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The Expansion of Religious Freedom Claims For Inmates Under RLUIPA: RLUIPA Extends Just As Far As the Legislature Intended It To

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Introduction

The Religious Land Use and Institutionalized Persons Act[1] ("RLUIPA") is working exactly how Congress intended it to — broadening the protections afforded to incarcerated persons' freedom of religious exercise. The right to freely exercise religion is extremely important for all individuals, especially for those most susceptible to losing these freedoms such as those who are confined in an institution for some period of time. When individuals lose their religious freedom, they lose much more than just their freedom to be religious.[2] "They lose their freedom to be human."[3] One study found that "religious practice in prison can be very extensive, with about fifty percent of inmates attending religious services an average of six times per month."[4] For incarcerated individuals, religious observance clearly is extremely important in regaining a sense of control and spirituality.[5] The participation in religious observance by prisoners was found to cut recidivism rates by an entire two-thirds.[6] As such, access to religion is imperative for the health, well-being, and rehabilitation of inmates. Access to freedom of religion allows for individuals to find a connection to their inner self as well as to a greater good. Access to religious observance in prison enables an inmate to "reclaim his dignity and reassert his individuality."[7] However, throughout history, the religious freedom of inmates has received extremely low levels of protection. This changed with the passage of RLUIPA by Congress in

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[1] 42 U.S.C. § 2000cc-1 *et seq*. (2000).
[2] Timothy Samuel Shah, *Witherspoon Inst. Task Force on Int'l Religious Freedom, Religious Freedom: Why Now? Defending an Embattled Human Right* (Jan. 31, 2023 5:53 PM), https://www.thepublicdiscourse.com/2012/07/5802/.
[3] *Id.*
[4] *See* Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. OFFENDER REHAB. 11, 28 (2002).
[5] *See* Jim Thomas & Barbara H. Zitzow, *Conning or Conversion? The Role of Religion in Prison Coping*, 86 PRISON J. 242, 250 (2006) (Religious rights in prison are important not only to aid rehabilitation, but to help prisoners cope with the inherent harms of prison life. Group in a membership helps inmates copy with the deprivations of prison life "by providing shared ways of thinking, feeling, and acting for all aspects of prison life).
[6] *See* 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).
[7] *Barnett v. Rodgers*, 410 F.2d 995, 1002 (D.C. Cir. 1969).

the year 2000. RLUIPA was passed in order to create a specific cause of action to protect and accommodate the religious exercise of prisoners.[8]

This paper, with a focus on the development and implementation of prisoners' religious rights, will cover four main sections. Section I will set out the beginnings of prisoners' rights. This section details the constitutional framework of these rights with a focus on incarcerated individuals in prisons and proceeds with the statutory frameworks of the Religious Freedom and Restoration Act ("RFRA")[9] as well as RLUIPA. Section II will discuss the Supreme Court's interpretations of these two statutes. Next, Section III will cover decisions in the lower courts on prisoner claims regarding dietary restriction substantially burdening their religious freedoms. Subpart A covers these decisions before the statutes, subpart B covers these decisions under RFRA, and subpart C covers these decisions under RLUIPA. Lastly, Section IV will cover an analysis of these decisions and the direction in which the court seems to be heading.

I. THE BEGINNING OF PRISONERS' RIGHTS: PROTECTING PRISONERS' FUNDAMENTAL RELIGIOUS CLAIMS

A. The Protections of Fundamental Constitutional Rights under Turner and Shabazz

Before there were specific statutes to guide the courts in their decisions, the beginning of prisoners' fundamental rights claims were governed by a constitutional framework in two Supreme Court cases. These cases were used as a guideline for several years, establishing a standard of review for the Court.

Prior to the passage of RLUIPA, the standard of review for prisoners' fundamental rights claims was covered by *Turner v. Safley*. In *Turner*, a 1987 Supreme Court decision, a prison

[8] 42 U.S.C. § 2000cc-1 *et seq*. (2000).
[9] 42 U.S.C. §2000 (1993).

inmate challenged the constitutionality of two prison regulations: (1) A prohibition on correspondence between inmates at different state prisons; and (2) An almost complete ban on inmate marriages.[10] The Court in *Turner* developed a reasonableness standard[11], stating that in order for the regulations to be reasonable, the prison regulations burdening the prisoners' fundamental rights must be reasonably related to legitimate penological interests with the absence of ready alternatives for the regulation.[12] Additionally, the Court should also consider the impact that the accommodation of the asserted constitutional right will have on guards, inmates, and on the general allocation of prison resources.[13] Under this standard, the Court upheld the correspondence regulation as a reasonable restriction, but found the marriage restriction to be unreasonable.[14] The Court concluded that the prohibition on correspondence between institutions was reasonably related to legitimate security interests in the prison such as escape plans, assault, and other violent acts.[15] The Court found a reasonableness standard to be the most appropriate in prisoners' fundamental rights cases in order to allow prison administrations to properly make judgments concerning their institutional operations.[16] The Court emphasized the idea that prison officials should not be subject to an inflexible strict scrutiny analysis because it would "unnecessarily perpetuate the involvement of the federal courts in affairs of prison administration."[17] *Turner* emphasized the level of broad discretion that

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[10] *Turner v. Safley*, 482 U.S. 78, 81 (1987).
[11] *Id.* at 89-90 (*Turner* Court set out a four-factor test that balanced inmates' constitutional rights with prison administration's concerns over prison safety and administration: "whether (1) the regulation is rationally connected to the legitimate government interests offered to justify the regulation; (2) alternative means of exercising the right remain open to prisoners under the regulation; (3) providing an accommodation or exceptions for inmates to exercise the asserted right impermissibly burdens prison staff, other inmates, or prison resources; (4) there is absence of ready alternatives" *Id.*).
[12] *Id.* at 91 (the Court stated that even where other avenues remain available, courts should stay conscious of the "measure of judicial deference" owed to corrections officers in gauging the regulation's validity).
[13] *Id.* at 90.
[14] *Id.* at 81.
[15] *Id.* at 91.
[16] *Turner*, 482 U.S. at 89.
[17] *Id.*

the Court afforded prisons at this time regarding fundamental constitutional challenges because it felt it was not proper to be involved in the decision making processes within these institutions.

