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## **Note**

### **“For I Was Hungry and You Gave Me Something to Eat”: Utilizing RLUIPA to Prevent Force-Feeding Religiously Based Hunger-Striking Inmates**

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*Religiously based hunger-striking prisoners face a cruel reality—being force-fed for adhering to their religious beliefs. Typically, hunger-striking prisoners facing being force-fed challenge this state action as a First Amendment violation. So far, no inmate has been successful. Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) in direct response to state infringement upon prisoners’ right to religious freedom. Because RLUIPA offers greater protection of religious rights than does the First Amendment, religiously based hunger-striking prisoners will have a greater likelihood of preventing a state from force-feeding them by alleging a RLUIPA violation.*

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# “For I Was Hungry and You Gave Me Something to Eat”:<sup>1</sup> Utilizing RLUIPA to Prevent Force-Feeding Religiously Based Hunger-Striking Inmates

MEGAN WADE\*

## I. INTRODUCTION

When engaging in a hunger strike based on his religious beliefs<sup>2</sup>, a prisoner faces a myriad of negative consequences including loss of privileges, solitary confinement, and potential force-feeding. Yet, in some situations, prisoners may not have any other options. This Note seeks to discuss three types of religiously based hunger strikes: (1) those for broad religious purposes; (2) those taken in response to a prison’s failure to provide religiously accommodating meals; and (3) religious fasts, taken in observance of religious tenets, which oftentimes are misclassified as hunger strikes.

An example of a hunger strike taken for broader religious purposes is the recent hunger strikes of the Guantanamo Bay detainees. Most recently, news spread of the large-scale force-feedings of prisoners housed at Guantanamo Bay. Since early 2002, several large-scale hunger strikes have taken place in response to the prisoners’ claims that they are being held without just cause, of poor prison conditions, and of human rights violations.<sup>3</sup> In response to these strikes, prison officials sought injunctions to force-feed the prisoners.

Religious strikes undertaken by prisoners due to a prison’s failure to provide religiously accommodating meals are much more common in prisons. Jewish prisoners, for example, believe that they must eat only Kosher foods to comply with the Jewish body of law, Kashrut. So what

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<sup>1</sup> Matthew 25:35 (New Int’l).

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<sup>2</sup> This Note will utilize masculine pronouns when describing prisoners, as more than 90% of U.S. prisoners are male. See *BOP Statistics: Inmate Gender*, Federal Bureau of Prisons (last updated Mar. 26, 2016), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_gender.jsp](https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp) [https://perma.cc/6GRZ-8ZY8].

<sup>3</sup> Samir Naji al Hasan Moqbel, *Gitmo Is Killing Me*, N.Y. TIMES, Apr. 15, 2013, at A19; see also Nicolai Haddal, *The 2013 Guantanamo Bay Hunger Strike*, CTR. FOR STUDY HUMAN RTS. AMERICAS (Nov. 20, 2013), <http://humanrights.ucdavis.edu/reports/2013-guantanamo-bay-detainee-hunger-strike> [https://perma.cc/JB2Y-BV5M].

happens when, despite the prisoner's request, the prison refuses to provide Kosher meals? The prisoner is faced with the decision of violating his sincerely held beliefs in Judaism or refusing to eat the non-Kosher meals to keep true to his religion. If the prisoner chooses to adhere to his beliefs, he can be classified by the prison, after just seventy-two hours of refusing food, as participating in a hunger strike even though he is not protesting his confinement or trying to make a political statement. In this case, he simply *cannot* eat the meals provided to him by the prison in order to obey the rules of his religion.

Last is the situation in which a prisoner undertakes a religious fast, but subsequently is misclassified by the prison as a hunger striker. Take, for example, a Muslim prisoner, who, during the sun-up hours of Ramadan, is asked to provide a urine sample but cannot do so because he fasts during these hours, and the prison has refused to provide him alternative meals during the sun-down hours. Thus, he essentially has engaged in a hunger strike by refusing to eat the provided meals during the sun-up hours. This prisoner now must decide whether to break fast and consume water in order to supply the urine sample or refuse to drink water and face being force-fed nutrients in order to provide the sample.

This particular scenario is not hypothetical. In 2003, a New York prison forced Darryl Holland, a Muslim prisoner, to act in opposition to his Islamic beliefs by forcing him to consume nutrients during the sun-up hours of Ramadan so that he could provide a urine sample.

Ultimately, this Note seeks to do two things: (1) to serve as a guide for successful RLUIPA litigation in the recently changing area of the law dealing with the government's place in the regulation of religious freedom; and (2) suggest that there are less intrusive means available to prisons for the purpose of ending religiously based hunger strikes than force-feeding inmates.

So then what exactly does the process of force-feeding entail? Prison guards shackle an inmate's arms and legs, hold his head still, and insert more than three feet of tubing up his nose, down his throat, and into his stomach. This is such a painful and intrusive procedure that oftentimes prisoners knock out the tubing, cough, choke, or vomit. Prisoners also have reported how painful the experience is. Still, prisoners endure this force-feeding twice a day, every day, during their hunger strikes.

Prisoners historically have had little recourse against these forced feedings. Even though the First Amendment protects a prisoner's fundamental right to exercise religion, courts have been hesitant to impede the administrative policies of prisons on this matter due to concerns of the government's duty to preserve life and the penological interests in maintaining prison safety and keeping costs down. Do these interests seem compelling enough to allow a prison to subject a religiously based hunger-striking inmate to twice-a-day force-feedings? Under the First

Amendment, the government's interests need not be compelling to justify force-feeding the inmates—they merely must be legitimate and rationally related to the prison's force-feeding policy. Under RLUIPA, however, the government's interests must be compelling, and the force-feeding policy must be the least restrictive means of furthering those interests. Further, there are options less intrusive and barbaric that do not infringe upon a prisoner's religious freedom than force-feeding to resolve his need to engage in the hunger strike. Thus, this Note argues that prisoners should raise statutory claims under RLUIPA instead of the First Amendment because Congress added protections to religious rights in RLUIPA that are stronger than religious protections under the First Amendment.

In Part II, this Note examines the definition of a hunger strike, discusses various reasons why prisoners engage in hunger strikes, and describes the two primary methods prisons use to force-feed inmates. Part III outlines traditional First Amendment claims against prisons that violate prisoners' free exercise rights. This Part examines prisoners' fundamental right to exercise a religion of their choosing under the First Amendment. Part III also describes Congress' response to the difficulties that prisoners have faced when filing First Amendment claims. The main legislative initiatives include the Religious Freedom Restoration Act of 1993 (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which Congress enacted to help provide prisoners an avenue for legal redress. In discussing the latter Act, this Note describes how a prisoner in a state or local prison may successfully file a claim. This Note then discusses two recent cases in which prisoners filed claims under RLUIPA. In Part IV, this Note examines why hunger-striking prisoners will be successful in prohibiting a prison from force-feeding them by filing a complaint alleging a RLUIPA violation. In general, this Note argues that the Act provides broader protection over prisoners' religious rights than the First Amendment. Then, in order to help future prisoners and lawyers taking up these cases, this Note provides a step-by-step guide on how to file a RLUIPA claim on behalf of a religiously based hunger-striking prisoner. In Part V, this Note then analyzes three types of hunger-striking prisoners—ones who hunger-strike for broad, religious purposes, ones who hunger-strike due to lack of religiously accommodating meals, and ones whose hunger fasts mistakenly are labeled as hunger strikes—and discusses prisoners' probabilities of success. This Note concludes by applying these principles to a hypothetical situation involving Steven Hayes, one of the men convicted in the Cheshire Home Invasion arson, rapes, and murders.

## II. RELIGIOUSLY BASED HUNGER STRIKES AND FORCE-FEEDING

### A. What Is a Hunger Strike?

An inmate is defined as engaging in a hunger strike “[w]hen he or she communicates that fact to staff and is observed by staff to be refraining from eating for a period of time, ordinarily in excess of 72 hours; or [w]hen staff observe the inmate to be refraining from eating for a period in excess of 72 hours.”<sup>4</sup> Moreover, most definitions state that competence of the hunger striker is also necessary for it to be an actual hunger strike.<sup>5</sup>

Additionally, hunger strikers do not necessarily deny all food and water, but rather consume some liquids, sugar, and vitamins.<sup>6</sup> Religious fasts, on the other hand, serve a different purpose than hunger strikes. Prisoners participating in hunger strikes typically fast to gain attention over a political agenda and to protest their prison conditions.<sup>7</sup> Prisoners engage in religious fasts, however, in order to stay true to their religious ideals.<sup>8</sup> The problem that arises for prisoners who engage in a religious fast is that prisons need not make a distinction between these and hunger strikes,<sup>9</sup> so any religious fast lasting longer than the seventy-two hours set out in the Code of Federal Regulations section may be deemed a hunger strike, for which the prison can seek an injunction from the court to force-feed the inmate.<sup>10</sup>

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<sup>4</sup> 28 C.F.R. § 549.61 (2011).

<sup>5</sup> See, e.g., Sondra S. Crosby et al., *Hunger Strikes, Force-feeding, and Physicians' Responsibilities*, 298 JAMA 563, 563 (2007) (defining a “hunger striker” as “a competent prisoner (understanding the nature and consequences of his or her actions) who voluntarily refuses food for a specific purpose” and indicating that “[a] food refuser who is not mentally competent does not qualify as a hunger striker”). Additionally, the U.S. Supreme Court has “suggested that the Constitution gave a competent individual the right to refuse lifesaving medical treatment. While a state could condition that right on the establishment of clear and convincing evidence of a patient’s wishes, the right itself was assumed.” Mara Silver, Note, *Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation*, 58 STAN. L. REV. 631, 639 (2005).

<sup>6</sup> See Avi Brisman, *Fair Fare?: Food as Contested Terrain in U.S. Prisons and Jails*, 15 GEO. J. ON POVERTY L. & POL’Y 49, 80 (2008) (discussing how some hunger strikes actually “include the ingestion of some water or other liquids, salt, sugar, and vitamin B1 for a certain time without asserting intent to fast to death”).

<sup>7</sup> Steven C. Bennett, Note, *The Privacy and Procedural Due Process Rights of Hunger Striking Prisoners*, 58 N.Y.U. L. REV. 1157, 1157 (1983) (describing various reasons for hunger strikes, including to make political statements and to protest confinement).

<sup>8</sup> See *Fasting Across Religions*, BELIEFNET, <http://www.beliefnet.com/Faiths/2001/02/Fasting-Chart.aspx> [<https://perma.cc/LLN7-2GB4>] (last visited Feb. 3, 2016) (listing, among others, “focus[ing] on love of God and spiritual matters,” “open[ing] a person to God’s grace,” and “[a]ton[ing] for sins and/or special requests to God” as reasons for religious fasts).

<sup>9</sup> In fact, prisons are instructed to classify any prisoner, who has not eaten in seventy-two hours, to be considered on a hunger strike. 28 C.F.R. § 549.61 (2011).

