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TABLE OF CONTENTS

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INTRODUCTION

Religion plays a vital role in the daily lives of many prisoners. For incarcerated persons, a connection to the divine can provide comfort during periods of isolation from their family and community. From a policy perspective, spiritual development and religious practice promote rehabilitation and reduce recidivism in inmates.[1] While prisoners forfeit many of their civil liberties, Congress has ensured that religious exercise is not among them.[2] As Congress enhanced religious freedom protections for prisoners, prison facilities became increasingly concerned that prisoners would feign religiosity to gain certain religious accommodations.[3] To counter this concern, prison facilities conditioned accommodations on the sincerity of an inmate's religious belief.[4] Some facilities, however, instituted problematic methods for determining sincerity of religious belief, such as requiring physical evidence of doctrinal adherence or removing lapsing prisoners from religious accommodations.[5]

This Note discusses the problems of current methods for testing the sincerity of religious belief in federally funded prisons and proposes a method for standardizing sincerity testing. Passed in 2000, the Religious Land Use and Institutionalized Persons Act (RLUIPA) protected the religious exercise of prisoners by holding religious exercise to the highest constitutional standard in our courts: strict scrutiny.[6] RLUIPA accorded prisoners a means of relief if their religious exercise was not properly ac-

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1. Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 511 (2005) ("Religious observance by prisoners . . . cut recidivism rates by two-thirds . . . ."); *see also* Religion in Prisons, PEW FORUM, (March 22, 2012), *available at* http://www.pewforum.org/2012/03/22/prison-chaplains-exec/ ("Nearly three-quarters of the chaplains (73%) . . . say they consider access to religion-related programs in prison to be 'absolutely critical' to successful rehabilitation of inmates.").

2. Yellowbear v. Lampert, 741 F.3d 48, 52 (10th Cir. 2014) (discussing Congress's motivations in passing the Religious Freedom and Restoration Act).

3. *See* Lizette Alvarez, *You Don't Have to be Jewish to Love a Kosher Prison Meal*, N.Y. TIMES, (Jan. 20, 2014), *available at* http://www.nytimes.com/2014/01/21/us/you-dont-have-to-be-jewish-to-love-a-kosher-prison-meal.html ("Florida is now under a court order to begin serving kosher food to eligible inmates, a routine and court-tested practice in most states. But state prison officials expressed alarm recently over the surge in prisoners, many of them gentiles, who have stated an interest in going kosher."); Wall v. Wade, 741 F.3d 492, 494 (4th Cir. 2014) ("Prior to 2010, Muslim inmates at [Red Onion State Prison ("ROSP")] simply had to sign up to participate in Ramadan. In 2009, approximately half of the inmate population signed up. ROSP staff later determined that a significant number of the participating inmates were not, in fact, practicing Muslims. As a result, ROSP devised a new eligibility policy for 2010: in addition to signing up, inmates had to provide some physical indicia of Islamic faith, such as a Quran, Kufi, prayer rug, or written religious material obtained from the prison Chaplain's office.").

4. *See generally Yellowbear*, 741 F.3d at 54; *Wall*, 741 F.3d at 499; Moussazadeh v. Tex. Dep't of Crim. Just., 703 F.3d 781, 791 (5th Cir. 2012).

5. *Wall*, 741 F.3d at 494; *Moussazadeh*, 703 F.3d at 792.

6. 42 U.S.C. § 2000cc-1.

commodated.[7] If a prisoner demonstrated that a policy substantially burdened his religious exercise, a facility could only continue engaging in that practice if it demonstrated a compelling state interest.[8]

After RLUIPA's passage, prisons feared that heightened protections for religious exercise would result in a flood of frivolous claims for religious accommodations arising out of a desire for preferential treatment, rather than out of a sincere need for the accommodation.[9] RLUIPA prohibits prisons and courts from granting religious accommodations only to practices that are "central to" or "compelled by" a religion.[10] In other words, RLUIPA does not differentiate between accommodations for practices mandated by religions, such as Kosher meals, and those encouraged by religions, such as supplementary fasts. By preventing the inquiry into centrality, RLUIPA provides prisoners with a platform to request accommodation for *any* religious exercise.[11] However, RLUIPA does permit inquiry into the sincerity of a prisoner's professed belief.[12] If an inmate is found to be insincere, a facility is not required to provide religious accommodations.[13] The permissibility of testing sincerity, however, created confusion in its application for both prison facilities and lower courts.[14] For example, some prison facilities removed prisoners from Kosher food programs after finding that the prisoners ate nonkosher food from the commissary.[15] Others required physical evidence of religious adherence before finding sincerity, such as possession of a Quran, prayer rug, or written religious materials from a chaplain's office.[16] While appellate courts often invalidated such policies, the more pressing worry is that prisons across the country are using unconstitutional methods of sincerity testing to determine belonging in particular religious groups and consequently, entitlement to religious accommodations. The result: policies that fail to accommodate for imperfect religious adherence end up violating

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7. 42 U.S.C. § 2000cc-2.

8. 42 U.S.C. § 2000cc-1. The term "compelling state interest" is defined in Part I.B.4, *infra*.

9. *See* Alvarez, *supra* note 3.

10. 42 U.S.C. § 2000cc-5(7)(A).

11. *See id*.

12. Cutter v. Wilkinson, 544 U.S. 709, 725 n. 13 (2005) ("Although RLUIPA bars inquiry into whether a particular belief or practice is "central" to a prisoner's religion . . . the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity.").

13. Gaubatz, *supra* note 1, at 521. (Protection does not extend – whether under the First Amendment or RLUIPA – to 'so-called religions which . . . are obviously shams and absurdities and whose members are patently devoid of religious sincerity.'") (emphasis added) (quoting Theriault v. Carlson, 495 F.2d 390, 395 (5th Cir. 1974)).

14. *See* Wall v. Wade, 741 F.3d 492, 492 (4th Cir. 2014) (prison policy attempting to distinguish sincerity was upheld at district court level, but overturned on appeal).

15. Moussazadeh v. Tex. Dep't of Crim. Just., 703 F.3d 781, 781 (5th Cir. 2012).

16. *Wall*, 741 F.3d at 494.

RLUIPA's constitutional protections and do not get resolved until the appellate level.

This Note argues that prison facilities are engaging in sincerity testing in a manner that violates constitutional free exercise protections. Yet, these violations occur as a result of the difficulty in applying the RLUIPA standard rather than out of an intentional desire to evade constitutional protections. This Note ultimately proposes a practical solution: a three-step test to determine the sincerity of a prisoner's religious belief, modeled, in part, after the test developed for conscientious objectors to military service.[17] Part I explains the history of RLUIPA and how prisoners may bring religious exercise claims under RLUIPA. Part II explains RLUIPA's burdensome standard in adjudicating sincerity of religious beliefs by examining prisons' problematic methods of testing sincerity, district court confusion in adjudication RLUIPA claims, and how appellate court decisions frequently overturn district court decisions and invalidate unconstitutional prison policies.

Part III proposes a three-part test that standardizes the sincerity inquiry and aids prisoners, prison facilities, and courts in the litigation of RLUIPA claims. This Note offers a simple and practical approach for what prisons and courts should consider when inquiring into the sincerity of a prisoner's religious beliefs by adapting the test used to measure the sincerity of religious belief for conscientious objector in the military context to RLUIPA claims.[18] This solution conducts a meaningful sincerity inquiry that distinguishes between the genuine practitioner and feigning believer while relieving judges from the precarious position of being arbiters of religious doctrine. The three-part inquiry also maintains a degree of flexibility that continues to provide prison facilities with the right to constitutionally rebut a prisoner's declaration of sincerity.

Ideally, this Note hopes for a directive from Congress to clarify the scope of permissible sincerity testing under RLUIPA in prison facilities. In the absence of such Congressional action, however, this Note aims to resolve the issue through clarifying and standardizing the confines of the sincerity inquiry: first through prison facilities and ultimately, through the courts. As courts begin setting the guidelines of the sincerity inquiry, prisons will reform their methods to conform to each district or circuit court's requirement.

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17. *See* Kevin L. Brady, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431, 1433 (2011). The adaptation of the conscientious objector test to the RLUIPA sincerity inquiry was first proposed in Brady's article. This Note expands on and modifies the test proposed by this article.

18. *See* United States v. Seeger, 380 U.S. 163, 166 (1965); *see also* Witmer v. United States, 348 U.S. 375, 376 (1955).

I. PROTECTING RELIGIOUS EXERCISE IN PRISON

A. *History of Free Exercise Jurisprudence*

RLUIPA was passed against the backdrop of a series of cases and statutes ensuring the free exercise of religion.[19] In 1963, in *Sherbert v. Verner*, the Supreme Court applied strict scrutiny to a claim for religious accommodation under the Free Exercise Clause of the First Amendment.[20] The Court held that laws substantially burdening religion could not be upheld unless the government could demonstrate that the law advanced a compelling government interest and was the least restrictive means of achieving that interest.[21] However, thirty years later, the Supreme Court abandoned *Sherbert*'s strong constitutional protections for the free exercise of religion.[22] In *Employment Division of Oregon v. Smith*, two employees lost their jobs as a result of using peyote, a required part of their Native American religion.[23] When the employees filed for government unemployment benefits, their applications were denied because they had been fired for work-related misconduct.[24] They sued the State of Oregon, citing violations of the Free Exercise Clause.[25] The Supreme Court, however, upheld Oregon's state law denying the plaintiffs' unemployment benefits.[26] The Court held that the laws need only meet a rational basis review.[27] *Smith* overruled *Sherbert*'s compelling interest test and declared that the Free Exercise Clause "does not exempt religious persons from the dictates of neutral laws of general applicability."[28]

In 1987, in *Turner v. Safley*, the Supreme Court addressed the Free Exercise Clause in the prison context. The Court held "when a prison

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19. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 398 (1963) (holding that unemployment benefits could not be denied to claimant who refused employment because it would require her to work on Saturday, in conflict with her religions beliefs); Religious Freedom and Restoration Act ("RFRA"), 42 U.S.C. § 2000-bb (1993) (restoring the compelling interest test set forth in *Sherbert* and "guarantee[ing] its application in all cases where free exercise of religion is substantially burdened" by government).

