

CURRENT ISSUES
IN
CONSTITUTIONAL
LITIGATION

A CONTEXT AND PRACTICE
CASEBOOK

Sarah E. Ricks
Evelyn M. Tenenbaum

Chapter 14

Protecting Freedom of Religion in Prison: The Free Exercise Clause and RLUIPA

Exercise 1: Chapter Problem

There are approximately 70,000 inmates in New York State prisons. Robert Sand is one of these inmates. He is incarcerated at Clinton Correctional Facility, a maximum-security prison.¹

Mr. Sand claims that his right to freely exercise his religion was violated when prison officials refused to allow him to practice his religion in accordance with his sincere religious beliefs. When he entered prison, Sand declared that he was Jewish. He began attending Jewish services, but quickly came to the conclusion that the Rabbi employed by the facility—Rabbi Samuel Cohen—did not practice Judaism correctly.

Sand became disruptive and argumentative during Jewish services and refused to follow the Rabbi's instructions. For example, he wrote notes during services held on the Sabbath and insisted on writing out the full name of God, even though the Rabbi explained that these practices violated Jewish law. He openly told other members of the congregation that the Rabbi was not knowledgeable about Judaism, interrupted the Rabbi during services to argue his own views, and refused to call the Rabbi by his proper title. Based on this behavior, Rabbi Cohen determined that Sand was not a bona fide member of the Jewish religion, that he was disruptive during services, and that he could no longer attend Jewish services at Clinton Correctional Facility.

According to Sand, Rabbi Cohen's views made it impossible for him to properly practice his religion. Rabbi Cohen is the only Rabbi at Clinton, so Sand requested that prison administrators either provide another Rabbi who recognized his religious beliefs or allow him to conduct religious services himself. He has a following of six inmates who have already expressed an interest in attending his services.

Clinton Correctional Facility's administrators denied Sand's request to lead religious services and refused to provide another Rabbi. They also denied several of Sand's other requests for religious accommodations. They denied his request

1. This exercise is based on the facts in *Sebok v. Friedman*, No. 99-CV-86 (N.D.N.Y. filed July 12, 2000). Some of the facts have been changed for educational purposes. Because the facts do not precisely track those in the actual case, the names of the parties have been changed.

to light candles in his cell on Saturdays — the Jewish Sabbath — and on Chanukah. They also denied his requests to have a mezuzah² placed outside his cell door and to have three boxes of books delivered to his cell, so he can continue to study Jewish law. Sand is permitted to observe other aspects of his religion in his cell.

As you read this chapter, assume that you are the attorney for Sand. Will you advise your client that he is likely to succeed on his First Amendment claims? Would he succeed on these claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA)? What additional facts would you want from Sand before making this determination? Use the case law and other materials provided in this chapter to determine what questions you will ask your client.

After acting as attorney for Sand, change sides and assume that you are the attorney for the New York State Department of Correctional Services. What additional facts do you want from your client to defend a possible action for violation of Sand's religious rights? Again, use the case law and materials provided in this chapter to determine the questions you will ask.

A. Balancing Religious Freedoms Against Institutional Safety, Financial, and Administrative Concerns

Prisoners in federal and state institutions do not lose all of their religious freedoms due to their incarceration. They retain some religious rights under the First Amendment of the United States Constitution, which protects “the free exercise [of religion],” and under federal statutes including the Religious Freedom Restoration Act (RFRA) and RLUIPA. Prison administrators also have incentives to foster religion in prisons because religious programs are helpful in rehabilitating prisoners and in maintaining order and security.³ The challenge for prison administrators is to balance the religious privileges granted to prisoners against the institution's legitimate concerns regarding safety, security, and budgetary restraints.⁴

The very nature of prison life — compared to life outside the prison — gives inmates enormous incentives to request religious accommodations. Outside of prison, citizens are responsible for paying for their religious needs and have much more control over their lives. They are required to pay for their churches and temples and for the clergy who provide their services. Private citizens control how they spend their free time, what they eat, what they wear, and how long they grow their hair. If, for example, the government tried to prevent an individual from wearing a crucifix, the courts would almost certainly find a first amendment violation.⁵

2. For a description of a mezuzah, *see infra* pp. 653–54.

3. U.S. Comm'n on Civil Rights, *Enforcing Religious Freedom in Prison* 30 (2008), available at <http://www.usccr.gov/pubs/STAT2008ERFIP.pdf>.

4. *Id.* at xiii; *see also id.* at 31 (addressing Stiles Unit, Supplemental Response to U.S. Comm'n on Civil Rights Interrogatories, Response to Interrogatory Request 24 (2008)); Ronald G. Turner, *The Religious Land Use and Institutionalized Persons Act of 2000: The Impact on People in Prison*, 45 *Tenn. B. J.* 25, 25 (2009).

5. U.S. Comm'n on Civil Rights, *supra* note 3, at 135.

On the other hand, inside the prison, many of the inmates' religious needs are provided by the correctional facilities. The prison must provide the chaplains, special meals, holiday breaks, meeting rooms, and some items necessary for worship. Because prisons are very restrictive and inmates have limited freedoms, they have substantial incentives to request religious privileges,⁶ even those they may not have purchased for themselves outside the prison.⁷ Indeed, while most inmates' religious requests are undoubtedly based on sincere religious beliefs, some inmates have feigned conversion to other religions and even invented religious beliefs in order to gain benefits and privileges that they would otherwise not be entitled to receive.⁸ Some extreme examples include an inmate group, known as the Church of New Song (CONS), who claimed that their religion required that they have steak and wine⁹ and an inmate who claimed that his religion—the Jack Daniels Faith—“required that he consume a fifth of whiskey each week.”¹⁰ While these claims were not successful, they provide an example of how religious requests for privileges can lead to attempts to obtain all sorts of privileges. If the inmate's beliefs are sincere, they must be accommodated unless the denial of privileges is based on compelling prison concerns. As discussed later in this chapter, determining sincerity is a very difficult task.

Even when inmates purchase their own religious items or want to perform their own religious services, they need prison administrators to sanction the services and the use of items they feel are necessary to meet their religious needs. Meeting inmate requests may be difficult for prison administrators due to the unique concerns in a prison setting. For example, maximum-security prisons must ban items that can be used as weapons.¹¹ Inmates are very ingenious in shaping weapons out of the objects they have available.¹² In the past, inmates have sharpened toothbrush handles, lids of food cans, and even plastic eyeglasses to use as weapons.¹³ Given this history, should maximum security prisons allow inmates to have metal crucifixes?¹⁴ How about wooden crucifixes that can be sharpened to gouge out an eye?¹⁵ In considering these questions, remember that the crucifix may provide considerable comfort to a religious inmate. Should the prison evaluate the security threat posed by each individual inmate before making this determination or should the prison instead have a uniform policy? Should prison administrators honor the requests of Wotanists and Asatru members,¹⁶ who claim that their religion entitles them to white supremacist literature?

6. Morgan F. Johnson, *Heaven Help Us: The Religious Land Use and Institutionalized Persons Act's Prisoners Provisions in the Aftermath of the Supreme Court's Decision in Cutter v. Wilkinson*, 14 Am. U. J. Gender Soc. Pol'y & L. 585, 608 (2006).

7. U.S. Comm'n on Civil Rights, *supra* note 3, at 125.

8. *Id.* at 610–11.

9. U.S. Comm'n on Civil Rights, *supra* note 3, at 124 n.22 (citing *Lindell v. McCallum*, 352 F.3d 1107, 1108 (7th Cir. 2003), *Wood v. Me. Dep't of Corr.*, No. 06-156-B-W, 2007 U.S. Dist. LEXIS 81146, at *3–*5, (D. Me. Oct. 25, 2007); and *Therhault v. Silber*, 453 F. Supp. 254, 260 (W.D. Tex. 1978)).

10. *See Doty v. Lewis*, 995 F. Supp. 1081, 1085 (D. Ariz. 1998).

11. U.S. Comm'n on Civil Rights, *supra* note 3, at 135.

12. N.Y.S. Dep't of Corr. Serv., *Prison Safety in New York: Working Together for Public Protection*, VII (2006).

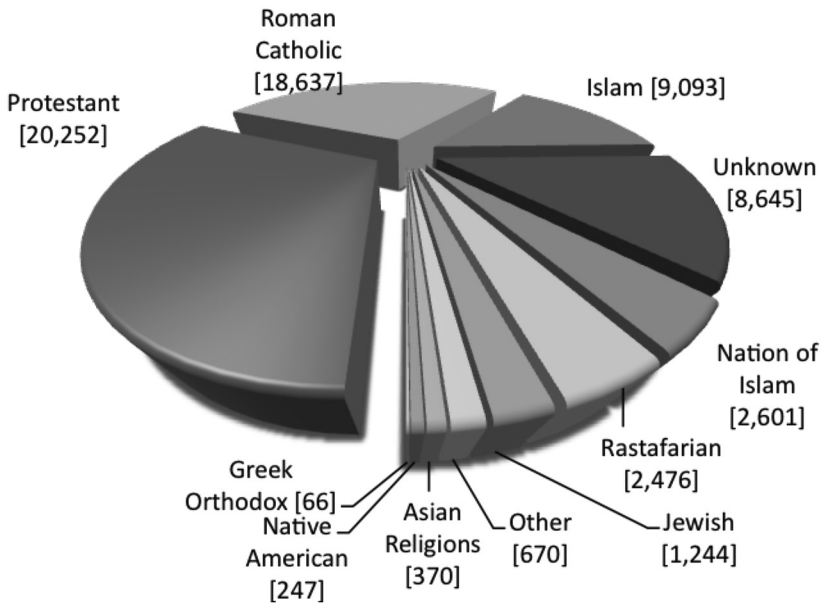
13. *Id.*

14. *See Sasnett v. Litchser*, 197 F.3d 290, 291 (7th Cir. 1999).

15. U.S. Comm'n on Civil Rights, *supra* note 3, at 135.

16. *Id.* at 124, 143 (noting that Wotanists worship Norse gods and tend to promote white supremacist teachings); *see also Borzych v. Frank*, 439 F.3d 388, 390 (7th Cir. 2006); *Wood v. Me. Dep't of Corr.*, *supra* note 9, at *6, *10, (D. Me. Oct. 25, 2007) (an inmate was denied access to reading materials that were found not to be religious in nature because the religion “as practiced by Wood [is]

Religious Populations in New York State Prisons



The large number of religions and the growing religious diversity of the inmate population compound the challenge of accommodating inmate beliefs.¹⁷ For example, the New York State Department of Correctional Services has recorded more than 53 religions in its prisons.¹⁸

Subcategories:

- Within Protestant: Adventist; Assembly of God; Baptist; Christian; Christian Scientist; Church of Christ; Church of God; Episcopal; Evangelical Covenant; Friends; Jehovah's Witness; Lutheran; Methodist; Nazarene; Pentecostal; Protestant; Presbyterian; Reformed; Salvation Army; 7th Day Adventist; United Church of Christ; Unitarian/Universist.
- Within Islam: American Muslim Mission; Islam; Mohammedan; Moslem; Shiite Muslim; Sunni.¹⁹
- Within Jewish: Jewish; Orthodox Jewish.
- Within Asian Religions: Buddhist; Hindu; Sikh; Taoist.
- Within Other: Agnostic; Animism; Atheist; Five Percenter; Moorish Science Temple; Odinist/Wodinit; Orisini; Santeria; Satanism; Vudu; Wiccan/Pagan; Yoruba.
- Within Unknown: Not Specified; Not Coded.

one that advocates white supremacy and encourages contempt and denigration of other races.”) (emphasis in original).

17. Turner, *supra* note 4, at 26.

18. Data provided by the New York State Department of Correctional Services (2004).

19. There is a substantial difference between Islam and Nation of Islam. Nation of Islam, whose followers are sometimes referred to as Black Muslims, was founded in 1930. Nation of Islam teaches the superiority of the Black race, that each race has its own god and that all Muslims are Allahs, beliefs considered sacrilegious within orthodox Islam. For further discussion, see Abraham Sarker, *Understand My Muslim People* 86–90 (Barclay Press 2004).

The numerous practices, holidays, religious leaders, dietary needs, clothing requirements, and personal property items needed for each religion make it difficult for prisons to meet all of the prisoners' religious requests. To accommodate the religious holidays alone, the New York State Department of Correctional Services must recognize 126 different religious holidays, each with its own requirements and practices.²⁰

One of the more burdensome religious requests made by inmates was a request by Native Americans for a sweat lodge.²¹ Sweat lodges are dome-shaped structures designed to give privacy to those participating in the ceremonies that take place inside.²² The ceremonies in the sweat lodge involve the use of burning hot coals, large rocks, and metal tools to create steam.²³ It is easy to understand why these lodges might create security concerns in a prison. Some religions have special meal requirements that can strain prison budgets. For example, kosher meals required by the Jewish faith can cost almost twice as much as a standard meal. In 2006, a kosher meal in Washington State cost \$12.00, halal meats and cheeses required by Muslims cost \$6.91, and a standard meal cost \$6.03.²⁴ Even religious requirements regarding hair length can cause significant burdens in the prison setting.²⁵ Rastafarians and members of some Native American religions believe that their religion requires them to wear their hair long and Orthodox Jews believe they must grow long beards.²⁶ Many prisons forbid long hair because it can be used to hide contraband.²⁷ Officers at the prison can avoid this problem by requiring inmates to comb through their hair at various check points. However, this accommodation requires officers to carry combs with them, take the time to have inmates comb through their hair, and constantly wash the combs to ensure they are clean.²⁸

Free exercise issues such as these, which can only be accommodated by exceptions to the prisons' general rules and practices, require prison officials to evaluate the extent to which the prison can accommodate religious freedoms given the realities of prison life, including security, safety, budgetary and staffing constraints. The court decisions in this area are often inconsistent due to the importance of inmates' religious rights and the difficulties involved in effectively and efficiently managing a population of inmates.²⁹

To further complicate matters, not only do prison officials have to be concerned about religious rights, but they must also be careful not to violate the Establishment Clause of the First Amendment. The Establishment Clause mandates that "Congress shall make no

20. Data provided by the New York State Department of Correctional Services (2005).

21. U.S. Comm'n on Civil Rights, *supra* note 3, at 135; *Fowler v. Crawford*, 534 F. 3d 931, 939–42 (8th Cir. 2008).

22. *Id.* at 934.

23. *Id.* at 935.

24. *Bilal v. Lehman*, No. C04-2507 JLR, 2006 WL 3626808, at *7 n.4 (W.D. Wash. Dec. 8, 2006).

25. Most of the examples in this section involve male inmates because the "overwhelming majority" of free exercise cases are brought by males. U.S. Comm'n on Civil Rights, *supra* note 3, at 81, 83.

26. Michael B. Mushlin, *Rights of Prisoners* 722 (3d ed., West 2002).

27. N.Y.S. Dep't of Corr. Serv., *supra* note 12, at 24; U.S. Comm'n on Civil Rights, *supra* note 3, at 137 (adding that contraband "may be hidden in long hair" and may also "help alter an inmate's appearance after escape").

28. N.Y.S. Dep't of Corr. Serv., *supra* note 12, at 44; *see also* *Jean-Laurent v. Wilkerson*, 438 F. Supp. 2d 318, 323–24 (S.D.N.Y. 2006) (discussing that plaintiff was a Muslim inmate who claimed that a strip search violated his religious belief that he not be naked in front of strangers).

29. *See* *Turner*, *supra* note 4, at 30.

**Religious Holidays Recognized by the New York State
Department of Correctional Services**

January				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31
February				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28			
March				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31
April				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	
May				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31
June				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

January

Mid-Winter (NA)
Fast of Tenth of Taves (JW)
Moorish-American New Year (MSTA)
Solemnity of Mary (RC)
Epiphany (RC)
Eve of Epiphany (RC)
Epiphany (GOC)
Ethiopian Christmas (RAST)
Prophet Noble Drew Ali's Birthday (MSTA)

February

Mid-Winter (NA)
Mubalahah (ISL)
Ash Wednesday (RC)
Lenten Season (PROT)
Nirvana (BOH)
Feast of Vail (WPT)
Fast of Ashurs (ISL)
Saviour's Day (NOI)
Purim (JW) (2 days)

March

Meatfare Sunday (GOC)
Cheesefare Sunday (GOC)
Clean Monday (GOC)
Lenten Season (GOC)
Moorish American Flag Day (MSTA)
Spring O-Higan (BDH)
Fast of Esither (JW)
First days Passover (JW) (3 days)

April

Holy Thursday (PROT, RC)
Good Friday (PROT, RC)
Easter (RC)
Palm Sunday (GOC)
Vaisakhi
Resurrection (PROT)
National Day of Prayer and Fast (PROT)
Last days of Passover (JW) (3 days)

May

Pascha (GOC)
May Day (WOT)
Fasika "Passover" (RAST)
Ascension Thursday (RC)
Family Observance of Passover (JW)
Merry Moon (WOT)

June

Ascension Thursday (GOC)
Gempo Memorial (BDH)
Shavuot (JW) (3 days)
Pentecost Sunday (GOC)
Midsummer (WOT)
Feast of St. John the Baptist (RC)
Fast for the Holy Apostles (GOC)

July				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31
August				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31
September				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	
October				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31
November				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	
December				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

July

Founders Day (WOT)
 O-Bon (BDH) (2 days)
 Constitution Day (RAST)
 Second Advent of the Cosmic Christ (RAST)
 Fast of the 17th Tammuz (JW)

August

Fast for Assumption of Mary (GOC) (14 days)
 Assumption of Mary (GOC, RC)
 Transfiguration of our Lord (GOC)
 Fast of 9th of Av (JW) (2 days)
 O-Higan Seashin (BDH) (2 days)
 Beheading of the Forerunner (GOC)
 Freyfaxi (WOT)
 Start of Ramadan (30 days)

September

Irs and Miraj (ISL)
 Eid-UI-Fitra
 Rastafarian New Year (RAST)
 Exaltation of the Holy Cross (GOC)
 Autumn O-Higan (BDH)
 Winter Finding (WOT)
 Nufus Shaban (ISL)
 Rosh Hashanah (JW) (2 days)
 Succos (JW) (2 days)
 Yom Kippur (JW)
 End of Ramadan (ISL)

October

Nequest Day (RAST)
 Dasher/Ramilil
 Bodhidharma(BDH)
 Savior's Day (NOI)
 Holy Day of Atonement(NOI) (2 days)
 Night of Power (ISL)

November

All Saints (RC)
 All Souls Day (RC)
 Transfiguration (RAST)
 Eid-ul-Fitr (NOI, ISL)
 Thanksgiving (PROT, RC)
 Christmas Advent (PROT, RC) (1 month season)
 Eid-UI-Adha

December

Chanukah (JW) (8 days)
 Christmas (GOC, PROT, RC)
 High Feast of Yule
 Twelfth Night (WOT)
 Mother Night (WOT)
 Anniversary of Sisters Auxiliary (MSTA)
 Anniversary of Young Moslem League (MSTA)
 Immaculate Conception (RC)

Key: BDH: Buddhist
 GOC: Greek Orthodox Christian
 ISL: Islamic
 JHW: Jehovah's Witness
 JW: Jewish
 MSTA: Moorish Science Temple of America

NA: Native American
 NOI: Nation of Islam
 PROT: Protestant
 RAST: Rastafarian
 RC: Roman Catholic
 WOT: Wotanist

law respecting an establishment of religion. . . .”³⁰ The courts have interpreted this provision to mean that government cannot establish a national religion,³¹ favor one religion over another, or spend taxpayer money to advance religion.³² Given these general principles, does the government violate the Establishment Clause by, for example, building chapels in prison or providing chaplains to help meet the inmates’ religious needs?³³ Do prison officials violate the Establishment Clause by providing religious inmates with special privileges, such as special diets or holiday breaks? The more prison officials deviate from general prison rules to accommodate inmates’ free exercise rights, the greater their risk of running afoul of the Establishment Clause.³⁴

In *Kaufman v. McCaughtry*,³⁵ the Seventh Circuit held that atheism qualified as a religion for first amendment purposes and that atheists were arguably entitled to study groups. Would study groups for atheists solve the Establishment Clause concerns? If prison officials provide some religious accommodations, must similar accommodations be provided to other religious groups? If the burdens and benefits are not spread equitably among religious groups, might there also be valid equal protection claims?

As this discussion demonstrates, accommodating inmates’ religious needs, while also balancing the legitimate concerns of prison officials, is a daunting task. The following discussion addresses the standards the courts and Congress have developed to deal with the difficult legal issues related to religion in prison.

B. Development of the Law Relating to Inmates’ Religious Rights

1. The Supreme Court sets the standard for deciding First Amendment free exercise cases in prisons.

In 1963 and 1972, in *Sherbert v. Verner*³⁶ and *Wisconsin v. Yoder*,³⁷ the Supreme Court set the standard for deciding religion cases—outside of prisons—under the First Amendment of the United States Constitution as applied to the states under the Fourteenth Amendment. In those cases, the Supreme Court determined that the Free Exercise Clause prevented the government from enforcing a law—even a neutral law of general applicability—in a manner that substantially burdened the exercise of religion unless the law

30. U.S. Const. amend. I, cl. 1. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

31. *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 15 (1947).

32. Mushlin, *supra* note 26, at 699–700.

33. *Id.* at 700; *see also* Lynn S. Branham, “*The Devil is in the Details*”: A Continued Dissection of the Constitutionality of Faith-Based Prison Units, 6 Ave Maria L. Rev 409, 416, 422 (2008).

34. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005).

35. 419 F. 3d 678, 682 (7th Cir. 2005).

36. 374 U.S. 398 (1963).

37. 406 U.S. 205 (1972).

was justified by a compelling state interest and was narrowly tailored to meet the government's purpose.³⁸

It was unclear whether this strict scrutiny standard was to be applied in prisons, or even whether prisoners retained First Amendment free exercise rights, until these questions were partially answered by the Supreme Court in *Cruz v. Beto*.³⁹ In *Cruz*, decided in 1972, an inmate brought an equal protection claim alleging that Buddhist prisoners were not afforded the same rights as Christian inmates. The Supreme Court found that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments. . . ."⁴⁰ Although the Court explicitly held that inmates retain some religious rights, the Court did not discuss the scope of these rights or whether the *Sherbert* standard should be used by the courts in deciding whether an inmate's First Amendment rights are infringed.

Indeed, the Supreme Court did not directly address the appropriate standard to be used in prisoner free exercise cases until 1987. In that year, the Court decided *O'Lone v. Shabazz*,⁴¹ a case in which Muslim inmates claimed they had a right to attend Friday afternoon Jumu'ah services. In reaching its decision in *O'Lone*, the Supreme Court applied the test developed in *Turner v. Safley*,⁴² a case decided earlier that year involving the constitutionality of prison regulations concerning inmate correspondence and marriage.

Questions to guide reading of *O'Lone v. Shabazz*

1. In *O'Lone*, did the Supreme Court apply the strict scrutiny test set out in *Sherbert* and *Yoder* or a lower level of scrutiny?
2. How did the Court choose to balance the religious privileges granted to prisoners and the concerns of prison administrators? In other words, according to *O'Lone*, how much deference should be given to the decisions of prison administrators? What language do you rely on in reaching your conclusion? What reasons does the Court give for applying this level of deference?
3. In *Turner v. Safley*, the Supreme Court developed a four part test for determining whether an inmate's constitutional rights have been violated by the government. These four factors are applied in *O'Lone*. What are they?
4. Did the Court require the prison officials in *O'Lone* to show that the Muslim inmates were provided with Jumu'ah services at a time other than Friday afternoon? Were the prison officials required to show that the Muslim inmates received religious accommodations other than Jumu'ah services?
5. What facts did the Court consider most important in deciding that the inmates' free exercise rights were not violated? Make sure you know which facts were used to show that the prison policy met each one of the four *Turner* factors.

