dismissed as moot, leaving prisoners no remedy for the violation of their free exercise

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177 *See generally* Guidry, *supra* note 36, at 446–47 (arguing that claims about growth of hair and beards will not substantially affect interstate commerce, therefore such claims fall outside of Congress's commerce power).

178 *See* Adler, *supra* note 50, at 763–64 (explaining that so long as a statute defines the regulated activity in broad economic terms, Congress has no limit in regulating non-commercial interstate activity through a comprehensive regulatory scheme).

179 *See generally* Armijo, *supra* note 29, at 299–303 (explaining that allowing prisoners freedom for religious practice benefits the individual prisoner and society at large).

180 *See* 42. U.S.C. § 1997e(e) (2006). In addition, PLRA requires prisoners to exhaust all administrative remedies before filing a claim. *Id*. § 1997e(a).

181 *See supra* note 52 (discussing how the loss of religious exercise is different than a mental or emotional injury).

182 Larson, *supra* note 29, at 1470 (arguing that courts possess the ability to convert the physical loss of religious exercise into monetary relief).

183 *Id*. at 1469 (arguing that PLRA prevents courts from awarding outrageous damages in successful RLUIPA claims).

184 *See* El Badrawi v. Dep't of Homeland Sec., 579 F. Supp. 2d 249, 252 (D. Conn. 2008) (requesting only monetary relief because he was no longer incarcerated). *But see* Bredehoft, *supra* note 68, at 169–70 (arguing that allowing prisoners to seek claims of monetary relief frustrates the purpose of RLUIPA). The intent of RLUIPA is to protect free exercise rights, but prisoners who sue their former institution after release or transfer will use RLUIPA to collect money and not as a method to protect religious practice. *Id*.

rights.[185] Similar to PLRA, release or transfer "would make RLUIPA's text inoperative . . . . Prisoners would lack a remedy under RLUIPA even though the violation of their rights was established and even where it comes close to shocking the conscience."[186] It seems unlikely that Congress would create a right that could, in many instances, be violated for extended periods and possibly have no remedy.[187]

Compared to society at large, free exercise rights are likely more meaningful to prisoners.[188] In the controlled prison environment,

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[185] *See* Neal v. Lucas, 75 F. App'x 960, 961 (5th Cir. 2003) (holding that prisoner's RLUIPA claims seeking injunctive and declaratory relief for use of religious publications were moot after the prisoner was transferred out of the facility, but that claims for monetary relief remained); Magee v. Keim, No. 05-087-GPM, 2008 WL 1902033, at *1–*2 (S.D. Ill. Apr. 28, 2008) (holding that claims for equitable relief were moot after plaintiff was transferred from the facility); Santiago v. Sherman, No. 05-153 Erie, 2007 WL 217353, at *3 (W.D. Pa. 2007) ("In the prison context, the transfer of an inmate from the facility complained of moots claims for injunctive relief involving that facility.").

[186] Larson, *supra* note 29, at 1471. Even if their claims are heard while incarcerated, injunctive relief fails to provide an adequate remedy if recurrence of the harm is unlikely. *Id*. *See* 42 U.S.C. § 2000cc-3(e) (2006). A RLUIPA claim can be rendered moot by the "safe harbor" provision if a change by the penal institution eliminates the burden on religious exercise:

> [G]overnment may avoid the preemptive force of any provision of this chapter 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.

*Id*. *See also* Boles v. Neet, 402 F. Supp. 2d 1237, 1241 (D. Colo. 2005) (explaining that the prisoner's damage before the correctional facility changed its policy towards wearing religious garb during outside transports was not pertinent because the safe harbor provision in RLUIPA preempted liability).