The Court once again deferred to the discretion of prison officials just eight days after the *Turner* decision when it considered *O'Lone v. Estate of Shabazz*.[18] In *Shabazz*, inmates who were members of the Islamic faith[19] challenged policies adopted by prison officials which resulted in their inability to attend Jumu'ah, a Muslim congressional service.[20] Under these policies, inmates who were assigned to outside work were prohibited from returning to the prison during the day except in the case of emergency.[21] The policy was created because evidence showed that prisoners returning during the day resulted in extreme security risks, administrative burdens, and extreme delays for guards.[22] The Court held that the prison regulations did not violate the inmates' rights under the Free Exercise Clause of the First Amendment.[23] Instead of applying strict scrutiny judicial review, which was the standard for all other free exercise cases, the *Shabazz* Court applied the reasonableness standard articulated in *Turner*, reasoning that the regulations were justified by concerns of institutional order and security as a legitimate penological interest.[24] The Court at this point afforded more deference to prison officials by judging the institutional regulations under a reasonableness test that was less restrictive than ordinary fundamental constitutional rights claims.[25]

Clearly, *Turner* and *Shabazz* demonstrate the lack of protection for prisoners' fundamental rights claims in this era with the Court giving extreme deference to prison officials

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[18] *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).
[19] *Id.* at 348 (Court emphasizes that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison").
[20] *Id.* at 344.
[21] *Id.* at 347.
[22] *Id.* at 346.
[23] *Shabazz*, 482 U.S. at 344.
[24] *Id.* at 351.
[25] *Id.* at 349.

and administration. However, while *Turner* and *Shabazz* did not favor any protection of prisoners' fundamental constitutional rights, they are the historical foundation for a turning point in prisoners' rights cases. The Court walked a thin line for over a decade, from 1987-2000, under the belief that it was in everyone's best interest to afford prison administrators the discretion to make their own decisions because they know how to best run their facilities. After the passage of the statutes, mainly RLUIPA, the Court began to transition from a deferential standard of review in favor of prison officials to an approach that was much more protective of the fundamental rights in prisons, especially religious claims.

B. Statutory Framework: The Development of the Compelling Interest Test Under RFRA and RLUIPA

In 1990, the Supreme Court took a dramatic departure involving the free exercise of religion and issued its decision in *Employment Division v. Smith*, abandoning the strict scrutiny standard of review and adopting rational basis in its place.[26] The Supreme Court held that generally applicable laws not targeting specific religious practices do not violate the Free Exercise Clause of the First Amendment.[27]

The ruling by the Court in *Smith* was a dramatic departure from the compelling interest test that was used in free exercise cases since 1963 and developed in *Sherbert v. Verner*.[28] In response to the considerable departure from the traditional compelling interest test in *Smith*,[29]

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[26] *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990) (In *Smith*, respondents were fired from their jobs because they ingested peyote for sacramental purposes at a ceremony of the Native American Church. When respondents applied for unemployment compensation, they were determined ineligible for benefits because they were discharged for work-related misconduct. Soon after, respondents sued, claiming that the denial of benefits violated their free exercise rights under the First Amendment. The question for the Court was whether the Free Exercise Clause of the First Amendment permitted the State of Oregon to prohibit sacramental peyote use and deny unemployment benefits to persons discharged for such use).

[27] *Id.*

[28] *Sherbert v. Verner*, 374 U.S. 398 (1963).

[29] *See* President William J. Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 WEEKLY COMP. PRES. DOC. 2377, 2377 (Nov. 16, 1993) ("More than 50 cases have been decided against

Congress passed the Religious Freedom Restoration Act of 1993 ("RFRA"). Congress passed the Act with the intention to restore the compelling interest test for free exercise claims and provide guidance to courts to determine whether there was a violation of free exercise rights.[30] Congress found that the government should not substantially burden a person's exercise of religion without compelling justification, even if the burden results from a rule of general applicability.[31] The statute provides that the Government:

> May substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[32]

Under RFRA, Congress established that any person who claims their religious exercise has been burdened in violation of this statute may assert their violation as a claim or defense and obtain appropriate relief against the government.[33] Congress reasserted the idea that an individual's right to freely express a religion of their choosing is a fundamental right.[34]

While RFRA broadened religious protections,[35] it was still extremely difficult for inmates to make a successful claim when they were substantially burdened. A study of RFRA claims by inmates throughout its duration from its passage in 1993 to the time it was held unconstitutional in 1997 showed that inmates were unsuccessful in more than ninety percent of their claims,[36]

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individuals making religious claims against Government action since the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) was handed down. This act will help to reverse that trend by honoring the principle that our laws and institutions should not impede or hinder but rather should protect and preserve our fundamental religious liberties").

[30] 42 U.S.C. § 2000bb-1.

[31] §2000bb(3).

[32] *Id.*

[33] *Id.*

[34] 42 U.S.C. §2000bb(a)(1) ("The framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution…").

[35] 139 CONG. REC. S14, 367 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (Senator Hatch, one of the original sponsors of RFRA, stated that, "We want religion in the prisons. It is one of the best rehabilitative influences we can have. Just because they are prisoners does not mean all of their rights should go down the drain").