<sup>10</sup> *Id.*

### B. Current Regulations Regarding Force-Feeding Inmates

One of the biggest problems with the force-feeding of inmates is that no standardized protocol exists within federal or state prison systems to regulate how prisons should approach hunger-striking inmates.<sup>11</sup> In 2001, the Department of Justice, National Institute of Corrections commissioned a reference book to provide jail and prison administrators and correctional health professionals with guidance in the provision of health services. This report contains a section on hunger strikes within prison systems.<sup>12</sup> Specifically, the reference book recommends “that serious hunger strikes (i.e., those lasting more than 2 or 3 days) be supervised by an interdisciplinary committee of correction and noncorrectional personnel.”<sup>13</sup> It emphasizes maintaining a balance between keeping the inmate aware of the possible effects of a hunger strike and violating the inmate’s wishes.<sup>14</sup> Because the ethical question of whether prisoners should be able to hunger strike until they die has not been answered, inconsistencies among various prisons exist.<sup>15</sup> Although this does raise the important ethical question regarding a prisoner’s right to die, this Note does not seek to analyze that complex issue. Rather, this Note argues that prisons have less restrictive means available to them to end religiously based hunger strikes than force-feeding hunger-striking inmates or allowing the strike to continue until death.

### C. Methods of Force-Feeding

Force-feeding is a painful and highly intrusive way of providing a hunger-striking inmate with nutrients. Prisons typically use one of two methods to force-feed inmates: (1) nasogastric feeding and (2) intravenous feeding.<sup>16</sup>

Nasogastric feeding “is accomplished by inserting a soft tube into the nose, through the esophagus, and directly into the stomach.”<sup>17</sup> Two specific accounts of nasogastric feeding show just how invasive and painful the

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<sup>11</sup> B. JAYE ANNO, U.S. DEP’T OF JUSTICE., CORRECTIONAL HEALTH CARE: GUIDELINES FOR THE MANAGEMENT OF AN ADEQUATE DELIVERY SYSTEM 85 (2001) (“None of the sets of national standards specifically addresses hunger strikes.”).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (“The task of the physician is then to keep the inmate apprised of his or her health status and the likely consequences of change or deterioration. . . . Force-feeding the inmate clearly would violate his or her wishes and concepts of patient autonomy . . . .”).

<sup>15</sup> *Id.* (“It is not clear whether an inmate who refuses sustenance should be allowed to die without interference from correctional or medical authorities . . . .”).

<sup>16</sup> Bennett, *supra* note 7, at 1176–77 (describing three methods of force feeding: nasogastric tube feeding, intravenous feeding, and gastronomy). This Note discusses the first two methods, as they are the methods most commonly used in prisons.

<sup>17</sup> Silver, *supra* note 5, at 637.

procedure can be. In *In re Caulk*,<sup>18</sup> the dissent provided the following account:

No novocaine was used during the insertion of the tube. [The prisoner] suffered a great deal of pain and discomfort as a result of the constant irritation of the tube on his throat and nasal passages. His efforts to resist the painful swallowing reflex caused him to suffer severe headaches. The tube was removed due to the danger of imminent ulceration of his throat and nasal passages.<sup>19</sup>

This account from plaintiff Caulk is common. The court in *In re Soliman*<sup>20</sup> recounted the plaintiff's telling of the nasogastric feeding that he was forced to endure:

[The prisoner] allege[d] that medical personnel initially inserted a large tube into his nose, which did not fit. The medical personnel then attempted to insert smaller and smaller tubes until Soliman's nose began bleeding internally. The doctor ordered that Soliman be injected with an anesthetic, and a gastric tube inserted through his mouth. Since then, Soliman has received an injection of anesthetic and a gastric tube through the mouth every three days.<sup>21</sup>

Intravenous treatment, which prisons utilize less frequently than nasogastric feeding, is the second method of force-feeding.<sup>22</sup> This method occurs by penetrating a needle through a major blood vessel in order to transfer nutrients directly into the prisoner's blood stream.<sup>23</sup> The main problem with intravenous treatment is that "unless a prisoner is sedated, he or she will in all likelihood attempt to obstruct treatment by pulling out the needles used to deliver nutrients. That interference could lead to a severe loss of blood that could be fatal in just three to four minutes."<sup>24</sup> Although not as painful or humiliating as nasogastric feeding, intravenous feeding intrudes even more on the prisoner's person. No prisoner hunger-striking for sincerely held religious reasons should endure this treatment simply for following his religious tenets, given that prisons have less restrictive means available to them to end the hunger strikes, such as providing religiously accommodating meals.

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<sup>18</sup> 480 A.2d 93 (N.H. 1984).

<sup>19</sup> *Id.* at 99 (Douglas, J., dissenting).

<sup>20</sup> 134 F. Supp. 2d 1238 (N.D. Ala. 2001).

<sup>21</sup> *Id.* at 1245.

<sup>22</sup> Bennett, *supra* note 7, at 1176–77 (describing nasogastric feeding as "the preferred method of treatment," intravenous feeding as "disfavored," and gastronomy as "the treatment of last resort").

<sup>23</sup> Silver, *supra* note 5, at 637.

<sup>24</sup> *Id.* at 637–38.

### III. CURRENT REGULATION OF PRISONERS' RIGHTS TO FREE EXERCISE OF RELIGION

#### A. *Prisoners' Rights and Interests Against Being Force-Fed*

Currently, prisoners most often seek legal redress to stop prisons from force-feeding them by claiming a violation of their First Amendment right to free exercise of religion. In this Part, this Note addresses the development of this right and its application to hunger-striking prisoners. This Part also examines legislative initiatives in response to prisoners' inability to successfully plead a violation of their right to free exercise of religion under the First Amendment.

##### 1. *First Amendment Right to Free Exercise of Religion*

In the late 1980s, courts recognized the rise in prisoners' claims alleging that prisoners were violating their fundamental right to free exercise of religion.<sup>25</sup> As a result, the Supreme Court heard and decided two cases, which set the stage for how courts should examine these specific issues: *Turner v. Safley*,<sup>26</sup> which set out a four-factor test for determining whether a prison's action or regulation violated a prisoner's First Amendment right to free exercise of religion and, if so, whether the regulation nevertheless was justified; and *O'Lone v. Estate of Shabazz*,<sup>27</sup> the first case to utilize this newly established test. Though these were important cases, they caused circuit splits on the issue of a prisoner's right to religious freedom and great confusion among courts about which level of scrutiny to apply when considering the religious rights of prisoners.

###### a. *Turner v. Safley*

In *Turner*, a case regarding the constitutionality of regulations dealing with inmate marriages and inmate correspondence, inmates brought a class action challenging two then-recently enacted prison regulations: the first permitted correspondence between inmates only when it concerned legal matters,<sup>28</sup> and the second "permit[ted] an inmate to marry only with the permission of the superintendent of the prison, and provide[d] that such approval should be given only 'when there [were] compelling reasons to do so.'"<sup>29</sup> The Supreme Court, recognizing the plight of prisoners trying to protect their fundamental rights, initially stated that "[p]rison walls do not form a barrier separating prison inmates from the protections of the

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<sup>25</sup> U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

<sup>26</sup> 482 U.S. 78 (1987).

<sup>27</sup> 482 U.S. 342 (1987).

<sup>28</sup> *Turner*, 482 U.S. at 81.

<sup>29</sup> *Id.* at 82.

Constitution.”<sup>30</sup> The Court also acknowledged its inability to “deal with the increasingly urgent problems of prison administration and reform.”<sup>31</sup> Because of this, the Court set out a new standard of review that would be responsive to the “policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.”<sup>32</sup>

The *Turner* Court set out a four-factor test that balanced inmates’ constitutional rights with the prison’s concerns over prison safety and administration: whether

- (1) the regulation is rationally connected to the legitimate government interests offered to justify the regulation;
- (2) alternative means of exercising the right remain open to prisoners under the regulation;
- (3) providing an accommodation or exceptions for inmates to exercise the asserted right impermissibly burdens prison staff, other inmates, or prison resources;
- (4) there is absence of ready alternatives.<sup>33</sup>

In applying its own newly-formulated test, the Court held that the mail regulation was constitutional because it was reasonably related to the goals of institutional safety and security,<sup>34</sup> but that the marriage regulation was unconstitutional because it was not reasonably related to the prison’s stated security concerns.<sup>35</sup>

#### b. *O’Lone v. Estate of Shabazz*

In *O’Lone*, Muslim inmates challenged a new prison regulation which required them to work off-site and thus prevented them from returning to the prison to participate in Jumu’ah, a Muslim assembly service commanded by the Koran.<sup>36</sup> Petitioner prison officials conceded that the Muslim inmates’ “sincerely held religious beliefs compelled attendance at Jumu’ah.”<sup>37</sup> The Court, however, found evidence of increased security risks in having the prisoners return from off-site during the day to attend these services.<sup>38</sup>

As it did in *Turner*, the Court began its analysis by emphasizing that

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<sup>30</sup> *Id.* at 84.

<sup>31</sup> *Id.* (citing *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)).

<sup>32</sup> *Id.* at 85 (citing *Procunier*, 416 U.S. at 406).

<sup>33</sup> *Id.* at 89–90.

<sup>34</sup> *Id.* at 93.

<sup>35</sup> See *id.* at 97–98.

<sup>36</sup> 482 U.S. 342, 344–45 (1987).

<sup>37</sup> *Id.* at 345.

<sup>38</sup> See *id.* at 346 (explaining that one guard supervised an entire detail of inmates, which resulted in heavy traffic at the main gate, a “high security area”).

“convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison.”<sup>39</sup> Decided shortly after the *Turner* decision was released, *O’Lone* applied the Court’s newly established four-factor test. In applying that test, the Court agreed with the district court and found that the regulation, which prevented Muslim inmates from attending religious services, was “reasonably related to legitimate penological objectives”<sup>40</sup> of prison administration. To comply with the prisoners’ request to attend services, the prison would have had to make several accommodations “including placing all Muslim inmates in one or two inside work details or providing weekend labor for Muslim inmates.”<sup>41</sup> Ultimately, the Court found that the “accommodations . . . would have undesirable results in the institution,”<sup>42</sup> and that the penological objectives were legitimate. Moreover, under these prison regulations, the Muslim inmates were “not deprived of all forms of religious exercise, but instead freely observe a number of their religious obligations,”<sup>43</sup> which led the Court to find that “the restrictions at issue here were reasonable.”<sup>44</sup>

### c. The *Turner/O’Lone* Test

Post-*Turner*, courts inconsistently applied the four-factor test.<sup>45</sup> Even within *Turner* itself, the dissenting Justices “worried that the new standard would subject inmates to the mercy of prison officials without adequate constitutional protection.”<sup>46</sup> A fundamental problem of the *Turner* test was that it seemed to give a more lenient standard of review for the regulation of inmate-to-inmate correspondence, but a stricter one for the regulation of inmate marriages.<sup>47</sup> Thereafter, circuit courts continued to disagree over how exactly to apply the *Turner* test, particularly when prisons failed or refused to provide Kosher meals.<sup>48</sup> In fact, the Second Circuit did not even utilize the *Turner* factors when it decided to grant Jewish inmates’ requests

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<sup>39</sup> *Id.* at 348.