20. 374 U.S. at 403.

21. *Id*. at 406–07. This standard is generally referred to as "strict scrutiny."

22. *See* Emp't Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 873 (1990).

23. *Id*. at 874.

24. *Id*.

25. *Id*.

26. Cutter v. Wilkinson, 544 U.S. 709, 714 (2005) (citing *Emp't Div.*, 494 U.S. at 878–82).

27. Gaubatz, *supra* note 1, at 508–09 ("[T]he *Smith* Court announced a new rule applying mere rational basis scrutiny in the usual case where religious exercise was burdened as a result of a neutral and generally applicable law.").

28. Yellowbear v. Lampert, 741 F.3d 48, 52 (10th Cir. 2014) (citing *Emp't Div.*, 494 U.S. at 872).

regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[29] In *O'Lone v. Estate of Shabazz*, the Court applied the *Turner* test and gave prison great deference in formulating policies to accommodate religious prisoners' requests.[30] Although *Turner* and *O'Lone* "were not significant retreats in prisoner rights protection," they clarified "what numerous courts were already doing."[31]

Worried that there was insufficient protection for the free exercise of religion, Congress sought to restore *Sherbert*'s compelling-interest test.[32] In 1993, Congress nearly unanimously passed the Religious Freedom and Restoration Act (RFRA).[33] RFRA prohibited the government from "substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can prove that the burden furthers a "compelling government interest" and is "the least restrictive means" of achieving that interest.[34] RFRA applied to both state and federal government officials.[35] Congress had temporarily succeeded in restoring a strict scrutiny standard for free exercise claims.

RFRA's success, however, was short lived. Less than four years after Congress passed RFRA, the statute was successfully challenged as an unconstitutional exercise of congressional power.[36] In *City of Boerne v. Flores*, the Supreme Court struck down RFRA as unconstitutional,[37] holding that RFRA exceeded Congress's powers under the Fourteenth Amendment due to its lack of a commerce clause underpinning or spending clause limitation.[38] RFRA was invalidated only as applied to the states, however, and continues to be applied to the federal government—including federal prisons.[39]

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29. Turner v. Safley, 482 U.S. 78, 89 (1987).

30. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987).

31. Daniel J. Solove, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 470 (1996).

32. Luckette v. Lewis, 883 F. Supp. 471, 475 (D. Ariz. 1995) ("Congress specifically stated that the purpose of the RFRA 'is to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*.'") (internal citations omitted).

33. 42 U.S.C. § 2000bb(b)(1).

34. Cutter v. Wilkinson, 544 U.S. 709, 714–15 (2005) (citing 42 U.S.C. § 2000bb).

35. 42 U.S.C. § 2000bb-2; City of Boerne v. Flores, 521 U.S. 507, 516 (1997) ("the Act's mandate applies to any 'branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States,' as well as to any 'State, or . . . subdivision of a State.'").

36. *See City of Boerne*, 521 U.S. at 536.

37. *Id*.

38. *Cutter*, 544 U.S. at 715.

39. *See* 42 U.S.C. § 2000bb-2; *see also* Gaubatz, *supra* note 1, at 513 n. 50 ("RFRA continues to apply against the federal government and provide a cause of action for federal prisoners against the federal government. Moreover, Section 7 of RLUIPA amended RFRA so that the scope of 'religious exercise' protected by RLUIPA is the same as that protected by RFRA.").

In 2000, Congress enacted RLUIPA, this time invoking its federal authority under the Spending Clause and the Commerce Clause.[40] RLUIPA reinstated RFRA's balancing test in two contexts: land use and prisons.[41] Section 3 of RLUIPA pertaining to prison policies, states:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . 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.[42]

RLUIPA applied to any prison facility that received federal financial assistance.[43] In 2005, the Supreme Court declared RLUIPA a constitutional exercise of Congressional power in *Cutter v. Wilkinson*.[44] RLUIPA aimed to restore free exercise protections to pre-*Smith* jurisprudence and uphold prisoners' religious free exercise.[45]

B. *RLUIPA's Added Protection: Bringing an RLUIPA Claim*

RLUIPA's attempt to protect religious exercise in the prison context succeeded more than any of Congress's previously enacted statutes.[46] Since RLUIPA's passing, there has been a "significant increase" in free exercise claims brought by inmates.[47] Under RLUIPA, more prisoners have prevailed on free exercise claims than any other statute or Supreme Court standard.[48]

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40. 42 U.S.C. § 2000cc (2000); *Cutter*, 544 U.S. at 715.

41. *Id.* at 715.

42. 42 U.S.C. § 2000cc-1 (2006). This section also applied to cases where the "substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several states, or with Indian Tribes." *Id.*

43. *Id. at* § 2000cc-1(b)(1); *Cutter*, 544 U.S. at 732.

44. *Cutter,* 544 U.S. at 720–21.

45. James D. Nelson, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2066 (2009) ("RLUIPA is the most recent attempt to protect religious liberty through codification of a heightened standard of review.").

46. Nelson, *supra* note 45, at 2063. ("In the last twenty years prisoners have not been successful in advancing constitutional free exercise claims under *Turner.* Likewise, prisoners were not successful under RFRA's codified heightened scrutiny.").

47. *Id.* at 2067.

48. *See* Nelson, *supra* note 45, at 2108 (referring to the hard-look model of some courts, Nelson notes that "[b]y isolating the imposition on religious practice for burdens analysis, abandoning the requirement of outright coercion, and replacing a searching centrality requirement with a cursory sincerity inquiry, courts have allowed a greater number of prisoners to make out a prima facie case for accommodation under RLUIPA.").

To raise an RLUIPA claim, a prisoner must show three elements.[49] First, he must demonstrate that a prison policy "interferes with his 'religious exercise.'"[50] Second, he must demonstrate that his religious beliefs are sincere.[51] Third, he must prove that the prison policy "substantially burdens" the practice of his religion.[52] After making a prima facie claim for an RLUIPA violation, the burden shifts to the government to show that the policy used is the "least restrictive means" of advancing a "compelling government interest."[53] If the government fails to meet its burden, the prisoner gets "any appropriate relief" and attorney's fees.[54] This often results in the prisoner being exempt from the challenged policy or receiving his requested religious accommodation.

1. RLUIPA's Broad Definition of Religious Exercise

A prisoner's first burden under RLUIPA is to demonstrate that his substantially burdened exercise was religious in nature.[55] Unlike previous statutes, which omitted a definition for "religious exercise,"[56] Congress took care to define "religious exercise" in RLUIPA.[57] Although RLUIPA distinguishes between a "religious belief" and a "way of life based on purely secular considerations,"[58] protecting only the former, RLUIPA greatly expands the definition of religious exercise. Under RLUIPA, religious exercise is defined to include "any exercise of religion whether or not compelled by, or central to, a system of religious belief."[59] Thus, RLUIPA protects any and all prisoners' claims to religious exercises, regardless of the importance of a practice to a particular religion.[60]

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49. *Id.* at 2067.

50. *Id.*; *see generally* Gaubatz, *supra* note 1, at 513–14 (citing 42 U.S.C. § 2000cc-2(e)) (stating that prior to bringing an RLUIPA claim, the prisoner has to show that he has exhausted any available administrative remedies).

51. Nelson, *supra* note 45, at 2067.

52. *Id.*

53. *Id.*; 42 U.S.C. § 2000cc-2(b).

54. Gaubatz, *supra* note 1, at 514.

55. Nelson, *supra* note 45, at 2108.

56. *Cf.* Religious Freedom and Restoration Act, 42 U.S.C. § 2000bb-1 (failing to define "religious exercise").

57. Gaubatz, *supra* note 1, at 517 (explaining that RFRA did not define "religious exercise," but that Congress specified RLUIPA's definition of "religious exercise" would also apply to RFRA, which had essentially left the term undefined).

58. *Id.* at 519–520 (RLUIPA required that the act be religiously motivated, and distinguished between a "religious belief" and a "way of life . . . based on purely secular considerations.").

59. 42 U.S.C. § 2000cc-5(7)(A) (2004).

60. Harv. L. Rev. Ass'n., *The Law of Prison: IV. in the Belly of the Whale: Religious Practice in Prison*, 115 HARV. L. REV. 1891, 1895 n. 25 (2002). ("RFRA defined religious exercise as "the exercise of religion under the First Amendment. Many courts limited the "substantial burden" requirement of RFRA to regulation that "significantly inhibit[s] or constrain[s]" a "cen-

The effect of RLUIPA's broad protections is most easily demonstrated by examining a hypothetical. Many Muslim prisoners request religious accommodations during the month of Ramadan in the form of meals at dawn and sunset and exemption from eating throughout the day.[61] Fasting during Ramadan from sunrise to sunset is an undisputed central tenet of Islam.[62] In contrast, fasting on Mondays and Thursdays is not a central tenet of Islam, but is a recommended additional activity for Muslim practitioners who are able to, and desire to, fast for additional days. After RLUIPA, prisoners were able to bring legitimate claims for accommodations to fast on Mondays and Thursdays. More importantly, prison facilities could not make a constitutional distinction between the two requests. If a prisoner prevails on all other requirements of an RLUIPA claim, RLUIPA mandates that he be equally likely to prevail on a prima facie claim for Ramadan fasts as he is to prevail on an accommodation for Monday and Thursday fasts.[63]

2. Shifting the Inquiry from Centrality to Sincerity

RLUIPA permits prisoners to bring claims pertaining to *any* religious exercise and prohibits inquiry into whether a particular belief or practice is "central to a prisoner's religion."[64] RLUIPA's ban on inquiring into centrality of belief was a major victory for prisoners' free exercise claims.[65]

Prior to RLUIPA's enactment, the centrality inquiry was closely tied with demonstrating that a policy poses a substantial burden.[66] Judges often

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tral tenet of a prisoner's individual beliefs" or denies opportunities to engage in activities "fundamental to a prisoner's religion," Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995), or that prevents a "mandated" practice, Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995). "Substantial burden" was understood similarly prior to RFRA."). *See also* Gaubatz, *supra* note 1, at 532 (explaining that the Sixth, Seventh, Eighth, Ninth, and Tenth circuits and some district courts imposed a centrality requirement in order for religious practice to be protected under RFRA).