[36] *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 591 (1998) (85 out of 94 prisoner RFRA claims resulted in judgments against the prisoner).

with more than seventy-five percent of those claims failing for their lack of proving a "substantial burden" on their religious exercise.[37]

Just four years after Congress enacted RFRA, the Court in *City of Boerne v. Flores* struck down RFRA and held it unconstitutional as applied to state governments and state agencies.[38] After RFRA was declared unconstitutional as applied to state and local governments and significantly undermined by *Boerne*, Congress began to look for new ways to protect religious freedoms.[39] In response to the Supreme Court's decision in *Boerne*, Congress enacted more targeted protections in two areas, religious land use claims and prison religious claims, with unanimous support in the House and the Senate.[40] RLUIPA provides a compelling interest test applicable in two contexts.[41] Section two of RLUIPA applies to land use regulations.[42] Section three of RLUIPA applies to the protection of religious exercise of persons who are confined to state or local institutions including, and namely, prisons. The Department of Justice displayed strong support for the bill and worked closely with both the House and the Senate in drafting the bill.[43] Upon signing the Act, President Bill Clinton greatly emphasized the importance of the free exercise of religion in support of the Act and stated that:

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[37] *Id.* at 608-615 (59 of the 85 unsuccessful federal claims were dismissed for failure to show a substantial burden).
[38] *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (declaring RFRA to be beyond Congress's remedial powers under the Fourteenth Amendment).
[39] *See* H.R. REP. NO. 106-219, 18-24 (1999); 146 CONG. REC. 16699 (2000) (Joint Statement of Senators Hatch and Kennedy) (Congress noted in its fact-finding that "some institutions restrict religious liberty in egregious and unnecessary ways," and that "prison officials sometimes impose frivolous or arbitrary rules"); H.R. REP. 106-219 at 9-10; Joint Statement at 16699 (The legislative history cited examples when making the statute including Jewish prisoners denied matzo bread at Passover, prisoners denied the ability to wear small religious symbols like crosses that posed zero security risks, as well as a Catholic prisoner whose private confession to a priest was found to be recorded by prison officials).
[40] 42 U.S.C. §2000cc.
[41] §2000cc-1.
[42] 42 U.S.C. §2000cc(a)(1) (stating no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest).
[43] 146 CONG. REC. S776 (daily ed. July 27, 2000) (letter from Assistant Attorney General Robert Raben).

> Religious liberty is a constitutional value of the highest order, and the Framers of the Constitution included protection for the free exercise of religion in the very first Amendment. This Act recognizes the importance the free exercise of religion plays in our democratic society.[44]

The passage of RLUIPA greatly expanded the protection of the free exercise of religion, especially for institutionalized persons. Section three of RLUIPA, aimed at institutions, provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that the imposition of the burden on that person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.[45]

This section of RLUIPA "covers state-run institutions – mental hospitals, prisons, and the like – in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise."[46] Expressly stated in the statute, RLUIPA was created by Congress with the aim to be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of the Act and by the Constitution.[47] As will be described in Sections III and IV, RLUIPA's express expansion of the protection of religious exercise eventually resulted in more favorable outcomes for prisoners claiming their religious freedoms were substantially burdened.

II. THE SUPREME COURT'S INTERPRETATIONS OF RFRA AND RLUIPA

A. The Supreme Court's Interpretations under RFRA

[44] Presidential Statement on Signing The Religious Land Use and Institutionalized Persons Act of 2000, 36 Comp. Pres. Doc. 2168 (September 22, 2000).
[45] *Id.* (Congress triggered a strict scrutiny analysis like in RFRA by using language like "substantial burden," "compelling governmental interest," and "least restrictive means").
[46] *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).
[47] 42 U.S.C. §2000cc-3(g).

In a series of cases under RFRA, the Supreme Court began to balance substantial burdens on freedom of religious exercise with compelling interests offered by the government. In addition, the Supreme Court began reading RFRA more broadly to protect religious freedoms. However, as noted above, the most successful RFRA claims are outside of the prison context.

In *Gonzales v. O'Centro Espirita Beneficente Uniao do Vegetal*, a religious sect received communion by drinking a sacramental tea brewed from plants in the Amazon Rainforest that contains a hallucinogen regulated under the Controlled Substances Act by the Federal Government.[48] The Government recognized the practice as a sincere exercise of religion, but sought to prohibit the religious sect form engaging in the practice, on the grounds that the Controlled Substances Act bars all use of the hallucinogen.[49] The religious sect moved for a preliminary injunction under RFRA.[50] The Court held that RFRA's strict scrutiny standard allowed for an exemption for a religious group's sacramental use of an illegal drug under the Controlled Substances Act.[51] The Court explained that Congress realized that even laws which are seemingly neutral toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.[52] As a result, Congress legislated the compelling interest test under RFRA as the means for courts to "strike sensible balances between religious liberty and competing prior governmental interests."[53] Applying this test, the Court found that the Government failed to demonstrate a compelling interest in banning the sacramental use of the drug.[54] The Government cannot simply assert a compelling interest; it must "demonstrate by meeting the burdens of going forward with evidence and persuasion" that the application of the

[48] *Gonzales v. O'Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006).
[49] *Id.*
[50] *Id.*
[51] *Id.* at 436.
[52] *Id.* at 439.
[53] *Gonzales*, 546 U.S. at 439.
[54] *Id.*

burden to the person is in furtherance of a compelling governmental interest.[55] Under the compelling interest test, the Court concluded that the Government failed to demonstrate a compelling interest sufficient to justify the substantial burden of religion on the church by barring their use of the drug.[56]

Eight years later, the Supreme Court interpreted RFRA again. In *Burwell v. Hobby Lobby Stores Inc.*, the Plaintiff owners of closely held corporations with sincere religious beliefs against certain types of contraception brought a lawsuit arguing that regulations requiring them to provide health insurance coverage for these drugs and devices violated RFRA by substantially burdening their exercise of religion.[57] The Court, in a landmark decision, held that RFRA applies to regulations that govern the activities of these closely held for-profit corporations.[58] The regulations imposed in this case therefore violated RFRA, which prohibits the Government from taking any action that substantially burdens the exercise of religion unless the action constitutes the least restrictive means of serving a compelling government interest.[59] The Court held that the contraceptive mandate substantially burdened the exercise of religion by requiring Plaintiffs to engage in conduct that sincerely violates their religious beliefs or face severe economic consequences.[60] While the regulations served a compelling governmental interest, they did not constitute the least restrictive means of serving that interest.[61] In its ruling, the Court emphasized that Congress explicitly intended for RFRA to be clearly construed in favor of "broad protection of religious exercise."[62]

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[55] *Id.* at 428.
[56] *Id.* at 427.
[57] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 683 (2014).
[58] *Id.* (clarifying that the holding is very narrow and specific in this case regarding for-profit corporations).
[59] *Id.* at 691.
[60] *Id.* at 685.
[61] *Id.* at 692.
[62] *Id.* at 714.