38. Sarah Keeton Campbell, *Restoring RLUIPA's Equal Terms Provision*, 58 DUKE L. J. 1071, 1076–77 (2009); Spencer T. Proffitt, *Gods Behind Bars: How Religious Liberty Has Been Sent Directly to Jail, and How to Get Out of Jail Free*, 40 ARIZ. ST. L.J. 1401, 1412–13 (2008).

39. 405 U.S. 319 (1972).

40. *Id.* at 322 n. 2.

41. 482 U.S. 342 (1987).

42. 482 U.S. 78 (1987).

6. Does the dissent advocate applying the strict scrutiny standard set out in *Sherbert-Yoder* or a lower level of scrutiny?
 7. In what ways does the dissenting opinion apply the *Turner* factors differently than the majority?
-

O'Lone, Administrator, Leesburg Prison Complex v. Estate of Shabazz

482 U.S. 342 (1987)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents, members of the Islamic faith, were prisoners in New Jersey's Leesburg State Prison. They challenged policies adopted by prison officials which resulted in their inability to attend Jumu'ah, a weekly Muslim congregational service regularly held in the main prison building and in a separate facility known as "the Farm." Jumu'ah is commanded by the Koran and must be held every Friday after the sun reaches its zenith and before the Asr, or afternoon prayer. There is no question that respondents' sincerely held religious beliefs compelled attendance at Jumu'ah. We hold that the prison regulations here challenged did not violate respondents' rights under the Free Exercise Clause of the First Amendment to the United States Constitution.

Inmates at Leesburg are placed in one of three custody classifications. Maximum security and "gang minimum" security inmates are housed in the main prison building, and those with the lowest classification — full minimum — live in "the Farm." Both respondents were classified as gang minimum security prisoners when this suit was filed, and respondent Mateen was later classified as full minimum. . . . [G]ang minimum inmates [are] ordinarily assigned jobs outside the main building. These inmates work in details of 8 to 15 persons, supervised by one guard. [F]ull minimum inmates work outside the main institution, whether on or off prison grounds, or in a satellite building such as the Farm. . . .

Significant problems arose with those inmates assigned to outside work details. Some avoided reporting for their assignments, while others found reasons for returning to the main building during the course of the workday (including their desire to attend religious services). Evidence showed that the return of prisoners during the day resulted in security risks and administrative burdens that prison officials found unacceptable. Because details of inmates were supervised by only one guard, the whole detail was forced to return to the main gate when one prisoner desired to return to the facility. The gate was the site of all incoming foot and vehicle traffic during the day, and prison officials viewed it as a high security risk area. When an inmate returned, vehicle traffic was delayed while the inmate was logged in and searched.

In response to these burdens, Leesburg officials took steps to ensure that those assigned to outside details remained there for the whole day. Thus, arrangements were made to have lunch and required medications brought out to the prisoners, and appointments with doctors and social workers were scheduled for the late afternoon. . . . [I]nmates assigned to outside work details [were also prohibited] from returning to the prison during the day except in the case of emergency.

The prohibition of returns prevented Muslims assigned to outside work details from attending Jumu'ah. Respondents filed suit under 42 U.S.C. § 1983 alleging that the prison

policies unconstitutionally denied them their free exercise rights under the First Amendment, as applied to the States through the Fourteenth Amendment. . . . Several general principles guide our consideration of the issues presented here. First, “convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison.” *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). See *Turner v. Safley*, [482 U.S. 78, 84 (1987)]; *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 129 (1977). Inmates clearly retain protections afforded by the First Amendment, including its directive that no law shall prohibit the free exercise of religion. See *Cruz v. Beto*, 405 U.S. 319 (1972) (*per curiam*). Second, “lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” *Price v. Johnston*, 334 U.S. 266, 285 (1948). The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security. *Pell v. Procunier*, [417 U.S. 817, 822–823 (1974)]; *Procunier v. Martinez*, 416 U.S. 396, 412 (1974).

In considering the appropriate balance of these factors, we have often said that evaluation of penological objectives is committed to the considered judgment of prison administrators, “who are actually charged with and trained in the running of the particular institution under examination.” *Bell v. Wolfish*, *supra*, at 562. See *Turner v. Safley*, *ante*, at 86–87. To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a “reasonableness” test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights. See, e. g., *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, *supra*, at 128. We recently restated the proper standard: “When a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Turner v. Safley*, *ante*, at 89.²

This approach ensures the ability of corrections officials “to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration,” *ibid.*, and avoids unnecessary intrusion of the judiciary into problems particularly ill suited to “resolution by decree.” *Procunier v. Martinez*, *supra*, at 405. See also *Turner v. Safley*, *ante*, at 89; *Bell v. Wolfish*, *supra*, at 548.

We think the Court of Appeals decision in this case was wrong when it established a separate burden on prison officials to prove “that no reasonable method exists by which [prisoners’] religious rights can be accommodated without creating bona fide security problems.” 782 F.2d, at 420. See also *id.*, at 419 (Prison officials should be required “to produce convincing evidence that they are unable to satisfy their institutional goals in any

2. Our decision in *Turner v. Safley* rejected respondents’ principal argument in this case—that more rigorous scrutiny is appropriate unless a court can conclude that the activity for which prisoners seek protection is “presumptively dangerous.” See Brief of Respondents at 30, *Turner v. Safley*, No. 85-1384 (U.S. Sept. 11, 1986). See also *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985). As we noted in *Turner*, “[t]he determination that an activity is ‘presumptively dangerous’ appears simply to be a conclusion about the reasonableness of the prison restriction in light of the articulated security concerns. It therefore provides a tenuous basis for creating a hierarchy of standards of review.” *Id.* at 89.

Nor are we convinced that heightened scrutiny is appropriate whenever regulations effectively prohibit, rather than simply limit, a particular exercise of constitutional rights. See Brief for the Respondents, *Turner v. Safley*, 482 U.S. 78, (1987) (No. 85-1384). As *Turner* makes clear, the presence or absence of alternative accommodations of prisoners’ rights is properly considered a factor in the reasonableness analysis rather than a basis for heightened scrutiny. See *Turner*, 482 U.S. 78 at 88, 90–91.

way that does not infringe inmates' free exercise rights"). Though the availability of accommodations is relevant to the reasonableness inquiry, we have rejected the notion that "prison officials . . . have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Turner v. Safley*, ante, at 90–91. By placing the burden on prison officials to disprove the availability of alternatives, the approach articulated by the Court of Appeals fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators.

Turning to consideration of the policies challenged in this case, we think the findings of the District Court establish clearly that prison officials have acted in a reasonable manner. *Turner v. Safley* drew upon our previous decisions to identify several factors relevant to this reasonableness determination. First, a regulation must have a logical connection to legitimate governmental interests invoked to justify it. The policies at issue here clearly meet that standard. The requirement that full minimum and gang minimum prisoners work outside the main facility was justified by concerns of institutional order and security, for the District Court found that it was "at least in part a response to a critical overcrowding in the state's prisons, and . . . at least in part designed to ease tension and drain on the facilities during that part of the day when the inmates were outside the confines of the main buildings." 595 F.Supp., at 929. We think it beyond doubt that the standard is related to this legitimate concern.

The subsequent policy prohibiting returns to the institution during the day also passes muster under this standard. Prison officials testified that the returns from outside work details generated congestion and delays at the main gate, a high risk area in any event. Return requests also placed pressure on guards supervising outside details, who previously were required to "evaluate each reason possibly justifying a return to the facilities and either accept or reject that reason." *Id.*, at 931. Rehabilitative concerns further supported the policy; corrections officials sought a simulation of working conditions and responsibilities in society. Chief Deputy Ucci testified: "One of the things that society demands or expects is that when you have a job, you show up on time, you put in your eight hours, or whatever hours you are supposed to put in, and you don't get off. . . . If we can show inmates that they're supposed to show up for work and work a full day, then when they get out at least we've done something." Tr. 89. These legitimate goals were advanced by the prohibition on returns; it cannot seriously be maintained that "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner v. Safley*, ante, at 89–90.

Our decision in *Turner* also found it relevant that "alternative means of exercising the right . . . remain open to prison inmates." *Ante*, at 90. There are, of course, no alternative means of attending Jumu'ah; respondents' religious beliefs insist that it occur at a particular time. But the very stringent requirements as to the time at which Jumu'ah may be held may make it extraordinarily difficult for prison officials to assure that every Muslim prisoner is able to attend that service. While we in no way minimize the central importance of Jumu'ah to respondents, we are unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end. . . . [W]e think it appropriate to see whether under these regulations respondents retain the ability to participate in other Muslim religious ceremonies. The record establishes that respondents are not deprived of all forms of religious exercise, but instead freely observe a number of their religious obligations. The right to congregate for prayer or discussion is "virtually unlimited except during working hours," (testimony of O'Lone), and the state-provided imam has free access to the prison. Muslim prisoners are given different meals whenever pork is served in the prison cafeteria. Special arrangements are also made during the

month-long observance of Ramadan, a period of fasting and prayer. During Ramadan, Muslim prisoners are awakened at 4 a.m. for an early breakfast, and receive dinner at 8:30 each evening. We think this ability on the part of respondents to participate in other religious observances of their faith supports the conclusion that the restrictions at issue here were reasonable.

Finally, the case for the validity of these regulations is strengthened by examination of the impact that accommodation of respondents' asserted right would have on other inmates, on prison personnel, and on allocation of prison resources generally. See *Turner v. Safley*, *ante*, at 90. Respondents suggest several accommodations of their practices, including placing all Muslim inmates in one or two inside work details or providing weekend labor for Muslim inmates. . . . [E]ach of respondents' suggested accommodations would, in the judgment of prison officials, have adverse effects on the institution. Inside work details for gang minimum inmates would . . . [require] extra supervision necessary to establish weekend details for Muslim prisoners [and] "would be a drain on scarce human resources" at the prison. 595 F.Supp., at 932. Prison officials determined that the alternatives would also threaten prison security by allowing "affinity groups" in the prison to flourish. Administrator O'Lone testified that "we have found out and think almost every prison administrator knows that any time you put a group of individuals together with one particular affinity interest . . . you wind up with . . . a leadership role and an organizational structure that will almost invariably challenge the institutional authority." Finally, the officials determined that special arrangements for one group would create problems as "other inmates [see] that a certain segment is escaping a rigorous work detail" and perceive favoritism. *Id.*, at 178–179. These concerns of prison administrators provide adequate support for the conclusion that accommodations of respondents' request to attend Jum'ah would have undesirable results in the institution. These difficulties also make clear that there are no "obvious, easy alternatives to the policy adopted by petitioners." *Turner v. Safley*, *ante*, at 93.

We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to "substitute our judgment on . . . difficult and sensitive matters of institutional administration," *Block v. Rutherford*, 468 U.S. 576, 588 (1984), for the determinations of those charged with the formidable task of running a prison. Here the District Court decided that the regulations alleged to infringe constitutional rights were reasonably related to legitimate penological objectives. We agree with the District Court, and it necessarily follows that the regulations in question do not offend the Free Exercise Clause of the First Amendment to the United States Constitution. The judgment of the Court of Appeals is therefore *Reversed*.

DISSENT BY: JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

The religious ceremony that these respondents seek to attend is not presumptively dangerous, and the prison has completely foreclosed respondents' participation in it. I therefore would require prison officials to demonstrate that the restrictions they have imposed are necessary to further an important government interest, and that these restrictions are no greater than necessary to achieve prison objectives. See *Turner v. Safley*, *ante*, at 101, n. 1 (STEVENS, J., concurring in part and dissenting in part) (citing *Abdul Wali v. Coughlin*, 754 F.2d 1015 (CA2 1985)).

...

Prisoners are persons whom most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness. They

are members of a “total institution” that controls their daily existence in a way that few of us can imagine[.] . . .

The challenge for this Court is to determine how best to protect those prisoners’ rights that remain. Our objective in selecting a standard of review is therefore *not*, as the Court declares, “to ensure that courts afford appropriate deference to prison officials.” . . . The Constitution was not adopted as a means of enhancing the efficiency with which government officials conduct their affairs, nor as a blueprint for ensuring sufficient reliance on administrative expertise. Rather, it was meant to provide a bulwark against infringements that might otherwise be justified as necessary expedients of governing. . . .

In my view, adoption of “reasonableness” as a standard of review for *all* constitutional challenges by inmates is inadequate to this task. Such a standard is categorically deferential, and does not discriminate among degrees of deprivation. From this perspective, restricting use of the prison library to certain hours warrants the same level of scrutiny as preventing inmates from reading at all. Various “factors” may be weighed differently in each situation, but the message to prison officials is clear: merely act “reasonably” and your actions will be upheld. If a directive that officials act “reasonably” were deemed sufficient to check all exercises of power, the Constitution would hardly be necessary. Yet the Court deems this single standard adequate to restrain *any* type of conduct in which prison officials might engage. . . .

Once we provide such an elastic and deferential principle of justification, “the principle . . . lies about like a loaded weapon ready for the hand of any authority that can bring forth a plausible claim of an urgent need. Mere assertions of exigency have a way of providing a colorable defense for governmental deprivation, and we should be especially wary of expansive delegations of power to those who wield it on the margins of society. Prisons are too often shielded from public view; there is no need to make them virtually invisible.

An approach better suited to the sensitive task of protecting the constitutional rights of inmates is laid out by Judge Kaufman in *Abdul Wali v. Coughlin*, 754 F.2d 1015 (CA2 1985). . . . Where exercise of the asserted right is not presumptively dangerous [] and where the prison has completely deprived an inmate of that right, then prison officials must show that “a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restrictions are no greater than necessary to effectuate the governmental objective involved.” *Ibid.* . . .

The prison in this case has completely prevented respondent inmates from attending the central religious service of their Muslim faith. I would therefore hold prison officials to the standard articulated in *Abdul Wali*, and would find their proffered justifications wanting. The State has neither demonstrated that the restriction is necessary to further an important objective nor proved that less extreme measures may not serve its purpose. Even if I accepted the Court’s standard of review, however, I could not conclude on this record that prison officials have proved that it is reasonable to preclude respondents from attending Jumu’ah. Petitioners have provided mere unsubstantiated assertions that the plausible alternatives proposed by respondents are infeasible.

II

In *Turner*, the Court set forth a framework for reviewing allegations that a constitutional right has been infringed by prison officials. The Court found relevant to that review “whether there are alternative means of exercising the right that remain open to prison inmates.” The Court in this case acknowledges that “respondents’ sincerely held religious beliefs compe[l] attendance at Jumu’ah,” and concedes that there are “no alternative means of attending Jumu’ah.” Nonetheless, the Court finds that prison policy does

not work a complete deprivation of respondents' asserted religious right, because respondents have the opportunity to participate in other religious activities. This analysis ignores the fact that, as the District Court found, Jumu'ah is the central religious ceremony of Muslims, "comparable to the Saturday service of the Jewish faith and the Sunday service of the various Christian sects." *Shabazz v. O'Lone*, 595 F.Supp. 928, 930 (NJ 1984). As with other faiths, this ceremony provides a special time in which Muslims "assert their identity as a community covenanted to God." Brief for Imam Jamil Abdullah Al-Amin et al. as *Amici Curiae* 32. As a result:

"unlike other Muslim prayers which are performed individually and can be made up if missed, the Jumu'ah is obligatory, cannot be made up, and must be performed in congregation. The Jumu'ah is therefore regarded as the central service of the Muslim religion, and the obligation to attend is commanded by the Qur'an, the central book of the Muslim religion." 595 F.Supp., at 930.

Jumu'ah therefore cannot be regarded as one of several essentially fungible religious practices. The ability to engage in other religious activities cannot obscure the fact that the denial at issue in this case is absolute: respondents are completely foreclosed from participating in the core ceremony that reflects their membership in a particular religious community. If a Catholic prisoner were prevented from attending Mass on Sunday, few would regard that deprivation as anything but absolute, even if the prisoner were afforded other opportunities to pray, to discuss the Catholic faith with others, and even to avoid eating meat on Friday if that were a preference. Prison officials in this case therefore cannot show that "'other avenues' remain available for the exercise of the asserted right." *Turner, ante*, at 90 (quoting *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 131 (1977)).

Under the Court's approach, as enunciated in *Turner*, the availability of other means of exercising the right in question counsels considerable deference to prison officials. By the same token, the infliction of an absolute deprivation should require more than mere assertion that such a deprivation is necessary. In particular, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Ibid*. In this case, petitioners have not established the reasonableness of their policy, because they have provided only bare assertions that the proposals for accommodation offered by respondents are infeasible. As discussed below, the federal policy of permitting inmates in federal prisons to participate in Jumu'ah, as well as Leesburg's own policy of permitting participation for several years, lends plausibility to respondents' suggestion that their religious practice can be accommodated. . . .

That Muslim inmates are able to participate in Jumu'ah throughout the entire federal prison system suggests that the practice is, under normal circumstances, compatible with the demands of prison administration. Indeed, the Leesburg State Prison permitted participation in this ceremony for five years, and experienced no threats to security or safety as a result. In light of both standard federal prison practice and Leesburg's own past practice, a reasonableness test in this case demands at least minimal substantiation by prison officials that alternatives that would permit participation in Jumu'ah are infeasible. Under the standard articulated by the Court in *Turner*, this does not mean that petitioners are responsible for identifying and discrediting these alternatives; "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." When prisoners themselves present alternatives, however, and when they fairly call into question official claims that these alternatives are infeasible, we must demand at least some evidence beyond mere assertion that the religious practice at issue cannot be accommodated. Examination of the alternatives proposed in this case indicates that prison officials have not provided such substantiation.

III

Respondents' first proposal is that gang minimum prisoners be assigned to an alternative inside work detail on Friday, as they had been before the recent change in policy. Prison officials testified that the alternative work detail is now restricted to maximum security prisoners, and that they did not wish maximum and minimum security prisoners to mingle. Even the District Court had difficulty with this assertion, as it commented that "the defendants did not explain why inmates of different security levels are not mixed on work assignments when otherwise they are mixed." 595 F.Supp., at 932.... The record as it now stands thus does not establish that the Friday alternative work detail would create a problem for the institution.

Respondents' second proposal is that gang minimum inmates be assigned to work details inside the main building on a regular basis. While admitting that the prison used inside details in the kitchen, bakery, and tailor shop, officials stated that these jobs are reserved for the riskiest gang minimum inmates, for whom an outside job might be unwise. *Ibid.* Thus, concluded officials, it would be a bad idea to move these inmates outside to make room for Muslim gang minimum inmates. Respondents contend, however, that the prison's own records indicate that there are a significant number of jobs inside the institution that could be performed by inmates posing a lesser security risk. This suggests that it might not be necessary for the riskier gang minimum inmates to be moved outside to make room for the less risky inmates. Officials provided no data on the number of inside jobs available, the number of high-risk gang minimum inmates performing them, the number of Muslim inmates that might seek inside positions, or the number of staff that would be necessary to monitor such an arrangement. Given the plausibility of respondents' claim, prison officials should present at least this information in substantiating their contention that inside assignments are infeasible.

Third, respondents suggested that gang minimum inmates be assigned to Saturday or Sunday work details, which would allow them to make up any time lost by attending Jumu'ah on Friday. While prison officials admitted the existence of weekend work details, they stated that "since prison personnel are needed for other programs on weekends, the creation of additional weekend details would be a drain on scarce human resources." *Ibid.* The record provides no indication, however, of the number of Muslims that would seek such a work detail, the current number of weekend details, or why it would be infeasible simply to reassign current Saturday or Sunday workers to Friday, rather than create additional details. The prison is able to arrange work schedules so that Jewish inmates may attend services on Saturday and Christian inmates may attend services on Sunday. *Id.*, at 935. Despite the fact that virtually all inmates are housed in the main building over the weekend, so that the demand on the facility is greater than at any other time, the prison is able to provide sufficient staff coverage to permit Jewish and Christian inmates to participate in their central religious ceremonies. Given the prison's duty to provide Muslims a "reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts," *Cruz v. Beto*, 405 U.S. 319, 322 (1972), prison officials should be required to provide more than mere assertions of the infeasibility of weekend details for Muslim inmates.

Finally, respondents proposed that minimum security inmates living at the Farm be assigned to jobs either in the Farm building or in its immediate vicinity. Since [prison rules] permit such assignments for full minimum inmates, and since such inmates need not return to prison facilities through the main entrance, this would [not] interfere ... with ... the no-return policy. Nonetheless, prison officials stated that such an arrangement might create an "affinity group" of Muslims representing a threat to prison authority. Officials

pointed to no such problem in the five years in which Muslim inmates were permitted to assemble for Jum'ah, and in which the alternative Friday work detail was in existence. Nor could they identify any threat resulting from the fact that during the month of Ramadan all Muslim prisoners participate in both breakfast and dinner at special times. Furthermore, there was no testimony that the concentration of Jewish or Christian inmates on work details or in religious services posed any type of "affinity group" threat. As the record now stands, prison officials have declared that a security risk is created by a grouping of Muslim inmates in the least dangerous security classification, but not by a grouping of maximum security inmates who are concentrated in a work detail inside the main building, and who are the only Muslims assured of participating in Jum'ah. Surely, prison officials should be required to provide at least some substantiation for this facially implausible contention.

Petitioners also maintained that the assignment of full minimum Muslim inmates to the Farm or its near vicinity might provoke resentment because of other inmates' perception that Muslims were receiving special treatment. Officials pointed to no such perception during the period in which the alternative Friday detail was in existence, nor to any resentment of the fact that Muslims' dietary preferences are accommodated and that Muslims are permitted to operate on a special schedule during the month of Ramadan. Nor do they identify any such problems created by the accommodation of the religious preferences of inmates of other faiths. Once again, prison officials should be required at a minimum to identify the basis for their assertions.

Despite the plausibility of the alternatives proposed by respondents in light of federal practice and the prison's own past practice, officials have essentially provided mere pronouncements that such alternatives are not workable. If this Court is to take seriously its commitment to the principle that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner, ante*, at 84, it must demand more than this record provides to justify a Muslim inmate's complete foreclosure from participation in the central religious service of the Muslim faith.

IV ...

Incarceration by its nature denies a prisoner participation in the larger human community. To deny the opportunity to affirm membership in a spiritual community, however, may extinguish an inmate's last source of hope for dignity and redemption. Such a denial requires more justification than mere assertion that any other course of action is infeasible. While I would prefer that this case be analyzed under the approach set out in Part I, *supra*, I would at a minimum remand to the District Court for an analysis of respondents' claims in accordance with the standard enunciated by the Court in *Turner* and in this case. I therefore dissent.

2. Congress Passes the Religious Freedom Restoration Act (RFRA) in Response to *Smith* and *O'Lone*

O'Lone was the start of a bigger retreat by the Supreme Court from the *Sherbert-Yoder* standard.⁴³ Three years later, in 1990, the Court decided *Employment Division, Dep't of Human*

43. Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y 501, 508 (2005).