61. *See* Wall v. Wade, 741 F.3d 492, 494 (4th Cir. 2014).

62. Lovelace v. Lee, 472 F.3d 174, 206 (4th Cir. 2006) ("The Ramadan fast occupies a special place as one of the central tenets of Islam. Prescribed in the Muslim holy scripture of the Qur'an, the month-long holiday is celebrated by Muslims around the world as a time of great religious and cultural significance.").

63. However, it is likely that a prison facility would prevail at the compelling-need inquiry on granting the Monday/Thursday fast accommodation.

64. Cutter v. Wilkinson, 544 U.S. 709, 725 n. 13 (2005).

65. Nelson, *supra* note 45, at 2077. ("The drafters intended RLUIPA to remove the many 'frivolous or arbitrary rules' that restrict the religious practice of prisoners in 'egregious and unnecessary ways.' They observed that the centrality inquiry placed an obstacle in the way of claimants attempting to secure an accommodation under both Sherbert and RFRA, and they specifically sought to eliminate that barrier.").

66. Solove, *supra* note 31, at 476. ("[C]ourts applying RFRA have held that the burden must interfere with a 'central tenet' of the religion or with a practice 'mandated' by the religion. The central tenet test, however, understands religion in a very narrow manner, leading many courts applying RFRA to dismiss any practice not deemed absolutely obligatory.").

decided whether a prison policy substantially burdens an inmate's religious exercise by inquiring into whether a practice was central to, or compelled by, a religion.[67] If a court found a practice was central to or compelled by a religion, an inmate could easily show that his religious exercise was substantially burdened.[68] Jewish prisoners can easily demonstrate that denial of Kosher food substantially burdens their religious exercise because Kosher meals are a central tenet of Judaism. The centrality requirement, however, was an "enormous hurdle" for many prisoners.[69] Supplementary religious practices often went unprotected. For instance, practitioners of religions with fewer compelled practices, such as followers of Native American religions, found it more difficult to prove that a prison policy substantially burdened their religion.[70] RLUIPA crystallized the prohibition on the centrality inquiry, and its effects were significant.[71] While under RFRA prisoners only had a nine percent success rate, they found that RLUIPA provided a greater chance of success.[72]

RLUIPA only requires that a prisoner demonstrate that his religious exercise is sincere.[73] Maintaining the permissibility of the sincerity inquiry is a crucial factor because the "government need only accommodate the exercise of actual religious convictions."[74] The First Amendment and RLUIPA do not extend protections to sham religions "whose members are patently devoid of religious sincerity."[75] Because RLUIPA prohibits prison facilities from denying prisoner's accommodations based on whether the requested accommodation is central to a prisoner's professed belief, prison facilities resorted to conducting sincerity tests in order to

67. *See* Abdur-Rahman v. Mich. Dep't of Corrections, 65 F.3d 489, 491–92 (6th Cir. 1995) (holding that a religious practice must be "essential" or "fundamental" to be protected); Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995) (finding that "the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.").

68. Luckette v. Lewis, 883 F. Supp. 471, 479 (D. Ariz. 1995) (holding that prisoner met his burden of proving that his attempts to maintain a Kosher diet, keep his hair at a certain length, and wear a headcovering of a particular color were central tenets of his faith and that prison policies substantially burdened his religious belief).

69. Nelson, *supra* note 45, at 2077.

70. *Id*. at 2064.

71. The distinction between centrality and sincerity and the bar on inquiring into centrality has been around since 1944. *See* United States v. Ballard, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting) ("If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer."). However, because there was no direct prohibition as clear as it was stated in RLUIPA, courts operating under RFRA and *Sherbert v. Verner*, 374 U.S. 398 (1963) maintained the ability to use the centrality inquiry to deny prisoners' rights claims.

72. Gaubatz, *supra* note 1, at 534.

73. Cutter v. Wilkinson, 544 U.S. 709, 725 n. 13 (2005).

74. Gaubatz, *supra* note 1, at 521.

75. *Id*.

differentiate between prisoners who are entitled to religious accommodations from those seeking to game the system.

3. Substantial Burden

The third element a prisoner must prove to prevail on an RLUIPA claim is that the prison policy substantially burdened his religious exercise.[76] This is the threshold inquiry in considering the merit of a prisoner's claim."[77] If a policy is found to substantially burden a religious practice, the burden then shifts to the government to prove that the policy advances a compelling government interest.[78] Congress did not define "substantial burden" within the text of RLUIPA.[79] However, "substantial burden" is commonly used in Free Exercise Clause jurisprudence. The Supreme Court held in *Sherbert v. Verner* "that a substantial burden exists when government actions or qualifications placed on benefits and privileges have a 'tendency to inhibit' religious exercise."[80] The Court went on to provide an example of a substantial burden, explaining that one exists when a person is required to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other."[81] Although courts differ on defining substantial burden, courts generally understand a substantial burden exists when a policy puts "pressure on individuals to modify their religious behavior or prevent[s] them from engaging in religious conduct in a way that is greater than a mere inconvenience."[82]

As explained above, the substantial burden inquiry was complicated by RLUIPA's prohibition on inquiring into centrality.[83] As courts reviewed prison policies for testing inmates' sincerity, they found it difficult to determine the existence of a substantial burden without inquiring into the centrality of religious belief.[84]

4. Compelling Interest

After a prisoner demonstrates that a prison policy substantially burdens his religious exercise, the burden shifts to the government or prison facility to defend the policy.[85] If a facility intends to maintain its existing

76. Nelson, *supra* note 45, at 2067.

77. Gaubatz, *supra* note 1, at 514.

78. Nelson, *supra* note 45, at 2067.

79. 42 U.S.C. § 2000cc-5 (2006). The term "substantial burden" is left undefined in the "Definitions" section.

80. Gaubatz, *supra* note 1, at 515.

81. *Id.* at 515–16.

82. *Id.* at 534. *See also* Washington v. Klem, 497 F.3d 272, 278 (3d Cir. 2007).

83. *See supra* Part I.B.2.

84. Courts responded to RLUIPA's prohibition on inquiring into centrality in one of two ways. These responses are discussed in Part II.D-E, *infra.*

85. Gaubatz, *supra* note 1, at 514.

policy, it must demonstrate that the policy furthers a compelling government interest and is the least restrictive means to achieve that interest.[86] This shift in the burden of proof distinguishes RLUIPA from prior free exercise jurisprudence by upholding prisoners' free exercise challenges to strict scrutiny.[87] After RLUIPA, it no longer sufficed for a facility to claim a "legitimate governmental interest," rather, prison facilities must assert a "compelling governmental interest"—a distinction that makes it easier for prisoners to prevail on free exercise claims.[88]

Compelling government interests in the RLUIPA context frequently include a prison's safety and security interests.[89] In *Cutter v. Wilkinson*, the Supreme Court emphasized that RLUIPA does not override an institution's safety and security interests,[90] stating "We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns."[91] Lower courts have followed the Supreme Court's directive and given great deference to prison administrators' expertise in determining a compelling governmental interest.[92] In fact, many prison facilities prevail by citing security concerns.[93] After a prison facility presents evidence of a compelling government need, courts weigh the facility's interest in the policy against the substantial burden in order to determine whether the accommodation should be granted.[94]

II. RLUIPA: THE PROBLEM

A. *Why Test Sincerity?*

Religious accommodations in prison are desirable. They often afford prisoners better food, more flexible sleeping schedules, extended time outside their cells, and more opportunities to congregate with fellow practitioners. Providing religious accommodations, however, can also be

86. *Id.*

87. *Id.*

88. *Id.* at 543.

89. *See generally* Cutter v. Wilkinson, 544 U.S. 709, 723 (2005) ("Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions and anticipated that courts would apply the Act's standard with due deference to prison administrators' experience and expertise.").

90. *Id.* at 722.

91. *Id.* at 721–22 ("While the Act adopts a 'compelling governmental interest' standard, § 2000cc-1(a), '[c]ontext matters' in the application of that standard.") (citation omitted).

92. *See generally* Nelson, *supra* note 45, at 2080–84 (discussing Sixth Circuit and Eighth Circuit cases in which courts have deferred to the judgment of prison officials when determining whether a compelling government interest exists).

93. *See, e.g.*, Fowler v. Crawford, 534 F.3d 931, 939 (8th Cir. 2008) (holding that a prohibition on access to a sweat lodge for prisoners of the Native American faith due to security concerns was not a violation of RLUIPA because it was in furtherance of a compelling government interest).

94. *See id.*

costly. Prison facilities are concerned about the cost of providing kosher meals, unfairly advantaging practitioners of certain religions, fostering feelings of jealousy between inmates, or overburdening personnel. Yet, the Constitution mandates that prison facilities grant some religious accommodations to inmates.[95] To minimize the cost of providing these accommodations, prison facilities have an interest in granting accommodations to as few inmates as possible.

One of the most efficient ways a prison can allocate minimal religious accommodations is by limiting accommodations to practices that are central to or compelled by a religion.[96] However, that strategy is expressly prohibited by RLUIPA.[97] Theoretically, after RLUIPA, an inmate could ask for *any* accommodation stemming from a sincere religious exercise.[98] RLUIPA did, however, permit prison facilities to condition accommodations on the sincerity of an inmate's professed belief, and as a result, sincerity testing has become an important way to distinguish between genuine believers and feigning practitioners.