B. The Supreme Court's Interpretations under RLUIPA

The passage of RLUIPA allowed for broadened protections of religious exercise, specifically for institutionalized persons. The Supreme Court upheld the constitutionality of RLUIPA in the prison context in 2005 in *Cutter v. Wilkinson*.[63] The Supreme Court interpreted RLUIPA again in 2015 in *Holt v. Hobbs*, demonstrating the difficulties for the government to justify substantial burdens on prisoners' religious rights without offering a compelling interest.[64]

In *Cutter v. Wilkinson*, inmates in Ohio complained that Ohio prison officials failed to accommodate their religious exercise in a variety of ways, including discriminating against them for exercising nontraditional faiths and denying them opportunities for group worship, in violation of RLUIPA.[65] The question for the Court was one of constitutionality – whether RLUIPA improperly advances religion in violation of the First Amendment's Establishment Clause.[66] The Court held that RLUIPA does not exceed the limits of permissible government accommodation of religious practices.[67] The Court explained that RLUIPA should not be read to elevate accommodation of religious observances over an institution's need to maintain order and security.[68] The Court noted that drafters and lawmakers in favor of RLUIPA were mindful of the "urgency of discipline, order, safety, and security in penal institutions."[69] They anticipated that courts would apply the Act's standard "with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with consideration of costs and limited

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[63] *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005).
[64] *Holt v. Hobbs*, 574 U.S. 352, 363 (2015).
[65] *Cutter*, 544 U.S. at 713.
[66] *Id.*; U.S. CONST. amend. I.
[67] *Cutter*, 544 U.S. at 714. (The Court additionally held that "RLUIPA does not differentiate among bona fide faiths," which was a concern in which prison officials believe might incite or encourage instability within prisons if prisoners think certain other prisoners are receiving preferential treatment based on their religious beliefs).
[68] *Id.* at 722.
[69] *Id.* at 723 (quoting Joint Statement of Sens. Hatch and Kennedy).

resources."[70] For the foregoing reasons, Section Three of RLUIPA does not, on its face, exceed the limits of permissible government accommodation of religious practices.[71] In this case, the Court reaffirmed and solidified the idea that there is "room for play in between the joints" in the Free Exercise and Establishment Clauses, allowing the government to accommodate religion without offense to the Establishment Clause.[72]

Ten years later, the Supreme Court took a case on the substance of prison provisions – *Holt v. Hobbs*.[73] The Petitioner in *Holt* was a devout Muslim inmate challenging a policy prohibiting prisoners from growing beards, with a single exception for inmates with diagnosed medical skin conditions.[74] The Court held that the grooming policy in the prison preventing Petitioner from growing a half inch beard in accordance with his religious beliefs violated RLUIPA.[75] The Court reasoned that the policy substantially burdened Petitioner's religious exercise.[76] Additionally, the institution failed to show that its policy was the least restrictive means of furthering its compelling interests.[77] The Court commented that the compelling interest the Government put forward, preventing prisoners from hiding contraband, was "hard to take seriously."[78]

Hobby Lobby and its interpretation of RFRA just a year prior to *Hobbs* impacted its interpretation of RLUIPA. The Court's very robust protection of free exercise in *Hobby Lobby* is directly transferred to *Hobbs* because both statutes have the same language, and both statutes are

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[70] *Id.* at 717.
[71] *Id.* at 714 (holding that Section Three of RLUIPA, on its face, qualifies as a permissible accommodation that is not barred by the Establishment Clause).
[72] *Id.* (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)).
[73] *Holt v. Hobbs*, 574 U.S. 352 (2015).
[74] *Id.* at 352.
[75] *Id.*
[76] *Id.* at 355 (The policy unlawfully forced Petitioner to choose between violating his sincerely held religious beliefs or risk discipline).
[77] *Id.*
[78] *Hobbs*, 574 U.S. at 365.

intended to be interpreted to give broad protection to free exercise.[79] This shows that even though RFRA did not directly provide help to institutionalized persons, its later interpretation influenced RLUIPA interpretations, moving toward greater protection for religious exercise.

The Court in *Hobbs* set a new precedent for future decisions by explaining the need for courts to apply RLUIPA rigorously in religious exercise cases. The Court explained that the least-restrictive-means standard is "exceptionally demanding" and requires the Government to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party.[80] If there are any less restrictive means available, the Government must use it.[81] This clearly is establishing a heightened standard for the Government to meet in future cases in order to show that they have a good enough reason to substantially burden religious exercise in prisons. The Court in *Hobbs* set forth and emphasized a balance of interests, showing that while RLUIPA provides ample protection for the freedom of religious exercise for institutionalized individuals, it also affords prison officials deference and ample ability to maintain security – just as the legislature intended for the statute to apply in practice.[82] This very pro-prisoner case seemingly demonstrated a possible shift in the Court with its unanimous ruling in favor of defending prisoners' religious rights.