[187] *See* 42 U.S.C. § 2000cc-3(g) (stating that RLUIPA should be construed to broadly protect religious exercise). *See also* Pugh v. Goord, 571 F. Supp. 2d 477, 488–90 (S.D.N.Y. 2008) (holding that release from the correctional facility rendered injunctive and declaratory relief moot). In *Pugh*, the court also heard RLUIPA and First Amendment claims of two prisoners, Pugh and Catlin, who were later released. *Id* at 484. The two inmates were Shi'ia Muslims and requested to have their religious ceremonies separate from Sunni Muslims. *Id*. at 485. Pugh claimed the Fishkill Correctional Facility violated RLUIPA by denying his request, however, the court heard his claims when he was housed at another facility. *Id*. at 484. The court held Pugh's claims were not moot because the RLUIPA violation was "capable of repetition, yet evading review," because the state could freely transfer Pugh between facilities prior to litigation. *Id*. at 489. *See also* Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (holding the Eleventh Amendment only allows for prospective relief). Thus, the Eleventh Amendment bars courts from issuing declaratory relief against state officials who violated federal law in the past. *Id*.

[188] *See generally* Armijo, *supra* note 29, at 301–02 (arguing that free exercise rights serve greater personal importance to prisoners compared to those outside of prison).

religious exercise is the only aspect of prison life in which prisoners feel ownership, and it may serve as their path to salvation as they recompense for the crimes they have committed.[189] Considering the importance of religious exercise, prisoners deserve monetary compensation when the government burdens their religious exercise if awarding damages is found appropriate by the sitting court.[190]

Ultimately, monetary relief further insulates prisoners from arbitrary regulations burdening religious exercise.[191] The approaches employed by the Fourth and Eleventh Circuits failed to consider the full statutory text of RLUIPA.[192] Both circuits agreed "appropriate relief" can include monetary relief, but each incorrectly addressed the ambiguity.[193] Further, RLUIPA in its current form possesses limited applicability under the Commerce Clause because so few claims can substantially affect interstate commerce.[194] Many claims will fall outside of Commerce Clause jurisdiction unless Congress amends RLUIPA.[195] Below, Part IV offers a resolution to the circuit split and an expansion of Commerce Clause jurisdiction.[196]

## IV. CONTRIBUTION

RLUIPA protects a prisoner's ability to exercise his or her religion to its "maximum extent."[197] When a prisoner loses this right, the injury is the loss of religious exercise that can be remedied by compensatory damages.[198] Courts award punitive damages when defendants act with malice or if the award would deter future unlawful conduct.[199] When no cognizable loss is found, prisoners can still be awarded nominal damages in situations when prison officials refuse to serve religious diets

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189 *See generally id*. *See also id.* at 302 n.26 (noting that President George W. Bush rigorously supported faith-based initiatives to facilitate religious rehabilitation).

190 *See* Bredehoft, *supra* note 68, at 168 (noting that without awarding damages, prison officials lack incentive to protect free exercise rights inside the penal institution). *See also infra* Part IV (proposing how monetary relief can be available to prisoners).

191 *See supra* Part III.C (arguing monetary relief fully compensates free exercise injury).

192 *See supra* Part III.A (analyzing decisions from the Fourth and Eleventh Circuits).

193 *See supra* Part II.C.1 (discussing the decisions from the Fourth and Eleventh Circuits).

194 *See supra* Part III.B (analyzing RLUIPA under the Commerce Clause).

195 *See supra* Part III.B.3 (explaining many RLUIPA claims cannot invoke the Commerce Clause).

196 *See infra* Part IV.A (proposing judicial interpretation).

197 42 U.S.C. § 2000cc-3(g) (2006).

198 *See supra* Part III.C (arguing that prisoners suffer physical injury from the loss of religious exercise).

199 Larson, *supra* note 29, at 1471 (noting that prisoners have a very high burden to support an award of punitive damages).

or force grooming that is inconsistent with religious tenets.[200] This Note proposes that damages are available in all official capacity claims.[201]

To determine the availability of monetary relief, courts should interpret "appropriate relief" using RLUIPA Section 2000cc-3(g), which mandates the protection of free exercise to the "maximum extent" of its terms.[202] In analyzing "appropriate relief," courts have no difficulty determining that it encompasses monetary relief, but balk at awarding damages due to Eleventh Amendment concerns.[203] Reading the statutory terms broadly removes the ambiguity of "appropriate relief" by leaving only one reasonable and plausible interpretation.[204] Thus, RLUIPA expressly conditions the acceptance of federal funds on the state's consent to waive its Eleventh Amendment immunity to monetary damages.