<sup>40</sup> *Id.* at 353.

<sup>41</sup> *Id.* at 352.

<sup>42</sup> *Id.* at 353.

<sup>43</sup> *Id.* at 352.

<sup>44</sup> *Id.*

<sup>45</sup> See *Turner v. Safley*, 482 U.S. 78, 112–15 (1987) (Stevens, J., dissenting) (discussing the Supreme Court’s inconsistent opinions on these issues); see also Benjamin Pi-wei Liu, *A Prisoner’s Right to Religious Diet Beyond the Free Exercise Clause*, 51 UCLA L. REV. 1151, 1161–63 (2004) (describing courts’ varying approaches to freedom of religion claims in the prison context).

<sup>46</sup> Liu, *supra* note 45, at 1160 (citing *Turner*, 482 U.S. at 100–01 (Stevens, J., dissenting)).

<sup>47</sup> *Id.* at 1160–61 (discussing the “lenient” and “strict” *Turner* tests).

<sup>48</sup> See *id.* at 1161–62 (noting that the Eighth, Ninth, and Tenth Circuits held that prisons were required to provide a strict Kosher diet, whereas the Fourth, Fifth, and Eleventh Circuits have denied prisoners Kosher meals).

for a Kosher diet.<sup>49</sup> Thus, decisions regarding inmates' right to exercise religion have varied under the *Turner* test.

## 2. Legislative Initiatives

In response to both the inconsistent decisions under the *Turner* test and the growing concern over prisoners' struggles with prisons violating their right to free exercise of religion,<sup>50</sup> Congress enacted legislation to provide guidance to courts on how to determine whether state action or regulation violated prisoners' fundamental right to express religion.

### a. The Religious Freedom Restoration Act

Congress enacted the Religious Freedom Restoration Act ("RFRA") in 1993,<sup>51</sup> in response to the Supreme Court's decision in *Employment Division v. Smith*.<sup>52</sup> In *Smith*, the respondents were fired from their jobs because they ingested peyote during a religious ceremony.<sup>53</sup> When they applied for unemployment compensation, the Oregon Employment Division determined that they were ineligible because "they had been discharged for work-related 'misconduct.'"<sup>54</sup>

On certiorari to the Supreme Court, the Employment Division argued that because Oregon had a law that made it illegal for the respondents to consume peyote, the denial of benefits was permissible.<sup>55</sup> The Court determined that it could not decide whether the religious use of peyote violated the Oregon statute, and remanded for further proceedings.<sup>56</sup> On remand, the Oregon Supreme Court found that the Oregon statute did, in fact, prohibit the respondents' religious use of peyote, and that the statute's prohibition was invalid under the Free Exercise Clause.<sup>57</sup> Ultimately, the Oregon Supreme Court held that the Employment Division could not deny the respondents benefits.<sup>58</sup>

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<sup>49</sup> See *Bass v. Coughlin*, 976 F.2d 98, 99 (2d Cir. 1992) (per curiam) (stating that *O'Lone* and *Turner* did not "place[] in any reasonable doubt" the proposition that "prison officials must provide a prisoner a diet that is consistent with his religious scruples").

<sup>50</sup> See President William J. Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 WEEKLY COMP. PRES. DOC. 2377, 2377 (Nov. 16, 1993) ("More than 50 cases have been decided against individuals making religious claims against Government action since . . . [the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 877 (1990)] was handed down. This act will help to reverse that trend by honoring the principle that our laws and institutions should not impede or hinder but rather should protect and preserve fundamental religious liberties.").

<sup>51</sup> Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb–§ 2000bb-4).

<sup>52</sup> 494 U.S. 872 (1990).

<sup>53</sup> *Id.* at 874.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 875.

<sup>56</sup> *Id.* at 875–76.

<sup>57</sup> *Id.* at 876.

<sup>58</sup> *Id.*

On certiorari again, the U.S. Supreme Court held that if “prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”<sup>59</sup> Thus, because the respondent’s use of peyote was prohibited by statute and that prohibition was constitutional, Oregon could deny the respondents unemployment compensation.<sup>60</sup>

The decision in *Smith* “galvanized a large number of diverse religious groups as well as civil rights organizations.”<sup>61</sup> Based on the Court’s broad holding, “[a] wide variety of religious and civil liberties groups reacted with shock and anger [,] . . . considering it a fundamental assault on their constitutional right to freedom of religion.”<sup>62</sup> Their fears and concerns included courts finding that “*Smith* did not permit the granting of exceptions for religious beliefs for a variety of laws,” and that courts would interpret the decision “as requiring a finding against free exercise claims.”<sup>63</sup>

Initially, in response to *Smith*, professors and religious and public interest groups petitioned the Supreme Court for a rehearing, but failed.<sup>64</sup> The next logical step was a legislative initiative, and “[i]n July of 1990, Representative Stephen Solarz introduced this bill, the RFRA, in the House.”<sup>65</sup> RFRA’s purpose was simple—“to reinstate the protection given to religious freedom prior to *Smith*.”<sup>66</sup> Additionally, the Act “prevent[ed] governmental restriction of the free exercise of religion, unless a compelling interest can be shown. This strict scrutiny test [wa]s applied to federal, state and local government actions. A person whose religious freedom [wa]s restricted illegally c[ould] bring a claim under RFRA.”<sup>67</sup> On November 16, 1993, President Clinton signed into law RFRA, restoring the right to religious freedom that the Supreme Court essentially eliminated in *Smith*.<sup>68</sup>

Congress stated within RFRA that the Act’s purpose was to prevent laws that substantially burdened a person’s free exercise of religion.<sup>69</sup>

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<sup>59</sup> *Id.* at 878.

<sup>60</sup> *Id.* at 890.

<sup>61</sup> Robert F. Drinan et al., *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIGION 531, 531 (1993).

<sup>62</sup> *Id.* at 532.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 533.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 541.

<sup>69</sup> 42 U.S.C. § 2000bb(b) (“The purposes of this chapter are—(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a

Through its enactment of RFRA, Congress reasserted the proposition that one's right to express a religion of one's choosing is a fundamental right.<sup>70</sup> The Act stated that:

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.<sup>71</sup>

After Congress enacted RFRA, for the first time, courts had guidance beyond that of the inconsistently applied *Turner* test for addressing claims alleging violation of one's freedom of expression of religion.

RFRA was intended to protect not just free citizens, but also prisoners. Senator Hatch, one of the original sponsors of RFRA, stated that “[w]e want religion in the prisons. It is one of the best rehabilitative influences we can have. Just because they are prisoners does not mean all of their rights should go down the drain.”<sup>72</sup> In applying RFRA to prisoners, the Act required courts to use a strict scrutiny test to determine whether a prison regulation or action violated a prisoner's freedom to express a religion of his choosing.<sup>73</sup> Specifically, the Act required the government or prison to demonstrate that the burden on the prisoner's fundamental right was in

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claim or defense to persons whose religious exercise is substantially burdened by government.”); *see also* William J. Clinton, *supra* note 50, at 2377 (“We all have a shared desire here to protect perhaps the most precious of all American liberties, religious freedom.”).

<sup>70</sup> 42 U.S.C. § 2000bb(a)(1) (“The framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution . . .”).

<sup>71</sup> *Id.* § 2000bb-1.

<sup>72</sup> 139 CONG. REC. S14,367 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch).

<sup>73</sup> 42 U.S.C. § 2000bb-1(b) (“Government may *substantially burden* a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of *a compelling governmental interest*; and (2) is the *least restrictive means* of furthering that compelling governmental interest.” (emphasis added)). When deciding whether a fundamental right has been violated, courts use a strict scrutiny test. Under a strict scrutiny analysis, “the government bears the burden of demonstrating that its interest is ‘compelling[.]’ . . . The law must be narrowly tailored so that the fit between the means and ends is extremely precise; in one common formulation of this tailoring, the government must use the ‘least restrictive means’ of achieving the law’s purpose.” Daniel J. Solove, Note, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 461 (1996).

furtherance of a “compelling” interest, and burdened that right in the “least restrictive means.”<sup>74</sup>

Just four years after Congress enacted the Act, however, in *City of Boerne v. Flores*, the Supreme Court struck down RFRA as unconstitutional as applied to state governments and state agencies.<sup>75</sup> In a 6-3 decision, the Court held that Congress exceeded its enforcement power under Section 5 of the Fourteenth Amendment,<sup>76</sup> and held that the Act was unconstitutional. The Supreme Court found that the stringent RFRA test was “a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”<sup>77</sup> Federal RFRA is constitutional,<sup>78</sup> however, and thus provides federal prisoners an effective means of protecting their religious freedoms.<sup>79</sup>

### b. The Religious Land Use and Institutionalized Persons Act

In response to the Supreme Court’s decision in *City of Boerne*,<sup>80</sup> Congress unanimously passed the Religious Land Use and Institutionalized Persons Act in 2000 (“RLUIPA”).<sup>81</sup> Specifically addressing prisoners, RLUIPA states that

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of

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<sup>74</sup> 42 U.S.C. § 2000bb-1(b).

<sup>75</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (Stevens, J. dissenting) (“RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.”).

<sup>76</sup> U.S. CONST. amend. XIV (“The Congress shall have power to enforce [the Amendment] by appropriate legislation . . .”).

<sup>77</sup> *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

<sup>78</sup> See generally *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006) (using RFRA to analyze and determine whether prohibiting the use of an otherwise illegal substance in a religious ceremony was improper).

<sup>79</sup> It is noteworthy that as of 2015, twenty-one states have enacted their own versions of RFRA since *City of Boerne*. See *State Religious Free Restoration Acts*, NAT'L. CONF. STATE LEGISLATURES (Oct. 15, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>. Because of the variances among state RFRAAs, however, for the purpose of providing consistent analysis of potential claims, this Note focuses solely on RLUIPA and the Federal RFRA and their application to state and federal prisoners.

<sup>80</sup> *City of Boerne*, 521 U.S. 507.

<sup>81</sup> Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, 42 U.S.C. §§ 2000cc–2000cc-5 (2012).

furthering that compelling governmental interest.<sup>82</sup>

Similar to RFRA, RLUIPA provides courts with a strict scrutiny test to use when determining whether a prisoner's fundamental rights were violated.<sup>83</sup>

Moreover, under RLUIPA, once a prisoner sets forth a prima facie case, the burden of persuasion shifts to the government.<sup>84</sup> Although RFRA was found to be unconstitutional and inapplicable specifically to prisoners at state and local penitentiaries, Congress enacted RLUIPA through its commerce and spending powers, not through Section 5 of the Fourteenth Amendment, and limited its application to prisons receiving federal funding.<sup>85</sup> RLUIPA is a prime example of Congress' "power of the purse,"<sup>86</sup> it holds federally funded state and local prisons accountable for their actions and regulations by applying a strict scrutiny analysis to prisoners' claims.<sup>87</sup> This leaves state prisons the option of refusing all federal funding in order to avoid RLUIPA, an option that prisons, in the face of growing financial concerns,<sup>88</sup> are unlikely to choose.