III. DENIAL OF DIET IN ACCORDANCE WITH SINCERELY HELD RELIGIOUS BELIEFS: BALANCING THE SUBSTANTIAL BURDEN ON THE INMATE VERSUS THE COMPELLING INTERST OF THE INSTITUTION

[79] *Id.* at 356. ("Congress enacted RLUIPA and its sister statute, RFRA, in order to provide very broad protection for religious liberty").
[80] *Id.*
[81] *Id.*
[82] *Id.* at 369.

In many cases, a diet that is consistent with an individual's religious beliefs can be critical to their health, safety, and well-being. Many religions require strict compliance with a dietary practice as a fundamental part of their religious observance. Most prominently, Jews practice a Kosher diet and Muslims practice a Halal diet. Denial of a diet consistent with an individual's religious beliefs can result in forcing inmates to make the choice between starving themselves or to eat what is given to them, resulting in violating their sincerely held religious beliefs.[83] The courts have been grappling for years between the balance of affording inmates the right to their sincerely held religious beliefs and the compelling interests of the government in maintaining their institutions, namely safety, order, discipline and security in the prisons.

In cases involving a claim of a substantial burden on the ability for religious inmates to practice their religion in regards to dietary accommodations, courts have been surprisingly inconsistent between decisions favoring the prison system, its limited resources, and available alternatives on one hand and decisions favoring an institutionalized person's right to practice their religion without being substantially burdened by the prison administration on the other hand. While prisoners have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion,[84] this right must be balanced with the prison's "legitimate interest in running a simplified food service, rather than one that gives rise to many administrative difficulties."[85]

A. Pre-statutes

Inmates have challenged religious dietary denial and restrictions in prisons for decades. Prior to the passage of RFRA and RLUIPA, the Fifth Circuit in *Walker v. Blackwell* analyzed

[83] *See* 28 C.F.R. §549.61 (2011) (Competent prisoners will often go on hunger strikes as an extreme form of protest in prison and refuse food for a specific purpose, aware of the potential consequences of their actions).
[84] *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987).
[85] *Ward v. Walsh*, 1 F.3d 873, 877 (9th Cir. 1993).

deprivation of preferred religious freedoms claims under the First and Fifth Amendments.[86] The inmates in *Walker* sought the privilege of being served a restricted diet after sunset during Ramadan according to their religious beliefs.[87] The question the court considered was whether the rules and regulations imposed on the inmates were reasonably justifiable in the administration of a large prison population, maintenance of discipline, and control of any dangers or hazards presented.[88] The court analyzed these First Amendment freedom claims under a seemingly strict scrutiny compelling interest test. The court said that first, the petitioner must demonstrate the deprivation of a right by (1) deliberate discrimination, or (2) even handed application of an inherently discriminatory rule.[89] Then, to continue the policy, the government must show a compelling and substantial public interest in order to infringe on that right.[90] The Fifth Circuit held that considerations of security and administrative expense outweighed the constitutional deprivation claimed by the inmates.[91] The court reasoned that the security concerns, as well as the additional expense of purchasing and preparing special food, were sufficiently substantial and compelling to outweigh the free exercise claim.[92]

Another pre-statute case before the court was *Raymond v. Johnson*.[93] In *Raymond*, Muslim inmates alleged that the prison infringed on their constitutional right of free exercise by refusing to accommodate various requests to facilitate the inmates' observance of their religion.[94]

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[86] *Walker v. Blackwell*, 411 F.2d 23, 24 (5th Cir. 1969).
[87] *Id.*
[88] *Id.*
[89] *Id.* at 25.
[90] *Id.*
[91] *Walker*, 411 F.2d at 26.
[92] *Id.* (Explaining the availability of other diets to sustain inmates who were avoiding pork and swine as well as the security problems created by the possibility of late meals due to the need for additional staff because of inmate classification).
[93] *Raymond v. Johnson*, U.S. App. Lexis 22119* (4th Cir. 1989).
[94] *Id.* at 2.

The inmates' claims were governed by *Turner* and *Shabazz*.[95] The court found that the prison administration could offer a permanent Ramadan diet with little or no additional administrative burden or cost.[96] Additionally, there were additional easy alternatives and the prison could reasonably accommodate the inmates' religious dietary requests.[97] The administration's claims of prejudice and nutrition were rejected by the court.[98]

This exemplifies a very interesting and unusual approach by the courts. *Raymond* was governed by a very deferential standard of review, a low standard usually favoring the government. Nonetheless, the court held in favor of the inmates for their dietary requests. Alternatively, the previously discussed case, *Walker*, used a strict scrutiny approach – an extremely high burden – and the court held in favor of the prison administration.

B. Diet claims under RFRA

RFRA claims made by prisoners have historically been much more difficult to succeed on as opposed to RLUIPA. RLUIPA, the sister statute to RFRA, borrows the same standard almost entirely, but with a specific provision protecting solely the rights of institutionalized persons.[99] To make a claim under RFRA, the plaintiff must show that the government has substantially burdened his exercise of a sincerely held religious belief.[100] In *Abdul-Malik v. Goord*, the court held that the inmates' claim failed under RFRA because a limited provision of Halal meat did not substantially burden the inmates' free exercise of religion.[101] The federal district court in *Goord* felt bound by Second Circuit precedent in *Kahane v. Carlson*, which explained that all that is required for a prison diet not to burden an inmate's free exercise of

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[95] *Id.* at 7.
[96] *Id.*
[97] *Id.* at 8.
[98] *Id.* at 9.
[99] 42 U.S.C. §2000cc-1(a).
[100] *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996).
[101] *Abdul-Malik v. Goord*, U.S. Dist. LEXIS 2047* 19 (S.D.N.Y. 1997).

religion is "the provision of a diet sufficient to sustain the prisoner in good health without violating his religion's dietary laws."[102]