Consider the following scenario based on current events in Florida State prisons:[99] Prisoner A is a very sincere prisoner. He was born Jewish, and has no reason not to receive Kosher food. He lapses a few times and buys non-Kosher food from the commissary. The prison facility then determines that he is no longer sincere in his belief and stops providing him with Kosher meals. Prisoner B feigns sincerity because he wants the better-tasting and more expensive Kosher food offered by the facility. He lapses and buys non-Kosher food from the commissary, not out of weakness in adhering to religious doctrine, but out of a lack of conviction in his professed belief. The prison determines he is insincere in his belief and prisoner B stops receiving Kosher meals. Sincerity testing, if properly conducted, can be an effective means for a facility to deny accommodations to insincere inmates. It can also, however, negatively impact sincere prisoners by requiring perfection in religious adherence.

B. *Sincerity Testing: A Problematic Alternative*

The Supreme Court has favored an inquiry into the sincerity of religious beliefs, rather than the inquiry into the centrality of religious doctrine, in order to avoid violating the Establishment Clause of the First Amendment. The central purpose of the Establishment Clause is to ensure

95. U.S. CONST. amend I.

96. Solove, *supra* note 31, at 476. (The central tenet test "understands religion in a very narrow manner" and can "dismiss any practice not deemed absolutely obligatory.").

97. 42 U.S.C. § 2000cc-1(a) (2000).

98. *See* Gaubatz, *supra* note 1, at 518, 530; Alvarez, *supra* note 3; *see also* Harv. L. Rev. Ass'n, *supra* note 60 at 1895 (stating that "under RLUIPA, the threshold appears to be only whether the beliefs are 'sincere' and 'religious,' not whether they are 'essential' or 'central.'").

99. Alvarez, *supra* note 3 (discussing gentile inmates in Florida who want Kosher meals, which cost four times as much as standard meals).

"government neutrality in matters of religion."[100] The Clause stands for the proposition "that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact."[101] If courts are permitted to inquire into the centrality of religious doctrine, judges risk violating the Establishment Clause by involving courts in the religious sphere. However, RLUIPA's prohibition on inquiring into centrality failed to anticipate prison facilities' difficulties in legitimately determining sincerity of religious belief. Similarly, the Supreme Court did not provide any guidelines for prison facilities seeking to test the sincerity of inmates requesting religious accommodations. In fact, in *Cutter v. Wilkinson*, Justice Ginsberg presumed that courts would succeed in properly adhering to RLUIPA's text and give prison administrators a great amount of deference.[102] In rejecting prisons' concerns that RLUIPA would result in an increasing number of frivolous claims, Justice Ginsberg stated that the Supreme Court had faith in lower courts' ability to properly adjudicate RLUIPA claims and give due deference to prison administrators' experience.[103] This level of deference meant that changes in policy to accommodate RLUIPA happened at the prison level, rather than as a mandate from the courts.[104] Without the necessary guidance from Congress or the courts on how to conduct sincerity tests, determining sincerity became a complicated process that often resulted in prison facilities conducting unconstitutional inquiries.

Determining sincerity of religious belief is a difficult task to undertake for both a prison facility and a court for a variety of reasons. First, the degree of sincerity of religious belief can be impossible to factually test without risking violating the Establishment Clause: "Faith is Faith because it cannot be demonstrated. A degree of doubt is therefore always possible."[105] Second, judges making sincerity determinations or chaplains determining whether an inmate belongs in a certain religious group can be

100. Gillette v. United States, 401 U.S. 437, 449–50 (1971) (citing U.S.C.A. CONST. amend I) ("And as a general matter it is surely true that the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.").

101. *Id*.

102. Cutter v. Wilkinson, 544 U.S. 709, 710 (2005) ("Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions and anticipated that courts would apply the Act's standard with due deference to prison administrators' experience and expertise.").

103. *Id*. ("There is no reason to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns.").

104. Alvarez, *supra* note 3, at 1895. ("Regardless of the formal level of scrutiny, however, the deference that courts accord prison administrators means that significant changes in policies tend to come from prisons, not from courts.").

105. Brady, *supra* note 17, at 1451 (citing John T. Noonan Jr, *How Sincere Do You Have to Be to Be Religious?,* 1988 U. ILL. L. REV. 713, 718 (1988).

affected by their own doctrinal commandments.[106] Therefore, a possibility of bias always exists. Third, testing the sincerity of a prisoner's religious belief can unfairly disadvantage the prisoner. Courts often readily doubt the sincerity of some prisoners' claims, presuming that prisoners have strong incentives to invent religious burdens in their quest for special treatment.[107] Lastly, sincerity testing burdens religious practitioners by creating an almost impossible burden of proof.[108] Prisoners must maintain unwavering religious adherence because lapses in adherence are considered evidence of insincerity.

C. *Prison Facilities' Problematic Methods of Sincerity Testing*

Sincerity testing in prisons is generally a two-prong inquiry.[109] First, an inmate requests the accommodation by filling out a questionnaire or form demonstrating that he belongs to a particular faith group and needs the requested accommodation.[110] After receiving the requested accommodation, a prisoner's behavior is monitored by the chaplain or other prison personnel to ensure that they are acting in accordance with their professed beliefs.[111] If they are deemed insincere, a prisoner may face repercussions, including removal from the requested accommodation.[112]

In many prison facilities, sincerity of religious belief is determined by having chaplains monitor the prisoners' adherence to their religions.[113] Lapsing prisoners, or those determined to be misusing an accommodation, face removal from the accommodations. For example, New York State prisons permit prisoners to wear certain religious headcoverings such as a Kufi, Yarmulke, Tsalot-Kob, Fez, and Khimar.[114] To determine whether or not an inmate is sincere, a chaplain of the inmate's faith must determine whether an inmate's practice and the "head-covering itself is 'legitimate.'"[115] If there is reason to believe that an inmate is wearing a religious

106. *Id*.

107. Nelson, *supra* note 45, at 2064.

108. *See id*. at 2064–65.

109. Although prison facilities differ in their manner of determining religious belonging and accommodations, this note will look to the New York State Prison system as a source for how state prisons determine religious belonging and adjudicate accommodations because it is generally regarded as a more progressive state prison system.

110. *See* STATE OF NY DEP'T OF CORR. AND CMTY. SUPERVISION, DIRECTIVE NO.4202, RELIGIOUS PROGRAMS AND PRACTICES 1, 5 (July 24, 2014), *available at* http://www.doccs.ny.gov/directives/4202.pdf. Some prisons also place limits on the number of times you can change your religion. For example, New York allows inmates to change their religion once a year. *Id*.

111. *Id*.

112. *See, e.g.*, *id*. at 9.

113. *See, e.g.*, *id*. at 9.

114. *See id*. at 8.

115. *Id*. at 8.

headcovering inappropriately, a facility chaplain will be asked to investigate the matter further.[116] If the inmate is not wearing the headcovering in a manner "consistent with his or her documented religion," then he or she is found to be wearing it inappropriately, and the privileges may be revoked.[117] The problem with this form of sincerity testing is that it places chaplains in the position of determining religious belonging. If a chaplain finds an inmate to be sincere, the inmate will continue to receive the accommodation. If a chaplain finds an inmate to be insincere, his access to the accommodation may be revoked. This is a problematic practice because it presumes that chaplains are able to determine sincerity for all sects of a particular religion. For minority religions and sects, this method of sincerity testing can be especially disadvantageous. While state prisons provide Chaplains for Islam, Judaism, and Christianity, they often do not have chaplains for religions such as Buddhism[118] or all sects of a particular religion in every prison facility. This results in sincerity determinations being conducting by chaplains from different sects or religions.

Other prison facilities determine sincerity by looking to legal requirements within the religion. In *Benning v. Georgia*, prison administrators denied a self-declared Jewish inmate, Benning, the right to grow earlocks after determining that Benning was not sincere in his Jewish belief.[119] As proof of insincerity, prison administrators argued that when Benning initially came to the prison he testified he was not Jewish, his parents were both Episcopalian, and he did not go through the formal conversion process.[120] The district court overturned the prison's classification and found Benning to be sincere in his belief.[121] Nevertheless, Benning's case highlights the extent of the various prison policies' problems. This particular policy violates both the text of RLUIPA and the Establishment Clause's prohibition on government involvement in religious affairs. The prison policy exceeded RLUIPA's permissible method of testing Benning's sincere belief in Judaism, and instead, evaluated the religious legitimacy of his claim under Jewish ecclesiastical laws.[122]

Other states conduct sincerity testing in a variety of ways. Red Onion State Prison ("ROSP") in Pound, Virginia, attempted to administer a sincerity test to address the problem discussed above.[123] Their policy, which prison administrators thought would be successful, was struck down

116. *Id*. at 8 ("The inmate shall be permitted to wear the head covering until the investigation is completed.").

117. *Id*. at 8.

118. Cruz v. Beto, 405 U.S. 319, 319 (1972) (per curiam).

119. Benning v. Georgia, 845 F. Supp. 2d 1372, 1378 (M.D. Ga. 2012).

120. *Id*.

121. *Id*.

122. *Id*.