Resources of Oregon v. Smith,⁴⁴ a case challenging an Oregon law that prohibited possession of controlled substances unless they were prescribed by a physician. The Native American church claimed that this law interfered with its members' rights to use peyote for sacramental purposes in religious ceremonies. The Supreme Court upheld the Oregon law using rational basis review. In a departure from the compelling interest test developed in *Sherbert*, the Court found that valid and neutral laws of general applicability do not offend the First Amendment, even if they incidentally burden the free exercise of religion. According to the Court, the laws are only suspect if they target a particular religious group or if the intent of the law is to interfere with the free exercise of religion.

Congress responded to the Supreme Court's decision in *Smith* by passing the Religious Freedom Restoration Act (RFRA) in 1993. In RFRA, Congress expressly stated that the purpose of the Act was to override *Smith*⁴⁵ and "restore the compelling interest test set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*."⁴⁶ The statute prohibited federal, state, and local governments from substantially burdening the free exercise of religion—even if the burden arose from a neutral law of general applicability—unless the burden was justified by a compelling state interest and was the least restrictive means of satisfying that interest.

The legislative history of RFRA made clear that the statute was to be applied in prisons. For example, the Senate Report issued by the Judiciary Committee stated that the "intent of the act is to restore the [] protection afforded to prisoners to observe their religions which was weakened by the decision in *O'Lone v. Estate of Shabazz*."⁴⁷ Thus, strict scrutiny was to be applied to rules substantially burdening the free exercise of religion, even in a prison context.

Despite Congress's direct support for a compelling interest standard, RFRA governed free exercise cases for less than four years. In 1997, the Supreme Court declared in *City of Boerne v. Flores*⁴⁸ that RFRA was unconstitutional as applied to states and localities. The Court held that Congress exceeded its constitutional powers by invoking section 5 of the Fourteenth Amendment, also known as the Enforcement Clause, to enact RFRA and apply its provisions to the states. As the Court explained, section 5 gives Congress the power "to enact legislation designed to prevent, as well as remedy, constitutional violations" by the states.⁴⁹ But RFRA was not enacted to "counteract state laws likely to be unconstitutional because of their treatment of religion,"⁵⁰ rather its purpose was to change the standard for deciding First Amendment free exercise cases. The Court thus concluded that Congress did not design RFRA to remedy or prevent constitutional violations as authorized by section 5, but rather to impose a standard contrary to *Smith* and, in this way, to make a substantive change in the rights granted by the constitution. Free exercise rights would change under RFRA because some state laws that would be valid under *Smith* would fall under RFRA.⁵¹ The Court wrote:

Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by

44. 494 U.S. 872 (1990).

45. Religious Freedom Restoration Act, 42 U.S.C. §2000bb(a)(4) (1993).

46. *Id.* at §2000bb(b).

47. S. Rep. No 103-111 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1899.

48. 521 U.S. 507 (1997).

49. *Id.* at 517.

50. *Id.* at 534–35.

51. *Id.* at 534.

changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.⁵²

The Court also indicated that, by enacting RFRA under section 5, Congress violated the separation of powers doctrine set forth in the Constitution. Citing *Marbury v. Madison*, the Court found that the Judicial Branch has the exclusive power to interpret the Constitution, “which embraces the duty to say what the law is.”⁵³ By enacting RFRA, Congress, in effect, usurped the judiciary’s role as interpreter of the constitution.

Because the Supreme Court’s analysis in *City of Boerne* focused on Congress’s powers to legislate under section 5 of the Fourteenth Amendment, the decision invalidated RFRA as applied to states and localities, but not as applied to federal prisons.⁵⁴ However, *City of Boerne* did have the effect of depriving most prisoners of the protections in RFRA. Of the approximately two million prisoners in the United States, more than 93 percent are in state and local prisons and jails.⁵⁵ After *City of Boerne*, the courts returned to applying the *Turner* factors set forth in *O’Lone* to the free exercise claims of state and local prisoners.⁵⁶

3. Congress Responds to *City of Boerne* by Passing the Religious Land Use and Institutionalized Persons Act (RLUIPA)

Congress responded to *City of Boerne* by overwhelmingly passing the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000. The purpose of RLUIPA was to revive the strict scrutiny standard set out in RFRA for deciding some cases in which state laws substantially burden the free exercise of religion.

Congress took three major steps to address the concerns in *City of Boerne* and ensure that RLUIPA — unlike RFRA — stood up to constitutional attack.⁵⁷ First, Congress narrowed the scope of the religious protections contained in RLUIPA to land use regulations and institutionalized persons, the two areas that Congress determined had the strongest problems related to free exercise of religion.⁵⁸ With respect to institutionalized persons, RLUIPA provides that state action that substantially burdens an institutionalized person’s religious exercise is unlawful unless it is the least restrictive means of furthering a compelling state interest.⁵⁹ Institutionalized persons include those in prisons and psychiatric hospitals⁶⁰ but most of the cases invoking RLUIPA’s protections for institutionalized persons involve prisoners.

52. *Id.* at 519.

53. *Id.* at 536.

54. Turner, *supra* note 4, at 27.

55. U.S. Comm’n on Civil Rights, *supra* note 3, at 32.

56. Mushlin, *supra* note 26, at 689; see also U.S. Comm’n on Civil Rights, *supra* note 3, at 8 (some states responded to the Supreme Court’s decision in *City of Boerne* by passing their own laws known as “state RFRA’s”).

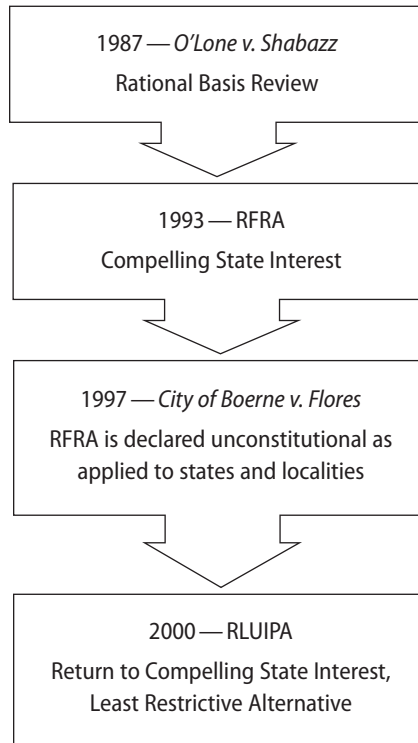
57. Patricia E. Salkin, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 Urb. Law. 195, 210 (2008).

58. Gaubatz, *supra* note 43, at 510.

59. See 42 U.S.C. § 2000cc-1(a).

60. See *Cutter v. Wilkinson*, 544 U.S. 709, 710 (2005).

Standards for Reviewing the Free Exercise Claims of Prisoners



Second, to show the need for RLUIPA, Congress held three years of hearings and made specific findings.⁶¹ With respect to prisons, Congress found that inmates are often subject to arbitrary rules that deny them the freedom to practice their religion.⁶²

Third, because *City of Boerne* precluded Congress from using section 5 of the Fourteenth Amendment to enact a stricter standard of review for free exercise cases, Congress used its powers under the Spending and Commerce Clauses to enact RLUIPA. RLUIPA only applies where the religious burden at issue “is imposed in a program or activity that receives Federal financial assistance”⁶³ or 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.”⁶⁴ The Spending Clause is generally more important in prisoner cases and the Commerce Clause in land use cases.⁶⁵ “Every State . . . accepts federal funding for its prisons.”⁶⁶

The Spending Clause gives Congress the power to attach conditions to the receipt of federal funds to further its policy objectives.⁶⁷ Although Congress cannot deprive citizens of their constitutional protections, Congress’s powers under the Spending Clause allow

61. *Id.* at 716.

62. *Id.*

63. See 42 U.S.C. § 2000cc-1(b)(1) (2009).

64. See 42 U.S.C. § 2000cc-1(b)(2).

65. Salkin, *supra* note 57, at 212.

66. *Cutter v. Wilkinson*, 544 U.S. at 716 n.4.

67. See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). *Dole* also sets forth limits on federal spending powers. *Id.* at 207–08. To validly exercise its spending powers, Congress must act within these limits. *Id.* at 207.

it to require stronger civil rights protections than those set out in the constitution. Congress used the Spending Clause to require all prisons — as a condition for accepting federal funds — to comply with the provisions in RLUIPA.

The steps Congress took to ensure the constitutionality of RLUIPA have paid off. Since it became law, the constitutionality of RLUIPA has been repeatedly challenged and upheld. All four Circuit courts that have considered the constitutionality of using the Spending Clause to enact RLUIPA have agreed that Congress acted properly.⁶⁸ The Ninth Circuit also found that RLUIPA does not infringe on the separation of powers mandated by the constitution. As long as Congress is acting pursuant to the Spending Clause, it can provide greater protections than those found in the constitution without violating separation of powers principles. As the Ninth Circuit wrote, the separation of powers principle is not violated because “the statute does not over-turn the Court’s constitutional interpretation in *Smith*,” but “[r]ather . . . provides additional protection for religious worship, respecting that *Smith* set only a constitutional floor — not a ceiling — for the protection of personal liberty.”⁶⁹

The Sixth Circuit did hold, in *Cutter v. Wilkinson*, that RLUIPA violated the Establishment Clause.⁷⁰ But that decision was later overturned by the Supreme Court.

Questions to guide reading of the Supreme Court’s decision in *Cutter v. Wilkinson*

1. What is the main reason the Court gives to support its holding that RLUIPA does not violate the Establishment Clause even though it requires prisons to accommodate religious practices?
2. Use the discussion in *Cutter* to explain how the Establishment Clause and the Free Exercise Clause “often exert conflicting pressures.”
3. The Sixth Circuit found that RLUIPA unconstitutionally promotes religion in violation of the Establishment Clause by, *inter alia*, “encouraging prisoners to become religious in order to enjoy greater rights.”⁷¹ How does *Cutter* deal with this issue? Is the Court’s response to the Sixth Circuit convincing?
4. How does *Cutter* deal with the Sixth Circuit’s argument that RLUIPA “impermissibly advanc[es] religion by giving greater protection to religious rights than to other constitutionally protected rights”?⁷²
5. Find and highlight all of the places in *Cutter* where the Court discusses deference to the judgment of prison officials. Does *Cutter* advocate a strict scrutiny

68. See *Cutter v. Wilkinson*, 423 F.3d 579, 590 (6th Cir. 2005) (rejecting Spending Clause and Tenth Amendment challenges to RLUIPA § 3); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003) (rejecting Establishment Clause, Spending Clause, and Tenth Amendment challenges to RLUIPA § 3); *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), *cert denied*, 540 U.S. 815 (2003) (rejecting Establishment Clause, Spending Clause, Tenth Amendment, Eleventh Amendment and separation of powers challenges to RLUIPA § 3); *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004) (rejecting Spending Clause, Establishment Clause and Tenth Amendment challenges to RLUIPA § 3). Section 2 of RLUIPA relates to land use and section 3 to institutionalized persons. For a list of district court cases addressing the constitutionality of RLUIPA, see Derek L. Gaubatz, *supra* note 43, at 572 n. 297.

69. *Mayweathers v. Newland*, 314 F.3d 1062, 1070 (9th Cir. 2002).

70. 349 F.3d 257 (6th Cir. 2003).

71. *Id.* at 266.

72. *Id.* at 264.

standard of review for deciding RLUIPA cases or a new standard of review—one that is strict yet deferential?

Cutter v. Wilkinson, Director, Ohio Department of Rehabilitation and Correction

544 U.S. 709 (2005)

JUSTICE GINSBURG delivered the opinion of the Court.

Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA or Act), 114 Stat. 804, 42 U.S.C. § 2000cc-1(a)(1)-(2), provides in part: “No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution,” unless the burden furthers “a compelling governmental interest,” and does so by “the least restrictive means.” Plaintiffs below, petitioners here, are current and former inmates of institutions operated by the Ohio Department of Rehabilitation and Correction and assert that they are adherents of “nonmainstream” religions: the Satanist, Wicca, and Asatru religions, and the Church of Jesus Christ Christian. They complain that Ohio prison officials (respondents here), in violation of RLUIPA, have failed to accommodate their religious exercise “in a variety of different ways, including retaliating and discriminating against them for exercising their nontraditional faiths, denying them access to religious literature, denying them the same opportunities for group worship that are granted to adherents of mainstream religions, forbidding them to adhere to the dress and appearance mandates of their religions, withholding religious ceremonial items that are substantially identical to those that the adherents of mainstream religions are permitted, and failing to provide a chaplain trained in their faith.” Brief for United States 5.

For purposes of this litigation at its current stage, respondents have stipulated that petitioners are members of bona fide religions and that they are sincere in their beliefs. *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827, 833 (SD Ohio 2002).

In response to petitioners’ complaints, respondent prison officials have mounted a facial challenge to the institutionalized-persons provision of RLUIPA; respondents contend, *inter alia*, that the Act improperly advances religion in violation of the First Amendment’s Establishment Clause. The District Court denied respondents’ motion to dismiss petitioners’ complaints, but the Court of Appeals reversed that determination. The appeals court held, as the prison officials urged, that the portion of RLUIPA applicable to institutionalized persons, 42 U.S.C. § 2000cc-1, violates the Establishment Clause. We reverse the Court of Appeals’ judgment.

“This Court has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause.” *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144–145 . . . (1987). Just last Term, in *Locke v. Davey*, 540 U.S. 712 . . . (2004), the Court reaffirmed that “there is room for play in the joints between” the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause. *Id.*, at 718 . . . (quoting *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 669 . . . (1970)). “At some point, accommodation may devolve into ‘an unlawful fostering of religion.’” *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334–335 . . . (1987) (quoting *Hobbie*, 480 U.S. at 145 . . .). But § 3

of RLUIPA, we hold, does not, on its face, exceed the limits of permissible government accommodation of religious practices.

I A ...

Before enacting § 3, Congress documented, in hearings spanning three years, that “frivolous or arbitrary” barriers impeded institutionalized persons’ religious exercise. See 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (hereinafter Joint Statement) (“Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.”).⁵ To secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the “compelling governmental interest”/“least restrictive means” standard. See *id.*, at 16698. Lawmakers anticipated, however, that courts entertaining complaints under § 3 would accord “due deference to the experience and expertise of prison and jail administrators.” *Id.*, at 16699 (quoting S. Rep. No. 103-111, p. 10 (1993)).

B ...

We granted certiorari to resolve the conflict among Courts of Appeals on the question whether RLUIPA’s institutionalized-persons provision, § 3 of the Act, is consistent with the Establishment Clause of the First Amendment. 543 U.S. 924 ... (2004). Compare 349 F.3d 257 with *Madison v. Riter*, 355 F.3d 310, 313 (CA4 2003) (§ 3 of RLUIPA does not violate the Establishment Clause); *Charles v. Verhagen*, 348 F.3d 601, 610–611 (CA7 2003) (same); *Mayweathers v. Newland*, 314 F.3d 1062, 1068–1069 (CA9 2002) (same). We now reverse the judgment of the Court of Appeals for the Sixth Circuit.

II A

The Religion Clauses of the First Amendment provide: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The first of the two Clauses, commonly called the Establishment Clause, commands a separation of church and state. The second, the Free Exercise Clause, requires government respect for, and noninterference with, the religious beliefs and practices of our Nation’s people. While the two Clauses express complementary values, they often exert conflicting pressures. See *Locke*, 540 U.S., at 718 ... (“These two Clauses ... are frequently in tension.”); *Walz*, 397 U.S., at 668–669 ... (“The Court has struggled to find a neutral course be-

5. The hearings held by Congress revealed, for a typical example, that “[a] state prison in Ohio refused to provide Moslems with Hallal food, even though it provided Kosher food.” Hearing on Protecting Religious Freedom After *Boerne v. Flores* before the Subcommittee on the Constitution of the House Committee on the Judiciary, 105th Cong., 2d Sess., pt. 3, p. 11, n. 1 (1998) (hereinafter Protecting Religious Freedom) (prepared statement of Marc D. Stern, Legal Director, American Jewish Congress). Across the country, Jewish inmates complained that prison officials refused to provide sack lunches, which would enable inmates to break their fasts after nightfall. *Id.*, at 39 (statement of Isaac M. Jaroslawicz, Director of Legal Affairs for the Aleph Institute). The “Michigan Department of Corrections ... prohibited the lighting of Chanukah candles at all state prisons” even though “smoking” and “votive candles” were permitted. *Id.*, at 41 (same). A priest responsible for communications between Roman Catholic dioceses and corrections facilities in Oklahoma stated that there “was [a] nearly yearly battle over the Catholic use of Sacramental Wine ... for the celebration of the Mass,” and that prisoners’ religious possessions, “such as the Bible, the Koran, the Talmud or items needed by Native Americans[,] ... were frequently treated with contempt and were confiscated, damaged or discarded” by prison officials. *Id.*, pt. 2, at 58–59 (prepared statement of Donald W. Brooks, Reverend, Diocese of Tulsa, Oklahoma).

tween the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”).

Our decisions recognize that “there is room for play in the joints” between the Clauses, *id.*, at 669..., some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause. See, e.g.... *Sherbert v. Verner*, 374 U.S. 398 ... (1963) (Harlan, J., dissenting) (“The constitutional obligation of ‘neutrality’ is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation.” (citation omitted)). In accord with the majority of Courts of Appeals that have ruled on the question, see *supra*, at 718 and this page, we hold that § 3 of RLUIPA fits within the corridor between the Religion Clauses: On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.

Foremost, we find RLUIPA’s institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise. See *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 ... (1994) (government need not “be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice”); *Amos*, 483 U.S., at 349 ... (O’CONNOR, J., concurring in judgment) (removal of government-imposed burdens on religious exercise is more likely to be perceived “as an accommodation of the exercise of religion rather than as a Government endorsement of religion”). Furthermore, the Act on its face does not founder on shoals our prior decisions have identified: Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries, see *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 ... (1985); and they must be satisfied that the Act’s prescriptions are and will be administered neutrally among different faiths, see *Bd. of Ed. of Kiryas Joel School Dist. v. Grumet*, 512 U.S. 687 ... (1994).⁸

“The ‘exercise of religion’ often involves not only belief and profession but the performance of ... physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine...” *Smith*, 494 U.S. at 877.... Section 3 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. 42 U.S.C. § 2000cc-1(a); § 1997; see Joint Statement 16699 (“Institutional residents’ right to practice their faith is at the mercy of those running the institution.”).⁹ RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government’s permission and accommodation for exercise of their religion.¹⁰

8. Directed at obstructions institutional arrangements place on religious observances, RLUIPA does not require a State to pay for an inmate’s devotional accessories. See, e.g., *Charles v. Verhagen*, 348 F.3d 601, 605 (CA7 2003) (overturning prohibition on possession of Islamic prayer oil but leaving inmate-plaintiff with responsibility for purchasing the oil).

9. See, e.g., *ibid.* (prison’s regulation prohibited Muslim prisoner from possessing ritual cleansing oil); *Young v. Lane*, 922 F.2d 370, 375–376 (CA7 1991) (prison’s regulation restricted wearing of yarmulkes); *Hunafa v. Murphy*, 907 F.2d 46, 47–48 (CA7 1990) (noting instances in which Jewish and Muslim prisoners were served pork, with no substitute available).

10. Respondents argue, in line with the Sixth Circuit, that RLUIPA goes beyond permissible reduction of impediments to free exercise. The Act, they project, advances religion by encouraging prisoners to “get religion,” and thereby gain accommodations afforded under RLUIPA. Brief for Respondents 15–17; see 349 F.3d at 266 (“One effect of RLUIPA is to induce prisoners to adopt or feign religious belief in order to receive the statute’s benefits.”). While some accommodations of religious observance, notably the opportunity to assemble in worship services, might attract joiners seeking a break in their closely guarded day, we doubt that all accommodations would be perceived as “benefits.” For example, congressional hearings on RLUIPA revealed that one state corrections system served as its

We note in this regard the Federal Government's accommodation of religious practice by members of the military. See, e.g., 10 U.S.C. § 3073 (referring to Army chaplains); *Katcoff v. Marsh*, 755 F.2d 223, 225–229 (CA2 1985) (describing the Army chaplaincy program). In *Goldman v. Weinberger*, 475 U.S. 503 ... (1986), we held that the Free Exercise Clause did not require the Air Force to exempt an Orthodox Jewish officer from uniform dress regulations so that he could wear a yarmulke indoors. In a military community, the Court observed, “there is simply not the same [individual] autonomy as there is in the larger civilian community.” *Id.* at 507 ... (brackets in original; internal quotation marks omitted). Congress responded to *Goldman* by prescribing that “a member of the armed forces may wear an item of religious apparel while wearing the uniform,” unless “the wearing of the item would interfere with the performance [of] military duties [or] the item of apparel is not neat and conservative.” 10 U.S.C. § 774(a)-(b).

We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests. In *Caldor*, the Court struck down a Connecticut law that “armed Sabbath observers with an absolute and unqualified right not to work on whatever day they designated as their Sabbath.” 472 U.S., at 709.... We held the law invalid under the Establishment Clause because it “unyieldingly weighted” the interests of Sabbatarians “over all other interests.” *Id.* at 710....

We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns. While the Act adopts a “compelling governmental interest” standard, see *supra*, at 715, “context matters” in the application of that standard. See *Grutter v. Bollinger*, 539 U.S. 306 ... (2003).¹¹ Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. See, e.g., 139 Cong. Rec. 26190 (1993) (remarks of Sen.

kosher diet “a fruit, a vegetable, a granola bar, and a liquid nutritional supplement—each and every meal.” Protecting Religious Freedom, pt. 3, at 38 (statement of Jaroslawicz).

The argument, in any event, founders on the fact that Ohio already facilitates religious services for mainstream faiths. The State provides chaplains, allows inmates to possess religious items, and permits assembly for worship. See App. 199 (affidavit of David Schwarz, Religious Services Administrator for the South Region of the Ohio Dept. of Rehabilitation and Correction (Oct. 19, 2000)) (job duties include “facilitating the delivery of religious services in 14 correctional institutions of various security levels throughout ... Ohio”); Ohio Dept. of Rehabilitation and Correction, Table of Organization (April 2005), available at <http://www.drc.state.oh.us/web/DRCORG1.pdf> (as visited May 27, 2005, and available in Clerk of Court's case file) (department includes “Religious Services” division); Brief for United States 20, and n. 8 (citing, *inter alia*, *Gawloski v. Dallman*, 803 F. Supp. 103, 113 (SD Ohio 1992) (inmate in protective custody allowed to attend a congregational religious service, possess a Bible and other religious materials, and receive chaplain visits); *Taylor v. Perini*, 413 F. Supp. 189, 238 (ND Ohio 1976) (institutional chaplains had free access to correctional area)).

11. The Sixth Circuit posited that an irreligious prisoner and member of the Aryan Nation who challenges prison officials' confiscation of his white supremacist literature as a violation of his free association and expression rights would have his claims evaluated under the deferential rational-relationship standard described in *Turner v. Safley*, 482 U.S. 78 ... (1987). A member of the Church of Jesus Christ Christian challenging a similar withholding, the Sixth Circuit assumed, would have a stronger prospect of success because a court would review his claim under RLUIPA's compelling-interest standard. 349 F.3d at 266 (citing *Madison v. Riter*, 240 F. Supp. 2d 566, 576 (WD Va. 2003)). Courts, however, may be expected to recognize the government's countervailing compelling interest in not facilitating inflammatory racist activity that could imperil prison security and order. Cf. *Reimann v. Murphy*, 897 F. Supp. 398, 402–403 (ED Wis. 1995) (concluding, under RFRA, that excluding racist literature advocating violence was the least restrictive means of furthering the compelling state interest in preventing prison violence); *George v. Sullivan*, 896 F. Supp. 895, 898 (WD Wis. 1995) (same).