RFRA applied to all prison claims from 1993-1997, and thereafter only to federal prison claims. In *Patel v. United States Bureau of Prisons*, an inmate claimed that the prison's failure to provide him with appropriate meals in compliance with his Islamic diet violated his right to practice his religion.[103] The Bureau created a cost-effective plan that was designed to accommodate all thirty-one religious groups in the prison system.[104] The Bureau stated that the plan was designed to give inmates an "equitable opportunity to observe their religious dietary practice within the constraints of budget limitations and the security and orderly running of the institution through a religious diet menu."[105] The inmate brought his claims under RFRA claiming that possible cross-contamination and subpar diet options burdened his ability to practice his religion through an appropriate diet.[106] The Eighth Circuit explained that to bring a claim under RFRA, there must be a substantial burden on his ability to practice his religion.[107] A regulation that substantially burdens one's free exercise of religion:

> Must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion.[108]

Courts have found that no substantial burden generally exists if the regulation merely makes the practice of a religious belief more expensive.[109] This disputes the inmate's claim that having

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[102] *Kahane v. Carlson*, 527 F.2d 492, 496 (2d Cir. 1975) (applying a strict scrutiny standard of review to the provision of a Kosher diet to a federal inmate).
[103] *Patel v. United States Bureau of Prisons*, 515 F.3d 807, 809 (8th Cir. 2008).
[104] *Id.*
[105] *Id.*
[106] *Id.* at 812.
[107] *Id.* at 813.
[108] *Patel*, 515 F.3d at 813.
[109] *Id.*

alternative food options offered for purchase in the commissary five days a week can be considered a substantial burden.[110] The court therefore held that the inmate did not exhaust alternative means of accommodating his religious dietary needs and there was no substantial burden on exercising his religion.[111]

C. *Diet claims under RLUIPA: The protection is not absolute, but a substantial shift is happening in the courts.*

Section Three of RLUIPA increased the level of protection of prisoners' and other incarcerated person's religious rights from government-imposed burdens.[112] RLUIPA in the prison context is essentially a balancing test between inmates and institutions. First, the plaintiff must show a substantial burden on his exercise of religion.[113] Next, the government must show that its dietary policy is the least restrictive means of furthering a compelling governmental interest.[114] However, RLUIPA is not intended to elevate accommodation of religion over the institutional needs to maintain good order, security, and discipline, or to control costs.[115] As such, RLUIPA claims in the dietary context are traditionally framed with an inmate claiming a substantial burden and the government arguing their policies are the least restrictive means of furthering a compelling interest of security, safety, space, personnel, or financial concerns for the prison and its inmates and employees.[116] The outcomes of these cases have varied by circuit.

In a recent case in the Seventh Circuit, *Jones v. Carter*, a Muslim inmate brought suit claiming the prison's refusal to provide him with a Halal diet including meat substantially

[110] *Id.*
[111] *Id.* at 815.
[112] *Cutter*, 544 U.S. at 714.
[113] *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007).
[114] *Id.*
[115] *Id.* (Fifth Circuit ruled in favor of the prison officials based on the argument that the Texas Department of Criminal Justice's limited budget would not permit it to provide kosher meals for a Jewish inmate); *Linehan v. Crosby*, 346 F. App'x. 471, 473 (11th Cir. 2009) (holding that providing kosher meals was too expensive of an accommodation under RLUIPA).
[116] *Baranowski*, 486 F.3d at 123.

burdened his exercise of religion in violation of RLUIPA.[117] The court found that requiring the inmate to engage in conduct that violated his sincerely held religious beliefs was a substantial burden on his religious exercise.[118] Additionally, the government could not prove a compelling interest because it was proven that it would not impose any incremental cost on the prison.[119] Unlike the court in *Patel* under RFRA, this court rejected the suggestion that the inmate purchase his Halal food at the commissary. The court found that the coercive pressure of the choice between violating his religion or facing starvation qualified as a substantial burden under RLUIPA.[120]

Confusion existed and decisions differed among circuits over time as there were debates about what constituted a "substantial burden" under RLUIPA. The courts of appeals have addressed the definition of "substantial burden" under RLUIPA, defining it in several ways. Most courts have adopted a standard similar to *Sherbert*/*Thomas*, a substantial coercive burden on religion standard, but reworded their holdings.[121] As a result, there are several definitions of "substantial burden" with minor variations.[122] Whether the differences in the definition of substantial burden result in any meaningful differences in application is mostly still an open question.[123] The Seventh Circuit interpreted the substantial burden language as requiring that the government's action rendered the religious exercise "effective impracticable."[124] Other circuits

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[117] *Jones v. Carter*, 915 F.3d 1147, 1147 (7th Cir. 2019).
[118] *Id*. at 1149.
[119] *Id*. *But see* the Seventh Circuit in *Hearn v. Kennell*, 433 F. App'x. 484, 484 (7th Cir. 2011) (holding there was no RLUIPA violation because there was no evidence that the prison's decision to serve kosher meat but not Halal meat was motivated by intentional or purposeful discrimination).
[120] *Jones*, 915 F.3d at 1149; *But see Patel* under RFRA (stating that a substantial burden is not proven just because a regulation makes a religious practice more expensive).
[121] *Washington v. Klem*, 497 F.3d 272, 279 (3rd Cir. 2007).
[122] *Id.*
[123] *Id.* at 280. *But see Murphy v. Missouri Dept. of Corrs*., 372 F.3d 979, 988 (8th Cir. 2004) (requirement that the government policy or action to substantially burden must be a "central tenet" of the individual's religious beliefs, although RLUIPA is protective of religious exercise that includes activities not always central to a system of religious belief).
[124] *Nelson v. Miller*, 570 F.3d 868, 878 (7th Cir. 2009).