The Supreme Court has upheld RLUIPA's constitutionality in the prison context. In *Cutter v. Wilkinson*,<sup>89</sup> the Court held that the Establishment Clause does not preempt RLUIPA because the law "alleviates exceptional government-created burdens on private religious exercise."<sup>90</sup> With prison safety often being a governmental concern in religious exercise cases, however, the Court did not read RLUIPA "to

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<sup>82</sup> 42 U.S.C. § 2000cc-1.

<sup>83</sup> The language that demonstrates that Congress triggered a strict scrutiny analysis for these issues is "substantial burden," "compelling governmental interest," and "least restrictive means," as is the case with RFRA.

<sup>84</sup> See RLUIPA, § 2000cc-2(b) ("If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.").

<sup>85</sup> 42 U.S.C. § 2000cc-1(b) ("This section applies in any case in which—(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.").

<sup>86</sup> *Power of the Purse*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/Institution/Origins-Development/Power-of-the-Purse/> (last visited Feb. 6, 2016) ("Congress—and in particular, the House of Representatives—is invested with the 'power of the purse,' the ability to tax and spend public money for national government.").

<sup>87</sup> See 42 U.S.C. § 2000cc-1 (providing that both compelling government interest and least restrictive means tests are applied when evaluating prisoners' religious rights).

<sup>88</sup> SUZANNE M. KIRCHOFF, CONG. RESEARCH SERV., R41177, ECONOMIC IMPACTS OF PRISON GROWTH 9 (2010) ("Corrections spending, as a share of state budgets, rose faster than health care, education, and natural resources spending from 1986 to 2001. The average cost of housing a prisoner for a year was about \$24,000 in 2005, though rates vary from state to state." (footnote omitted)).

<sup>89</sup> 544 U.S. 709 (2005).

<sup>90</sup> *Id.* at 720.

elevate accommodation of religious observances over an institution's need to maintain order and safety"<sup>91</sup>—RLUIPA still requires a weighing of the regulation and reasons for that regulation with prisoners' rights. Lastly, the Court found that "RLUIPA does not differentiate among bona fide faiths,"<sup>92</sup> a concern which prison officials believe might incite instability within prisons if prisoners think certain other prisoners are receiving preferential treatment based on their religious beliefs.

### i. Filing a Claim Under RLUIPA

For the purposes of this Note, this Part will examine how a state or local prisoner may allege a RLUIPA violation. Additionally, it is important to note that federal prisoners may file a similar allegation under RFRA, as both statutes have similar elements. Thus, at the outset of bringing a RLUIPA or RFRA challenge it is necessary to determine which statute controls—if the prisoner is within a federal prison, RFRA controls; if the prisoner is within a state or local prison that receives federal funding, then RLUIPA controls.<sup>93</sup>

Congress set out a clear test for determining whether a prison's actions or regulations violate a prisoner's right to religious freedom. First, RLUIPA requires a prisoner to plead adequately three elements to make out a *prima facie* case:

- (1) that prison officials have imposed a "substantial burden" on his [or her] "religious exercise" . . . ;
- (2) that the "substantial burden" was either (a) imposed in a program or activity that receives federal funds or (b) affects interstate commerce . . . ; and
- (3) that he [or she] has exhausted any available administrative remedies.<sup>94</sup>

Once a plaintiff has set forth a *prima facie* case, the burden then shifts to the defendant, whose actions or regulations are analyzed under strict scrutiny.<sup>95</sup> As with RFRA, under strict scrutiny, defendants must prove that the burden they placed upon the prisoner was prompted by a "compelling governmental interest" and that the substantial burden is the "least

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<sup>91</sup> *Id.* at 722.

<sup>92</sup> *Id.* at 723.

<sup>93</sup> See *infra* Part IV.B.1 (discussing RLUIPA's jurisdictional requirement).

<sup>94</sup> Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 514 (2005).

<sup>95</sup> 42 U.S.C. § 2000cc-2(b) ("If a plaintiff produces *prima facie* evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim . . .").

restrictive means” of achieving that governmental interest.<sup>96</sup> RLUIPA does not specifically define these terms but “directs courts to apply established precedent concerning what constitutes a compelling government interest and the least restrictive means of furthering that interest.”<sup>97</sup>

Prisons most frequently include maintaining institutional security and safety as compelling government interests.<sup>98</sup> The Supreme Court, in *Sherbert v. Verner*, however, stated that “[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation” and constitute a compelling interest.<sup>99</sup> The Court in *Sherbert* also explained that the “least restrictive means” prong of the strict scrutiny analysis requires the defendant to prove that “no alternative forms of regulation would combat” the defendant’s compelling interests without substantially burdening the prisoner’s rights.<sup>100</sup> Thus, this Note argues that if the government cannot establish that its policy, which substantially burdens a prisoner’s religious exercise, furthers a compelling interest *and* is the least restrictive means of furthering that interest, then the prisoner will succeed in his RLUIPA allegation.

## ii. Recent RLUIPA Case Law

Prisoners in the hunger-striking context infrequently have utilized RLUIPA as a way of preventing prisons from force-feeding them.<sup>101</sup> Perhaps this is because they are unaware of this legal authority, or perhaps it is because they do not realize that this avenue is available until after a court issues an injunction for them to be force-fed. Recently, however, more RLUIPA cases have surfaced, further revealing the statute’s implications. The following Supreme Court and Second Circuit Court of Appeals cases show how courts currently evaluate prisoners’ RLUIPA claims.

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<sup>96</sup> *Id.* § 2000cc-1(a).

<sup>97</sup> Gaubatz, *supra* note 94, at 540.

<sup>98</sup> See, e.g., *Pell v. Procunier*, 417 U.S. 817, 823 (1974) (“[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.”); see also *infra* Part IV.B.3 (discussing in depth the various “compelling interests” that the government is likely to assert in the hunger-strike context).

<sup>99</sup> 374 U.S. 398, 406 (1963). *Sherbert* was a case about a Seventh-Day Adventist who was fired and then denied unemployment benefits for failing to work Saturdays. Although that is a different context than religiously based hunger-striking inmates, *Sherbert*’s compelling interest definition nevertheless applies to religious infringement claims.

<sup>100</sup> *Id.* at 407.

<sup>101</sup> Typical RLUIPA claims include: challenging prison grooming and clothing policies, restrictions on group worship, and limits on access to religious literature. See Gaubatz, *supra* note 94, at 559–68.

### A. *Holt v. Hobbs*<sup>102</sup>

In the most recent RLUIPA case to reach the U.S. Supreme Court, the prisoner prevailed. Petitioner Gregory Holt, also known as Abdul Maalik, is a prisoner in an Arkansas penitentiary.<sup>103</sup> As a Muslim, Holt wished to grow his beard in accord with the Muslim faith.<sup>104</sup> The prison, however, had a policy “which prohibit[ed] inmates from growing beards unless they ha[d] a particular dermatological condition.”<sup>105</sup> Although the Muslim religion requires men not to trim their beards at all, Holt “proposed a ‘compromise’ under which he would grow only a 1/2-inch beard.”<sup>106</sup>

Upon analyzing Holt’s RLUIPA claim, the Court found that “the religious exercise at issue [wa]s the growing of a beard, which petitioner believe[d] [wa]s a dictate of his religious faith.”<sup>107</sup> The Court also found that the policy substantially burdened Holt’s exercise of religion because the “grooming policy require[d] petitioner to shave his beard and thus to engage in conduct that seriously violates [his] religious beliefs . . . [or] face serious disciplinary action.”<sup>108</sup>

The burden then shifted to the government to show that the policy of prohibiting Holt from growing a beard was the least restrictive means of furthering a compelling governmental interest. The Department of Corrections (DOC) argued that its grooming policy was in place to further its compelling interest in maintaining prison safety and security.<sup>109</sup> The DOC further argued that this regulation was the least restrictive means of maintaining prison safety by “prevent[ing] prisoners from hiding contraband . . . [and] from disguising their identities.”<sup>110</sup>

The Court rejected both arguments for two reasons: first, because the DOC failed to show that it could not further its interest in prison safety by searching the prisoner’s beard;<sup>111</sup> and second, because the Court believed that the DOC could solve the problem of disguised identities “by requiring that all inmates be photographed without beards when first admitted to the facility and, if necessary, periodically thereafter.”<sup>112</sup> Ultimately, the Court found in favor of Holt that the policy prohibiting facial hair constituted a

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<sup>102</sup> 135 S. Ct. 853 (2015).

<sup>103</sup> *Id.* at 859.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*; see also *id.* at 860 (“[T]he Department’s grooming policy . . . provides that [n]o inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip.”).

<sup>106</sup> *Id.* at 861.

<sup>107</sup> *Id.* at 862.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 863.

<sup>110</sup> *Id.* at 863–64.

<sup>111</sup> *Id.* at 864.

<sup>112</sup> *Id.* at 865.

RLUIPA violation.<sup>113</sup> Therefore, because the prisoner was able to demonstrate that the prison regulation substantially burdened his religious exercise, he was able to plead a RLUIPA violation. It is important to note that although not required of the prisoner, he did offer a compromise. This compromise helped establish that there were other less restrictive means to further the prison's interest in maintaining the health and safety of its prisoners.

### B. *Holland v. Goord*<sup>114</sup>

Darryl Holland is an inmate who converted to Islam while incarcerated in a New York correctional facility.<sup>115</sup> After hearing that Holland was using drugs, a prison captain ordered an officer to collect a urine sample from the prisoner.<sup>116</sup> At the time, there was a policy that "required that inmates provide a urine sample within three hours of being ordered to do so, without exception."<sup>117</sup> Holland, however, stated that he could not provide a sample because he was observing a religious fast in accordance with Ramadan.<sup>118</sup> In an effort to comply with the urinalysis request, "Holland offered to drink water and provide a sample after sunset, when his fast had ended."<sup>119</sup> The prison declined Holland's offer and, after he failed to comply with the order, charged him with "violating the urinalysis guidelines and defying a direct order. Holland was then placed in keeplock pending a disciplinary hearing on the matter."<sup>120</sup> At the hearing, he was sentenced to ninety days in keeplock and ninety days of lost privileges.<sup>121</sup> Holland then was released from keeplock after seventy-seven days of being "confined to his cell for 23 hours each day, . . . barred from attending Islamic services, including the Eid ul-Fitr feast celebrating the end of Ramadan, allegedly received 'punishment trays' containing meager portions, and lost his seniority and higher wage job at [the prison]."<sup>122</sup>

In response to the prison's actions, Holland filed several complaints including a RLUIPA claim "that the order to provide a urine sample and his resultant confinement in keeplock violated his right to free exercise of religion."<sup>123</sup> He also sought an order for a change to the Department of Corrections urinalysis directive.<sup>124</sup> It is important to note that "after seven

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<sup>113</sup> *Id.* at 867.