Hatch). 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 resources." Joint Statement 16699 (quoting S. Rep. No. 103-111, at 10).

Finally, RLUIPA does not differentiate among bona fide faiths. In *Kiryas Joel*, we invalidated a state law that carved out a separate school district to serve exclusively a community of highly religious Jews, the Satmar Hasidim. We held that the law violated the Establishment Clause, 512 U.S. at 690..., in part because it "singled out a particular religious sect for special treatment," *id.* at 706... (footnote omitted). RLUIPA presents no such defect. It confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment.

B

The Sixth Circuit misread our precedents to require invalidation of RLUIPA as "impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights." 349 F.3d at 264. Our decision in *Amos* counsels otherwise. There, we upheld against an Establishment Clause challenge a provision exempting "religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion." 483 U.S. at 329.... The District Court in *Amos*, reasoning in part that the exemption improperly "singled out religious entities for a benefit," *id.* at 338..., had "declared the statute unconstitutional as applied to secular activity," *id.* at 333.... Religious accommodations, we held, need not "come packaged with benefits to secular entities." *Id.* at 338...; see *Madison*, 355 F.3d at 318 ("There is no requirement that legislative protections for fundamental rights march in lockstep").

Were the Court of Appeals' view the correct reading of our decisions, all manner of religious accommodations would fall. Congressional permission for members of the military to wear religious apparel while in uniform would fail, see 10 U.S.C. § 774, as would accommodations Ohio itself makes. Ohio could not, as it now does, accommodate "traditionally recognized" religions, 221 F. Supp. 2d, at 832: The State provides inmates with chaplains "but not with publicists or political consultants," and allows "prisoners to assemble for worship, but not for political rallies," Reply Brief for United States 5.

In upholding RLUIPA's institutionalized-persons provision, we emphasize that respondents "have raised a facial challenge to [the Act's] constitutionality, and have not contended that under the facts of any of [petitioners'] specific cases ... [that] applying RLUIPA would produce unconstitutional results." 221 F. Supp. 2d, at 831. The District Court, noting the underdeveloped state of the record, concluded: A finding "that it is *factually impossible* to provide the kind of accommodations that RLUIPA will require without significantly compromising prison security or the levels of service provided to other inmates" cannot be made at this juncture. *Id.* at 848 (emphasis added).¹³ We agree.

13. Respondents argue that prison gangs use religious activity to cloak their illicit and often violent conduct. The instant case was considered below on a motion to dismiss. Thus, the parties' conflicting assertions on this matter are not before us. It bears repetition, however, that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area. See *supra*, at 722–723. Further, prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic. Although RLUIPA bars inquiry into whether a particular belief or practice is "central" to a prisoner's religion, see 42 U.S.C. § 2000cc-5(7)(A), the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity. Cf. *Gillette v. United States*, 401 U.S. 437... (1971) ("The 'truth' of a belief is not open to

“For more than a decade, the federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners.” Brief for United States 24 (citation omitted). The Congress that enacted RLUIPA was aware of the Bureau’s experience. See Joint Statement 16700 (letter from Dept. of Justice to Sen. Hatch) (“We do not believe [RLUIPA] would have an unreasonable impact on prison operations. RFRA has been in effect in the Federal prison system for six years and compliance with that statute has not been an unreasonable burden to the Federal prison system.”). We see no reason to anticipate that abusive prisoner litigation will overburden the operations of state and local institutions....

Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order.

For the reasons stated, the judgment of the United States Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.⁷³

Law Practice Simulation 11

RLUIPA requires courts to use strict scrutiny to review rules that substantially burden religious exercise. *Cutter* appears to uphold this strict scrutiny standard, but also requires deference to the expertise of prison officials. Is it possible to have a strict, but deferential, standard of review? Is the Court creating a new standard of review that operates between strict scrutiny and rational basis?

Assume that you work for a Congressman and that you have been asked to redraft RLUIPA to clarify the standard of review. Your job is to incorporate the deference to prison officials required in *Cutter* so RLUIPA can be applied by the lower courts without any confusion. The relevant provisions of RLUIPA are set forth below.

2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule

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.

...

question’; rather, the question is whether the objector’s beliefs are ‘truly held.’” (quoting *United States v. Seeger*, 380 U.S. 163 ... (1965)).

73. The concurring opinion of Justice Thomas has been omitted.

§ 2000cc-3. Rules of construction ...

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

...

4. The Law Regarding Inmates' Religious Rights Since RLUIPA

Because the constitutionality of RLUIPA has been upheld, it remains good law and provides the standard for deciding free exercise cases brought by inmates in state prisons and local jails. Federal inmates can rely on RFRA and all inmates can also file their claims under the First Amendment of the U.S. Constitution. Indeed, many RLUIPA claims are filed in tandem with First Amendment claims.⁷⁴

An inmate may choose to file a claim under the First Amendment—even though the standard of review is rational basis, rather than strict scrutiny—because most courts have held that a plaintiff cannot recover money damages under RLUIPA. These courts have reasoned that, even though states accepting federal money for their prisons have consented to be sued under RLUIPA, any waiver of sovereign immunity must be strictly construed and does not include money damages unless the underlying statute expressly provides for that remedy.⁷⁵

To succeed on a RLUIPA claim, a prisoner must first make a *prima facie* showing that prison officials “impose[d] a substantial burden on [his or her] religious exercise.”⁷⁶ Congress did not define the term “substantial burden” in RLUIPA and the Circuit courts have differing interpretations of what the term means.⁷⁷ Basically, “substantial burden” means that a government action “puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.”⁷⁸ The pressure exerted by the government need not be directed at religious activity. RLUIPA explicitly provides that the burden can “result[] from a rule of general applicability.”⁷⁹ Prison officials can even exert substantial pressure by creating a neutral rule or policy that has the unintended effect of forcing an inmate to

74. Salkin, *supra* note 57, at 217.

75. *See e.g.*, *Madison v. Virginia*, 474 F.3d 118, 130–32 (4th Cir. 2006) (concluding that the phrase “appropriate relief” in RLUIPA does not provide the unequivocal language necessary to waive State immunity from monetary damages). To date, only the Eleventh Circuit has held otherwise. *See Benning v. Georgia*, 391 F.3d 1299, 1305–06 (11th Cir. 2004) (State’s receipt of federal prison funds constitutes a waiver of sovereign immunity for suits seeking monetary damages under RLUIPA). The Supreme Court granted certiorari in *Sossamon v. Texas*, 130 S. Ct. 3319 (2010) to resolve this circuit conflict. There is also a split in the lower courts over whether RLUIPA creates a cause of action for damages against state officials sued in their individual capacities. *See e.g.*, *Madison v. Virginia*, 474 F.3d at 130 n. 3. For a discussion of the Eleventh Amendment and individual capacity lawsuits, see Chapter 15.

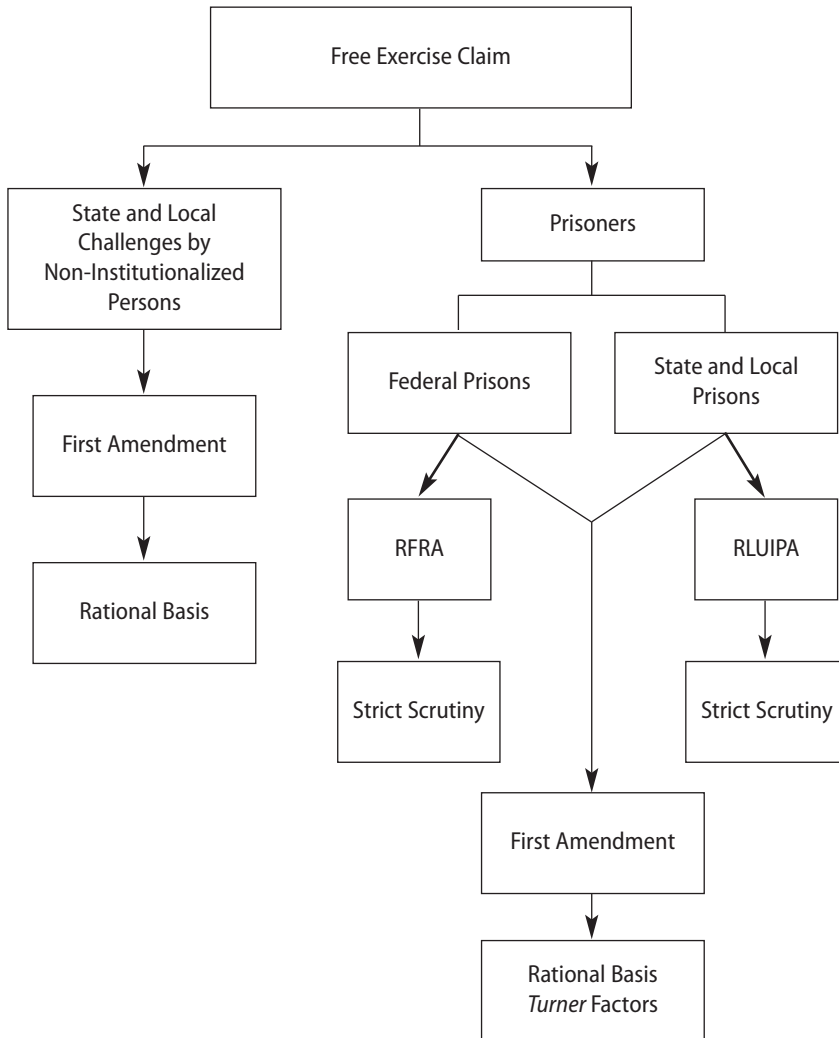
76. 42 U.S.C. § 2000cc-1(a) (2009).

77. *Washington v. Klem*, 497 F.3d 272, 277–281 (3d Cir. 2007) (this case contains a lengthy discussion of “substantial burden” and includes the differing definitions in the Circuit courts).

78. *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006); *see also Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (defining “substantial burden” as government action which “truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.”).

79. 42 U.S.C. § 2000cc-1(a) (2009).

Standards for Deciding Free Exercise Claims



choose between receiving a benefit available to other inmates or violating his sincere religious beliefs.⁸⁰

Inmates not only must show a substantial burden, but also that the burden is imposed on a “religious exercise.” RLUIPA broadly defines “religious exercise” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”⁸¹ Thus, the “religious exercise” being burdened can be merely a discretionary religious activity. For example, a Muslim may want to use prayer oils or a Catholic may prefer to pray using a rosary.⁸² Although these practices may not be mandated or key to the religion, they are protected under RLUIPA.

80. See *Washington v. Klem*, 497 F.3d at 280.

81. 42 U.S.C. § 2000cc-5(7)(A) (2009).

82. Gaubatz, *supra* note 43, at 522.

The religious exercise must, however, be based on a sincere belief and be religious in nature. To qualify as religious in nature, the activity cannot be based solely on moral, secular, or political beliefs.⁸³ While it is clear what religious is not, the courts have had difficulty finding a precise definition of religion that selects out sham “religions” designed solely to obtain advantages in prison while also protecting unfamiliar faiths with unusual beliefs and traditions.⁸⁴ A religious belief can be subjective and can qualify for protection even if it does not include belief in a Supreme Being or is considered bizarre to most.⁸⁵

The Supreme Court has defined religion to include a “belief occupy[ing] the same place in the life of the [adherent] as an orthodox belief in God...”⁸⁶ The Third Circuit found three factors helpful in determining whether an inmate’s beliefs were religious:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.⁸⁷

These factors have not been adopted by the Supreme Court, but have been used by five Circuit courts.⁸⁸ The Second Circuit used a more subjective test and limited “the factfinder’s inquiry to a determination of whether ‘the beliefs professed ... are, in [the claimant’s] own scheme of things, religious.’”⁸⁹ While the definition of a religion is not settled, the issue is an important one. Courts have already had to decide whether groups such as the Black Muslims, Rastafarians, Five Percenters and MOVE, qualify as religions and entitle prisoners to the accommodations granted other religious groups.⁹⁰

To succeed on a RLUIPA claim, the inmate’s beliefs must also be sincerely held. As the Supreme Court stated, “while the ‘truth’ of a belief is not open to question, there remains the significant question whether it is ‘truly held.’”⁹¹ Determining whether a belief is sincere is very difficult and has been described by the Second Circuit as “exceedingly amorphous, requiring the factfinder to delve into the claimant’s most veiled motivations ...”⁹² and “‘an awesome problem,’ capable of resolution only by reference to a panoply of subjective factors.”⁹³ One way to avoid the problem of determining sincerity would be to simply accept the inmate’s declarations that his beliefs are truly held. However, without

83. Mushlin, *supra* note 26, at 714; *see also* *Africa v. Commonwealth of Pa.*, 662 F.2d 1025, 1034 (3d Cir. 1981).

84. *See Africa v. Commonwealth of Pa.*, 662 F.2d at 1031 (“Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion...”).

85. *See Reed v. Faulkner*, 842 F.2d 960, 962 (7th Cir. 1988) (“religious beliefs often strike the non-believer as bizarre.”).

86. *U.S. v. Seeger*, 380 U.S. 163, 184 (1965).

87. *Africa v. Commonwealth of Pa.*, 662 F.2d at 1032.

88. Ronald G. Turner, *supra* note 4, at 31.

89. *Patrick v. LeFevre*, 745 F.2d 153, 158–59 (2d Cir. 1984) (quoting *U.S. v. Seeger*, 380 U.S. 163, 185 (1965)).

90. *See* Mushlin, *supra* note 26, at 706–07; *Holt v. Hutto*, 363 F. Supp. 194, 202 (E.D. Ark. 1973) (Black Muslim group qualifies as a religion); *Reed v. Faulkner*, 653 F. Supp. 965, 971 (N.D. Ind. 1987) (Rastafarian qualifies as a religion); *Patrick v. LeFevre*, 745 F.2d at 157–58 (remanding the issue of whether the beliefs of an inmate identifying himself as a member of the Five Percenter Nation of Islam are sincerely held and religious in nature); *Africa v. Commonwealth of Pa.*, 662 F.2d at 1032 (MOVE does not qualify as a religion afforded First Amendment protection).

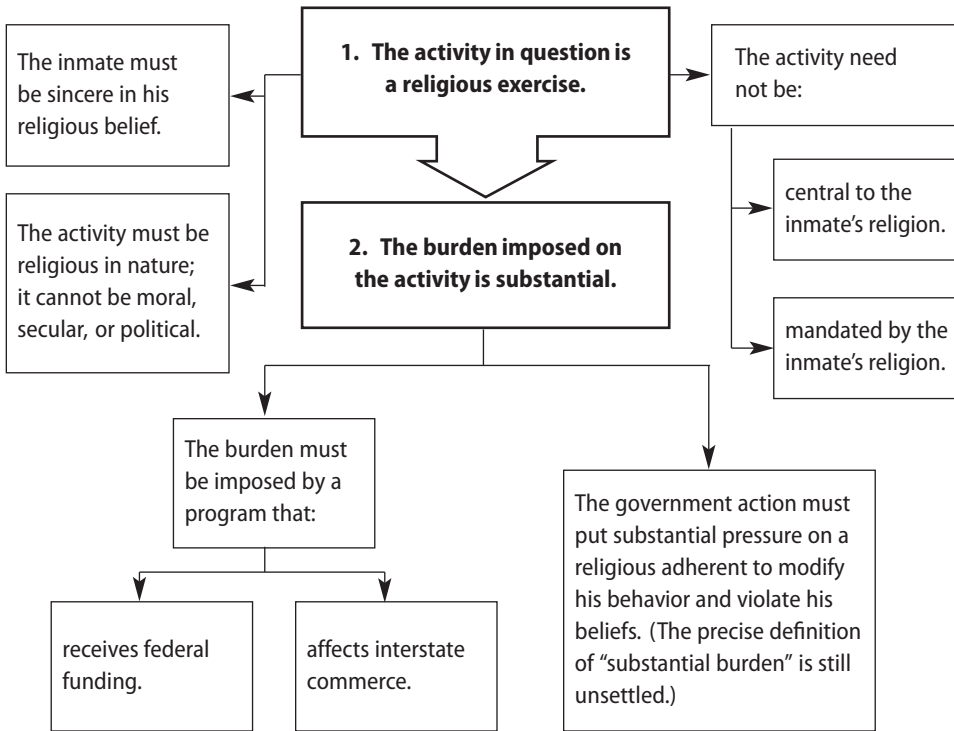
91. *U.S. v. Seeger*, 380 U.S. at 185.

92. *Patrick v. LeFevre*, 745 F.2d at 157.

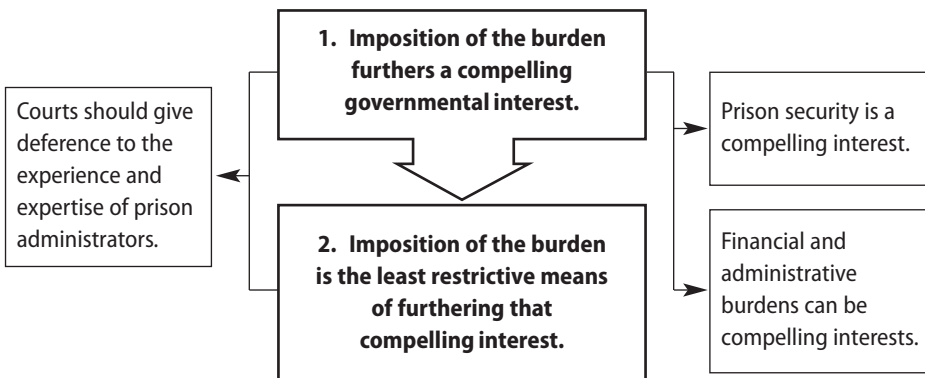
93. *Id.* at 159.

RLUIPA

The prisoner must initially show that the following two factors are met:



If the Prisoner meets the above burden, the burden shifts to the correctional facility to show the following two factors are met:



some sincerity requirement, inmates would be able to avoid valid prison requirements simply by fabricating religious beliefs.⁹⁴

A hearing is almost always necessary to determine questions of sincerity.⁹⁵ But even a hearing cannot solve the difficulties inherent in making this determination. A belief can

94. See *Africa v. Commonwealth of Pa.*, 662 F.2d at 1031.

95. See *Shaheed-Muhammad v. DiPaolo*, 393 F. Supp. 2d 80, 90 (D. Mass. 2005).

be sincere even if an adherent does not belong to any organized religion⁹⁶ and even if he does not follow all of the dictates of his declared religion.⁹⁷ As one court wrote, “[it] would be bizarre for prisons to undertake in effect to promote strict orthodoxy, by forfeiting the religious rights of any inmate [who] . . . does not adhere steadfastly to every tenet of his faith.”⁹⁸ Thus, the courts may find an inmate’s religious beliefs to be sincere even if the prison authorities can show that the inmate has not declared himself a member of a religion and even if he fails to follow the requirements of the religion. Indeed, all the courts may agree upon is that the inmate should have some knowledge of his professed religious faith.⁹⁹

Once the inmate makes a prima facie showing that the prison has substantially burdened a religious exercise, the burden shifts to the government to prove that imposing the burden is the least restrictive means of furthering a compelling government interest.¹⁰⁰ Before RLUIPA, the prisoner had the burden of proving that prison administrators had no legitimate reason for imposing a burden on the exercise of his religion.¹⁰¹ Under RLUIPA, the government — not the prisoner — has the burden of proving that its reasons for imposing a substantial burden on the inmate’s religious exercise are compelling.¹⁰² Interests that are merely important or rational are not sufficient under RLUIPA.¹⁰³

The government must also prove that there are no alternative means of meeting its interests without burdening the inmate’s exercise of his religion.¹⁰⁴ This least restrictive alternative test is the more difficult part of the government’s burden.¹⁰⁵

Questions to guide reading of *Washington v. Klem*

1. According to *Washington*, is the Pennsylvania Department of Corrections’ (DOC’s) ten-book limit on the number of books an inmate can have in his cell supported by a compelling governmental interest? Why or why not?
2. What reasons did the court give for finding that the ten-book limit was not the Pennsylvania DOC’s least restrictive alternative?
3. According to *Washington*, can prisoners use the fact that other prisons successfully used a less restrictive policy to prove that the Pennsylvania DOC’s policy is not the least restrictive alternative? Can prisoners use the fact that a less restrictive policy was used in the same prison in relation to other prisoners to argue that the DOC’s policy is not the least restrictive alternative?
4. According to *Washington*, does the Pennsylvania DOC have to consider other specific alternative policies before it can conclude that the policy it has chosen is the least restrictive alternative?

96. *Mosier v. Maynard*, 937 F.2d 1521, 1523 (10th Cir. 1991).

97. *Reed v. Faulkner*, 653 F. Supp. 965, 971 (N.D. Ind. 1987).

98. *Reed v. Faulkner*, 842 F.2d at 963.

99. See Mushlin, *supra* note 26, at 713.

100. *Washington v. Klem*, 497 F.3d at 283.

101. Gaubatz, *supra* note 43, at 543.

102. *Id.*

103. *Id.* at 540, 545.

104. *Id.* at 541.

105. Mushlin, *supra* note 26, at 695.

5. Does the court suggest how the Pennsylvania DOC could create a rule that would withstand review under RLUIPA while still restricting the number of books allowed in a prison cell?
-

Washington v. Klem

497 F.3d 272 (3d Cir. 2007)

OPINION OF THE COURT—SMITH, *Circuit Judge*.

This case requires us to . . . determine whether the Pennsylvania Department of Corrections' (DOC's) restriction on inmates that they possess in their cells only ten books at a time substantially burdens inmate Henry Unseld Washington's religious exercise. We hold that it does. Because the DOC is unable to show that its ten-book policy is the least restrictive means to further its compelling governmental interest in the safety and health of prisoners and prison employees, we will reverse the District Court's order dismissing Washington's RLUIPA claim and remand with instructions to consider whether any factual issues remain when that claim is evaluated under the proper legal standard.

I.

Henry Unseld Washington is an inmate in the custody of the Pennsylvania DOC who has attempted to practice his religion while incarcerated. Washington founded and has been a practitioner of the Children of the Sun Church for over two decades. According to Washington, the Children of the Sun Church supports the development of "Pan-Afrikanism" whereby adherents to the religion stress that "only through Pan-Afrikanism can Afrikan people worldwide, be able to change the conditions of Afrikan people in the diaspora and the motherland." To this end, Washington's Church states that "[f]or every Afrikan's eyes you open with his teachings you will gain rewards in the life everafter." One of the rituals requires a practitioner to read four different Afro-centric books per day.¹ This ritual is aimed at educating the adherent to doctrine, so that he is able to teach others more effectively. Washington views this ritual as necessary to his Church's proselytization requirement, so that the books "are in essence the religion itself."

The Pennsylvania DOC limits the amount of property any inmate may store in his cell. The DOC's policy states that "limitations on the amount and variety of inmate property may be imposed for security, hygiene and/or safety reasons." With respect to publications, each inmate is permitted to retain three newspapers, ten magazines, and ten books, "unless additional books are approved by the facility's education department." This provision applies to every prison in the Pennsylvania DOC. The DOC also permits "storage space equal to four records center boxes. This space may be made up of the four records center boxes or one footlocker and two records center boxes. In cells that have either a built-in or a free standing storage cabinet, the inmate is permitted to use that space and either two records center boxes or one footlocker."