developed various tests. For example, the Tenth Circuit said that for there to be a substantial burden, the government must require, prohibit, or substantially pressure religiously relevant conduct.[125] The Fifth Circuit articulated a standard that the government must influence an adherent to act or force him to choose between a generally available non-trivial benefit and religious beliefs.[126] The Eighth Circuit stated that the government must significantly inhibit, meaningfully curtail, or deny reasonable opportunities for religious exercise.[127] The Third Circuit followed a test combining the holdings of *Sherbert* and *Thomas*, stating that a substantial burden exists where: (1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; or (2) the government puts substantial pressure on an adherent to substantially modify his behavior to violate his beliefs.[128]

The debate among circuits was largely dispelled in recent cases *Hobby Lobby* and *Hobbs* where the Court notably articulated a more protective standard for religious exercise.[129] The Court in these cases clarified that RLUIPA's substantial burden inquiry "robustly supports inmate religious practice."[130] Therefore, when the State forces a prisoner to choose between adequate nutrition and religious practice, it is effectively imposing a substantial burden on religion under the articulated rule.[131]

IV. ANALYSIS OF DECISIONS

[125] *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1313 (10th Cir. 2010).
[126] *Moussazadeh v. Texas Dep't of Criminal Justice*, 703 F.3d 781, 793 (5th Cir. 2012).
[127] *Patel*, 515 F.3d at 814.
[128] *Washington*, 497 F.3d at 279; *Riley v. DeCarlo*, 532 F. App'x. 23, 29 (3rd Cir. 2013).
[129] *See also Schlemm v. Wall*, 784 F.3d 362, 364 (7th Cir. 2015) (noting that *Hobbs* and *Hobby Lobby* articulated a substantial burden standard requiring a sincere violation of religious beliefs, much easier to satisfy than former standards of something rendering religious exercise "effectively impracticable").
[130] *Jones*, 915 F.3d at 1150.
[131] *Id*; *but see* dissent at 1152 (arguing that the interpretation of "substantial" is still unresolved because the majority believes it means that *any* burden on an inmate's religious diet, no matter how slight, violates RLUIPA).

Compared to its predecessor, RLUIPA has helped provide protection for the fundamental religious rights of inmates for twenty-two years – just as Congress intended when curating the Act. While prison administrators often assert that RLUIPA overly burdens their capacity to accommodate prisoners' religious practices, these claims have had drastically inconsistent outcomes over the past twenty-two years when litigated by courts. Even with prison officials demanding deference to their administration regardless of RLUIPA, they are not always able to make a successful claim, especially with modern interpretations.

Federal enforcement of RLUIPA has allowed for institutionalized persons to directly benefit from greater religious freedom. Over the last twenty-two years, the Civil Rights Division of The United States Department of Justice had a central role in enforcing RLUIPA and protecting the religious freedom of institutionalized persons.[132] According to a United States Department of Justice Report, the passage of RLUIPA has provided incarcerated men and women with the ability to freely exercise their "essential and inborn right" to practice religion while in prison.[133] From 2000 to 2020, the Department itself conducted sixty-eight formal and informal investigations, initiated three lawsuits, and filed eight statements of interest as well as thirteen *amicus* briefs regarding RLUIPA and institutionalized persons.[134] The Department has prompted voluntary compliance or court-ordered resolutions in cases encompassing various religious practices – religious diet, access to religious texts and articles, opportunities to participate in religious groups, meetings, and organizations, religious headwear, and the accommodation of religious grooming practices.[135] Through these actions, the Department

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[132] *See* U.S. DEP'T OF JUST., REPORT ON THE TWENTIETH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 3 (2020), https://www.justice.gov/crt/case-document/file/1319186/download (The Department of Justice has enforced RLUIPA through investigations, settlements, court filings, and public education).
[133] *Id.* at 27.
[134] *Id.*
[135] *Id.*

successfully provided religious accommodations for prisoners throughout the country.[136] The Department has achieved institutional policy changes that benefit the prisoner whose claim initially came to its attention, those of the same religion, and also prisoners of differing religious faiths whose religious beliefs require similar accommodation.[137]

Lower courts have been very responsive to the Supreme Court's RLUIPA decisions. Prior to *Cutter*, no circuit court found that religious accommodations overly burdened prisons.[138] Post-*Cutter* lower court decisions demonstrated the impact that *Cutter* had on RLUIPA claims, leaning more frequently toward deferring to prison administrations.[139] However, the unanimous ruling in favor of the prisoner in *Hobbs* in 2015[140] may suggest a future trend of courts affording more protection to prisoners.

More recent decisions in the Supreme Court show that RLUIPA cases are still being explored, developed, protected, and questioned in the Court. Just this past year, in a case where an inmate was sentenced to death row as punishment for capital murder, the Supreme Court once again emphasized the idea that RLUIPA protects prisoners' rights to freedom of religious exercise unless there is a compelling reason offered by the government to impose a restriction on the religious belief.[141] In *Ramirez v. Collier*, an inmate ultimately filed a grievance requesting that the State allow his long-term pastor to "lay hands" on him and "pray over" him during his execution, acts claimed to be a part of his religious faith.[142] The inmate claimed the refusal of

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[136] *Id.* (The Department provided access to religious accommodations for even some of the nation's largest correctional institutions, including California and Florida, each confining over 100,000 inmates).
[137] *Id.* ("For example, policy changes permitting a Sikh prisoner to maintain untrimmed hair or a beard also benefits those of other religions requiring accommodation of grooming practices, such as Muslim or Native American prisoners. The Department's work has supported the religious exercise of people practicing a wide range of religions, including Jews, Muslims, Sikhs, Christians, and Native Americans").
[138] Taylor G. Stout, *The Costs of Religious Accommodation in Prisons*, 96 Va. L. Rev. In Brief 1201 (2010).
[139] *Id.*
[140] *Hobbs*, 574 U.S. at 354.
[141] *Ramirez v. Collier*, 142 U.S. 1264 (2021).
[142] *Id.* at 1268.

prison officials to allow his pastor to lay hands on him while in the execution chamber violated RLUIPA and the First Amendment.[143] The Court found that the inmate's RLUIPA claim is likely to succeed because the State's restrictions on "religious touch and audible prayer" in the execution chamber substantially burden religious exercise and are not the least restrictive means of furthering the State's proffered compelling interests.[144] As such, it does not justify a substantial burden on religion. The Court stressed that mere speculative concerns offered by the State cannot be enough to justify a substantial burden on an inmate's religion.[145] This 8-1 decision emphasizes the sincere and extensive protection of religious exercise for inmates that has developed under RLUIPA, even when it comes to a situation as crucial as capital punishment and execution in prison.