<sup>114</sup> 758 F.3d 215 (2d Cir. 2014).

<sup>115</sup> *Id.* at 218.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 218–19.

<sup>119</sup> *Id.* at 219.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 220.

years of litigation . . . DOCS added a ‘Note’ to Directive 4937,” advising that

[i]nmates participating in an approved religious fast should not be required to provide a urine sample during fasting periods since consumption of water may be necessary. Sample requests should be scheduled during other periods of the day and normal urinalysis testing procedures should then apply, including offering water to those inmates unable to provide a urine sample.<sup>125</sup>

The court granted the defendants’ motion to dismiss because Holland sought “monetary damages against state officers in either their official or individual capacities,” which is not authorized by RLUIPA.<sup>126</sup> Also, the court noted that Holland’s claim for injunctive relief was moot because the DOC added a note which changed the policy to allow for religious exceptions to the urinalysis protocol.<sup>127</sup>

Although the court ruled in favor of the defendants, they did express that “[u]nder the [RLUIPA] analysis, Holland would likely prevail on the substance of his RLUIPA claim.”<sup>128</sup> It is easy to see why the court stated this; as discussed below, had the defendants not made this change to the policy, Holland likely would have been awarded injunctive relief in response to his RLUIPA claim.<sup>129</sup>

#### IV. BEST METHOD OF LEGAL REDRESS: ALLEGING A RLUIPA VIOLATION

##### A. *RLUIPA’s Protection of Prisoners’ Rights Against Being Force-Fed*

RLUIPA affords state and local prisoners broader protection over their religious rights than the First Amendment Free Exercise Clause. For this reason, religiously based hunger-striking inmates should file a RLUIPA violation in order to prevent the prison from force-feeding them.

Procedurally, RLUIPA “increase[s] the level of protection for prisoner religious exercise beyond that of the *Turner/O’Lone* rational basis standard” by requiring courts to analyze claims under strict scrutiny.<sup>130</sup> When a prisoner alleges a RLUIPA violation, courts apply a strict scrutiny analysis to determine whether the prisoner’s religious rights were substantially burdened and whether the prison’s policy was the least restrictive means of furthering a compelling interest.<sup>131</sup> Here, the

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 224.

<sup>127</sup> *Id.* at 223–24.

<sup>128</sup> *Id.*

<sup>129</sup> See *infra* Part V.C.

<sup>130</sup> Gaubatz, *supra* note 94, at 553.

<sup>131</sup> *Id.*

government must establish that it had a *compelling* interest in effectuating its policy and that the policy itself was the *least restrictive* means of furthering that interest.

By contrast, when a prisoner alleges that a prison policy violates his First Amendment right to free exercise of his religion, courts apply the *Turner/O'Lone* test, which merely requires the court to conduct a rational basis test. For the government to successfully defeat the allegations, it merely must demonstrate that its policy—infringing upon the prisoner's right to free exercise of religion—is *rationally* related to a *legitimate* government interest. Under this standard, the government bears a much lower burden and can easily dispense with prisoners' religious rights.

Moreover, Congress' purpose behind RLUIPA was to provide a way for prisoners to obtain justice when they encounter hindrances to their religious practices.<sup>132</sup> The enactment of RLUIPA effectuated Congress' intent to give legal redress to prisoners whose religious rights were substantially burdened. As such, hunger-striking prisoners should allege a RLUIPA violation in order to prevent prisons from force-feeding them.

### B. How to Draft a Successful RLUIPA Claim

When drafting a RLUIPA violation in his complaint, the prisoner carries the initial burden of proof to plead that the government's action substantially burdens the exercise of his religious beliefs.<sup>133</sup> Once that is adequately pled, the burden shifts to the government to show that its action is the least restrictive means of furthering a compelling government interest.<sup>134</sup>

#### 1. Jurisdictional Requirement

RLUIPA specifically provides protections when "(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with the Indian tribes."<sup>135</sup> Thus, a state or local

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<sup>132</sup> See Taylor G. Stout, Note, *The Costs of Religious Accommodation in Prisons*, 96 VA. L. REV. 1201, 1204 n.7 (2010) (quoting a joint statement of Senators Hatch and Kennedy on the purpose of RLUIPA stating that “[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.”) (citing 146 CONG. REC. 16,698–99 (2000)).

<sup>133</sup> 42 U.S.C. § 2000cc-2(b) (“If a plaintiff produces *prima facie* evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.”).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* § 2000cc-1(b).

prisoner facing being force-fed first must show that RLUIPA applies to the prison policy or action challenged. If the state or local prison at which the prisoner is confined accepts federal funding, “RLUIPA will apply to all of its programs.”<sup>136</sup> Ultimately, because “[v]irtually every prison and jail system accepts some federal money, . . . [a prisoner] can and should plead in good faith in [his] complaint that the court has Spending Clause jurisdiction.”<sup>137</sup>

Although this Note specifically describes how to file a RLUIPA claim, federal prisoners may follow the same template by filing a similar complaint under RFRA, which applies to federal prisons. Because both RLUIPA and RFRA “prohibit laws and policies that substantially burden the exercise of [prisoners’] religion, unless the restrictions further a compelling governmental interest using the least restrictive means available,”<sup>138</sup> they are elementally similar. Thus, federal prisoners who are engaged in a religiously based hunger strike should use the RLUIPA template to file a complaint alleging a RFRA violation in order to prevent a prison from force-feeding them.

## 2. Substantial Burden on Exercise of Religion

Once a prisoner establishes that RLUIPA applies, he must plead that the prison’s policy substantially burdens his exercise of religion. Thus, the prisoner must allege two things in his complaint: (1) that the policy creates a substantial burden; and (2) that the policy burdens his sincerely held religious beliefs.

First, demonstrating that the prison’s action or regulation has substantially burdened a prisoner’s exercise of religion is not straightforward. This is in part because RLUIPA does not provide a definition for “substantial burden.”<sup>139</sup> Courts, however, have set forth various standards and definitions for what constitutes a substantial burden on the exercise of religion. In *Adkins v. Kaspar*,<sup>140</sup> the Fifth Circuit said that:

[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a

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<sup>136</sup> COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER’S MANUAL ch. 27 (8th ed. 2009).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*; see also 42 U.S.C. § 2000cc-1; 42 U.S.C. § 2000bb-1.

<sup>139</sup> See 42 U.S.C. § 2000cc-5 (listing defined terms, from which “substantial burden” is absent).

<sup>140</sup> 393 F.3d 559 (5th Cir. 2004).

burden upon religion exists.<sup>141</sup>

In that case, a prisoner filed a complaint stating that he had not been allowed to observe rest and worship each Saturday for the Sabbath and for other holy days.<sup>142</sup>

Relying on the definition of “substantial burden” announced by the Seventh Circuit,<sup>143</sup> the court found that the requirement of an outside volunteer to be present in order for the prisoner and other members of the Yahweh Evangelical Assembly to congregate on holy days was “a uniform requirement for all religious assemblies at [the prison] with the exception of Muslims” and “[did] not place a substantial burden on [the prisoner’s] religious exercise.”<sup>144</sup>

Additionally, the Ninth Circuit defined a substantial burden on religious exercise by using the meaning provided by *Black’s Law Dictionary* and *Merriam-Webster’s Collegiate Dictionary* as an action that “must impose a significantly great restriction or onus upon such exercise.”<sup>145</sup> The Eleventh Circuit, declining to use the Seventh Circuit’s definition, held that

a “substantial burden” must place more than an inconvenience on religious exercise; a “substantial burden” is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.<sup>146</sup>

Moreover, even the Supreme Court has had conflicting definitions of what constitutes a “substantial burden” on religious freedom.<sup>147</sup>

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<sup>141</sup> *Id.* at 569 (quoting Thomas v. Review Bd. of Indep. Emp’t Sec. Div., 450 U.S. 707, 717–18 (1981)).

<sup>142</sup> *Id.* at 562.

<sup>143</sup> See *Mack v. O’Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (holding that “a substantial burden on the free exercise of religion, within the meaning of the Act, is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person’s religious beliefs, or compels conduct or expression that is contrary to those beliefs”).

<sup>144</sup> *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004).

<sup>145</sup> *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004).

<sup>146</sup> *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

<sup>147</sup> See *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450 (1988) (finding that “indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment”); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141 (1987) (quoting *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 717–18 (1981)) (“Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is

Although the definition has varied from circuit to circuit and even within the Supreme Court itself, a common theme prevails. Courts generally accept that pressuring or coercing a prisoner to change his or her behavior or deviate from his or her religious beliefs constitutes a substantial burden.<sup>148</sup> Put simply, “the appropriate standard for determining whether a burden is ‘substantial’ is to ask whether government action either (1) puts pressure on individuals to modify their religious behavior or (2) prevents them from engaging in religious conduct, in a way that is greater than a mere inconvenience.”<sup>149</sup> Thus, for a prisoner to successfully plead a *prima facie* case and shift the burden of proof to the defendant in a RLUIPA claim, he or she must plead coercion or pressure to deviate from his sincerely held religious beliefs to satisfy the “substantial burden” element.

Determining what constitutes religious exercise is simple, however, as Congress took care to define it within RLUIPA.<sup>150</sup> As the definition of “religious exercise” is fairly broad, the prisoner’s burden of showing that he sincerely holds a religious belief is a low bar. The Act states that religious exercise “includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>151</sup> The Supreme Court has expanded this definition by noting that “the ‘exercise of religion’ often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.”<sup>152</sup> It is important to note that to be considered religious exercise, the practices do not have to be central to the religion’s tenets.<sup>153</sup> However, “[b]ecause

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nonetheless substantial.”).

<sup>148</sup> See, e.g., *Smith v. Ozmint*, 578 F.3d 246, 251 (4th Cir. 2009) (finding that a prison grooming policy that required an inmate to have close-cropped hair and authorized the forcible shaving of the prisoner’s head substantially burdened his religious exercise because it compelled him to modify his behavior against his religious beliefs); *Shakur v. Selsky*, 391 F.3d 106, 120 (2d Cir. 2004) (holding that preventing an inmate from attending Eid al-ul Fitr, an Islamic feast, substantially burdened his exercise of religion by forcing him to change his behavior in opposition to his religious beliefs); *Johns v. Lemmon*, 980 F. Supp. 2d 1055, 1059 (N.D. Ind. 2013) (holding that requiring a prisoner to pay for Sabbath food in order to practice his faith is a substantial burden on his religious exercise); *Willis v. Comm'r, Ind. Dep't of Corr.*, 753 F. Supp. 2d 768, 777 (S.D. Ind. 2010) (finding that the denial of Kosher food substantially burdened the prisoner’s rights); *Charles v. Verhagen*, 220 F. Supp. 2d 937, 946 (W.D. Wis. 2002) (stating that a Muslim prisoner’s inability to celebrate both the completion of Ramadan and the Hajj with a communal meal each year substantially burdened his exercise of religion).