1. Washington quotes Church doctrine to require "a daily reading of Afrocentrick books, newspaper, newsletters, magazines, etc., (at least four different sources on the same topic a must !!!) view Afrikan-centered books, plays, dances, etc." While this statement seems to permit Washington to use non-books to fulfill the four source requirement, the Pennsylvania DOC stipulates that Washington is supposed to read four books per day as part of his religious practice.

The conflict in this case arises from the clash between Washington's interest in practicing what he claims is his religion and the prison's interest in limiting, for security, hygiene, and safety reasons, the amount of inmate property that may be held in a cell. In July 2000, Washington was transferred from the State Correctional Institution (SCI) at Mahanoy to SCI-Retreat. In February 2001, Washington's books, religious literature, and legal materials arrived at SCI-Retreat in thirteen boxes. In December 2001, authorities at SCI-Retreat informed Washington that he was in possession of property in his cell that exceeded the amount of property permitted. The excess property was removed from Washington's cell, although authorities permitted Washington to choose which ten books to keep in his cell. SCI-Retreat authorities gave Washington the option of mailing the books out of the prison or having the books destroyed by the DOC because of a lack of adequate storage space for excess inmate property. The Superintendent of SCI-Retreat wrote to Washington personally, stating that Washington could also donate the books to the prison library so he could still access them on an as-needed basis. The prison, though, had a policy limiting the number of trips an inmate could take to the library to one per week. Library policy allowed inmates to check out four books per visit. SCI-Retreat did not destroy the property, and shipped it to SCI-Albion when Washington was transferred there in December 2002.

Washington, proceeding *pro se*, sued several employees of Pennsylvania's DOC pursuant to 42 U.S.C. § 1983 and 42 U.S.C. §§ 2000cc–2000cc-5 (the Religious Land Use and Institutionalized Persons Act of 2000, or RLUIPA) in December 2001. His suit alleged that the ten-book policy violated his First Amendment rights and the terms of RLUIPA...

II...

In our view, the Pennsylvania DOC's ten-book limitation in a prisoner's cell constitutes a substantial burden which impedes Washington from exercising his professed religion.

Washington argues that the ten-book limitation places a substantial burden on his religious exercise because it prevents him from reading four books per day and teaching others about the African people. Washington's religion requires a daily reading of four Afro-centric books. Further, Washington argues that his ability to teach others about the African people exists only to the extent that he himself has learned about the African people.

The Pennsylvania DOC contends that limiting the number of books that Washington may keep in his cell at any one time does not significantly inhibit or constrain his conduct, or the expression, of his religious beliefs. This book limitation, it asserts, does not prohibit Washington from adhering to his faith or deny him the opportunity to engage in activity fundamental to his religion. The Pennsylvania DOC also argues that its regulations do not render Washington's religious exercise effectively impracticable...

The DOC has, for whatever reason, elected not to challenge the sincerity of Washington's religious beliefs. The brief for the DOC prison officials states that those officials "do not dispute that Washington's beliefs are sincerely held religious beliefs and that the books are necessary to enable him to fulfill his religious missionary work..." Washington's religion contains two interrelated components—reading four books per day about Africa and African people, and then proselytizing about what he has read. The record amply supports the proposition that Washington cannot practice his religion in the absence of reading these books. Washington is therefore correct in his assertion that "his books and his religion are one and the same; his religion is destroyed in the absence of his religious books."

The ten-book limitation substantially burdens ... Washington's religious exercise ... because it severely inhibits his ability to read four new books per day. Before the end of

three days, Washington would run out of new books. In response, the Pennsylvania DOC makes two arguments. First, the DOC states that the prison library is available for Washington's use and that he would be permitted to read books that are housed in the library. The fatal flaw in this argument is that, as we have mentioned, Washington was permitted to visit the library only once a week and could take out just four books at a time. This policy precludes Washington from reading twenty-eight Afrocentric books per week. Thus, even if the Pennsylvania DOC is correct that Washington could house his own books in the prison library, this policy would still not permit him to read four books per day. Second, the Pennsylvania DOC argues that there is no prohibition on Washington's trading those ten books for another ten books at any time. We find nothing in the record to show that Washington could freely trade books that were located inside the prison. Similarly, forcing Washington, an indigent prisoner, to have outsiders continuously mail books to him severely inhibits his ability to read four new books per day. Coupling Washington's sincerity of religious belief with the inseparability of the four-book requirement from the exercise of his religion leads us to the conclusion that the Pennsylvania DOC's ten-book limitation substantially burdens the practice of Washington's religion.

2. Compelling Governmental Interest

Washington has satisfied his burden to show that the Pennsylvania DOC's ten-book limitation substantially burdens his exercise of religion. 42 U.S.C. § 2000cc-2(b). Accordingly, the burden shifts to the Pennsylvania DOC to show that the policy is in furtherance of a compelling governmental interest and is the least restrictive means of furthering this interest. 42 U.S.C. § 2000cc-1(a).

Interests of safety and health play a particularly important role in the institutional setting. *Williams v. Morton*, 343 F.3d 212, 218 (3d Cir. 2003) (stating that "when a challenged regulation implicates security ... judicial deference is especially appropriate") (internal quotation omitted); *Lovelace*, 472 F.3d at 210–11 (Wilkinson, J., dissenting) (chastising the majority for not properly accounting for the prison's compelling interest in safety and security). The Supreme Court in *Cutter v. Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005), repeatedly referenced the importance of according deference to prison authorities' choices about how to run their institution. The Court plainly stated that "[w]e do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain *order and safety*." *Cutter*, 544 U.S. at 722 (emphasis added); *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007) (a policy that "is related to maintaining good order and controlling costs" serves a compelling governmental interest). The Court in *Cutter* noted the importance of order, security, and the granting of deference to prison administrators' expertise, and also displayed "particular sensitivity to security concerns." 544 U.S. at 722–23. Further, "context matters in the application of that standard." *Id.* at 723 (internal quotation omitted). See *Hoevenaar v. Lazaroff*, 422 F.3d 366, 370–72 (6th Cir. 2005); see also *Lovelace*, 472 F.3d at 212 (Wilkinson, J., dissenting) ("As the Supreme Court recognized in *Cutter*, it is simply impossible to divorce a prison's compelling interests in safety and security from internal administration and order."). Even in light of the substantial deference given to prison authorities, the mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement. Rather, the particular policy must further this interest. See, e.g., *Spratt*, 482 F.3d at 39; *Murphy*, 372 F.3d at 988–89; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211, 1225, 163 L. Ed. 2d 1017 (2006) (rejecting the government's reliance on a general interest in health and safety in the related RFRA context). A conclusory statement is not enough.

In this case, Washington argues that general assertions of safety and security are not sufficient to establish a compelling governmental interest. He points to the Pennsylvania Administrative Code, which recommends that prisoners should be allowed “a reasonable quantity of reading materials,” and that “[n]eatness and good order should be of primary concern rather than a specified number of publications.” 37 PA. CODE §95.245. As further support, Washington points out the arbitrary nature of the ten-book limitation. One DOC policy allows for an exception to the limitation when the books are for educational purposes. Also, an inmate may have ten magazines and three newspapers in addition to the ten books. Similarly, an inmate may have as many non-literature items as will fit in four storage boxes in his cell. If safety and security are the paramount concerns, these exceptions seem to undermine the *compelling* nature of the ten-book limitation.

The Pennsylvania DOC responds that its limitation on the number of books in a cell furthers a compelling governmental interest in protecting the safety and health of prisoners and DOC employees. The District Court agreed with the DOC that the policy furthers the state’s compelling governmental interest. The DOC contends that an excess number of books can create a fire hazard, provide a place to conceal weapons or other contraband, and also create a sanitation problem in the relatively small confines of a prison cell.

Certainly, the Pennsylvania DOC has asserted a valid interest, but it fails to make clear how its ten-book limitation furthers this interest. It is unclear how the book limitation decreases the likelihood of a fire in a cell or provides hiding places for contraband when a prisoner in that same cell is permitted to have magazines and newspapers in addition to ten books. We suppose that books eleven through twenty, for example, provide more hiding places than books one through ten. It is also plausible that the physical space taken by these extra books might make a cell dirtier. In this sense, the ten-book limitation might further the Pennsylvania DOC’s interest in safety and health. Yet even assuming that the DOC has shown that its ten-book limitation serves a compelling governmental interest, it falls short of satisfying its burden that this DOC policy is the least restrictive means for achieving this interest. . . .

3. Least Restrictive Means

In other strict scrutiny contexts, the Supreme Court has suggested that the Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means. See *Warsoldier*, 418 F.3d at 999 (citing *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 824, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 507, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989)). In light of the statute’s text and legislative history, we agree with the Ninth Circuit in *Warsoldier* that this requirement applies with equal force to RLUIPA. Additionally, the phrase “least restrictive means” is, by definition, a relative term. It necessarily implies a comparison with other means. Because this burden is placed on the Government, it must be the party to make this comparison.

The Pennsylvania DOC argues that the manner in which its policies were applied to Washington were the least restrictive means of furthering the compelling governmental interest in health and safety. To support this point, the DOC emphasizes that the policies were applied to Washington in a flexible manner. The DOC notes that none of Washington’s books was ever destroyed, Washington could have donated his books to the prison library so that they would be available to him, and Washington could have exchanged his books for new ones. Because of this flexibility, according to the Pennsylvania DOC, the policy was applied to him in the least restrictive manner possible. There are two interrelated problems with the Pennsylvania DOC’s argument. First, this discussion occurred in

the District Court against the backdrop of the incorrect assumption that Washington had the burden to prove that there were other less restrictive means available. The District Court noted that “[w]e cannot comprehend, and Washington has not suggested, any way in which the Defendants can better keep inmates’ cells safe, other than limiting the amount of personal property inmates may store within their cells.” RLUIPA, however, mandates that the Government has the burden to prove that its policy is the least restrictive means. 42 U.S.C. § 2000cc-1(a).

Once we place this burden on the proper party, the second problem arises. This problem is that the ten-book limitation, either facially or as applied to Washington, arbitrarily limits the property an inmate may possess. The record indicates that Pennsylvania DOC policies permit prisoners to have personal property up to a limit of four storage boxes or their equivalent. However, an inmate is not permitted to fill these boxes with more than ten books, although the inmate may fill the boxes with other property. The least restrictive means would be to allow an inmate to choose what property he may keep in the storage units so long as the property does not violate prison policy for an independently legitimate reason. A prisoner could not, for example, keep a knife in the storage unit. Additionally, prison policy permits more than ten books when the books are approved for educational purposes. Finally, inmates are permitted to have ten books, ten magazines, and three newspapers, but not more books instead of fewer magazines and newspapers. Put simply, these two policies evince a flexibility in the prison regulations that belies the “compelling” nature of the policies with respect to safety and security.

There is also flexibility within the Pennsylvania DOC system. Prior to transferring to SCI-Retreat, Washington spent two decades incarcerated, apparently in the Pennsylvania DOC system. We can find nothing in the record to indicate that prison authorities at these other institutions objected to Washington possessing his books. See *Warsoldier*, 418 F.3d at 1000 (“[T]he failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means.”). In sum, even though the ten-book limitation was not strictly applied to Washington, the Pennsylvania DOC has not satisfied its burden to show that the limitation qualified as the least restrictive means to protect its interests in health, safety, and security.

We are satisfied that a ruling in favor of the plaintiff will not lead to judicial micro-management of the Pennsylvania DOC. Here, we are doing no more than examining prison policies on their own terms to determine whether the ten-book limitation is the least restrictive means to achieving a compelling interest in health, safety, and security. The Pennsylvania DOC’s own policies state that safety and security of a prison cell are satisfied when the prisoner possesses storage boxes that have the capacity to hold more than ten books. Given the existence of those policies, falling back on safety and security concerns, while possibly satisfying the compelling governmental interest prong of strict scrutiny, will not, independent of other reasoning, also satisfy the least restrictive means test.¹⁰ See *Warsoldier*, 418 F.3d at 998–99 (rejecting the state’s “conclusory statements that the [policy in question] is the least restrictive means to ensuring prison security”). We are not facially invalidating the ten-book limitation. We do hold that its application in this case has

10. If the books themselves preached violence that undermined safety and security within the prison, then this would be a different case. See *Borzych v. Frank*, 439 F.3d 388 (7th Cir. 2006) (purportedly religious texts advocated white-supremacist violence).

substantially burdened the exercise of Washington’s religious beliefs—the sincerity of which the Pennsylvania DOC does not challenge—and that the DOC has not shown that this burden is the least restrictive means to further its interest in safety and security.

III

For the above-stated reasons, we will *reverse* the District Court’s Order dismissing Washington’s RLUIPA claim and *remand* with instructions to consider whether any factual issues remain when that claim is evaluated under the proper legal standard. On the current record, the DOC has failed to demonstrate that its policy is the least restrictive means to further its interest in safety and security. However, we recognize that the Pennsylvania DOC has not had a full opportunity to rebut Washington’s assertions because the District Court appeared to place the least restrictive means burden on Washington rather than the DOC. On remand, the DOC will have the opportunity to do so.

Law Practice Simulation 12

In Exercise 1, Clinton Correctional Facility refused Sand’s request to have three boxes of books delivered to his cell so he can continue to study Jewish law. Assume that you are an attorney for the New York State Department of Correctional Services (DOCS). Write a prison policy that would allow DOCS to limit the number of books Sand can have in his cell. The policy should be written so that it will withstand a RLUIPA challenge. In writing this policy, you should:

1. Include the reasons for the policy.
2. Consider whether the policy should be applied only at Clinton Correctional Facility or at all DOCS facilities.
3. Include alternatives that were considered if you think that is necessary.
4. Decide if there should be any exceptions to the policy.
5. Consider the reasoning in *Washington* in constructing your policy.

Law Practice Simulation 13

In Exercise 1, Clinton Correctional Facility refused Sand’s request to light candles in his cell on Saturdays—the Jewish Sabbath—and on Chanukah. Assume that you are the attorney for Sand. What facts would you want to know from Sand before commencing a lawsuit under RLUIPA challenging the denial of these requests? In constructing your fact questions, remember that Sand has the initial burden of showing that prison officials imposed a substantial burden on his religious exercise. (Assume for purposes of this simulation that Sand’s beliefs are “religious”).

You should also ask Sand questions that would prepare you to answer the government’s arguments that the policy is based on compelling state interests and is the least restrictive means of furthering those interests. Determine what facts the *Washington* court found important and use these facts to help you draft your questions.

For further discussion

Assume that there were several fires in apartment buildings in the City of Berne. The City studied the cause of the fires and determined that some of them were caused by candles during a city-wide blackout. To help avoid a future disaster, the City passed a candle ordinance prohibiting tenants in apartment buildings from lighting candles in their apartments.

James Levin was Jewish and lit candles in his apartment on Friday night to celebrate the Sabbath. He was arrested and found guilty of violating the candle ordinance. Levin was sentenced to two months in jail. While incarcerated in the local jail, he requested permission to light candles in his cell on Friday nights to celebrate the Sabbath. His request was denied based on a prison policy prohibiting the lighting of candles in jail cells.

Levin claims that the candle ordinance and the jail policy forbidding the lighting of candles violates his free exercise rights under the First Amendment of the U.S. Constitution and under RLUIPA.

1. Will his challenge to the candle ordinance be decided using strict scrutiny or a rational basis test? Explain.
2. Will his challenge to the jail policy be decided using strict scrutiny or a rational basis test? Explain.
3. Based on your answers to 1 and 2 above, is it possible that Levin might be successful in compelling the jail to allow him to light candles in his cell on the Sabbath and unsuccessful in his challenge to the candle ordinance? Do the religious rights of convicted inmates receive more protection than the religious rights of law-abiding citizens? Explain. Does this mean that Levin might be able to compel the jail to allow him to engage in exactly the activity that caused him to be incarcerated in the first place?¹⁰⁶

Law Practice Simulation 14

In Exercise 1, Clinton Correctional Facility refused Sand's request to have a mezuzah placed outside his cell door. A mezuzah—literally meaning “doorpost” in Hebrew—is a small case containing Judaism's holiest prayer—the Shema—written on a piece of parchment and is intended to be affixed to the doorposts of Jewish homes, businesses and synagogues.¹⁰⁷ The case containing the Shema can be made of wood, metal, glass, or other materials and is often decorated.¹⁰⁸ The practice of using mezuzahs derives from the Jewish Torah's commandment

106. For a further discussion of this conundrum, see Spencer T. Proffitt, *GODS Behind Bars: How Religious Liberty Has Been Sent Directly to Jail, and How to Get Out of Jail Free*, 40 Ariz. St. L.J. 1401, 1403 (2008).

107. See Milechai.com, *Jewish Ritual—Mezuzah Case*, <http://milechai.com/jewish-ritual/mezuzah-cases/mezuzah-case-2.html> (last visited August 24, 2009) (providing a definition of the mezuzah and the mezuzah case); see also CHABAD.ORG, *Mezuzah: What is a Mezuzah?* http://www.chabad.org/library/howto/wizard_cdo/aid/278461/jewish/1-What-Is-a-Mezuzah.html (last visited August 24, 2009) (defining mezuzah and providing a religious overview of the practice).

108. Judaica Mall, *Glossary of Terms*, <http://www.judaica-mall.com/glossary-terms.htm> (last visited August 24, 2009) (defining mezuzah case and listing materials commonly used in making a mezuzah case).

to inscribe the words of the Shema on the doorposts of your house and on your gates.¹⁰⁹

Assume that you are an attorney for DOCS. What compelling interests might justify prohibiting placement of a mezuzah outside an inmate's cell door?

Write a prison policy for Clinton Correctional Facility prohibiting the placement of mezuzahs outside the inmates' cell doors. What additional facts would you want from DOCS to insure that your policy would withstand a RLUIPA challenge?

Now, assume that you are the attorney for Sand. What additional facts would you want from Sand to support a RLUIPA challenge to the mezuzah policy you have written? Do you think DOCS' policy will stand up to the challenge? If you are unsure, what facts do you think are pivotal in making this determination?



Above: Decorative Menorah. Photograph by Max Damashek



Right: Mezuzah fastened to a door. Photograph by Jonathan Gillerman.

5. Meetings and Inmate Religious Leaders

In most religions, congregate services are an important part of the religious experience.¹¹⁰ Group religious meetings provide an opportunity for members of a particular faith to get together and learn the tenets of their religion with the assistance of a religious leader.¹¹¹

Prison chaplains are generally charged with providing religious counseling to all of the facility's inmates regardless of their faith.¹¹² The chaplains also lead services in their own faith and assist inmates in finding religious leaders in other faiths.¹¹³ In 2007, there were

109. Israel Ministry of Foreign Affairs, *Jewish Ceremonial Objects*, <http://www.mfa.gov.il/MFA/Facts%20About%20Israel/People/Jewish%20Ceremonial%20Objects> (last visited August 24, 2009) (defining mezuzah and providing religious information).

110. Mushlin, *supra* note 26, at 741.

111. *Id.*

112. U.S. Comm'n on Civil Rights, *supra* note 3, at 16.

113. *Id.*

251 chaplains employed by the Federal Bureau of Prisons.¹¹⁴ There is at least one full-time chaplain employed at each federal and state prison.¹¹⁵

If the prison does not have a chaplain who can meet the religious needs of a particular religious group, the prison will attempt to either contract with outside clergy or use outside volunteers to meet these needs.¹¹⁶ In 2007, the Federal Bureau of Prisons had between 27 and 150 volunteer religious leaders in each facility.¹¹⁷

If an outside religious leader or volunteer cannot be found to meet a religious group's needs, some prisons will allow inmate-led services. However, inmate-led services create substantial concerns for prison administrators.¹¹⁸ Gang activity is one of the biggest security problems facing prison administrators and inmate-led religious services can be used as a disguise for gang meetings.¹¹⁹ Religious meetings can also be used, *inter alia*, to plan escapes, to engage in illegal drug transactions, to recruit radical groups, to undermine security, and to plot assaults on staff and other inmates.¹²⁰ For these reasons, when inmate-led services are allowed, the prison authorities generally attend and monitor the services.¹²¹

Questions to guide reading of *Spratt v. Rhode Island Department of Corrections*

1. What was the reason given by the Rhode Island Department of Corrections (RIDOC) for prohibiting Spratt from preaching to his fellow inmates during religious services?
2. Was Spratt successful in his claim that he should be allowed to continue to preach during religious services? What relief was awarded by the court? Why did the court choose to grant this relief?
3. According to *Spratt*, does a court have to consider and reject other alternatives before deciding that Spratt cannot preach during religious services? If your answer is yes, does this mean that RIDOC must consider every possible option or just some alternatives? Is RIDOC responsible for explaining why it rejected the alternatives?
4. Does RIDOC have to consider Spratt as an individual in deciding that there are no less restrictive measures that would further its compelling interest in prohibiting inmate preaching or can RIDOC have a well-justified uniform

114. *Id.*

115. *Id.* at 16–17 (“[e]ach of the federal prisons surveyed had a minimum of two full-time chaplains and some had up to four... All of the state prisons surveyed engage the services of at least one full-time chaplain.”).

116. *Id.* at 16, 39. (“[f]ederal and state prisons have indicated a difficulty in recruiting chaplains of other faiths, specifically chaplains of non-Christian faiths such as Islam and Wicca. As a result, both federal and state correctional institutions rely heavily on religious contractors, volunteers and faith-based organizations to meet inmates’ religious needs.”).

117. *Id.* at 16.

118. Mushlin, *supra* note 26, at 742.

119. U.S. Comm’n on Civil Rights, *supra* note 3, at 30; Michael Keegan, *The Supreme Court’s “Prisoner Dilemma:” How Johnson, RLUIPA, and Cutter Re-Defined Inmate Constitutional Claims*, 86 Neb. L. Rev. 279, 325 (2007) (“[c]ontrolling prison gangs is the foremost problem facing prison administrators and guards...”).

120. U.S. Comm’n on Civil Rights, *supra* note 3, at 30–31; see Mushlin, *supra* note 26, at 741.

121. See U.S. Comm’n on Civil Rights, *supra* note 3, at 31.

policy concerning inmate preaching? Can the court both make a case-by-case individualized assessment and consider the success of alternative policies at other institutions?

5. The court found significant that Spratt had preached during religious services in the prison for seven years without incident. Does this mean that an inmate who has never had a chance to preach during services would have less chance of prevailing on a similar claim?

Spratt v. Rhode Island Department of Corrections

482 F.3d 33 (1st Cir. 2007)

JUDGES: Before Torruella, Lynch, and Lipez, Circuit Judges.

TORRUELLA, Circuit Judge. Wesley Spratt (“Spratt”) is a prisoner in the Adult Correctional Institution (“ACI”) in Rhode Island. After prison officials prohibited Spratt from preaching to his fellow inmates, he filed suit against the Rhode Island Department of Corrections and its director, A.T. Wall (collectively, “RIDOC”) under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* (“RLUIPA”). The district court granted summary judgment to RIDOC. After careful consideration, we reverse and remand for further proceedings.

I. Background

Spratt is a prisoner in the maximum security unit and is serving a life sentence for murder. *See State v. Spratt*, 742 A.2d 1194 (R.I. 1999). In 1995, Spratt underwent a religious awakening, and began attending Christian services at the ACI. Impressed with his commitment and devotion, the prison chaplains began allowing Spratt to preach¹ to inmates during weekly services. In 2000, Spratt was ordained as a minister by the Universal Life Church. From 1995 until 2003, no prison official interfered with Spratt’s religious activities. Spratt’s preaching during this seven year period did not lead to any apparent disciplinary problems at the ACI.