123. Wall v. Wade, 741 F.3d 492, 494 (4th Cir. 2014).

as unconstitutional by the Fourth Circuit.[124] ROSP had a Ramadan meals program that provided Muslim inmates with special meals before sunrise and after sunset.[125] To participate in the program, Muslim inmates simply had to sign up, but the ease of the registration process resulted in approximately half of the inmate population signing up for the program.[126] ROSP staff later determined that most of the participants were not practicing Muslims and devised a new policy in 2010.[127] If a prisoner wanted to participate in Ramadan after 2010, the facility required that he possess a Quran, a prayer rug, or some other indication of his Islamic faith,[128] regardless of whether the prisoner observes his faith in other ways. If they did not have the materials or refused to acquire them, they were found to be insincere and denied participation in the program.[129] Although this policy was struck down at the by the Fourth Circuit, it demonstrates the difficulty prison administrators face in allocating accommodations.[130]

Other facilities administer tests that exclude lapsing prisoners from receiving their requested accommodations.[131] Texas prison systems also engage in this type of sincerity testing. In *Moussazadeh v. Texas Dep't*, a prison denied an inmate kosher food after finding that he purchased non-kosher food from the commissary.[132]

These various methods for determining sincerity exemplify the problem with sincerity testing. Without a uniform test to employ, prison facilities are left to create their own assortment of tests that are often ineffective or based on arbitrary distinctions about different religious practices, such as an inmate's consistency in adhering to rigid religious doctrines. In addition, these varying tests, employed without uniform guidelines, create uncertainty as courts are forced to evaluate prisons' tests on a case-by-case basis to determine their constitutionality.

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124. *Id.* at 501–02.

125. *Id.* at 494.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 502.

131. Some prisons have sought to establish a four strikes rule, permitting prisoners to lapse up to four times before they are removed from an accommodation. Courts have not yet ruled on the constitutionality of the four strikes rule. *E.g.,* Kuperman v. Warden, N.H. State Prison, No. 06-CV-420-JL, 2009 WL 4042760, at *5–6 (D.N.H. Nov. 20, 2009) ("For imperfect but nonetheless sincere believers who happen to stray from their religious diets four times over the course of two years (i.e., once every six months), the policy could impose a heavy burden indeed, resulting in at least a one-month suspension of the religious diet and thus forcing the inmate to choose between his religious scruples and his nutritional needs.").

132. Moussazadeh v. Tex. Dep't of Crim. Just., 703 F.3d 781, 785 (5th Cir. 2012), *as corrected* (Feb. 20, 2013).

D. *District Courts Confusion in Adjudicating Sincerity of Religious Belief under RLUIPA*

District courts appear equally confused by RLUIPA's prohibition on inquiring into the centrality of religious belief. After RLUIPA, courts became uncertain on how to assess the substantial burden inquiry without taking into account the centrality of a prisoner's religious practice. The difficulty of conducting a meaningful sincerity inquiry resulted in many courts adopting one of two approaches.[133] In the first approach, courts conduct a centrality inquiry to determine whether a prisoner's religious exercise is substantially burdened.[134] In the second approach, courts refrain from evaluating sincerity almost entirely and essentially give prisoners a "free pass" in demonstrating their prima facie RLUIPA claim.[135]

Courts continuing to conduct the centrality inquiry find it easier to find the existence of a substantial burden.[136] The less central a practice is to a religion, the less of a burden a prisoner faces if his requested accommodation is denied. In *McFaul v. Valenzuela*, a prisoner was denied his request to wear a religious medallion in Celtic Druid ceremonies.[137] The court determined that wearing the medallion was not central to his belief, and therefore denial of the medallion did not substantially burden the prisoner's religious exercise.[138] Although the court discussed sincerity of religious belief, a sincerity inquiry was replaced with a true centrality test. Rather than evaluating whether the prisoner truly held his religious beliefs in requesting the medallion, the court measured the necessity of the medallion to Celtic Druids.[139]

Other courts attempt to remain true to RLUIPA's text and only conduct a sincerity inquiry. However, courts that take this approach frequently permit prisoners to prevail on establishing their prima facie RLUIPA claim without a legitimate inquiry into the sincerity of the prisoner's belief.[140] In their attempt to refrain from passing judgment on whether a practice is a central tenet of the prisoner's professed belief, these

133. These two approaches are adapted from Nelson's two models of review: the deferential model and the hard look model. Nelson, *supra* note 45, at 2068.

134. *See* Nelson, *supra* note 45, at 2071 (referencing "The Deferential Model").

135. *See id.* at 2092 (referencing "The Hard Look Model").

136. *See* Wall v. Wade, 741 F.3d 492, 501 (4th Cir. 2014).

137. McFaul v. Valenzuela, 684 F.3d 564, 576 (5th Cir. 2012) ("Nevertheless, his silence regarding the doctrines of the religion prevents him from showing that the burdens on his religious exercise are substantial.").

138. *Id.*

139. *Id.*

140. *See* Kroger v. Bryan 523 F.3d 789, 797 (7th Cir. 2008) (rejecting the prison facility's testimony that the prisoner was insincere in his belief by providing chaplain testimony to the contrary and presuming the prisoner's sincerity).

courts have abstained from questioning sincerity altogether.[141] By allowing prisoners to prevail more easily on establishing a prima facie RLUIPA claim, the burden shifts to the prison to demonstrate why the policy furthers a compelling governmental interest and is the least restrictive means of achieving that interest.[142] Consequently, determinations of whether a prison policy substantially burdens an inmate's free exercise of religion are determined at the compelling need inquiry. The result is that these courts applied strict scrutiny with less stringency than the standard usually required.[143] Although this approach allows prisoners to prevail more easily on their RLUIPA claims, it fails to adhere to RLUIPA's text.[144] Furthermore, as prisoners increasingly prevail under RLUIPA, greater numbers of prisoners may be encouraged to bring RLUIPA claims, resulting in potentially unmanageable amounts of litigation.

E. *The Appellate Standard of Administering RLUIPA*

As outlined above, in cases where prisoners' sincerity is disputed, appellate court decisions frequently overturn findings of insincerity and declare prison policies unconstitutional.[145] In *Moussazadeh*, the Fifth Circuit stated that the sincerity inquiry must be handled with a "light touch or judicial shyness."[146] The court held that the sincerity inquiry, at its core, was a credibility inquiry that should not constantly be questioned.[147] Instead, the court stated, "sincerity is generally presumed or easily established."[148] While the Fifth Circuit did not give prison administrators a directive to formulate sincerity tests, it did provide loose guidelines for prison facilities to adopt.[149] The court stated that the sincerity inquiry is made by looking to the "words and actions of the inmate," with the important question being what the prisoner "claimed was important to him."[150] Actions include, among others, whether the prisoner purchased non-kosher food from the commissary, whether the prisoner exhausted his administrative remedies, and whether the prisoner filed grievances after his

141. Nelson, *supra* note 45, at 2096–97. ("The result of this substitution under the hard look model has been the elimination of a perennial hurdle to religious claimants in prison, and the application of a sincerity inquiry that has amounted to little more than a rubber stamp.").

142. *Id*. at 2067.

143. Nelson, *supra* note 45, at 2055.

144. *See generally id*. (arguing that more prisoners have prevailed under RLUIPA and RLUIPA cases have increased drastically since its passage).

145. *See supra*, Part II.C.

146. Moussazadeh v. Tex. Dep't of Crim. Just., 703 F.3d 781, 792 (5th Cir. 2012), 703 F.3d 781, 792 (5th Cir. 2012), *as corrected* (Feb. 20, 2013) (quoting A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248, 262 (5th Cir. 2010).

147. *Id*.

148. *Id*. at 791.

149. *See id*.

150. *Id*. (quoting McAlister v. Livingston, 348 F. App'x 923, 935 (5th Cir. 2009)).

requested accommodation was denied.[151] However, the court noted that eating non-Kosher food is not per se evidence of insincerity, stating, "A showing of sincerity does not necessarily require strict doctrinal adherence to standards created by organized religious hierarchies."[152]

Other circuits have followed suit and approached the sincerity inquiry in a similar manner. The Tenth Circuit stated that the sincerity inquiry is "limited to asking whether a claimant is seeking to perpetrate a fraud on the court."[153] Again, the court translated the sincerity inquiry into a credibility assessment. If the prisoner "actually holds the beliefs he claims to hold," he was found to be sincere, regardless of whether or not the belief is logical.[154] The Tenth Circuit went even further in directing prisons to refrain from assessing the sacredness of a prisoner's belief. In highlighting the risks of violating the Establishment Clause, the court stated, "separating the sacred from the secular can be a tricky business, especially for a civil court whose warrant does not extend to matters divine."[155]

Some circuits have also placed strict limitations on the types of sincerity testing a prison facility could permissibly conduct. The Fourth Circuit in *Wall v. Wade* acknowledged that prisons may conduct sincerity testing, but denied the prison facility's policy of requiring physical items of proof as evidence of a prisoner's sincerity.[156] The circuit court stated that it exceeds a prison's authority to decide which religious relics are sufficiently important to gauge faith,[157] and found that such a policy would be "arbitrary or irrational."[158]

III. STANDARDIZING THE SINCERITY INQUIRY USING THE CONSCIENTIOUS OBJECTOR TEST

The problem of testing sincerity has resulted in a variety of strict and arbitrary methods of testing. In reviewing prison policies, courts have approached sincerity testing by either conducting the equivalent of a centrality inquiry or by making it easy for prisoners to prevail on prima facie RLUIPA claims.[159]

Courts conducting the equivalent of a centrality inquiry are in violation of RLUIPA's text, which expressly prohibits judges from passing

151. *Id.* at 791–92.

152. *Id.* at 791.

153. Yellowbear v. Lampert, 741 F.3d 48, 54 (10th Cir. 2014).

154. *Id.* at 54–55.

155. *Id.* at 54.

156. Wall v. Wade, 741 F.3d 492, 499–500 (4th Cir. 2014).

157. *Id.* at 499–500 ("Thus, the fact that Wall did not have, for example, a prayer rug in his possession is not a sufficiently reliable indicator of whether he is a practicing Muslim.").

158. *Id.* at 500.