<sup>149</sup> Gaubatz, *supra* note 94, at 517.

<sup>150</sup> 42 U.S.C. § 2000cc-5(7).

<sup>151</sup> 42 U.S.C. § 2000cc-5(7)(A).

<sup>152</sup> Emp’t Div. v. Smith, 494 U.S. 872, 877 (1990).

<sup>153</sup> See RLUIPA, § 2000cc-5(7) (stating that religious exercise may be “any exercise of religion, whether or not compelled by, or central to, a system of religious belief”) (emphasis added). This is in

RLUIPA is a guarantor of sincerely held religious beliefs, it may not be invoked simply to protect any way of life, however virtuous and admirable, . . . if it is based on purely secular considerations.”<sup>154</sup> Ultimately, in order to present a *prima facie* case for a RLUIPA violation, a religiously based hunger-striking prisoner should demonstrate in their complaint that their hunger strike or fast stems from a sincerely held religious belief, and that the prison’s attempt to force-feed him will substantially burden that belief by making him choose between continuing his hunger strike and being force-fed, or sacrificing his religious ideals by breaking fast or eating non-accommodating meals in order to avoid being force-fed.

### 3. *In Furtherance of a Compelling Governmental Interest*

Once a prisoner demonstrates that the prison’s action or regulation created a substantial burden on his exercise of religion, the burden then shifts to the government to show that the decision or policy leading to the substantial burden was in furtherance of a compelling governmental interest.<sup>155</sup> Courts approach this inquiry with deference to prison officials by acknowledging that prison administrators know best how to efficiently and effectively run prisons.<sup>156</sup> Although RLUIPA does provide prisoners broader protections over their religious rights than the First Amendment’s Free Exercise Clause,<sup>157</sup> its purpose is not to reduce prison safety.<sup>158</sup> Thus, even though the courts review RLUIPA claims with deference to prison officials, defendant-governments may not simply state that they have a compelling interest when restricting the prisoner’s right to religious freedom. Rather, they must plead a compelling governmental interest with sufficient specificity to the situation.<sup>159</sup>

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contrast to a RFRA analysis which requires the religious exercise to be a central tenet of a person’s religious beliefs. *See Mack v. O’Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (holding that “a substantial burden on the free exercise of religion . . . is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression *that manifests a central tenet of a person’s religious beliefs*, or compels conduct or expression that is contrary to those beliefs” (emphasis added)).

<sup>154</sup> *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008). In *Koger*, the Court explained that if a prisoner’s “desire for a non-meat diet was rooted solely in concerns for his bodily health, it would not be protected by RLUIPA.” *Id.*

<sup>155</sup> 42 U.S.C. § 2000cc-2(b); 42 U.S.C. § 2000cc-1(a).

<sup>156</sup> *See Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (discussing how Congress intended for courts to “apply the Act’s standard with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures”).

<sup>157</sup> *See supra* Part IV.A (discussing RLUIPA’s broad protections).

<sup>158</sup> *See Cutter*, 544 U.S. at 722 (“RLUIPA [is not to be read] to elevate accommodation of religious observances over an institution’s need to maintain order and safety.”). *But see Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006) (finding that “a court should not rubber stamp or mechanically accept the judgments of prison administrators . . . [but must take] into account any institutional need to maintain good order, security, and discipline or to control costs”).

<sup>159</sup> *See Washington v. Klem*, 497 F.3d 272, 283 (3d Cir. 2007) (“Even in light of the substantial

Not only must the government enumerate a compelling interest, they must also show that the specific policy or action furthers that compelling governmental interest.<sup>160</sup> For example, in response to a prisoner's claim that he has not received Kosher meals, a prison cannot simply state that its compelling interest is keeping down prison administrative costs. Rather, the government specifically must show how refusing to provide Kosher meals and thereby forcing the prisoner to choose to eat non-accommodating meals or be force-fed nutrients furthered its financial interests. As discussed below, however, financial and economic concerns, on their own, typically do not constitute compelling governmental interests.

The most common compelling interests the government pleads are: the preservation of life,<sup>161</sup> maintenance of prison safety and administration,<sup>162</sup> and implementation of cost-effective practices.<sup>163</sup>

#### a. Preservation of Life

In response to a prisoner's allegation that a prison policy violates RLUIPA, the most likely compelling interest that the state will allege is its interest in preserving human life. Courts have found the government's duty to protect and care for its inmates, its interest in preventing suicide, and its interest in enhancing the sanctity of life as compelling governmental interests.<sup>164</sup> The rationale behind the state's interest in the preservation of life is "that the state has an obligation to protect the [prisoners'] welfare."<sup>165</sup> Additionally, prison officials believe that if a prison allows a prisoner to die during a hunger strike, riots within the prison will ensue. Although the "state's interest in the preservation of life has been characterized as compelling by most courts,"<sup>166</sup> other courts have often found that prisoners have the right to refuse to eat food forbidden by their religious beliefs.

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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.").

<sup>160</sup> See *id.* ("Rather, the particular policy must further this interest. . . . A conclusory statement is not enough.").

<sup>161</sup> See Silver, *supra* note 5, at 642.

<sup>162</sup> See *Cutter*, 544 U.S. at 725 n.13 (stating that "prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area").

<sup>163</sup> See *Willis v. Comm'r, Ind. Dep't of Corr.*, 753 F. Supp. 2d 768, 778 ("RLUIPA specifically contemplates that the law 'may require a government to incur expenses in its own operations to avoid imposing a substantial burden.' Because the statute expressly anticipates increased costs, the fact that such diets may be costlier than non-religious diets is not alone a compelling governmental interest under the statute." (citation omitted) (citing 42 U.S.C. § 2000cc-3(c))).

<sup>164</sup> See Joel K. Greenberg, Note, *Hunger Striking Prisoners: The Constitutionality of Force-Feeding*, 51 FORDHAM L. REV. 747, 752 n.42 (1983).

<sup>165</sup> Steven C. Sunshine, Note, *Should a Hunger-Striking Prisoner Be Allowed to Die?*, 25 B.C. L. REV. 423, 441 (1984).

<sup>166</sup> *Id.*

The government may argue that “[b]ecause unnecessary death arguably cheapens the value of life, perhaps [it] should be permitted to force-feed a hunger striker.”<sup>167</sup> In the hunger-striking context, however, this argument “does not consider whether the sanctity of life could be enhanced by allowing a hunger striker to die.”<sup>168</sup> This Note does not seek to resolve or address the complex ethical question of the “right to die” that arises not only here, but also in various other contexts such as with terminally ill patients. Rather, this Note focuses on addressing the myriad alternatives the prison has which are less restrictive means to ending hunger strikes than force-feeding an inmate.

### b. Institutional Security

The government may also argue that its policy to force-feed a hunger-striking prisoner furthers its interest in keeping the prison secure by preventing riots and not allowing other prisoners to think that the prison will give in to a prisoner’s demands because the prisoner refuses food.<sup>169</sup> The Supreme Court determined this interest to be the most important penal interest.<sup>170</sup> Moreover, the Court identified the preservation of the institution’s “internal order and discipline”<sup>171</sup> as an institutional interest. This interest “recognizes the need for prison officials to maintain control within prison walls.”<sup>172</sup>

Although riots stemming from prisoners’ perceptions that the prison shows favoritism to religion might be a valid governmental interest, it is unlikely that the hunger-striking prisoners discussed in this Note<sup>173</sup> would encourage other prisoners to also hunger strike. These prisoners do not seek broad changes, but rather hunger strike in order to comply with their sincerely held religious beliefs. Thus, these penological interests are not necessarily compelling in this particular context.

### c. Economic Interests

Courts have said that cost concerns alone typically do not rise to the level of being considered a compelling government interest.<sup>174</sup> The government, however, can plead cost concerns as compelling interests if

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<sup>167</sup> Greenberg, *supra* note 164, at 760 (footnote omitted).

<sup>168</sup> *Id.*

<sup>169</sup> See *id.* at 764 (discussing how hunger strikers may encourage other prisoners to hunger strike, which would burden the administration of the prison).

<sup>170</sup> See *Bell v. Wolfish*, 441 U.S. 520, 546–47 (1979) (discussing the importance of prison officials being able to maintain prison order and security).

<sup>171</sup> *Procurier v. Martinez*, 416 U.S. 396, 412 (1974).

<sup>172</sup> Sunshine, *supra* note 165, at 443.

<sup>173</sup> This Note is limited in scope to prisoners who hunger strike for lack of religiously accommodating meals and those who are perceived to be hunger-striking but who are merely participating in a religious fast.

<sup>174</sup> *Willis v. Comm'r, Ind. Dep't of Corr.*, 753 F. Supp. 2d 768, 778 (S.D. Ind. 2010).

they tie the concern to safety risks.<sup>175</sup> In the hunger-striking context specifically, the government might allege that providing specific diets for every individual religion would be costly for the prison in terms of monetary costs for the food itself and for staffing and administration necessary to make these changes. The prison might tie these cost concerns into safety risks because some non-religious inmates or inmates of other religions might view the prison accommodating certain religions as showing favoritism, which may result in riots.

#### 4. Least Restrictive Means

Even if the government succeeds in demonstrating that its policy furthers a compelling government interest, still it is unlikely to establish that the policy of force-feeding the hunger-striking prisoner is the least restrictive means of furthering that compelling governmental interest.<sup>176</sup> Moreover, 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.”<sup>177</sup> It is important to note that “[u]nder RLUIPA, it is not the plaintiff’s burden to show that reasonable alternatives do exist—it is [the defendant’s] burden to show that reasonable alternatives do not exist.”<sup>178</sup> Although it is not the prisoner’s burden to show reasonable alternatives exist, it would be persuasive to present arguments in the RLUIPA motion as to why the prison’s force-feeding policy is not the least restrictive means of furthering its governmental interest.

In *Willis v. Commissioner, Indiana Department of Corrections*,<sup>179</sup> for example, the plaintiff-prisoners claimed that the Department of Corrections (DOC) violated their RLUIPA rights by denying them Kosher meals.<sup>180</sup> After the prisoners demonstrated that the prison’s refusal to provide them with a Kosher diet was a substantial burden on their exercise of religion,<sup>181</sup> the DOC argued that the “cost of kosher diets—when added to the Hallal diets—was unacceptably high, thus creating a compelling governmental interest in reducing ‘spiraling costs.’”<sup>182</sup> The court emphasized that “[w]ithout offering any additional reasons for terminating kosher meals,

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<sup>175</sup> See, e.g., Baranowski v. Hart, 486 F.3d 112, 125 (5th Cir. 2007) (finding cost to be a compelling interest after the government showed that the budget was not big enough for a separate kosher kitchen, such a policy would breed resentment and lead to a security risk, and there would be a heightened demand for similar dietary accommodations).