In 2003, then-Warden Whitman was replaced by Warden Weeden, who remains the warden of the ACI. On October 15, 2003, Spratt was told by a correctional officer that he was no longer allowed to preach in the chapel. When Spratt approached Warden Weeden about the matter, he was told that preaching by prisoners was not allowed under prison regulations. Spratt formalized his complaint in writing, and Warden Weeden responded that inmate preaching was prohibited by RIDOC Policy # 26.01-2DOC, which states that all religious services are scheduled, supervised, and directed by institutional chaplains. Weeden also informed Spratt that if he was found to be preaching, he would be subject to disciplinary action. Spratt then filed a complaint with A.T. Wall, director of RIDOC, stating the aforementioned facts, and asking that Wall allow him to preach. Wall responded in a letter dated December 15, 2003, which states:

Mr. Spratt, you do have the right to practice your religion under the constitution subject to reasonable restrictions. Because you are not an acknowledged

1. To be clear, we use the word “preach” to refer to the activity of commenting or expounding upon some religious text. RIDOC continues to allow Spratt to read scripture aloud during religious services so long as he does not add any commentary.

member of the clergy, you do not have the right to proselytize or preach to the inmate population. Therefore, your request for my intervention is denied.

Spratt proceeded to file a pro se complaint against Wall and RIDOC in the United States District Court for the District of Rhode Island, asking for relief under the First Amendment, the Fourteenth Amendment, and the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1(c) (“RFRA”).⁴ ...

RIDOC submitted a supplemental memorandum acknowledging that it was subject to RLUIPA ... and attached an affidavit from Jake Gadsden, Assistant Director of Operations for the Rhode Island Department of Corrections. The affidavit briefly reviews Gadsden’s professional experience, and states that inmates may not lead religious services in RIDOC facilities. Gadsden explains in the affidavit that inmate preaching could be dangerous because “placing an inmate in a position of actual or perceived leadership before an inmate group threatens security, as it provides the perceived inmate leader with influence within the administration.” Gadsden further states in the affidavit that “there is no less restrictive manner to accommodate Spratt’s desire to preach to an inmate congregation, other than an outright ban,” because even an inmate preaching under RIDOC supervision would be perceived as having influence. Finally, the affidavit states that Gadsden was familiar with a program in the Texas Correctional System which he identified as the “trustee” program, in which inmates were given certain leadership roles. Gadsden states that Texas abolished the program because the inmate leaders abused their positions to garner favors from fellow inmates.

Spratt filed an affidavit in response, which states that he acknowledges Gadsden’s “noteworthy” credentials, but that Gadsden’s conclusions are “exaggerat[ion] and speculation.” Spratt also stated in a memorandum of law that he would willingly submit to further RIDOC supervision of his preaching activities. He also suggested that RIDOC could retain their policy against inmate preaching but grant limited exemptions when enforcement of the policy would result in a violation of RLUIPA. Spratt noted that RIDOC allows inmates to congregate and talk freely about non-religious topics during recreational time, and that this had not been found to pose a threat to prison security...

II. Analysis

A. Standard of Review

We review a grant of summary judgment *de novo*, viewing the record in the light most favorable to the non-moving party. *Iverson v. City of Boston*, 452 F.3d 94, 98 (1st Cir. 2006). Summary judgment is appropriate only if there are no material disputes of fact, and if the moving party is entitled to judgment as a matter of law. *Id.*

B. RLUIPA ...

A claim under RLUIPA includes four elements. On the first two elements, (1) that an institutionalized person’s religious exercise has been burdened and (2) that the burden is substantial, the plaintiff bears the burden of proof. *Id.* §2000cc-2(b). Once a plaintiff has established that his religious exercise has been substantially burdened, the onus shifts

4. Spratt initially filed suit under RFRA. However, RFRA was found to be unconstitutional as applied to purely state (as opposed to federal) action in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). In its response to Spratt’s complaint, RIDOC noted that Spratt would likely refile his complaint under RLUIPA. Since then, the district court and the parties have treated Spratt’s complaint as arising out of RLUIPA. We do not disturb this decision.

to the government to show (3) that the burden furthers a compelling governmental interest and (4) that the burden is the least restrictive means of achieving that compelling interest. *Id.*

1. Spratt's Burden

For purposes of this appeal, the state does not seriously dispute that Spratt's evidence on his prima facie case is sufficient to survive summary judgment. As an inmate in a state correctional facility, Spratt is an institutionalized person within the definition of RLUIPA. *See id.* § 1997(1) ("The term 'institution' means any facility or institution—(A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and (B) which is—(ii) a jail, prison, or other correctional facility..."). Furthermore, it is clear that preaching is a form of religious exercise. *See McDaniel v. Paty*, 435 U.S. 618, 626, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978) ("[T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions.").

As to the second prong, RIDOC devotes a footnote in its brief to suggesting that Spratt's "exercise of . . . religion in general is not being substantially burdened." Appellees' Br. at 11 n.6. RIDOC points out that "Spratt may still attend and participate in religious services. He may pray, sing, or recite during such services just as every other inmate may." *Id.* . . . Spratt has stated that RIDOC will not allow him to preach anytime or anywhere, threatening that if he does so, he will be subject to disciplinary sanctions. As such, for the purposes of this appeal, Spratt has made a prima facie showing that his religious exercise has been substantially burdened.

2. RIDOC's Burden

The burden thus shifts to RIDOC to demonstrate that its ban on inmate preaching, as applied to Spratt, furthers a "compelling governmental interest" and is the least restrictive means of achieving that interest. 42 U.S.C. § 2000cc-1. We are mindful, however, that in passing RLUIPA, Congress stated that we should continue to give "due deference to the experience and expertise of prison and jail administrators" in determining prison policy. *Cutter*, 544 U.S. at 717 (internal quotation marks omitted) (quoting 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy on RLUIPA)). However, as the Congressional sponsors of RLUIPA stated, "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." 146 Cong. Rec. at S7775 (internal quotation marks omitted).

RIDOC asserts that it has a compelling state interest in maintaining prison security. We agree. *See, e.g., Cutter*, 544 U.S. at 725 n.13 ("It bears repetition . . . that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area."). However, merely stating a compelling interest does not fully satisfy RIDOC's burden on this element of RLUIPA; RIDOC must also establish that prison security is furthered by barring Wesley Spratt from engaging in any preaching at any time.

RIDOC has offered just one piece of evidence to support this assertion: the Gadsden affidavit. This affidavit, which cites no studies and discusses no research in support of its position, simply describes the equation thus: if Spratt is a preacher, he is a leader; having leaders in prison (even those sanctioned by the administration) is detrimental to prison security; thus, Spratt's preaching activity is detrimental to prison security. But to prevail on summary judgment, RIDOC "must do more than merely assert a security con-

cern.” *Murphy v. Mo. Dep’t of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004). The Gadsden affidavit offers only one reference to another prison in support of its assertion that inmate preaching is a security concern: the affidavit mentions a situation in Texas which was described as a “trustee” system. We believe that Gadsden was referring to the “building tender” system present in Texas prisons in the 1970s. This situation, of course, is radically different: building tenders were inmates who were armed, served as official guards within the prison, and who were serving in supervisory capacities in the prison system. See generally *Ruiz v. Estelle*, 503 F. Supp. 1265, 1294–98 (S.D. Tex. 1980). Whereas it is quite easy to see how armed prisoners granted nearly indiscriminate authority to brutalize fellow prisoners are a threat to institutional security, the same cannot be said about a preacher who offers a weekly sermon under the direction of the prison chaplain.

Beyond the Texas “trustee system,” Gadsden cites no past instances where having inmates in leadership positions endangered security, nor does he explain why a person who expounds on the scripture during a weekly religious service would be considered a leader. Self-serving affidavits that do not “contain adequate specific factual information based on personal knowledge” are insufficient to defeat a motion for summary judgment, let alone to sustain one. *Quinones v. Houser Buick*, 436 F.3d 284, 290 (1st Cir. 2006); see also *Hayes*, 8 F.3d at 92 (“Although an expert affidavit need not include details about all of the raw data used to produce a conclusion, or about scientific or other specialized input which might be confusing to a lay person, it must at least include the factual basis and the process of reasoning which makes the conclusion viable in order to defeat a motion for summary judgment.”).

In addition, RIDOC’s initial explanation for the preaching ban was that only ordained ministers were allowed to preach, and that Spratt was not ordained. However, according to materials submitted in connection with Spratt’s motion for summary judgment, he had been an ordained minister since 2000. RIDOC now claims that its initial explanation was “incomplete,” and that the real reason is that no inmates are allowed to preach at all. At the very least, the inconsistencies between RIDOC’s various explanations for its policy require further explanation.⁹

Finally, RIDOC claims that it was merely “lucky” that institutional security was not threatened during Spratt’s seven year stint as a preacher, and that it need not wait for a dangerous situation to occur before it takes steps to remedy the threat. See *Casey v. Lewis*, 4 F.3d 1516, 1521 (9th Cir. 1993) (noting that “failure to specify a past event” that threatened institutional security “does not render irrational the adoption and implementation of a . . . policy” to address future events that might pose a threat). RIDOC also claims that its policy is long-standing, and that prison officials who permitted Spratt to preach were in violation of it. However, Spratt’s seven-year track record as a preacher, which is apparently unblemished by any hint of unsavory activity, at the very least casts doubt on the strength of the link between his activities and institutional security. While we recognize that prison officials are to be accorded substantial deference in the way they run their

9. RIDOC offers a third explanation for its prohibition on inmate preaching. RIDOC suggests that inmate-led religious activities could foment terrorism-related activity. See Appellee’s Br. at 18 n.8 (citing Frank Cilluffo et al., Geo. Wash. Univ. Homeland Sec. Policy Inst. and Univ. of Va. Critical Incident Analysis Group, *Out of the Shadows: Getting Ahead of Prisoner Radicalization* (2006), available at <http://www.gwumc.edu/hspi/reports/rad/Out%20of%20the%20shadows.pdf>). The report cited by RIDOC describes the formation of terror cells in prisons by radicalized Muslim inmates. This explanation for the blanket ban on inmate preaching further demonstrates that RIDOC has not engaged in any individualized consideration of Spratt’s preaching whatsoever. Cf. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211, 1221, 163 L. Ed. 2d 1017 (2006) (requiring that the government engage in individualized consideration of the necessity of a burden on religious exercise).

prisons, this does not mean that we will “rubber stamp or mechanically accept the judgments of prison administrators.” *Lovelace*, 472 F.3d at 190.

Even if we assume that RIDOC has shown a link between Spratt’s preaching and institutional security, RIDOC still has not shown that the blanket ban on all inmate preaching is the “least restrictive means” available to achieve its interest. A prison “cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.” *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *Murphy*, 372 F.3d at 989 (“It is not clear that MDOC seriously considered any other alternatives, nor were any explored before the district court.”); cf. *Casey v. City of Newport*, 308 F.3d 106, 114 (1st Cir. 2002) (“[T]he narrow-tailoring test requires the district court to consider whether the regulation challenged on First Amendment grounds sweeps more broadly than necessary to promote the government’s interest. That consideration, in turn, cannot be done without some evaluation of the alternative measures put in issue by the parties.”).¹¹ Rather than considering alternatives, RIDOC argues that inmate preaching is an “all or nothing” issue: any amount of inmate preaching, it contends, is dangerous to institutional security under any circumstances. As such, RIDOC argues, there are no “less restrictive alternatives.” However, it is not clear how RIDOC has come to this conclusion. See *Warsoldier*, 418 F.3d at 999 (explaining that a California prison had done “nothing to . . . discuss whether it has ever considered a less restrictive approach” to a blanket ban on long hair). RIDOC offers no explanation for why alternative policies would be unfeasible, or why they would be less effective in maintaining institutional security.

RIDOC responds by pointing to the Eighth Circuit’s decision in *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996), in which that court accepted prison administrators’ contention that a regulation requiring inmates to have short hair was the least restrictive means of achieving prison security. However, the court in *Hamilton* made this determination after considering lengthy testimony by the prison administrators in the district court, something which is notably absent here. *Id.* at 1555. In addition, the Eighth Circuit relied on several district court decisions upholding hair length regulations against RFRA challenges, at least one of which appears to have considered and rejected alternatives to the regulation. *Id.* at 1555 n.12. In contrast, RIDOC offers no case finding that blanket bans on inmate preaching satisfy the least restrictive means test, and none appear to exist.¹² Finally, the Eighth Circuit explicitly acknowledged that “prison authorities must do more than offer conclusory statements and post hoc rationalizations for their conduct.” *Id.* at 1554 n.10. Thus, *Hamilton* lends little support to RIDOC’s argument here.

11. It is important to note that we do not construe RLUIPA to “require prison administrators to refute every conceivable option in order to satisfy the least restrictive means prong of RFRA.” *Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996). However, to meet the least restrictive means test, prison administrators generally ought to explore at least some alternatives, and their rejection should generally be accompanied by some measure of explanation. A blanket statement that all alternatives have been considered and rejected, such as the one here, will ordinarily be insufficient.

12. Past decisions have found that restricting inmate preaching “reasonably” furthered institutional security. See, e.g., *Anderson v. Angelone*, 123 F.3d 1197, 1199 (9th Cir. 1997) (“Requiring an outside minister to lead religious activity among inmates undoubtedly contributes to prison security.”); *Hadi v. Horn*, 830 F.2d 779, 785 n.9 (7th Cir. 1987). However, these cases were decided under the pre-RLUIPA standard of *Turner v. Safley*, which states that a “[prison] regulation is valid if it is reasonably related to legitimate penological interests.” 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). The RLUIPA standard, which requires that prison administrators achieve a “compelling interest” by the “least restrictive means,” imposes a different burden on prison officials. See *Lovelace*, 472 F.3d at 199–200 (“[T]he First Amendment affords less protection to inmates’ free exercise rights than does RLUIPA.”).

In fact, RIDOC's "all or nothing" argument raises many questions. Why are inmates banned from preaching when they are free to become leaders under other circumstances? Likewise, why is Spratt still allowed to stand in front of his congregation and read scripture if it is his appearance in the pulpit that is problematic? If it is the "teaching" element of scripture that is so troubling, why are inmates permitted to assist instructors in educational programs at the prison? Why would allowing preaching only under strict prison supervision be a less effective solution to the purported "threat to institutional security"? These questions, all unanswered, suggest that RIDOC has not given consideration to possible alternatives.¹³

Furthermore, "[e]qually problematic . . . is that other prison systems, including the Federal Bureau of Prisons, do not have such . . . policies or, if they do, [they] provide . . . exemptions." *Warsoldier*, 418 F.3d at 999. As Spratt points out, the Federal Bureau of Prisons policy on religious practices appears to contemplate inmate-led religious services in certain circumstances. See Federal Bureau of Prisons, *Program Statement: Religious Beliefs and Practices*, Statement P5360.09 (2004) P 7(d) ("Inmate-led religious programs require constant staff supervision."); *id.* P 7(a) ("Inmates may recite formulaic prayers in the language required by their religion. Sermons, original oratory, teachings and admonitions must be delivered in English."). We recognize that "prison officials . . . are infinitely more familiar with their own institutions than outside observers," *Hamilton*, 74 F.3d at 1556 n.15, and that as such, evidence of policies at one prison is not conclusive proof that the same policies would work at another institution. However, in the absence of any explanation by RIDOC of significant differences between the ACI and a federal prison that would render the federal policy unworkable, the Federal Bureau of Prisons policy suggests that some form of inmate preaching could be permissible without disturbing prison security.

Simply put, RIDOC must "demonstrate, and not just assert, that the rule at issue is the least restrictive means of achieving a compelling governmental interest." *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003). This does not conflict with our policy of deferring to the judgment of prison administrators. Rather, before we can evaluate whether deference is due, we require that prison administrators explain in some detail what their judgment is.¹⁴ Here, RIDOC "offer[s] conclusory statements that a limitation on religious freedom is required for security, health or safety." *Weaver v. Jago*, 675 F.2d 116, 119 (6th Cir. 1982). To prevail on summary judgment, RIDOC must do more.

C. Remedy

Spratt asks that we enter summary judgment in his favor. . . . Summary judgment is proper only when "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). Denial of summary judgment is also appropriate where factual records are "disturbingly thin," "contain gaps," and require judgment calls which depend on evidence not in the record but readily obtainable. See *Mandel v. The Boston Phoenix, Inc.*, 456 F.3d 198, 205–07

13. This list of questions is offered by way of example, and is not exhaustive. We leave it to the district court to determine whether RIDOC has adequately shown that its policy is the least restrictive means of achieving prison security.

14. The level of deference to be accorded to prison administrators under RLUIPA remains an open question. RLUIPA's statutory requirement that we apply strict scrutiny to prison policies that substantially burden religious exercise may be in tension with the legislative history which suggests that courts should continue to defer to the expertise of prison administrators. Obviously, courts will need to find some balance between scrutiny of and deference to prison regulations. We need not resolve that question now because RIDOC has yet to present any reasoned judgment to justify the policies at issue in this case.

(1st Cir. 2006). Notwithstanding Spratt's protestations to the contrary, it is clear that there are factual disputes, including whether a ban on inmate preaching furthers prison security, and whether a blanket ban is the least restrictive means necessary. The factual record on these issues is quite thin. As such, it would also be improvident at this point to grant summary judgment in favor of Spratt. We have held that entry of summary judgment for defendant was not warranted. Each side, on remand, may present further evidence and argument.

III. Conclusion

For the foregoing reasons, we reverse the judgment of the district court and remand for further disposition in accordance herewith.

Reversed and Remanded.

Questions to guide reading of *Baranowski v. Hart*

1. What facts did the court find most significant in denying Baranowski's First Amendment free exercise claim that his rights were violated because the prison failed to provide weekly Sabbath and other holy day services even though these services could be provided if inmates were allowed to lead them?
 2. Why did the court deny Baranowski's equal protection claim even though Christian and Muslim services were conducted more frequently than Jewish services and other religious groups had more access to the chapel?
 3. What was the court's rationale for denying Baranowski's RLUIPA claim? How did the court deal with Baranowski's argument that inmates should be allowed to lead Jewish services when no Rabbi or outside volunteer is available?
 4. Can the reasoning in *Baranowski* be reconciled with the reasoning in *Spratt*? How are these two cases different? Do the defendants in *Baranowski* provide more or less specific factual information to support their policy of denying inmates the right to conduct religious services than the defendants in *Spratt*?
-

Baranowski v. Hart

486 F.3d 112 (5th Cir. 2007)

JUDGES: Before HIGGINBOTHAM, WIENER, and PRADO, Circuit Judges.

PRADO, Circuit Judge:

In this appeal, a Texas prisoner contends that the defendants-appellees violated his rights under the First Amendment, the Fourteenth Amendment, and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc-1 et seq., by failing to provide weekly Sabbath and other holy day services [and] by failing to allow Jewish prisoners to use the chapel for their religious services. . . . For the reasons that follow, we AFFIRM the district court's order granting summary judgment in favor of the defendants-appellees.

I. FACTUAL AND PROCEDURAL BACKGROUND

Thomas H. Baranowski (“Baranowski”), an inmate incarcerated in the Huntsville Unit of the Texas Department of Criminal Justice (“TDCJ”), proceeding pro se and *in forma pauperis*, filed a civil rights complaint in federal district court, pursuant to 42 U.S.C. § 1983, against employees and officials of the TDCJ: Defendants-Appellees Larry Hart (“Hart”), Huntsville Unit Chaplain; Lawrence Hodges, Huntsville Unit Warden; ... ; Bill Pierce (“Pierce”), Director of the TDCJ Chaplaincy Department; and Douglas Dretke, former Director of the TDCJ (collectively, “Defendants”).... Baranowski, a member of the Jewish faith, alleged that Defendants ... deprived him and other Jewish inmates of access to Friday Sabbath services in September and October 2003 and High Holy Day services [and] deprived him and other Jewish inmates of access to the Huntsville Unit chapel for their religious observances.... Baranowski also claimed that prisoners of other religious faiths were treated more favorably than Jewish prisoners, citing limited religious services and chapel access for Jewish prisoners.

Defendants moved for summary judgment, filing copies of various prison policies and sworn affidavits in support. In his affidavit, Pierce, the Director of the TDCJ Chaplaincy Department, testified that “TDCJ allows all offenders to worship according to their faith preference in their cell[s] using allowed items such as sacred texts, devotional items, and materials.” According to Pierce, TDCJ policy is to allow inmates as much freedom and opportunity as possible for pursuing their individual beliefs and practices, consistent with agency security, safety, order, and rehabilitation concerns. Pierce explained that religious services are provided based on demand, need, and resources. He further testified that “[c]haplaincy services are nondiscriminatory in the treatment of offenders’ religious beliefs, but TDCJ policy attempts to take space, time, and staffing restraints into consideration.”

Pierce stated that of the 145,000 offenders currently confined in TDCJ, only 900 are self described as Jewish. Of those, only 70 to 75 are “recognized” as actually practicing their faith, with 90 in the conversion process. According to Pierce, these numbers are very small when compared to the number of observant Protestants, Catholics, and Muslims.

Pierce also stated that although Jewish programs and activities are not available at every unit, they are available at the Huntsville Unit, which is one of seven Jewish “host” units within the TDCJ. He explained that “[r]abbis, not offenders, lead Jewish services to ensure that religious practices reflect Jewish doctrines. There is no other way for TDCJ to accommodate the demand for Jewish congregational services from practicing Jews.” According to Pierce, “[b]ecause of the small number of inmates who actually practice Judaism and attend Jewish services, as well as the limited availability of rabbis in certain geographical areas of the state, TDCJ is unable to hold Jewish services at every Jewish host unit on a weekly basis.” Pierce testified that services are held at least monthly at each of the Jewish host units. Pierce explained that in addition to monthly services, however, the TDCJ recognizes twenty-one Jewish holy days (compared with two for Christians), and that time off is permitted for eight of those days....

Defendants also introduced affidavit testimony of Hart, a chaplain at the Huntsville Unit, in support of their summary judgment motion. Hart testified that because rabbis or approved outside volunteers lead Jewish services, “[s]cheduled events may be delayed or canceled when qualified spiritual leaders are not available.” The Huntsville Unit has a contract rabbi who works with Hart to schedule Jewish services, order religious items, and authorize time off for Jewish holy days. Hart explained that Jewish services in September and October 2003 were canceled, as complained of by Baranowski, because a rabbi or qualified volunteer was not available.

Hart also testified about the use of the Huntsville Unit chapel. He explained that Friday night Sabbath services for the twelve Jewish inmates who routinely attend are held in

the Education Department and not the chapel because the chapel is made available to the New Birth Bible Program, a group consisting of approximately 175 participants. Hart pointed out that the chapel is open to all offenders from 10:30 a.m. until 11:30 a.m. on Monday through Thursday for religious study.

The district court granted summary judgment and entered a judgment dismissing the complaint with prejudice. . . . Baranowski now appeals. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. . . .

III. DISCUSSION . . .

A. Free Exercise Claim

Baranowski argues that Defendants have impeded his free exercise of religion under the First Amendment by denying him access to Jewish Sabbath and other holy day services . . . and by denying him access to the Huntsville Unit chapel for religious observances. Defendants counter that valid penological objectives, including security, staff and space limitations . . . justify TDCJ's policies, and that Baranowski has alternative means of practicing his religion.