159. *See infra* Part II.D-E.

judgments on whether a practice is central to a religion.[160] These courts also risk violating free exercise jurisprudence by placing judges in the position of being arbiters of religious doctrine. Courts adopting the second view, permitting prisoners to easily make prima facie claims for accommodation and shifting the burden of persuasion to the government, seek to remain true to the text of RLUIPA. This approach, however, reduces the sincerity inquiry to "little more than a rubber stamp."[161] Although this model succeeds in permitting prisoners to prevail more easily on their RLUIPA claims,[162] it is likely to be challenged as more prisoners raise RLUIPA claims.[163]

This Note proposes a third alternative: a standardized sincerity inquiry for courts to utilize in reviewing prison policies that will also act as a directive to prison administrators when formulating effective and constitutional sincerity tests. This standardized inquiry combines factors relied on in the context of conscientious objectors from military service with appellate RLUIPA jurisprudence.

A. *The Conscientious Objector Test*

Courts' reluctance to formulate a definitive test for sincerity in the context of RLUIPA stands in contradiction to prior Supreme Court jurisprudence in determining sincerity of religious belief. In the 1970s, courts readily involved themselves in the process of testing the sincerity of religious beliefs in the context of conscientious objectors from the armed forces.[164] Section 6(j) of the Universal Military Training and Service Act exempted from military service anyone "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[165] In granting such exemptions, the Supreme Court, in *United States v. Seeger*, held that the "test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."[166]

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160. 42 U.S.C. § 2000cc-5(7)(A) (2006); *see supra* Part II.

161. Nelson, *supra* note 45, at 2092–93.

162. *See* Nelson, *supra* note 45, at 2053–54. There has been a drastic increase in the litigation of RLUIPA claims. This increase, however, has yet to be empirically analyzed. I predict courts will be forced to standardize their inquiry due to the sheer number of RLUIPA claims being brought forth. This standardization will assist in accurately determining a method of differentiating between sincere and insincere practitioners, rather than shifting the inquiry to the compelling need test.

163. *See* Nelson, *supra* note 45, at 2099 (stating that "[u]nder the hard look model, however, courts are again employing a series of doctrines, not typically found in the accommodation context, that have raised the bar as to what counts as a compelling state interest.").

164. *See* United States v. Seeger, 380 U.S. 163 (1965); Witmer v. United States, 348 U.S. 375 (1955); Clay v. United States, 403 U.S. 698 (1971).

165. 50 App. U.S.C.A. § 456 (2012).

166. *Seeger*, 380 U.S. at 165–66.

To prevail on a § 6(j) claim, a claimant must make a short statement showing that he is: (1) conscientiously opposed to war; (2) his opposition is based on religious belief; and (3) his objection is sincere.[167] To make this showing, a registrant fills out a questionnaire in which he states his religious belief and cites evidence "such as prior expression of his views" to demonstrate sincerity.[168] A military review board then decides whether the registrant's beliefs are sincerely held.[169] If they are found to be sincere, he is classified as a conscientious objector. If he is found to be insincere, he is denied the 6(j) exemption. The registrant may appeal a finding of insincerity to an appeal board and subsequently appear before an officer where he may present more evidence of his sincerity.[170]

If the matter of a registrant's sincerity is appealed to a court, the court can then consider several factors when determining the sincerity of the registrant's belief and overturn a board's classification if it has "no basis in fact."[171] Although courts have differed on the degree of importance of certain factors, an aggregation of Supreme Court and appellate court decisions indicates that courts take into consideration various combinations of the following factors:

Consistency of belief;[172]

Delay in asserting conscientious objector status;[173]

Objector's testimony before the review board;[174]

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167. *Clay*, 403 U.S. at 700 ("In applying these tests, the Selective Service System must be concerned with the registrant as an individual, not with its own interpretation of the dogma of the religious sect, if any, to which he may belong.").

168. *Witmer*, 348 U.S. at 376.

169. *Id.* at 377.

170. *Id.* ("If the local Board denies the claim, the registrant has a right of appeal to the Appeal Board. That Board, before reaching a final decision, refers the registrant's file to the Department of Justice for 'inquiry and hearing.' As the first step in this auxiliary procedure, the Federal Bureau of Investigation investigates the registrant's claim and refers its report to a hearing officer of the Department of Justice. The registrant may then appear before this officer to present evidence and witnesses in his behalf. After this, the hearing officer makes a report to his superiors in the Department of Justice, suggesting a disposition of the case. The Department, after reviewing the registrant's file, the FBI report and the report of the hearing officer, writes a short recommendation, stating its reasons and whether it has concurred in or overruled the suggestion of the hearing officer. This recommendation of the Department of Justice is transmitted to the Appeal Board and placed in the registrant's file . . . . The Appeal Board, then, on the basis of the registrant's full file before it, comes to its conclusion, which, in the usual case, is the final determination of the Selective Service System.").

171. *Id.* at 381.

172. *Id.* at 382–383.

173. Clay v. United States, 403 U.S. 698, 703 (1971) ("The Department of Justice was wrong in advising the Board in terms of a purported rule of law that it should disregard this finding simply because of the circumstances and timing of the petitioner's claim.").

174. *Witmer*, 348 U.S. at 383.

Religious leader testimony;[175]

The strength of the registrant's statement of religious belief;[176]

The Supreme Court in *Witmer v. U.S.* held that "the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form."[177] In *Witmer*, the defendant was convicted of refusing induction into the army.[178] In determining whether Witmer should be exempted from service, the Court relied on the consistency of conduct and the consistency of his statements claiming exemption.[179]

However, prior to delving into the sincerity inquiry, the *Witmer* Court established a presumption of sincerity where there were no facts that readily required inferences to the contrary.[180] The Court then examined whether facts required defeating the presumption of sincerity. In Witmer's case, the Court found that the presumption prevailed because the registrant's demeanor did not appear shifty or evasive when he first made his declaration.[181] After finding that Witmer stated his belief with apparent sincerity, the Court then examined objective facts presented to the review board to evaluate his sincerity of belief.[182] These included, among other facts, looking to Witmer's consistency of belief.[183]

The Court found Witmer to be insincere in his § 6(j) claim due to his inconsistent statements.[184] The Court determined that inconsistency is found if a registrant's views had fluctuated: if at times the registrant had claimed a religious exemption and at other times, denied belonging to the religious group, based on whichever exemption was most advantageous.[185] In a prior application to the board for classification as a farmer, Witmer swore that a ministerial classification did not apply to him.[186] Yet, in his

175. Brady, *supra* note 17, at 1453.

176. *Id.* at 1454.

177. *Witmer*, 348 U.S. at 381.

178. *Id.* at 376.

179. *Id.* at 382–83.

180. *Id.* at 382. ("In short, the nature of a registrant's prima facie case determines the type of evidence needed to rebut his claim. If the issue is the nature of his activities, as in Dickinson, the evidence providing 'basis in fact' must tend to show that his activities are other than as stated. If, as here, the issue is the registrant's sincerity and good faith belief, then there must be some inference of insincerity or bad faith.").

181. *Id.*

182. *Witmer*, 348 U.S. at 382.

183. *Id.* at 383. ("There are other indications which, while possibly insignificant standing alone, in this context help support the finding of insincerity. Among these is petitioner's failure to adduce evidence of any prior expression of his allegedly deeply felt religious convictions against participation in war.").

184. *Id.*

185. *Id.* at 378–379.

186. *Id.*

§ 6(j) conscientious objector application, he asserted his ministerial beliefs.[187] The Court found that the inconsistent statements "cast considerable doubt on the sincerity of petitioner's claims."[188]

In reviewing the sincerity of registrants' conscientious objector applications, courts have also noted several factors that may not be considered. Courts are expressly prohibited from concluding insincerity based on whether or not an applicant's conduct adheres to religious doctrine.[189] For example, "the government cannot prove that a Mormon's belief in the Bible is insincere by demonstrating that she drinks alcohol."[190] In refraining from inquiring into the extent to which a claimant adheres to the teachings of his religion, courts refrain from violating the Establishment Clause.[191] This prohibition also acknowledges that people have lapses in adherence to doctrinal commandments without necessarily being insincere in their beliefs.[192] Court have also declared that a registrant cannot be declared insincere solely due to the circumstances and timing of his claim.[193] If a registrant raises a § 6(j) conscientious objector claim immediately before he is to be drafted, the timing of the claim cannot be exclusive evidence of religious insincerity.[194]

B. *Standardizing the Sincerity Inquiry: Adapting the Conscientious Objector Test*

To improve the method of evaluating sincerity, this section proposes a three-step test that adapts factors from the conscientious objector test to create a practical and administrable inquiry into RLUIPA claims. Although sincerity testing is inevitably a fact-specific inquiry conducted on a case-by-case basis, this three-step inquiry is an easily administrable process that courts should employ when evaluating sincerity. This test understands that the sincerity inquiry should be nothing more than a finding that what a prisoner says is what in fact he claims he says. By limiting the court's determination of sincerity to a credibility inquiry, courts will remain faithful to the text of RLUIPA by refraining from entangling judges in the intricacies of religious doctrine. At the same time, courts will be able to differentiate between the feigning practitioner and the true believer.

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187. *Witmer*, 348 U.S.. at 379.

188. *Id*. at 382–83.

189. United States v Rutherford, 437 F.2d 182, 187 (8th Cir. 1972).

190. Brady, *supra* note 17, at 1454.

191. U.S. CONST. amend. I.

192. *Id*.

193. Clay v. United States, 403 U.S. 698, 703 (1971).

194. Witmer v. United States, 348 U.S. 375, 396 (2955). *See also* Cohen v. Laird, 439 F.2d 866, 868 (4th Cir. 1971) ("While we recognize that such timing alone would not bar a sincere, deeply held conscientious objector claim if such belief crystallized due to the immediate prospect of combat duty in Vietnam . . . .").