Moreover, a broad interpretation of "appropriate relief" to include monetary damages is not radical or beyond a fair reading of the statute.[205] Nor will interpreting "appropriate relief" to include damages obligate the state to pay prisoners in every successful RLUIPA claim because the term "appropriate" allows the court discretion to award monetary relief.[206] Moreover, only a few prisoners are successful in their RLUIPA claims, and out of that small group, even fewer present claims that warrant monetary relief.[207] For instance, monetary relief is proper when the prisoners are transferred or released after bringing the claim.[208] In addition, monetary damages are proper in claims that present a scenario where the religious burden was the result of willful or wanton conduct aimed at bullying the prisoner or was done in retaliation.[209] PLRA further shields the State from large damage awards by barring

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200 *Id*. at 1467 (stating that courts award nominal damages for violations of rights that do not cause harm).

201 *See infra* Part IV.A (proposing judicial interpretation).

202 *See* 42 U.S.C. § 2000cc-3(g); *supra* Part III.A.1 (analyzing Section 2000cc-3(g) in conjunction with the phrase "appropriate relief").

203 *See supra* Part II.C.1 (explaining that courts readily identified that "appropriate relief" could include monetary damages).

204 *See supra* note 147 (discussing the definition of "maximum" to include "an upper limit allowed" and "the greatest quantity").

205 *See* 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady) (discussing the statutory language of RLUIPA).

206 *See* Ruckelshaus v. Sierra Club, 463 U.S. 680, 683 (1983) (defining "appropriate").

207 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

208 *See supra* Part III.C (explaining that many courts dismiss RLUIPA claims as moot if the prisoner who brought the claim was released or transferred to another prison).

209 *See* Larson, *supra* note 29, at 1467–68.

prisoners from bringing damage claims without physical injury.[210] Awarding monetary relief will not result in excessive payouts to prisoners, but will work towards the purpose of RLUIPA—to protect prisoners' free exercise rights to the "maximum extent."

## V. CONCLUSION

A decade after *Employment Division v. Smith*, Congress finally developed a successful model to vigorously protect free exercise rights.[211] Establishing the strict scrutiny standard of review through congressional spending and commerce powers has numerous applications outside of the prison context. But it is telling that Congress chose to protect the free exercise rights of prisoners first. It demonstrates Congress's passion to protect those in the most vulnerable positions. Sometimes, however, Congress leaves a few loose ends, forcing those seeking protection to rely on their own creativity.

With damages available, the hypothetical that began this Note ends with justice served.[212] Awarding monetary relief prevents the South Greenwich State Prison from easily escaping liability, while fully compensating the prisoner for injuries related to the free exercise loss.[213] Protecting prisoners' free exercise rights to the maximum extent is achieved by interpreting "appropriate relief" to include monetary relief.[214] When a state accepts federal funding and subjects itself to RLUIPA's terms, no other reasonable interpretation of "appropriate relief" exists. With states consenting to suit for monetary relief, prisoners deserve damages when the court deems them appropriate. As the Supreme Court stated in *Turner v. Safley*, "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."[215] Allowing monetary damages helps hurdle that barrier.

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[210] *See* 42 U.S.C. § 1997e(e) (2006). *See supra* note 52 (explaining how PLRA applies to RLUIPA).

[211] *See generally* Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that neutral laws of general applicability do not need to satisfy strict scrutiny review).

[212] *See supra* Part I (presenting a hypothetical illustrating the injustices of not awarding monetary relief in RLUIPA claims).

[213] *See supra* Part I.

[214] *See supra* Part IV.A.

[215] 482 U.S. 78, 84 (1987).

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