This court reviews prison policies that impinge on fundamental constitutional rights under the deferential standard set forth in *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Under *Turner*, a prison regulation that impinges on an inmate's constitutional rights is valid if it is reasonably related to legitimate penological interests. *Id.* at 89. *Turner* requires the court to consider four factors: (1) whether a valid and rational connection exists between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) the impact of the accommodation on prison guards, other inmates, and the allocation of prison resources generally; and (4) whether there are "ready alternatives" to the regulation in question. *Id.* at 89–90. "A court 'must determine whether the government objective underlying the regulation at issue is legitimate and neutral, and that the regulations are rationally related to that objective.'" *Freeman*, 369 F.3d at 860 (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 414–15, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989)); see also *Scott v. Miss. Dep't of Corr.*, 961 F.2d 77, 80–81 (5th Cir. 1992) (explaining that a court need not "weigh evenly, or even consider, each of these factors," as rationality is the controlling standard).

Turning to the *Turner* factors, we hold that the TDCJ policies on the availability of religious services and use of the chapel pass constitutional muster. . . . The record demonstrates that the prison policies at issue here are logically connected to legitimate penological concerns of security, staff and space limitations, and that there are no obvious or easy alternatives. Baranowski's main complaint is that the prison could accommodate the need for weekly Jewish services if inmates were permitted to lead the services without the assistance of a rabbi or approved outside volunteer. . . . The summary judgment evidence shows that despite being denied weekly Sabbath services and other holy day services when a rabbi or approved volunteer is not present, Baranowski retains the ability to participate in alternative means of exercising his religious beliefs, including the ability to worship in his cell using religious materials and the ability to access the chapel and lockers containing religious materials on certain days and times. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 351–52, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987) (upholding a regulation that prevented Muslim prisoners from attending Friday Jumu'ah services, and recognizing that although there were "no alternative means of attending Jumu'ah [since] respondents' religious beliefs insist that it occur at a particular time," inmates were "not deprived of all

forms of religious exercise, but instead freely observe a number of their religious obligations"); *see also Turner*, 482 U.S. at 90 ("Where other avenues remain available for the exercise of asserted rights, courts should be particularly conscious of the measure of judicial deference owed to corrections officials in gauging the validity of the regulation.") (internal quotation marks, citations, and alterations omitted). Finally, the Jewish population at the TDCJ constitutes less than one percent of the total inmate population. If this court were to require the TDCJ to accommodate every religious holiday and requirement of the Jewish faith, regardless of the availability of qualified volunteers and adequate space and security, we "would spawn a cottage industry of litigation and could have a negative impact on prison staff, inmates, and prison resources." *Freeman*, 369 F.3d at 862. We decline to yield to Baranowski's demands. . . .

B. Equal Protection Claim

Baranowski next alleges that Defendants violated his equal protection rights by favoring other religions over Judaism. Specifically, he contends Christian and Muslim services are conducted more frequently than Jewish services, and that other groups have greater access to the chapel. Defendants respond that Baranowski has provided no summary judgment evidence of purposeful discrimination regarding any of his allegations.

To succeed on his equal protection claim, Baranowski "must prove purposeful discrimination resulting in a discriminatory effect among persons similarly situated." *Adkins*, 393 F.3d at 566 (*quoting Muhammad v. Lynaugh*, 966 F.2d 901, 903 (5th Cir. 1992)). "However, the Fourteenth Amendment does not demand 'that every religious sect or group within a prison—however few in numbers—must have identical facilities or personnel.'" *Freeman*, 369 F.3d at 862–63 (*quoting Cruz v. Beto*, 405 U.S. 319, 322 n.2, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972)). Rather, prison officials must afford prisoners "reasonable opportunities . . . to exercise the religious freedom guaranteed by the First and Fourteenth Amendment[s]." *Cruz*, 405 U.S. at 322 n.2. "*Turner* applies with corresponding force to equal protection claims." *Freeman*, 369 F.3d at 863.

Baranowski's equal protection claim must fail. He has offered no competent summary judgment evidence that similarly situated faiths are afforded superior treatment, or that TDCJ's policies are the product of purposeful discrimination. Although Baranowski claims that other religious groups have greater access to the chapel, it is recognized that "[a] special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand." *Cruz*, 405 U.S. at 322 n.2. It is therefore not constitutionally impermissible for Defendants to consider the demand and need of the group requesting the chapel, along with space and staffing limitations, when deciding where religious groups will conduct their services. *See id.* (noting that the Constitution does not demand that every religious group, regardless of size, have identical facilities).

In sum, Baranowski has failed to provide anything more than bald and unsubstantiated allegations that Defendants purposefully discriminated against him. This is not enough to succeed on an equal protection claim. *See Adkins*, 393 F.3d at 566. We therefore affirm the district court's dismissal of this claim.

C. RLUIPA Claim

Baranowski next argues that his inability to observe Sabbath and other holy day services . . . substantially burden his ability to practice Judaism, in violation of RLUIPA. As a "Torah-observant Jew," Baranowski claims that he is compelled to observe the Sabbath

and other holy days. . . . He contends that the substantial burdens imposed by Defendants pressure him to modify his behavior and to violate his sincerely held religious beliefs. Defendants counter that Baranowski has failed to establish that his religious practices are substantially burdened. In the alternative, Defendants argue that their policies are the least restrictive means of furthering their compelling interests of security [and] safety . . . for the prison and its inmates and employees. . . .

The threshold inquiry under RLUIPA is whether the challenged governmental action substantially burdens the exercise of religion. The burden of proving the existence of a substantial interference with a religious exercise rests on the religious adherent. 42 U.S.C. § 2000cc-2(b). If such a substantial burden is proven, it is then up to the government to demonstrate that the compelling interest test is satisfied. *See id.*

RLUIPA defines “religious exercise” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” *Id.* § 2000cc-5(7)(A). “[T]he ‘exercise of religion’ often involves not only belief and profession but the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine. . . .” *Cutter*, 544 U.S. at 720 (*quoting Employment Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). There is no question that the activities alleged to be burdened in this case — Jewish Sabbath and holy day services . . . — qualify as “religious exercises” for the practice of Judaism under RLUIPA’s generous definition. *See Adkins*, 393 F.3d at 567–68 (stating that Sabbath and holy day gatherings “easily qualify as ‘religious exercise’”). . . .

In *Adkins*, we considered the meaning of “substantial burden,” which is not defined by the statute. We held that “for purposes of applying the RLUIPA in this circuit, a government action or regulation creates a ‘substantial burden’ on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.” 393 F.3d at 569–70. The court cautioned, however, that “our test requires a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a significant burden on an adherent’s religious exercise. . . .” *Id.* at 571.

We first consider whether Baranowski’s religious exercise was substantially burdened when he was prevented from congregating with other Jewish inmates on many Sabbath and Jewish holy days. The uncontroverted summary judgment evidence shows that on the days Baranowski claims that services were not provided, no rabbi or approved religious volunteer was available to lead the services. This court considered a similar claim under RLUIPA in *Adkins*; the plaintiff in that case was prevented from gathering with other YEA members for various religious observances. We explained that the plaintiff and other YEA members were not prevented from congregating by prison policy but by the dearth of clergy and authorized volunteers. *Id.* We held that the requirement of an outside volunteer did not place a substantial burden on the plaintiff’s religious exercise under RLUIPA. *Id.* In light of this court’s decision in *Adkins* and the summary judgment evidence before us, we are convinced that the acts of Defendants regarding religious services have not placed a substantial burden on Baranowski’s free exercise of his Jewish faith, within the contemplation of RLUIPA. *See id.* . . .

IV. CONCLUSION

For the reasons stated above, we affirm the district court’s grant of summary judgment.

For further discussion

The Texas Department of Criminal Justice (TDCJ) assumed that Baranowski had adequate alternative means of exercising his religion because he could “worship in his cell using religious materials [and] access the chapel and lockers containing religious materials on certain days and times.”¹²² However, Baranowski was a Torah-observant Jew and solitary prayer is not an appropriate alternative for this group.

In order to hold many religious services, a Jewish prayer service requires the assembly of a minyan—a quorum of at least ten men. Denied the right to assemble even without a rabbi or volunteer, Baranowski was unable to read from the Torah. Baranowski was also unable to read certain prayers, including but not limited to the Kaddish. These aspects of the prayer service are of fundamental importance to Torah-observant Jews given that they are called for in the Torah and Talmud, the principal sources of Jewish law.

...

[A] rabbi or approved outside volunteer is not preferable or necessarily more competent than a Torah-observant Jewish inmate at leading religious services. Orthodox rabbis often do not lead their congregations in religious services because of the perceived conflict between being a community leader who may make decisions that his congregants may oppose and a prayer leader who represents each congregant. Consequently, a non-rabbi leader is often preferred by Torah-observant Jews.¹²³

Do you think that if this additional information was submitted to the court the decision in *Baranowski* would have been the same with respect to the First Amendment claim? Why or why not? Would the decision have been the same with respect to the RLUIPA claim? Why or why not?



Law Practice Simulation 15

In Exercise 1, Rabbi Cohen determined that Sand was not a bona fide member of the Jewish religion, that he was disruptive, and that he could no longer attend Jewish services at Clinton Correctional Facility. Sand requested that the Correctional Facility either provide another Rabbi or allow him to conduct the religious services himself. DOCS denied his request.

Assume that Sand commenced an action in federal court claiming that his rights under RLUIPA were violated because he could not attend Jewish services at the prison and was not allowed to conduct religious services himself. To determine if DOCS violated RLUIPA, you would first want to review DOCS’ policy with respect to inmate-led services. DOCS’ policies are contained in the DOCS Directives and Directive 4202 controls inmate-led services.

122. *Baranowski v. Hart*, 486 F.3d 112, 121 (5th Cir. 2007).

123. Ian J. Silverbrand, *Baranowski v. Hart: Limitations on Jailhouse Religion Despite the Free Exercise Clause and RLUIPA*, 85 U. Det. Mercy L. Rev. 587, 598–600 (2008).

 <p>STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES</p> <p style="text-align: center;">DIRECTIVE</p>	TITLE		NO. 4202
	Religious Programs and Practices		DATE 01/18/2008
SUPERSEDES DIR# 4202 Dtd. 05/12/04	DISTRIBUTION A B	PAGES PAGE 1	DATE LAST REVISED 9/16/2008
REFERENCES (Include but are not limited to)	APPROVING AUTHORITY 		

- A. **SCOPE.** This directive concerns religious programs and practices within facilities of the New York State Department of Correctional Services and covers the religious rights and obligations of inmates and chaplains within these facilities.
- B. **BACKGROUND.** The Division of Ministerial and Family Services, which falls under the jurisdiction of the Deputy Commissioner for Program Services, is responsible for ensuring that all religious programs and practices are carried out in accordance with the established tenets and practices of the faiths as well as the policies and procedures of the Department. For religions not represented by certified Chaplains, the Department will seek advice on matters of religious doctrine, practice and tradition from recognized religious authorities in the outside community.

The Director of the Division reports to the Deputy Commissioner and is responsible for its day-to-day activities and the involvement of facility chaplains and their approved programs. Facility chaplains are responsible for carrying out all aspects of the religious programs of their respective faiths, including supervision of religious volunteers. Directive #4200, "Functions of the Division of Ministerial and Family Services," sets forth the mission and internal organization of the Division.

- C. **POLICY.** In recognition of the First Amendment right of "religious liberty" and in pursuit of the objective of assisting inmates to live as law abiding citizens, it is the intent of the Department to extend to inmates as much spiritual assistance as possible as well as to provide as many opportunities as feasible for the practice of their chosen faiths consistent with the safe and secure operations of the Department's correctional facilities. This includes provisions for religious volunteers who must be fully registered (see Directive #4750, "Volunteer Services Program") to participate in authorized facility religious programs.

In situations where an inmate's faith may not be represented by a chaplain at his or her resident facility, the inmate may encourage an outside clergyman to contact the coordinating chaplain and apply to become a registered religious volunteer. If a chaplain or an outside religious volunteer is not available to serve the spiritual needs of a group of inmates of a known religious faith, the facility Superintendent, in consultation with the Director of Ministerial and Family Services, may authorize the inmates to participate in a religious education class, study group or congregate worship service up to once per week with an approved inmate acting as facilitator and with security staff present. See Attachment B for the protocol regarding inmate facilitators.

It should be clearly understood that the Department takes no position "acknowledging" any particular religion within its inmate population. The Department merely attempts to identify particular faiths within the inmate population in an effort to accommodate the legitimate spiritual needs of its inmates as reasonably as possible in a manner which is commensurate with its legitimate correctional interests and the safety and security of its respective facilities.

Department employees, including chaplains, volunteer chaplains and inmate facilitators shall refrain from disparaging in any manner whatsoever either the doctrines, beliefs, practices or teachings of any other religious faith or any inmate or group of inmates who are adherents of any other religious faith or sect.

Under no circumstances will proselytizing be permitted on the part of staff, volunteers or inmates. Ministerial Program Coordinators (MPC's) and facility chaplains should be consulted with regard to the tenets, practices, holy day observances, etc. of their respective faiths. The facility Coordinating Chaplain, in consultation with the Department's Director of Ministerial and Family Services or designee, will obtain all necessary information where a particular faith is not represented by an employee chaplain. . . .

F. RELIGIOUS WORSHIP SERVICES AND PROGRAMS.

1. Chaplain's leadership role. Each facility chaplain is responsible to personally lead the primary congregational worship and prayer services of his/her particular faith on a regular basis at his or her assigned facility. In addition, each chaplain shall share responsibility for assisting faith groups not represented by a facility chaplain in the exercise of their faith's practices. The chaplains shall not defer their leadership role to any person from outside the facility except on rare or special occasions, and only with the expressed consent of the facility Superintendent. Except as may be authorized under subsection 2-a-(3) below, inmates shall not provide any leadership role for the worshipping inmate community since this is properly the function of the facility chaplains. Inmates who are themselves legitimately ordained clergy are not permitted to practice their profession while incarcerated.
2. Attendance.
 - a. To the extent possible and consistent with the safety and security of the facility, authorized inmates shall be permitted
 - (1) to observe their congregational worship services when led by employee chaplains or outside religious volunteers, and
 - (2) to attend religious study, meetings, classes, study groups, or congregational worship of their respective religious faiths as authorized by the Superintendent and
 - (3) with specific authorization of the facility Superintendent, to meet for religious education, congregational worship with an approved inmate acting as facilitator.
 - (a) Requests will only be considered under the following conditions:
 - (i) there must be a need among the inmate population for congregate worship or religious education classes;
 - (ii) the religious faith must have tenets that can be expressed, taught or practiced in a group setting by a facilitator;
 - (iii) no employee chaplain or outside religious volunteer of this particular faith is available to serve in a leadership capacity; and

- (iv) the inmate acting as facilitator must be specifically approved by the Superintendent after consultation with the coordinating chaplain and the Director of Ministerial and Family Services.
 - (b) Inmate facilitated meetings or congregate worship may not be held more than once per week without the approval of the Superintendent after consultation with the Director of Ministerial and Family Services. Content must be pre-approved by appropriate staff.
 - (c) The Superintendent shall make a determination on each request for an additional weekly meeting within 14 days of receipt.
 - (d) The Superintendent may limit the number of inmates permitted to attend religious education meetings or congregate worship based upon space limitations and security concerns.
 - (e) Inmate facilitated meetings and congregate worship will be conducted only with appropriate oversight by security staff. This may include electronic recording (audio or videotaping) of the meeting or congregate worship for review by the coordinating chaplain or other person designated by the Superintendent.
- b. Ordinarily an inmate may attend only the religious programs of his or her designated religion as noted in facility records. However, an inmate who desires to learn more about the religious practices of another faith may request permission to attend up to three services or study sessions per year from the chaplain or spiritual advisor of that faith group. If attendance can be accommodated, the chaplain or spiritual advisor will advise the Deputy Superintendent for Programs that the inmate will be placed on a call-out.
 - c. Participation by an inmate in any religious celebration, service, meeting, or study group is voluntary.
 - d. The Superintendent, in consultation with the facility chaplain of the affected faith group and the Ministerial Program Coordinator for the faith group, shall resolve any conflicts pertaining to the scheduling and conduct of worship services. . . .

ARTICLE V

The inmate facilitator must be trained by bona fide clergy of the religion. Training may be provided by Chaplains, or religious volunteer clergy from recognized religious congregations in the outside community. At no time will an inmate facilitator be allowed to present information or materials which are not approved. In the case of disputed materials the matter will be referred to the Director of Ministerial and Family Services.

These religious study programs must be approved through the usual channels.

If you represented DOCS and wanted a further explanation of Directive 4202 and how it is applied, you might contact John Lomane, the Director of Ministerial and Family Services for DOCS. Assume that Mr. Lomane prepared the following affidavit with your assistance explaining the DOCS' Directive.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT SAND,

Plaintiff,

-against-

No.10-CV-0086
 AFFIDAVIT
 (TJM)(RWS)

SAMUEL COHEN, Jewish Chaplin,
 Clinton Corr. Facility; JOHN LOMANE
 Dir. Ministerial and Family Services,
 N.Y. Dept. of Correctional Services;
 DANIEL SMITH, Superintendent,
 Clinton Corr. Facility

Defendants.

STATE OF NEW YORK)
) SS:
 COUNTY OF CLINTON)

JOHN LOMANE,¹²⁴ being duly sworn, deposes and says:

1. I am the Director of Ministerial and Family Services for the New York State Department of Correctional Services (DOCS). I have held this position for approximately one year. Prior to this position, I was a Regional Coordinator at DOCS for five years and the Imam at Bare Hill Correctional Facility for approximately eight years. My responsibilities include ensuring that all religious programs are carried out in accordance with the policies and procedures of DOCS and are supervised by a qualified religious leader. I make this affidavit in support of defendants' motion for summary judgment. The information in this affidavit is based on documents maintained by DOCS and my own personal knowledge.

124. This affidavit is from *Sebok v. Friedman*, No. 99-CV-86 (N.D.N.Y. filed July 12, 2000). Some of the facts have been omitted and there has been some minor editing of the language in the original affidavit. The names of the parties have also been changed.

A. DOCS Policy

2. DOCS has traditionally sanctioned several religions with a large inmate following for group activities. These religions include: Catholic, Protestant, Jewish, and Muslim.
3. DOCS also sanctions other religions for group activities that have fewer inmates participating. These religions include: Rastafarian, Native American, and Santeria.
4. Officially sanctioning a religious group for group activities means that the religious practices of these groups are accommodated by DOCS to the fullest extent possible, taking into consideration the security, administrative, and monetary restrictions of the Department and its correctional facilities.
5. The religious practices that are accommodated include, but are not limited to, arranging regular services and holiday services conducted by an approved religious leader.
6. DOCS will also officially sanction any other religion for group activities that has a body of dogma, a religious leader outside of the prison, and some traditions indicating the religion was not formed in prison.
7. Every medium and maximum security facility has a full-time Chaplain who coordinates religious activities at that facility. Once a religious group or inmate shows the facility Chaplain that there is a written body of religious dogma concerning the religion, the facility Chaplain will assist the inmate in contacting a person outside the prison who has the appropriate credentials for that religion and who can verify the existence of the religion outside of the prison and its traditions. Where possible, DOCS will provide those inmates with access to that religious leader.
8. For example, DOCS has, in the past, officially sanctioned the religions of Odinism and Taino for group activities, because inmates could provide a written body of dogma and a religious leader outside of the prison was able to verify the existence and traditions of the religion.
9. Once a religion is officially sanctioned for group activities, DOCS will accommodate the religious practices of the religion as set forth in paragraph 4 above.

B. Determining Membership in Religious Groups

10. When an inmate enters the prison he/she voluntarily states his/her religion. If the inmate selects any group that has been officially sanctioned for group activities (hereafter a religious group), the inmate is then allowed to attend the group's religious services.
11. The determination of whether an inmate can continue to attend the group religious services is made by that group's leader.
12. All religious leaders at DOCS must be approved by the Department of Corrections. DOCS will only hire religious leaders who are endorsed by their religion. For example, a Rabbi must be endorsed by the New York Board of Rabbis, Catholic clergy must be endorsed by the Archdiocese, Protestants must be endorsed by the Community of Churches, and Muslim Imams must be endorsed by the World Community of Islam. This ensures that the religious leaders will act in accordance with the dictates of the religion and that the religious leader is not a front for illicit activities.

13. A religious leader can only refuse to allow the inmate to attend the services of the religion he/she has selected if the inmate is not a bona fide member of the religion or if the inmate is disruptive.
14. DOCS delegates the determination of whether an inmate is a bona fide member of a religious group and whether an inmate is disrupting services to the religious leader of the group. DOCS does not require the religious leader to use any particular method for making these determinations.
15. DOCS agents, such as corrections officers and other correctional facility personnel, are not qualified to assess whether an inmate is a bona fide member of the religion because they are not familiar with the accepted norms of practice, and they are not sufficiently knowledgeable concerning the importance of various beliefs and practices to the differing religious groups.
16. If DOCS officials made the decision concerning whether an inmate is a bona fide member of a religious group, a group may be forced to accept a member who does not meet their criteria and does not properly follow the religion's tenets. This may affect the group's ability to effectively practice the religion. For example, some religious groups, including Jewish groups, are more comfortable praying with others who share their religious beliefs.
17. There is also a danger that DOCS officials may misinterpret the dictates of a religion and decide that an inmate is not a member of a religion when the religious group believes the inmate is a member of the group.
18. DOCS officials are also not qualified to determine whether an inmate is disrupting services. An inmate who disrupts services affects the ability of other inmates to practice their religion and the ability of the religious leader to effectively conduct services.
19. It would be difficult for DOCS to determine if particular behavior is disruptive. For example, Jews forbid the name of God to be spoken in Temple. An official would have to be aware of this religious dictate before determining that the use of this word was disruptive.
20. If an inmate is determined to be a bona fide member of the religious group, he/she is entitled to all of the religious privileges afforded to that religious group. If an inmate is disruptive, and thus removed from group religious services, that inmate is still entitled to the privileges of his/her religion, except for attending group religious services.

C. Safeguards

21. DOCS does not delegate unbridled authority to the religious leaders. DOCS has safeguards to ensure that religious leaders do not arbitrarily deprive inmates of religious privileges.
22. As stated previously, DOCS only hires religious leaders who are endorsed by their religion. This helps ensure that the religious leader will act in accordance with the dictates of the religion.
23. Also, if an inmate believes that a religious leader is arbitrarily denying the inmate access to religious privileges, the inmate may grieve the decision of the religious leader.
24. If it appears that an inmate's complaint about a religious leader is not frivolous, the facility administration will communicate with the religious leader and attempt to work out accommodations that suit both the religious leader and

the inmate. If the facility receives many complaints about a particular religious leader, the religious leader may be dismissed.

25. The inmates can also complain directly to the head Chaplain at the facility, the Superintendent at the facility and/or myself (the Director of Ministerial and Family Services) if they feel the individual religious leader is treating them unfairly. The religious leader will then be investigated and, if necessary, removed from the position.
26. In addition, the endorsing religious bodies generally monitor the activities of their own religious leaders and will remove a religious leader who is not acting appropriately.