Step I of the test proposes that courts adopt a rebuttable presumption of sincerity when a prisoner makes a request for an accommodation.[195] This presumption is established only after a prisoner establishes a nexus between his religious belief and the requested accommodation. Step II permits prisons to refute the presumption by inquiring into the consistency of a prisoner's behavior, with the caveat that the individual must be given a chance to demonstrate his sincerity prior to being removed from an accommodation. Step III outlines factors for courts to consider in resolving the disputed sincerity by evaluating the credibility of the prisoner's professed belief under a Totality of the Circumstances ("TOC") test. Adapting factors from the conscientious objector test, courts are permitted to question the consistency of a prisoner's behavior, but must refrain from inquiring into the extent to which a prisoner adheres to religious doctrine, resolving disputed facts in favor of sincerity.

1. Rebuttable Presumption of Sincerity of Religious Belief

As outlined in Part II.C, prisoners can request religious accommodations in most prison facilities by filing a form declaring their religion and requesting a particular accommodation.[196] To prevail on their request for a religious accommodation a prisoner must make a short statement showing: (1) the request for a particular accommodation; (2) that the accommodation is based on a religious belief; and (3) that their belief is sincere.[197] After this showing is made, the presumption of sincerity should be established. These three steps, together, place the burden on the prisoner to establish a nexus between his requested accommodation and his sincere religious belief.

A prisoner can successfully satisfy these three steps in a variety of ways. The prisoner can fulfill this requirement by providing doctrinal proof of the need of his religious accommodation, a facility chaplain's testimony, another religious leader's testimony, or a statement explaining his understanding of his religion's endorsement of a particular practice. This

195. The rebuttable presumption was first proposed in Kevin L. Brady's article, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431, 1455 (2011). Brady adapted the idea of the rebuttable presumption of sincerity from some courts' presumption of sincerity in the conscription context. In particular, Brady focused on the Second Circuit's holding that a "registrant's signed statement of belief and testimony before the review board are prima facie evidence of sincerity." *Id.* at 1454.

196. *See* MICH. DEP'T OF CORRECTIONS, POLICY DIRECTIVE, 5.03.150 (July 2013), *available at* http://www.michigan.gov/documents/corrections/05_03_150_429021_7.pdf ("A prisoner may eat from a Vegan menu only with approval of the Special Activities Coordinator. Approval shall be granted only if it is necessary to the practice of the prisoner's designated religion, including the prisoner's sincerely held religious beliefs. To request approval, the prisoner must submit a written request to the Warden or designee, who shall obtain information regarding the prisoner's request and religious beliefs prior to referring the request to the Special Activities Coordinator.").

197. Adapted from Clay v. United States, 403 U.S. 698, 700 (1971).

step of the inquiry should do little more than demonstrate that a prisoner's requested accommodation is linked to a sincere religious belief. It should not require a prisoner to demonstrate that a practice is mandated by his religion.[198]

It should be noted that not all prisoners are members of a doctrinal religion and cannot easily provide doctrinal proof of a religion. For lesser-known religions whose structures may be unfamiliar to the courts, prisoners can demonstrate a nexus between their religious belief and their requested accommodation through a personal statement explaining the need for the accommodation in order for the individual to practice their religion freely.

When a prisoner files a form requesting an accommodation and meets the requirements outlined above, this should be prima facie evidence of sincerity sufficient to establish the presumption.[199] In the conscription context, courts accepted statements and testimony before a military draft board as evidence of sincerity. Relative to conscientious objectors, prisoners have weaker incentives to feign sincerity.[200] Perceptions that religious accommodations are always desirable can be misguided, and strict religious adherence to gain such accommodations is difficult to maintain. For example, while prison officials may believe that prisoners are feigning religiosity to take advantage of kosher food programs—in many states, Kosher meals are not necessarily better tasting. In Michigan, Kosher food is prepared in special kitchens separate from the prison facility, so inmates that request Kosher meals eat frozen food.[201]

There are many benefits to establishing a presumption of sincerity in the prison context. The rebuttable presumption creates a structure through which to standardize the sincerity inquiry. It places the initial burden of providing evidence of religious adherence and the need for the accommodation on the prisoner. If a prison facility has reason to doubt a prisoner's sincerity, they may refute the presumption with the requisite evidence. This presumption of sincerity also adheres to the Fifth and Tenth Circuit's approach to RLUIPA jurisprudence by approaching the sincerity inquiry with a "light touch" or "judicial shyness."[202] By creating a presumption of sincerity, courts are presented with a structure through which to evaluate a prisoner's RLUIPA claims.

198. If the burden on establishing a nexus between his requested accommodation and religion required a prisoner to demonstrate centrality of religious belief, the first step of the test would violate 42 U.S.C. § 2000cc(a)(1).

199. *See* Brady, *supra* note 17, at 1455.

200. *Id*.

201. *Id*. at 1456.

202. Moussazadeh v. Tex. Dep't of Crim. Just., 703 F.3d 781, 790–92 (5th Cir. 2012), *as corrected* (Feb. 20, 2013); *see also* Yellowbear v. Lampert, 741 F.3d 48, 54 (10th Cir. 2014).

2. Rebutting the Presumption of Sincerity

After a prisoner makes a showing of sincerity, prison officials may refute the presumption with affirmative evidence of his insincerity. The *Witmer* Court emphasized the importance of a claimant's initial statement, stating, "In short, the nature of a registrant's prima facie case determines the type of evidence needed to rebut his claim. If the issue is the nature of his activities, as in Dickinson, the evidence providing 'basis in fact' must tend to show that his activities are other than as stated. If, as here, the issue is the registrant's sincerity and good faith belief, then there must be some inference of insincerity or bad faith."[203] A facility may challenge the consistency of a prisoner's statements in a variety of ways. Examples include: presenting chaplain testimony challenging the sincerity of the prisoner's beliefs or other prison personnel testimony refuting a prisoner's professed sincerity.

Prison chaplains often provide religious materials to inmates and know which prisoners have requested Bibles or other religious items.[204] A chaplain can refute a prisoner's assertion that he attends a religious service or needs a certain religious item. Prisons are in a better position than the courts to refute a prisoner's sincerity by bringing forth the necessary evidence because prison personnel interact with the individual on a daily basis. Federal prisons have "increase[ed] supervision within the federal system so that no inmate-led religious groups meet without 100 percent staff supervision."[205]

However, a prison facility should not immediately remove a prisoner from an accommodation without giving the prisoner a chance to further demonstrate his sincerity. If a prison facility challenges the presumption of sincerity, a prisoner should be allowed to strengthen his case by introducing relevant facts proving his sincerity. These facts could include religious leader testimony, peer testimony of evidence of attendance of religious ceremonies, or additional personal statements. This caveat allows room for small lapses in strict religious adherence, understanding that all individuals can practice imperfect sincerity.

If prison officials do not challenge the presumption of sincerity, the court will proceed to the compelling need inquiry and make the determination of whether a prison's policy outweighs the prisoner's interest in the religious accommodation.[206] However, if prison officials refute the presumption of sincerity, the court proceeds to Step III of the sincerity in-

203. Witmer v. United States, 348 U.S. 375, 382 (1955).

204. Brady, *supra* note 17, at 1457.

205. *Id*. at 1457–58.

206. To prevail on an RLUIPA claim, a prisoner must demonstrate that a prison policy interferes with his religious exercise, that his religious beliefs are sincere, and that the prison policy substantially burdens his religion. After making this showing, the burden shifts to the government to show that the policy used is the "least restrictive means of furthering that "compelling government interest." 42 U.S.C. § 2000cc-1. Thus, if a presumption of sincerity is estab-

quiry: a totality of the circumstances test, evaluating facts and circumstances to determine whether the prisoner is sincere in his belief. This evidence must be strong enough to overcome the presumption of sincerity.[207]

3. Step III: Determining Sincerity Under a Totality of the Circumstances Test

Step III of the inquiry grants courts the power to resolve a prisoner's disputed sincerity. If a prison facility refutes the rebuttable presumption with the necessary evidence under Step II, the court may then inquire into facts and circumstances under a totality of the circumstances test to evaluate a prisoner's sincerity. These include consistency of belief, the timing of the request for accommodation, inconsistent statements or conduct, religious leader testimony, and various other factors.[208] These factors are adapted from the factors utilized in the conscientious objector sincerity tests in *Witmer* and *Clay*.[209]

At its core, the sincerity inquiry is a credibility determination aimed to determine whether the inmate truly believes what he professes to believe.[210] A court can look to the consistency of a prisoner's professed belief to determine sincerity. This may involve comparing a prisoner's initial statement requesting the accommodation with subsequent behavior regarding his professed belief. For example, if a prisoner makes an initial request to join a Kosher meals program, but subsequently alternates between eating Kosher meals and non-Kosher meals from month to month before a facility finally removes him from program, a court may consider the inconsistent behavior as evidence of insincerity. Similarly, if a prisoner is removed from a Kosher food program and fails to file a grievance or express any outward objection to his removal from the program, a court may consider failure to object at the time of removal and subsequent RLUIPA claim as evidence of inconsistent conduct.[211]

Looking to the conscientious objector factors, there are four factors that are particularly adaptable to the sincerity inquiry: the consistency of the prisoner's claims, the strength of the prisoner's initial statement of re-

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lished and the prisoner prevails on his RLUIPA claim, the court should simply proceed to determining whether the prison policy advances a compelling government interest.

207. Brady, *supra* note 17, at 1458.

208. Adapted from the *Witmer* test. 348 U.S. at 382.

209. *See infra* Part IV.A (discussing the conscientious objector test).

210. Moussazadeh v. Tex. Dep't of Crim. Just., 703 F.3d 781, 792 (5th Cir. 2012), *as corrected* (Feb. 20, 2013) ("We limit ourselves to 'almost exclusively a credibility assessment' when determining sincerity.").

211. *See id.* at 791–92.

quest for an accommodation, delay in asserting conscientious objector status, and religious leader testimony.[212]

Courts may consider the inmate's statement of request for the religious accommodation or statements explaining circumstances surrounding the request. In *Wall v. Wade*, a prison facility required a Muslim inmate to provide physical proof, such as a Quran or prayer rug, that he was Muslim.[213] The prisoner stated that he had no physical indicia of proof because he had lost all of his belongings when he was transferred to a new facility.[214] Although the prisoner prevailed in this case due to the unconstitutionality of the prison's policy requiring physical proof of religiosity,[215] such statements explaining sincerity or insincerity should be taken into account when there is uncertainty.