<sup>176</sup> 42 U.S.C. §§ 2000cc-1(a)(1)–(2).

<sup>177</sup> Shakur v. Schriro, 514 F.3d 878, 890 (9th Cir. 2008).

<sup>178</sup> *Willis*, 753 F. Supp. 2d at 779 (emphasis omitted) (citing 42 U.S.C. § 2000cc-1(a)).

<sup>179</sup> *Id.* at 768.

<sup>180</sup> *Id.* at 770.

<sup>181</sup> *Id.* at 776–77.

<sup>182</sup> *Id.* at 778 (citations omitted).

[it] [could not] find that the government had a compelling interest that might justify burdening the religious exercise of Plaintiffs.”<sup>183</sup> The court then continued its RLUIPA analysis by saying that even if the DOC had established that its cost concerns constituted a compelling government interest, it had not demonstrated that “substituting vegan meals for kosher ones [was] the least restrictive means of furthering that compelling governmental interest.”<sup>184</sup> Further, the plaintiffs provided a list of additional less restrictive alternatives that the DOC could have implemented, to which the government did not even respond.<sup>185</sup> Ultimately, the court granted summary judgment to the plaintiffs because the termination of Kosher diets violated RLUIPA.<sup>186</sup>

In the hunger-striking context, it is unlikely that the government would be able to establish that force-feeding a prisoner who, for example, refused to eat non-accommodating meals would be the least-restrictive means of furthering its compelling interests in preserving life or keeping down prison expenses. The prisoner could—and should—allege in his complaint that other less restrictive means exist, such as providing the prisoner with meals that accommodate his sincerely held religious beliefs.

## V. APPLICATION TO PREVENT FORCE-FEEDING

Because RLUIPA offers greater protections of prisoners’ religious freedoms than the First Amendment Free Exercise Clause, religiously based hunger-striking prisoners in state and local prisons should file a complaint alleging a RLUIPA violation in order to prevent prisons from force-feeding them against their religious beliefs.

This Note will now examine how three categories of religiously based hunger-striking prisoners should allege RLUIPA violations in order to prevent the government from force-feeding them: (1) prisoners who are hunger-striking for broad religious purposes; (2) prisoners who are hunger-striking due to a lack of an accommodating religious diet; and (3) prisoners who are classified as “hunger-striking,” but instead are participating in a religious fast. This Note will then analyze each category of hunger-striking prisoners’ likelihood of success in preventing prisons from force-feeding them if they properly allege a RLUIPA violation prior to a court issuing an injunction allowing the prison to force-feed them.

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 779.

<sup>185</sup> *Id.* at 779–80 (listing less expensive Kosher vendors, a new contract with Aramark, Kosher kitchens, or providing Kosher meals that need not be frozen as potential alternatives).

<sup>186</sup> *Id.* at 780.

### A. Hunger-Striking for Broad Religious Purposes

The category of prisoners who hunger strike for broad religious purposes likely will have the most difficult time of the three groups to plead a RLUIPA claim. After pleading the jurisdictional requirement, next the prisoner would need to plead that the prison's policy of force-feeding the inmate substantially burdened his religious exercise. As noted above, the definition of "religious exercise" is fairly broad and thus is easy to establish.<sup>187</sup> To do so, the prisoner could plead that the act of the strike served some part of that prisoner's religious beliefs. Most religions fast for one day at a time, or for certain hours of the day, so pleading that an extended hunger strike is a religious exercise likely would be challenging.<sup>188</sup> Here, it is not as though the hunger strike is a tenet of the prisoner's religion—the prisoner may be striking, for example, to bring attention to certain issues or beliefs of his or her specific religion. Thus, although the definition of "religious exercise" is broad, it is unlikely that the prisoner would be able to adequately plead that participating in a hunger strike for a broad religious reason, rather than in conformity with specific religious ideals, constitutes "religious exercise."

The prisoner then must allege that the prison's policy to force-feed him would impose a substantial burden upon his or her religious exercise of hunger-striking. Because force-feeding the prisoner either would end the hunger strike or coerce the inmate to eat something to avoid being force-fed, the prisoner would have a fairly strong and straightforward argument that the prison's action of force-feeding substantially burdened his or her right to exercise a religion of his choosing. But again, establishing that the hunger strike, in the first place, was a "religious exercise," would be a difficult argument to make.

If the prisoner successfully presents a *prima facie* case, the burden then would shift to the government to show that the action of force-feeding the inmate was in furtherance of a compelling government interest. The prison likely will argue that its compelling interest is in maintaining prison safety; if other prisoners see that the prison gives in to demands for hunger strikes, they might also engage in hunger strikes.<sup>189</sup> Additionally, the state could argue that it has an interest in preserving life and, depending on how long the inmate has been hunger-striking, that force-feeding the prisoner is in furtherance of protecting the safety of the inmate who is depriving himself proper nutrition.

Although preservation of life likely would be a successful compelling

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<sup>187</sup> See *supra* Part IV.B.2 (discussing how RLUIPA defines "religious exercise").

<sup>188</sup> See *Fasting Across Religions*, *supra* note 8 (describing, for example, the Jewish fast which occurs from sunrise to sundown on Fridays, Yom Kippur, and Tisha B'Av).

<sup>189</sup> See Silver, *supra* note 5, at 648 (discussing how discouraging "copycat[]" hunger strikers can be for prisons because "the only thing worse than one hunger strike would be many hunger strikes").

governmental interest, the government then would have to demonstrate that force-feeding the prisoner is the least restrictive means of ending the inmate's hunger strike. In this particular category of hunger-striking inmates, the government could plead that no other alternative exists to get the inmate to end his hunger strike—it is not as if the prison can solve a broad religious issue. If, for example, the prisoner alleges that he is hunger-striking to draw attention to perceived religious desecration at Guantanamo Bay and the prisoner's health is at a critical point, the government likely will argue successfully that it had no other option but to seek an injunction to force-feed the inmate. It could not solve the problem for which the prisoner was hunger-striking, and so no other option would be available. Thus, these cases are likely to be the most difficult of the force-feeding RLUIPA claims to file—mostly due to the difficulty the prisoner would have in demonstrating that the hunger strike, for broad, religious purposes, falls within the definition of religious exercise. Ultimately, in this specific category of hunger-striking inmates, an inmate would not be successful in preventing the prison from force-feeding him.

### B. Hunger-Striking for a Lack of Accommodating Religious Diet

The category of prisoners who hunger strike because they have not been provided with religiously accommodating meals will very likely prevent the prison from force-feeding these prisoners because it will be fairly easy to adequately plead a RLUIPA violation. Oftentimes, prisoners will strike because the prison has not provided them with an accommodating diet in accord with their religion.<sup>190</sup> After the state seeks an injunction to force-feed the inmate, but prior to the court issuing a ruling, the inmate should file a RLUIPA claim. The prisoner must then plead the jurisdictional requirement.

Once the prisoner has established that RLUIPA applies to the prison in which he is incarcerated, he then must plead that the prison's policy of force-feeding him substantially burdened his religious exercise. This category of inmates easily can establish that the hunger strike is part of the exercise of his religion. For example, suppose a Jewish inmate requested Kosher meals, and the prison refused.<sup>191</sup> Because the inmate sincerely believes that eating non-Kosher food goes against his religion, he chose not to eat the non-Kosher food. After several weeks, however, the prison discussed with the prisoner having to force-feed him to ensure that he remained healthy. Despite this warning, the inmate continued to abstain

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<sup>190</sup> See, e.g., Ben-Avraham v. Moses, 1 F.3d 1246 (9th Cir. 1993) (describing a case in which a Hasidic Jewish prisoner went on strike because he was not provided with a kosher diet).

<sup>191</sup> Also, for the purposes of this hypothetical, assume that the inmate meets weekly with the prison Rabbi, and so there is no question about whether his beliefs are sincerely held.

from eating the non-Kosher food in order to comply with his religious beliefs. His refusal to eat for an extended amount of time would be considered a hunger strike. Additionally, this inmate may refuse to take any additional nutrients that the prison may offer in order to strike for a change in prison policy to provide religiously accommodating meals. In both instances, and in similar situations, the hunger strike certainly would be considered “religious exercise”—the prisoner is striking in adherence to his religion, which requires him to eat only Kosher food.<sup>192</sup>

Next, the inmate must plead that the prison’s policy of force-feeding him substantially burdens his religious exercise. Since the threat of force feeding the inmate would cause him to choose between consuming food that is not permitted by his religion or undergoing the highly invasive and intrusive ordeal of being force-fed, the inmate easily can argue that the force-feeding substantially burdened the exercise of his religion. Ultimately, the threat would force him to consume non-Kosher meals or he would be force-fed non-Kosher nutrients. In either situation, the force-feeding policy substantially burdens his exercise of religion.

The burden then would shift to the state to demonstrate that force-feeding the inmate to end his hunger strike would be the least restrictive means of furthering some compelling governmental interest. In this category of hunger-striking inmates, the government likely will allege that it has a compelling interest in preservation of life and maintaining institutional security. A court likely would view preservation of life as a compelling governmental interest, as the government has a duty to protect those within its custody. The government also might allege that it has an interest in maintaining institutional security—that allowing an inmate to die in its care might incite riots. This also might be viewed as a compelling governmental interest.

Even if a court agrees that the government’s policy to force-feed hunger-striking prisoners furthers a compelling governmental interest, in this category of hunger-striking prisoners, the state will fail, as it will not be able to demonstrate that force-feeding the prisoner is the least restrictive means of furthering this interest. If, for example, a prisoner is hunger-striking because the prison does not provide him Kosher meals, even though he sincerely holds beliefs akin to Judaism, it seems less restrictive simply to provide that prisoner with a Kosher meal rather than to strap him down and insert a tube down his throat or pierce his veins with a needle. The government cannot then claim that it is not economically feasible to do this because “RLUIPA specifically contemplates that the law ‘may require a government to incur expenses in its own operations to avoid imposing a

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<sup>192</sup> The government might also try to argue that the prisoner does not hold sincere religious beliefs. Because of this, it is important that the prisoner adequately plead sufficient facts to establish that he holds legitimate religious beliefs in his or her complaint.

substantial burden.”<sup>193</sup> An obvious less restrictive means to ending the prisoner’s hunger strike would be to provide religiously accommodating meals.

Moreover, if a prisoner partakes in a hunger fast during the sun-up hours of Ramadan based on his sincerely held Islamic beliefs and the prison fails to provide adequately nutritious meals during the sundown hours, that prisoner’s refusal to eat during the sun-up hours for the entire month could be considered to be a hunger strike. Again, it seems less restrictive for the prison simply to provide meals to the Muslim prisoner during sun-down hours of the month of Ramadan than to subject that prisoner to extremely intrusive and sometimes barbaric force-feeding. Because no standard method currently exists as to how to address hunger-striking inmates, it is hard to see how this painful and intrusive method of force-feeding could be seen as the least restrictive means to achieve any of the prison’s potential interests. Thus, this category of hunger-striking prisoners likely would succeed in preventing the prison from force-feeding them by adequately pleading a RLUIPA violation in its complaint against the prison.