Another recent Supreme Court case, *Holt v. Hobbs*, emphasizing a very pro-prisoner standpoint, has been influential in the lower courts and could potentially be used as positive precedent in the future for other inmates. Almost immediately after the Supreme Court issued a ruling in *Hobbs*, the Court vacated and remanded its decision in *Knight v. Thompson* back to the Eleventh Circuit "for further consideration in light of *Hobbs*" where the Court "refused to blindly defer to prison policy based on the specific facts of the case."[146] In *Knight*, the Department of Corrections ("DOC") had a policy that required all male prisoners to wear a "regular haircut," defined as "off the neck and ears."[147] The DOC did not grant any exceptions for this policy,

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[143] *Id.* at 1269.
[144] *Id.*
[145] *Id.*
[146] *Knight v. Thompson*, 797 F.3d 934 (11th Cir. 2015) (The court explained that lawmakers in support of RLUIPA were very mindful of the necessity of discipline, order, safety, and security in penal institutions and that this standard would be applied with due deference to the experience and expertise of prison administrators. However, this deference cannot be unlimited and policies grounded on "mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet RLUIPA's requirements).
[147] *Id.* at 937.

religious or not.[148] The inmates, none of which were considered maximum security, sought a complete religion-based exemption to the policy, claiming that wearing long hair was a central tenet of their religious faith.[149] As to the hair length claims, the Court had to make new findings of fact and conclusions of law in regard to whether a total ban on the wearing of long hair and denial of an exemption based on the Native American religion was the least restrictive means of furthering the DOC's compelling governmental interest in "security, discipline, hygiene, and safety within the prisons and in the public's safety in the event of escapes and alterations of appearances."[150]

There is a potential, considering the recent holdings in the Court, that future post-*Hobbs* and post-*Ramirez* decisions in the Court will give less deference to prison officials and more protection to prisoners' religious claims. At the very least, the Court seems to be much more conscious of the application and adherence to RLUIPA before primarily deferring to prison administrators. Although surviving and seemingly fulfilling its purpose for much longer than its predecessor, RFRA, RLUIPA is clearly still a product of ongoing litigation, debate, and tension in the Court.

The decisions in the courts seem to sometimes have common, but not definitive trends, resulting in tension and confusion in the courts. Despite a seemingly simple statute, RLUIPA has produced a lot of inconsistent outcomes in the courts.[151] We are left with a lot of evolving

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[148] *Id.*
[149] *Id.*
[150] *Id.* at 938.
[151] *See*, Morgan F. Johnson, *Common, Heaven Help Us: The Religious Land Use and Institutionalized Persons Act Prisoners Provisions in the Aftermath of the Supreme Court's Decision in Cutter v. Wilkinson*, 14 AM. U.J. GENDER SOC. POL'Y & L. 585, 611-612 (concluding that the aftermath of *Cutter*'s interpretations of RLUIPA is a "standard that is confusing and may lead to inconsistent outcomes"; *Id*. at 596 (declaring that although the language of RLUIPA seems to protect the religious practices of prisoners, the strict scrutiny standard of review has hardly been "fatal in fact" in the prison setting because of the deference given to prison officials and the inconsistency in the Act's application).

questions and litigation around RLUIPA and the balance between inmates and prison administration. For example, there are questions about when a prison should have to accommodate "nonmainstream" religions if an inmate does not have to prove that they hold a sincere belief. This will likely become an evolving issue as time develops and religious claims potentially increase. Additionally, there are extremely different interpretations among the courts about what considers a substantial burden, which impacts many facets of litigation involving religious claims for inmates. This raises potential questions about how far prison administrations can possibly go in burdening an inmate's religious practice. The case holdings are dramatically different – some seem to have a low bar, and some seem to have a higher threshold, deferring more to the prison administration like earlier cases.

The Supreme Court has not ruled on a substantial number of RLUIPA claims by inmates – in fact, there have only been three rulings since its enactment. Because the Supreme Court has only ruled on three RLUIPA claims by inmates, it is difficult to predict the definitive trajectory of the Court and which direction future cases will go.[152] However, the Court seems to have moved toward a more broad interpretation of RLUIPA, becoming much more receptive of prisoners' religious freedom claims and allowing inmates an avenue to express these claims.

Conclusion

The Court has expanded the way it covers and interprets individual fundamental constitutional rights throughout its history. Before RFRA and RLUIPA, the Court relied on *Turner* and *Shabazz* in establishing a constitutional framework for fundamental rights claims that deferred to prison administrators. Before RFRA and RLUIPA, the Court assessed claims by

[152] *See Borzych v. Frank*, 439 F.3d 388, 390 (7th Cir. 2006) (explaining that the analysis under RLUIPA is case-specific and courts should not be required to nullify entire regulations because there is a potential for "improper application" to a particular faith or belief).

using a reasonableness standard. The Court later turned to a compelling interest test when Congress passed RFRA in 1993, and later on with greater specificity to and focus on the prison context, RLUIPA in 2000. The Court has grappled with the limits of religious freedom and its involvement in the prison system. However, RLUIPA extends just as far as the legislature intended for it to by greatly broadening religious protections for institutionalized persons. Over the past twenty-two years, RLUIPA has overall been generally successful in fulfilling its specific purpose of being a protection against substantial burdens on religious exercise.