Courts may also consider the timing of a prisoner's request for an accommodation, but the timing of the request should not be dispositive of sincerity or insincerity.[216] Where a prisoner does not assert an expression of belief until it is clear he will gain an advantageous accommodation, a court may consider timing as evidence of insincerity.[217] For example, if a prisoner switches his religion to Judaism only after a prison facility begins to offer Kosher meals, a court may consider this as evidence of insincerity. However, timing of a request must be considered in conjunction with other evidence sufficient to overcome the presumption of sincerity.

Courts may also consider religious leader testimony presented by either party. Prison chaplains are in the unique position of interacting with prisoners on a frequent basis, and may be able to provide valuable evidence about a prisoner's sincerity. Chaplains often witness a prisoner's daily exercises in practicing his or her religion and can express an opinion about a prisoner's sincerity. Courts may consider a chaplain's testimony in conjunction with other presented evidence.

However, courts may not consider lapses in adherence to doctrinal teachings as evidence of insincerity. If a prisoner requests Kosher food but lapses and eats food from the commissary occasionally, the court should not take this fact to be determinative of insincerity of belief in eating Kosher food. If courts looked to lapses in adherence as evidence of sincerity, prisoners would be held to a higher standard of religious adherence than other citizens, thereby contradicting RLUIPA's intent. Furthermore, there are ample reasons why a prisoner may want to keep kosher food for main

212. This is not an all-inclusive list, but is meant to serve as an example of factors courts should consider.

213. Wall v. Wade, 741 F.3d 492, 494 (4th Cir. 2014).

214. *Id.* at 495.

215. *Id.* at 501–02.

216. *See* Clay v. United States, 403 U.S. 698, 703 (1971).

217. *See id.* at 702 ("[A] registrant has not shown overt manifestations sufficient to establish his subjective belief where, as here, his conscientious-objector claim was not asserted until military service became imminent.").

meals and not for other meals. A prisoner may be struggling with the difficulty of keeping Kosher meals, but still have a sincere desire to better his Jewish faith. People also have varying degrees to which they adhere Kosher dietary restrictions. As the Fifth Circuit has noted, "[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?"[218]

When considering additional facts, courts must refrain from any inquiries into whether practices are central to or mandated by a religion. Courts must also refrain from evaluating whether a prisoner's conduct conforms to his religion's teachings. In *Benning v. Georgia*, a prison facility denied a prisoner's request to grow earlocks because the facility determined that the prisoner failed to establish that he was Jewish in accordance with the laws of Judaism. The prison provided the testimony of a Rabbi, stating, "Judaism does not allow one to convert simply by declaring him/herself to be Jewish."[219] The District Court properly overruled the prison facility's argument and declared that the sincerity question is not an "ecclesiastical question" of "whether he is in fact a Jew under Judaic Law."[220] It would be burdensome to require prison facilities to provide chaplains for each and every sect for a religion and to pass judgments on religious doctrinal questions.[221] Even if prison facilities were equipped to make such determinations, they would be violating the underlying intent of the sincerity inquiry. The sincerity inquiry is a credibility inquiry that asks whether the inmate believes what he professes to believe.[222] This inquiry should simply question whether the inmate's conduct conforms to his professed statements, not whether it conforms to the doctrinal underpinnings of the religion.

C. *Why Standardize the Sincerity Inquiry?*

Standardizing the sincerity inquiry would remain faithful to RLUIPA's text.[223] The test places the burden of establishing a nexus between the requested accommodation and the religious belief on the prisoner, rather than the courts. Courts are involved in evaluating the sincerity of the prisoner's claims only when it is disputed by the prisoner facility and when a facility presents affirmative evidence to the contrary. Thus, this test

218. Moussazadeh v. Tex. Dep't of Crim. Just., 703 F.3d 781, 791–92 (5th Cir. 2012), *as corrected* (Feb. 20, 2013) (citing Grayson v. Schuler, 666 F.3d 450, 454 (7th Cir. 2012)).

219. *Benning v. Georgia*, 845 F. Supp. 2d 1372, 1378 (M.D. Ga. 2012).

220. *Id.* (citing Jackson v. Mann, 196 F.3d 316, 321 (2d Cir.1999).

221. *See* MICH. DEP'T OF CORRECTIONS, POLICY DIRECTIVE, 5.03.150 (July 2013), *available at* http://www.michigan.gov/documents/corrections/05_03_150_429021_7.pdf ("The Correctional Facilities Administration (CFA) Special Activities Coordinator shall be a member of the CAC and ensure that all major religions are represented.").

222. *Moussazadeh*, 703 F.3d at 792, *as corrected* (Feb. 20, 2013).

223. *See* discussion *supra*, Part II.

creates a practical, administrable, and predictable test for courts to determine a prisoner's sincerity of religious belief.

The standardized sincerity inquiry also adheres to prior court interpretations of the sincerity test. In *Witmer*, the Court adopted a presumption of sincerity after the claimant presented a statement of his religious belief and conscientious objector status.[224] By presuming sincerity after the prisoner makes the requisite showing, the courts are approaching the sincerity inquiry with a "light touch" and refraining from heavily involving themselves in passing determinations on doctrinal teachings of a prisoner's religion.[225]

In addition, a standardized sincerity test is preferable to a centrality test because it allows courts to determine a substantial burden without inquiring into the centrality of a prisoner's requested accommodation.[226] After determining sincerity, courts can then evaluate the extent to which a prisoner is substantially burdened in his religious belief. The three-part sincerity inquiry is also preferable to the court approach of allowing prisoners to easily prevail on their prima facie RLUIPA claims because it eliminates feigning practitioner's RLUIPA claims before they reach the compelling need inquiry.[227] As a result, the standardized three-part sincerity inquiry prevents courts from loosening the standard for strict scrutiny.[228]

Furthermore, the three-part inquiry could decrease litigation costs for both parties by notifying the parties of the relevant factors in determining sincerity prior to litigation. The three-part inquiry puts prisoners on notice of what factors will be considered in the evaluation of their RLUIPA claims for religious accommodation. If prisoners are aware that a court will scrupulously examine evidence of their past inconsistent statements or conduct, insincere practitioners will likely be discouraged from litigating claims arising from a desire to gain more comfortable religious accommodations. Prisoners will also be put on notice that the timing of their request for a religious accommodation, as well as a chaplain's testimony, will be relevant to their assessment for sincerity.[229]

The test would be beneficial to all parties. It is in a prison facility's interest to formulate constitutional policies that will be upheld at the district court and appellate court levels. Prisons would also be discouraged

224. Witmer v. United States, 348 U.S. 375, 382 (1955).

225. *See Moussazadeh*, 703 F.3d at 792, *as corrected* (Feb. 20, 2013).

226. *See* McFaul v. Valenzuela, 684 F.3d 564, 577 (5th Cir. 2012) ("Without some religious framework, claims such as McFaul's would open the door to finding that any inmate's assertion constitutes a sincerely held religious belief and that any limitation on that belief constitutes a substantial burden on the practice of his religion. *See Smith*, 502 F.3d at 1278. Accordingly, we affirm the dismissal of the RLUIPA and TRFRA claims.") (internal citations omitted).

227. See *supra* Part I.B (discussing the steps for filing an RLUIPA claim).

228. *See supra* Part II.C-D (discussing The Hard Look and Deferential Models).

229. *See* discussion *supra* Part III.A-B.

from using unconstitutional sincerity inquiries if they are aware such inquiries will be overturned on review. A standardized inquiry puts prison administrators on notice of constitutional policies so that administrators can operationalize the three-part inquiry into a practical directive.

Lastly, a standardized inquiry will permit courts to resolve RLUIPA cases more efficiently. If courts apply the same three-part inquiry, courts would be able to resolve them at the first stage of litigation, and as a result, parties would be discouraged from appealing their cases.

CONCLUSION

Ultimately, the goal of legislations such as RFRA and RLUIPA is to keep religion in prisons because religion is "one of the best rehabilitative influences we can have.[230] As Senator Orrin Hatch, one of the original sponsors of RFRA declared, "Just because they are prisoners does not mean all of their rights should go down the drain."[231] RLUIPA solidified Supreme Court jurisprudence prohibiting courts from inquiring into the centrality of religious belief.[232] In response to RLUIPA and in an attempt to distinguish the feigning practitioners from the sincere believers, prison facilities implemented sincerity tests. These sincerity tests, however, have proved difficult to administer effectively. Prison facilities implemented arbitrary and unconstitutional sincerity tests, such as requiring prisoners to provide physical evidence of religiosity, or by removing lapsing prisoners from accommodation programs. Courts frequently overturned prison policies on review, but remained unable to standardize the sincerity inquiry. Due to the difficulty of determining sincerity, courts responded to RLUIPA in two ways that both failed to adhere to the text of RLUIPA. This Note's proposal of a third approach to the problem, a three-part test to determine sincerity of religious belief, would significantly improve prisons facilities' determination of sincerity and consistency in the courts on this issue. By fairly and constitutionally inquiring into sincerity of religious belief, courts and prisons can ease the difficulty of weeding out insincere prisoners, while adhering to RLUIPA's original text and intent.

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230. Solove, *supra* note 31, at 459 (citing 139 Cong. Rec. S14, 367 (Daily Ed. Oct. 26, 1993) (statement of Sen. Hatch)).

231. *Id.*

232. 42 U.S.C. §2000cc-1 (2006); *see also* Cutter v. Wilkinson, 544 U.S. 709 (2005) (holding that the Act, which "defines 'religious exercise' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief'" does not violate the Establishment Clause).