D. Individualized Belief Systems

27. Even if an inmate is disruptive, or found not to be a bona fide member of a religious group, he may still have sincere religious beliefs. An inmate can have individualized beliefs that do not have any supporting body of dogma and/or do not have any support by a religious leader outside of the prison. An inmate can also claim to be a member of a religious group, but insist that he practices the religion in his own unique way. He may claim that he needs special accommodations in addition to those of the religious group to which he belongs or that he needs different accommodations than the religious group.
28. For example, Mr. Sand claims that he practices Judaism differently than Rabbi Cohen and that Rabbi Cohen's manner of practicing Judaism is incorrect.
29. DOCS cannot realistically accommodate the religious practices of every inmate who claims his individualized requests for privileges are based on religious beliefs not common to any religious group, or claims his request for privileges is based on the unique way in which he practices a group religion.

E. DOCS Accommodations of Individualized Beliefs

30. To deal with these individualized beliefs, DOCS has established general guidelines that enable inmates who have individualized beliefs to practice their religion while recognizing the necessary limitations in a prison setting. These general guidelines provide all inmates with many religious privileges.
31. For example, while inmates with individualized beliefs are not given individualized services, they are given accommodations that enable them to pray and receive religious guidance. All inmates, regardless of their religious status, are allowed to pray and study in their cells and receive religious publications. The only restriction on religious publications is that inmates are not allowed material that will incite violence.
32. Inmates can also meet individually with any facility religious leader. All facility Chaplains and religious leaders are encouraged to meet with inmates individually, regardless of their religious beliefs, to discuss religious issues and provide as much spiritual guidance as possible.
33. The restraints on DOCS' ability to fully accommodate all inmates' individualized beliefs is due to: 1) the difficulty in determining whether individualized beliefs are sincere, 2) the substantial administrative burdens, and 3) security concerns.

F. Sincerity

34. It would be difficult to determine if an inmate is sincere in his individualized religious beliefs because of the strong incentives in a prison setting to construct beliefs that will help inmates obtain certain special privileges.
35. While some religious observances require sacrifices on the part of the inmate, many religious practices provide inmates with privileges that they have no other way of obtaining. Religious accommodations can also enable inmates to alter their daily routines and to gather for holiday services.

G. Administrative Burden

36. Inmates with individualized religious beliefs could claim they needed their own religious services. According to DOCS Directive 4202 (I), religious services should, except under extreme space constraints, be held in areas designated for religious purposes only. The Directive states: "All spaces in facilities that are designated as places for religious worship . . . are to be reserved for religious uses only."
37. There is not enough room in the facilities to designate religious worship areas for all inmates with individualized religious beliefs.
38. For example, Mr. Sand claims he cannot practice his religion with Rabbi Cohen, the only Rabbi at Clinton Correctional Facility. Accommodating Mr. Sand's individualized beliefs would require that he have his own Rabbi and a separate place or time to worship.
39. Allowing each inmate to select holidays from many religions would create other major administrative concerns. Each religion can have many religious observances. For example, there are eight major holidays for the American Indian Religion alone. Zen Buddhism has eleven religious holidays, one of which lasts a month. There is no limit to the number of potential religious holidays that inmates might claim need to be accommodated.
40. Allowing each individual inmate to practice his religion in his own unique way might require modification of work and school schedules. Also the limited prison personnel would have to be available to supervise the varying inmate schedules.

H. Security

41. Gangs are the most common cause of violence in correctional facilities. Gang members may act violently toward other gangs, toward correctional facility personnel, or toward other individual inmates. Making inmates choose one religion helps ensure that the group meetings associated with that religion are necessary for religious purposes and not to promote illicit activities.
42. For example, only Auburn Correctional Facility has the religious personnel and other accommodations necessary to practice the Long House religion. In the past, inmates claimed they were members of the Long House religion and requested to be transferred to Auburn Correctional Facility not because of their alleged religious beliefs, but because of gang membership.
43. Similarly, at Adirondack Correctional Facility, several inmates claimed they were members of a new religion called the Moorish Science Temple religion. The inmates then used the religious meetings for prohibited gang meetings.

44. Limiting religious groups to those with a body of dogma, some verifiable tradition outside the prison, and an outside religious leader helps prevent religious meetings from being used as gang meetings, thus reducing the risk of violence within the correctional facilities. If any inmate or group of inmates were allowed to gather as a group simply by claiming they had a religious need, inmates could easily hold gang meetings.
45. In sum, due to the foregoing concerns, DOCS assumes each inmate's individualized beliefs are sincere and then accommodates individuals who want to practice a group religion in their own unique way, or who claim to practice a religion that has no body of dogma and/or outside religious leader and tradition. DOCS does this through a uniform set of guidelines that enables all inmates to receive religious counseling and to satisfy many aspects of their religious needs.

WHEREFORE, your affiant requests that defendants' motion for summary judgment dismissing the complaint and action be granted in its entirety.

JOHN LOMANE

Sworn to before me

Notary Public

Is Sand likely to win on his claim that DOCS violated his religious rights under RLUIPA by not providing another Rabbi or allowing him to conduct religious services himself? In answering this question, assume that you are representing DOCS and consider the following:

1. Did DOCS violate Sand's rights under RLUIPA by allowing the Rabbi to determine that he was not a bona fide member of the Jewish religion and that he could no longer attend Jewish services at Clinton Correctional Facility?
2. Does DOCS Directive 4202 substantially burden Sand's religious exercise by preventing him from conducting his own services when an "employee chaplain ... of [his] particular faith is available to serve in a leadership capacity?"
3. Does DOCS have a compelling interest in having a uniform policy regarding an inmate's unique exercise of an established religion?
4. If your answer to 3 is yes, is DOCS' policy the least restrictive means of furthering that compelling interest?
5. What additional facts, if any, would you add to the Lomane affidavit to make DOCS' position stronger?

After answering the questions above, determine the best arguments for Sand by considering questions 1 through 4 above.

Contents

Table of Cases	xvii
Foreword by David Rudovsky	xxxiii
Foreword by Karen Blum	xxxv
Series Editor's Preface	xxxvii
Acknowledgments	xxxix
Copyright Acknowledgments	xl
Chapter One · Historical Context and Introduction to Modern 42 U.S.C. § 1983	3
A. Introduction	3
B. Translating the Results of the Civil War into Law	4
C. Resistance in Former Confederate States	6
D. Section 1983 as a Congressional Response to Klan Resistance	7
Profile of Amos T. Akerman	8
E. Testimony of Survivors	10
Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States	11
For further discussion	16
F. Brief Introduction to Modern 42 U.S.C. § 1983	17
<i>Monroe v. Pape</i>	19
For further discussion	27
<i>Monell v. Dept. of Social Services of the City of New York</i>	28
For further discussion	35
Chapter Two · Eighth Amendment Prisoner Litigation	37
A. Chapter Overview	37
B. Factual Context	38
C. Prison Health Care	41
<i>Estelle v. Gamble</i>	44
Exercise 2-A: Applying <i>Estelle</i> at the 12(b)(6) stage	48
For further discussion	49
D. Violence in Prison	50
Statement by Ronald Kaschak to the Commission on Safety and Abuse in America's Prisons	50
<i>Whitley v. Albers</i>	52
For further discussion	61
Exercise 2-B	63
Exercise 2-C	63
Exercise 2-D	64
Third Circuit Model Jury Instruction for an Eighth Amendment Excessive Force Claim, with Comments	64

Fifth Circuit’s Model Jury Instruction for Eighth Amendment Excessive Force Claims	66
E. Prison Rape	67
Oral Argument before U.S. Supreme Court: <i>Farmer v. Brennan</i>	67
<i>Farmer v. Brennan</i>	76
For further discussion	85
Exercise 2-E: Applying <i>Farmer</i> at the 12(b)(6) stage	85
Interview with Elizabeth Alexander	86
F. Legislative Reaction to the Problem of Prison Rape	87
The Prison Rape Elimination Commission Report	89
For further discussion	92
G. Development of Doctrine in the Circuits: Applying the <i>Farmer</i> Standard to a Factual Record	93
<i>Giroux v. Somerset County</i>	94
<i>Miller v. McBride</i>	98
<i>Rodriguez v. Secretary for Dept. of Corrections</i>	101
For further discussion	110
Guide to Law Practice Simulation 1	113
Practice Pointer	114
Chapter Three · Fourteenth Amendment Substantive Due Process: Part One	117
A. Chapter Overview	117
<i>Daniels v. Williams</i>	118
Amici Curiae Brief of Local and State Government Organizations in <i>Lewis</i>	122
Amicus Curiae Brief of Solutions to the Tragedies of Police Pursuits in <i>Lewis</i> County of Sacramento v. <i>Lewis</i>	126
Exercise 3-A	130
Exercise 3-A	135
B. Development of Doctrine in the Circuits: Applying <i>Lewis</i> to Liberty Interests	136
<i>Ziccardi v. City of Philadelphia</i>	136
Illustration of <i>Lewis</i> Threshold Spectrum of Fault Inquiry	139
C. Development of Doctrine in the Circuits: Applying <i>Lewis</i> to Property Interests	140
Petition for Certiorari in <i>Eichenlaub v. Township of Indiana</i>	141
Brief in Opposition to Certiorari in <i>Eichenlaub v. Township of Indiana</i>	144
For further discussion	148
Chapter Four · Substantive Due Process (Part Two): Exceptions to <i>DeShaney</i>	151
A. Chapter Overview	151
Chart: General Rule of <i>DeShaney</i>	152
B. Factual Context	153
For further discussion	156
C. The General Rule of <i>DeShaney</i>	157
Supreme Court Oral Argument in <i>DeShaney</i>	157
<i>DeShaney v. Winnebago County Dept. of Social Services</i>	162
For further discussion	169
D. Development of Doctrine in the Circuits: State-Created Danger Exception to <i>DeShaney</i>	169
<i>Kneipp v. Tedder</i>	170
<i>McClendon v. City of Columbia</i>	177

<i>Butera v. District of Columbia</i>	184
Sarah E. Ricks, The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit	188
Exercise 4-A	193
Exercise 4-B	193
For further discussion	195
Man killed at Mardi Gras was trying to help woman	195
Chief Stands by Standby Tactic	196
Interview with Karen K. Koehler, Plaintiffs' Counsel in <i>Kime</i>	198
Guide to Law Practice Simulation 2	198
E. Development of Doctrine in the Circuits: Special Relationship Exception to <i>DeShaney</i>	200
<i>D.R. v. Middle Bucks Area Voc. Tech. School</i>	201
<i>Walton v. Alexander</i>	205
For further discussion	213
<i>Nicini v. Morra</i>	213
For further discussion	223
<i>In re County Investigating Grand Jury XXII</i>	224
For further discussion	228
Practice Pointer	228
Chapter Five · 42 U.S.C. § 1983 Action Under Color of Law	231
A. Chapter Overview	231
<i>West v. Atkins</i>	232
For further discussion	234
B. Development of Doctrine in the Circuits	235
<i>Barna v. City of Perth Amboy</i>	236
<i>Martinez v. Colon</i>	242
<i>Anderson v. Warner</i>	249
Jury Instructions	253
Exercise 5-A	257
Exercise 5-B	257
For further discussion	257
Guide to Law Practice Simulation 3	260
Chapter Six · Fourth Amendment Standards and Police Misconduct	263
A. Chapter Overview	263
B. Factual Context	264
C. Supreme Court Application of the Fourth Amendment: Excessive Force	268
<i>Tennessee v. Garner</i>	268
For further discussion	272
<i>Graham v. Connor</i>	273
D. Development of Doctrine in the Lower Courts: Applying <i>Garner</i> & <i>Graham</i>	277
Jury Instructions	278
The Eighth Circuit's Pattern Jury Instructions	278
Jury Verdict Sheet	279
Eleventh Circuit Jury Verdict Form	279
For further discussion	280

<i>Bryan v. MacPherson</i>	281
For further discussion	284
Exercise 6-A	285
E. Application of Doctrine in the Trial Court: Evolution of a 4th Amendment Excessive Force Claim from Complaint to Verdict	285
F. Supreme Court Application of the Fourth Amendment: Excessive Force in the Context of Police Chases	289
<i>County of Sacramento v. Lewis</i>	290
Amicus Curiae Brief in <i>Scott v. Harris</i>	291
Supreme Court Oral Argument in <i>Scott</i>	293
<i>Scott v. Harris</i>	298
For further discussion	305
Exercise 6-B	307
Exercise 6-C	308
G. Development of Doctrine in the Lower Courts: Applying <i>Scott</i>	308
<i>Lytle v. Bexar County, Tex.</i>	309
Practice Pointer	314
Chapter Seven · Distinguishing 4th, 14th, and 8th Amendment Claims: Development of Doctrine in the Circuits	315
A. Chapter Overview	315
B. Excessive Force Claims Post-Arrest	315
<i>Lopez v. City of Chicago</i>	316
For further discussion	320
<i>Wilson v. Spain</i>	321
Eleventh Circuit Jury Instructions	323
Seventh Circuit Pattern Jury Instructions	325
Practice Pointer	326
Guide to Law Practice Simulation 4	326
C. Jail Suicide by Pretrial Detainees	328
<i>Short v. Smoot</i>	329
For further discussion	333
Chapter Eight · Procedural Due Process: Protection of Property Interests	339
A. Procedural Due Process versus Substantive Due Process	339
B. Chapter Overview	340
C. Protection of Real Property Interests	340
<i>Freeman v. City of Dallas</i>	341
For further discussion	344
D. Protection of Non-Traditional Property Interests	345
1. Public Employment	345
<i>Bd. of Regents of State Colls. v. Roth</i>	346
<i>Cleveland Bd. of Educ. v. Loudermill</i>	348
For further discussion	351
Exercise 8-A	353
For further discussion	353
<i>Olivieri v. Rodriguez</i>	355
For further discussion	356
Exercise 8-B	357

For further discussion	357
Practice pointer	359
<i>Nicholas v. Pa. State Univ.</i>	360
2. Enforcement of Restraining Orders	364
<i>Castle Rock, Colorado v. Gonzales</i>	365
Amici Curiae Brief of Denver Police Protective Ass'n, et al. in <i>Castle Rock v. Gonzales</i>	367
Amici Curiae Brief of National Black Police Ass'n, et al. in <i>Castle Rock v. Gonzales</i>	370
<i>Town of Castle Rock, Colorado v. Gonzales</i>	375
For further discussion	386
3. Development of Doctrine in the Circuits: Applying Castle Rock	389
<i>Burella v. City of Philadelphia</i>	390
<i>Hudson v. Hudson</i>	394
Guide to Law Practice Simulation 5	395
Guide to Law Practice Simulation 6	398
Chapter Nine · Absolute Immunity	401
A. Chapter Overview	401
B. Judicial Function	402
<i>Pierson v. Ray</i>	402
For further discussion	405
<i>Forrester v. White</i>	406
For further discussion	410
C. Prosecutorial Function	412
<i>Kalina v. Fletcher</i>	413
For further discussion	416
D. Development of Doctrine in the Circuits: Absolute Immunity for Social Workers	419
<i>Ernst v. Child and Youth Services of Chester County</i>	419
<i>Holloway v. Brush</i>	426
Guide to Law Practice Simulation 7	435
Chapter Ten · Other Statutes: Attorney's Fees, the Prison Litigation Reform Act, and Selected Recurring Procedural Issues in 42 U.S.C. § 1983 Actions	437
A. Chapter Overview	437
42 U.S.C. § 1988 Civil Rights Attorney's Fees	438
The Civil Rights Attorney's Fees Awards Act of 1976	439
For further discussion	441
<i>Sole v. Wyner</i>	442
B. Development of Doctrine in the Circuits	443
<i>Roberson v. Giuliani</i>	444
<i>Walker v. Calumet City, Ill.</i>	448
<i>Dearmore v. City of Garland</i>	451
For further discussion	453
Exercise 10-A	455
C. Prison Litigation Reform Act of 1995	455
<i>Jones v. Bock</i>	455

Attorney's Fees Provision of Prison Litigation Reform Act	462
For further discussion	463
David Fathi, No Equal Justice: The Prison Litigation Reform Act in the United States	463
For further discussion	466
D. Selected Recurring Procedural Issues in § 1983 Litigation	466
1. Statute of Limitations	466
2. <i>Heck v. Humphrey</i> Bar on 42 U.S.C. § 1983 Actions	467
3. Accrual of a False Arrest Claim and the <i>Heck v. Humphrey</i> Bar	467
4. 42 U.S.C. § 1983 Pleading Requirements	467
5. Federal Rule of Civil Procedure 68 Offers of Judgment	470
6. Removal of 42 U.S.C. § 1983 Cases from State to Federal Court	470
a. Cory Brente — Assistant City Attorney for Los Angeles	471
b. Robert Davis — Attorney Defending City of Plano, Texas in § 1983 Suits	472
c. Jacob Schwarzberg — Senior Trial Attorney for Detroit Law Department	472
d. Liza Franklin — Chief Assistant Attorney for Chicago	472
Chapter Eleven · Qualified Immunity	475
A. Introduction	475
B. Chapter Overview	476
<i>Harlow v. Fitzgerald</i>	477
Exercise 11-A	481
For further discussion	481
<i>County of Sacramento v. Lewis</i>	484
<i>Hope v. Pelzer</i>	485
For further discussion	491
<i>Brosseau v. Haugen</i>	492
For further discussion	497
Brief of Amicus Curiae ACLU in <i>Pearson</i>	497
<i>Pearson v. Callahan</i>	500
For further discussion	504
C. Development of Doctrine in the Circuits	507
Exercise 11-B	507
<i>Butera v. District of Columbia</i>	511
<i>Carr v. Tatangelo</i>	517
<i>Espinosa v. City and County of San Francisco</i>	525
For further discussion	529
Guide to Law Practice Simulation 8	530
Guide to Law Practice Simulation 9	532
Chapter Twelve · Local Government Liability	535
A. Chapter Overview	535
B. Theories of Local Government Liability: The Supreme Court	536
Questions to guide reading of <i>Monell</i>	536
David Jacks Achtenberg, Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior	537
For further discussion	539

Is a Police Chief a Final Policymaker? A Sampling of the Circuits	541
<i>City of Canton, Ohio v. Harris</i>	542
For further discussion	546
Exercise 12-A	549
Exercise 12-B	550
For further discussion	551
Interview with David Rudovsky, Plaintiff's Counsel in <i>Canton</i>	552
C. Development of Doctrine in the Circuits: Applying <i>Monell</i> and <i>Canton</i>	554
<i>Bordanaro v. McLeod</i>	555
Exercise 12-C	561
Federal Jury Practice and Instructions	562
<i>Dunn v. City of Chicago</i>	564
For further discussion	567
<i>McLendon v. City of Albuquerque</i>	568
D. The Relationship of Municipal Liability and Individual Liability for Constitutional Violations: The Supreme Court	570
<i>City of Los Angeles v. Heller</i>	571
For further discussion	574
E. Development of Doctrine in the Circuits: Applying <i>Heller</i>	574
Sarah E. Ricks, The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the State-Created Danger Doctrine in One Circuit	575
For further discussion	579
F. Does Supervisory Liability Still Exist?	579
Practice pointer	582
Chapter Thirteen · Case Study of a Legal Doctrine: The Evolving Scope of the Parental Liberty Interest	583
A. Introduction	583
B. Recognizing a Parental Liberty Interest in Companionship of Children	584
<i>Bell v. City of Milwaukee</i>	584
<i>Kelson v. City of Springfield</i>	587
C. Refusing to Recognize a Parental Liberty Interest in Companionship Alone	589
<i>Butera v. District of Columbia</i>	589
For further discussion	591
D. Doctrinal Shift: Evolution of the Parental Liberty Interest in Companionship of Children	591
Brief of Amici Curiae Cities in <i>McCurdy v. Dodd</i>	592
Carmel Sileo, U.S. Courts Grapple with Constitutional Claims for Loss of Adult Children	599
E. Doctrinal Shift: Post- <i>Butera</i> / <i>McCurdy</i> Evolution of the Parental Liberty Interest in Adult Children	601
<i>Russ v. Watts</i>	603
For further discussion	607
<i>Rentz v. Spokane County</i>	608
For further discussion	610
Romana Kaleem, Towards the Recognition of a Parental Right of Companionship in Adult Children Under the 14th Amendment Substantive Due Process Clause	610
Guide to Law Practice Simulation 10	612

Chapter Fourteen · Protecting Freedom of Religion in Prison: The Free Exercise Clause and RLUIPA by <i>Evelyn M. Tenenbaum</i>	615
Exercise 1: Chapter Problem	615
A. Balancing Religious Freedoms Against Institutional Safety, Financial, and Administrative Concerns	616
B. Development of the Law Relating to Inmates' Religious Rights	622
1. The Supreme Court sets the standard for deciding First Amendment free exercise cases in prisons.	622
<i>O'Lone, Administrator, Leesburg Prison Complex v. Estate of Shabazz</i>	624
2. Congress Passes the Religious Freedom Restoration Act (RFRA) in Response to <i>Smith</i> and <i>O'Lone</i>	631
3. Congress Responds to <i>City of Boerne</i> by Passing the Religious Land Use and Institutionalized Persons Act (RLUIPA)	633
<i>Cutter v. Wilkinson, Director, Ohio Department of Rehabilitation and Correction</i>	636
Law Practice Simulation 11	641
4. The Law Regarding Inmates' Religious Rights Since RLUIPA	642
<i>Washington v. Klem</i>	647
Law Practice Simulation 12	652
Law Practice Simulation 13	652
For further discussion	653
Law Practice Simulation 14	653
5. Meetings and Inmate Religious Leaders	654
<i>Spratt v. Rhode Island Department of Corrections</i>	656
<i>Baranowski v. Hart</i>	662
For further discussion	667
Law Practice Simulation 15	667
Chapter Fifteen · The Eleventh Amendment by <i>Evelyn M. Tenenbaum</i>	677
A. Introduction and Chapter Overview	677
B. Historical Background	677
1. The Constitutional Debates	677
Historical Debate Simulation	678
2. <i>Chisholm v. Georgia</i> : The First Supreme Court Case to Address Federal Court Jurisdiction Over States under Article III	680
<i>Chisholm v. Georgia</i>	681
3. Congress Enacts the Eleventh Amendment in Response to <i>Chisholm</i>	684
4. Developments Through 1908	685
<i>Hans v. Louisiana</i>	685
For Further Discussion	687
C. What Constitutes “The State” for Purposes of the Eleventh Amendment?	688
1. Should Municipal Entities That Perform a Governmental Function on Behalf of the State Be Entitled to Assert the State's Eleventh Amendment Immunity from Suit?	688
2. Should the Eleventh Amendment Apply to Lawsuits against State Agencies and Instrumentalities?	689
<i>Sturdevant v. Paulsen</i>	690
3. Should the Eleventh Amendment Apply to Lawsuits Against State Officials?	696

a. Suing State Officials in their Official Capacity	696
<i>Ex Parte Young</i>	697
For Further Discussion	705
b. Understanding the Difference Between an Official Capacity and a Personal Capacity Lawsuit	707
D. The Eleventh Amendment vs. the Fourteenth Amendment — Balancing State Sovereign Interests with Enforcement of Civil Rights Guaranteed by the Fourteenth Amendment	710
For Further Discussion	711
<i>Kimel v. Florida Bd. of Regents</i>	714
E. Can Congress Enact Laws under Its Article I Authority That Abrogate the States' Eleventh Amendment Immunity?	718
1. Commerce Clause	718
2. Spending Clause	719
Index	721