### C. Religious Fasting

Members of various religions partake in fasts for different amounts of time. With the seventy-two-hour prison guideline to declare a hunger strike, however, legitimate hunger fasts may be misclassified as hunger strikes by the prison. Should a prison classify a hunger fast as a hunger strike and seek an injunction to force-feed an inmate, that inmate should file a RLUIPA claim. These claims would look similar to those filed by prisoners who engage in a hunger strike due to a lack of accommodating meals, and would have the same high probability of success.

After the state seeks an injunction to force-feed an inmate, but prior to the court issuing a ruling, the inmate should file a complaint alleging a RLUIPA violation. To plead his *prima facie* case, the inmate must establish the jurisdictional requirement, and that the government’s force-feeding policy substantially burdens his religious exercise of engaging in a hunger fast.

Take, for example, Darryl Holland’s situation in the recent Second Circuit case.<sup>194</sup> The Court stated that Holland’s RLUIPA claim would not have been moot and would have been successful had the Department of Corrections not changed its policy regarding obtaining urine samples from

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<sup>193</sup> Willis v. Comm’r, Ind. Dep’t of Corr., 753 F. Supp. 2d 768, 778 (S.D. Ind. 2010).

<sup>194</sup> Holland v. Goord, 758 F.3d 215 (2d Cir. 2014); *see also supra* text accompanying notes 114–129 (describing the *Holland v. Goord* case).

Muslim prisoners engaging in a religious fast during Ramadan.<sup>195</sup> Although the court did not explain its reasoning, by following the RLUIPA template offered in this Note we can examine why this would be the case for hunger-fasting inmates facing being force-fed by a prison.

First, the inmate would need to file a complaint alleging a RLUIPA violation prior to the court ordering an injunction to allow the government to force-feed him. In this complaint, the inmate would need to plead the jurisdictional requirement. Then, he must establish that his participation in the hunger fast was part of his religious exercise. In Holland's case, that was easy to do, as he was fasting during the sun-up hours of Ramadan.

Holland must then adequately plead that the policy directive requiring him to provide a urine sample during daylight hours substantially burdened his exercise of religion. The exercise of religion in question would be Holland's ability to continue to participate in a fast during sun-up hours in accordance with Ramadan. The policy of requiring prisoners to submit to urinalysis testing within three hours substantially burdened Holland's exercise of religion because it forced him to choose between following his sincerely held religious beliefs and being punished for refusing to drink water to provide a urine sample, and breaking his fast in opposition to his religious beliefs.

The burden then would shift to the government to show that the urinalysis policy was in furtherance of a compelling governmental interest and would be the least restrictive means of furthering that interest. The government would likely argue that the compelling interest would be to preserve Holland's life and to maintain prison safety. Although these are compelling governmental interests, the government would not be able to demonstrate that force-feeding Holland nutrients is the least restrictive means of furthering this interest. The prison could wait until the sun-down hours of Ramadan and then offer Holland nutrients so that he may provide the urine sample. This least restrictive means is evidenced by the DOC adding a note to the policy to make religious exceptions.<sup>196</sup> Thus, had Holland filed a complaint alleging a RLUIPA violation *prior* to the prison force-feeding him nutrients which caused him to break his religious fast, he would have been successful in preventing the force-feeding.

Take, for another example, a Muslim inmate who fasts during the sun-up hours of Ramadan but is confined to a prison that does not provide meals after sundown. The inmate then refuses nutrients during the sun-up hours out of respect for his religion, and so midway through the month of Ramadan, the prison classifies the inmate as a hunger-striker. Despite the prison's discussions with the inmate that if he continues to refuse nutrients

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<sup>195</sup> *Holland*, 758 F.3d at 224.

<sup>196</sup> *Id.* at 220 (describing how the DOC added a directive exempting religiously fasting prisoners from the typical time period required for submitting a urine sample).

and his weight and health continue to decline that they will need to force-feed him, the inmate stays true to his religious ideals and refuses nutrients. The prison then seeks an injunction to force-feed him.

Here, the inmate should file a complaint alleging a RLUIPA violation. He can easily establish that the fast is a part of his religion—he is fasting during the sun-up hours to comply with his religion and is then forced to fast during the sun-down hours because the prison does not provide religiously accommodating meals so that he may consume nutrients when he is not religiously fasting.

The prisoner, then, would show that force-feeding him would substantially burden his exercise of religion. The threat of force-feeding the prisoner would likely pressure him to break the fast, which would go against his religious beliefs. If the prisoner continues the fast, force-feeding him would break the fast, clearly burdening his religious beliefs.

The burden then would shift to the government to show that its force-feeding the inmate would be in furtherance of a compelling governmental interest. The government likely will argue that force-feeding the inmate would be in furtherance of preserving his life. Although this is a compelling governmental interest, the government would not be able to establish that force-feeding the inmate would be the least-restrictive means of furthering its interest. An obvious least restrictive means to ending the prisoner's hunger strike would be to provide the prisoner with meals at sun-down during the month of Ramadan. Thus, prisoners in this situation would likely successfully deter an injunction to force-feed them by filing a complaint alleging a RLUIPA violation.

#### D. A Hypothetical: Steven Hayes

Convicted killer and death row inmate Steven Hayes recently filed a complaint in the U.S. District Court for the District of Connecticut based on his assertion that his religious rights were being violated by the prison's refusal to provide him with stricter Kosher meals.<sup>197</sup> Hayes brought a RLUIPA claim for monetary damages against the director of religious services for the Connecticut Department of Corrections, a warden, a district warden, and all members of the Religious Review Committee.<sup>198</sup> Hayes' main complaint was that the prison did not provide him with strict Kosher meals.<sup>199</sup> Thus, he claimed to have "been suffering almost starvation for the past year."<sup>200</sup> Hayes sought compensatory damages and a declaratory judgment to ensure future compliance with any favorable

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<sup>197</sup> See Pro-Se Prisoner Civil Rights Complaint, Hayes v. Bruno, No. 3:14-cv-01203-AWT (D. Conn. Aug. 19, 2014).

<sup>198</sup> *Id.* at 1.

<sup>199</sup> *Id.* at 3.

<sup>200</sup> *Id.*

ruling he may receive, and injunctive relief in the form of: (1) providing prepackaged Kosher meals to all Jewish prisoners; and (2) requiring the Department of Justice to investigate and oversee the Kosher meal program in Connecticut prisons.<sup>201</sup>

The government argued, in its motion to dismiss, that the DOC Common Fare menu, which was offered at the prison where Hayes was located, had been deemed constitutional and Kosher.<sup>202</sup> In fact, “[t]his Court reviewed and approved the Connecticut DOC Common Fare menu, most recently in *Wortham v. Lantz*, which held that providing Common Fare meals to inmates requiring kosher meals furthered the compelling governmental interests of controlling costs and reducing administrative burdens.”<sup>203</sup>

Ultimately, the court denied Hayes’ motions.<sup>204</sup> Judge Alvin Thompson noted that “[a]lthough (Hayes) raise[d] as an issue the lack of a reliable orthodox certificate or an onsite Jewish overseer, he provide[d] no evidence suggesting that their absence le[d] to a finding that the meals [were] not kosher.”<sup>205</sup> By denying Hayes’ motions, the judge “found there is not a likelihood that [Hayes] will succeed.”<sup>206</sup>

If, however, the prison had sought an injunction to force-feed Hayes due to his hunger strike, he could file another complaint alleging a RLUIPA violation. His complaint, however, would likely be unsuccessful. The burden would first be on Hayes to show that force-feeding him would substantially burden his exercise of religion. He could argue that the exercise of religion is his hunger-striking due to the prison’s refusal to provide religiously accommodating meals.

Force-feeding him would require him to choose between eating non-Kosher food in opposition to his religious beliefs or being force-fed against his will. His ability to plead a *prima facie* case would hinge upon whether the court believed he had a sincerely held belief in Judaism, and that the prison’s meals were truly non-Kosher. Based on the current court documents, it appears that the prison meals in fact are Kosher and that the preparation of these meals is supervised by Rabbis. Thus, it is unlikely that Hayes would be able to plead a *prima facie* case to avoid being force-fed.

If Hayes successfully pled a *prima facie* case, then the burden would

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<sup>201</sup> *Id.* at 5.

<sup>202</sup> Defendant’s Motion to Dismiss at 11, Hayes v. Bruno, No. 3:14-cv-01203-AWT (D. Conn. Nov. 14, 2014).

<sup>203</sup> *Id.* at 12 (citation omitted) (citing *Wortham v. Lantz*, No. 3:10-CV-1127 DJS, 2014 WL 4073201, at \*1 (D. Conn. Aug. 13, 2014)).

<sup>204</sup> See Pat Eaton-Robb, *Death Row Inmate Steven Hayes Loses Fight for Kosher Food*, HUFFINGTON POST (Nov. 29, 2014), [http://www.huffingtonpost.com/2014/11/29/steven-hayes-kosher\\_n\\_6240420.html](http://www.huffingtonpost.com/2014/11/29/steven-hayes-kosher_n_6240420.html) [<https://perma.cc/L89E-8S24>].

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

shift to the government to show that force-feeding Hayes would be in furtherance of a compelling governmental interest and is the least restrictive means of doing so. The government would likely argue that it has a compelling interest in preserving the life of and ensuring the safety of a prisoner whose health is rapidly deteriorating. This likely would be viewed as a compelling governmental interest. Moreover, because the meals actually are Kosher, the prison could argue that force-feeding Hayes is the least-restrictive means to preserving his life. Therefore, changing the meals is not an option, and only a change in the meals would end his hunger strike. Thus, even if Hayes does plead a *prima facie* case alleging a RLUIPA violation, the government would likely successfully defeat it, as force-feeding him would be in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.

## VI. CONCLUSION

The Supreme Court infrequently, in the past, has considered RLUIPA claims. Most recently, however, in *Holt v. Hobbs*, a prisoner successfully sued the government for infringing upon his religious beliefs. This, in addition to the recent *Hobby Lobby*<sup>207</sup> decision, shows that the Supreme Court is receptive to claims of violations of religious rights. With recent religious victories at the Supreme Court level for RLUIPA claims, prisoners who are hunger-striking or fasting for religious purposes would likely be successful in deterring an injunction to be force-fed if they pled RLUIPA violations, rather than First Amendment violations, as RLUIPA forces courts to analyze the claim under strict scrutiny, rather than rational basis. Thus, religiously based hunger-striking prisoners who seek to prevent the prison from force-feeding them would have the strongest chance of success by filing a complaint alleging a RLUIPA violation.

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<sup>207</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that, based upon RFRA analysis, for-profit corporations are exempt from a law to which its owners religiously object if there is a less restrictive means of furthering the law's interest).