

CHAPTER 27

RELIGIOUS FREEDOM IN PRISON*

A. Introduction

While in prison, you have the right to observe and practice the religion of your choice.¹ The U.S. Constitution, as well as federal and state laws, protect this right. This Chapter describes these protections and explains how courts determine whether a prisoner’s right to religious freedom has been violated. Part B of this Chapter discusses the First Amendment Establishment Clause. Part C discusses the First Amendment Free Exercise Clause and RLUIPA or RFRA protections. Part D discusses your rights under selected state statutes, while Part E considers recent developments in faith-based rehabilitation programs. The Appendix lists some religious organizations that may provide you with additional support.

1. Constitutional Protections

The First Amendment to the Constitution is the most basic protection of your right to religious freedom. This Amendment says that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”²

The first part of the Amendment—“Congress shall make no law respecting an establishment of religion”—is known as the Establishment Clause, and it prohibits government officials from establishing a national religion. Generally, this means that the government is not allowed to set up a religion, to aid one religion, to aid all religions, or to favor one religion over another.³

The second part of the First Amendment—“or prohibiting the free exercise thereof”—is known as the Free Exercise Clause, and it means that government officials cannot prevent you from practicing your religion. However, under the Free Exercise Clause, prison officials can impose restrictions on your exercise of religion that are “reasonably related” to legitimate prison goals.⁴ In other words, you might be barred from performing a religious practice if the justification reasonably relates to the prison’s legitimate aims. These justifications may include preventing crime, rehabilitating prisoners, and ensuring the internal security of the correctional facility.⁵

Even though the Establishment Clause and the Free Exercise Clause are both part of the First Amendment, courts address these clauses separately, so this Chapter will address them separately too.

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1. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding the exercise of religion for purposes of the Free Exercise Clause involves not only belief and profession, but the performance of, or abstention from, physical acts that are engaged in for religious reasons). *See also* *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 1082–83, 31 L. Ed. 2d 263, 268 (1972) (finding that prisoners retain First Amendment protections, including its directive that no law shall prohibit the free exercise of religion).

2. U.S. CONST. amend. I.

3. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 15, 67 S. Ct. 504, 511, 91 L. Ed. 711, 723 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”).

4. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

5. *See* *Pell v. Procunier*, 417 U.S. 817, 822–23, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 501–02 (1974) (finding deterrence of crime, rehabilitation of prisoners, and internal security within a correctional facility are legitimate prison goals); *McKune v. Lile*, 536 U.S. 24, 122 S. Ct. 2017 (2002) (stating that sexual abuse treatment programs serve legitimate prison goals); *Procunier v. Martinez*, 416 U.S. 396, 412, 94 S. Ct. 1800, 1810–11, 40 L. Ed. 2d 224, 239 (1974), (finding preservation of internal order and discipline, maintenance of institutional security against escape or unauthorized entry, and rehabilitation of prisoners are justifiable interests of the government), *overruled on other grounds by* *Thornburgh v. Abbott*, 490 U.S. 401, 413–14, 109 S. Ct. 1874, 1881–82, 104 L. Ed. 2d 459, 473 (1989).

2. Statutory Protections

Laws passed by the U.S. Congress and state legislatures provide additional protections for your religious freedom. Depending on whether you are in a state or federal prison, different laws apply. If you are in a state prison, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) protects your religious freedom,⁶ but if you are in a federal prison, the Religious Freedom Restoration Act of 1993 (RFRA) protects your religious freedom instead.⁷

Although RLUIPA and RFRA are two different laws, both use the same language to describe the religious free exercise protections given to prisoners.⁸ Therefore, if you are a federal prisoner protected by RFRA, this Chapter's discussion of RLUIPA can still help you figure out how strong your RFRA claims are. You can also cite cases decided under either RLUIPA or RFRA to support your claim, regardless of whether you are in federal or state prison.⁹

Some states have also enacted additional laws that further protect the religious freedom of prisoners in their correctional facilities. These laws are discussed in more detail in Part D of this Chapter.

3. Bringing a Religious Freedom Lawsuit

If you believe prison officials have violated your constitutional or statutory rights to religious freedom, and you wish to bring a suit against them, you will first need to follow your institution's administrative grievance procedure.¹⁰ See Chapter 15 of the *JLM*, "Inmate Grievance Procedures," for further information on inmate grievance procedures.

If you do not receive a favorable result through the grievance procedure, you can file suit in federal court. Depending on which type of prison you are in, you will need to bring different types of claims. If you are a state prisoner, you should bring a RLUIPA claim under 42 U.S.C. § 2000cc and a First Amendment claim under 42 U.S.C. § 1983. If you are a federal prisoner, you should bring a RFRA claim under 42 U.S.C. § 2000bb and a First Amendment claim in a *Bivens* action.¹¹

Regardless of which types of claims you bring, when you draft your complaint, you should be sure to begin by asserting a RLUIPA claim (if you are a state prisoner) or a RFRA claim (if you are a federal prisoner), followed by a First Amendment claim. This is because it is easier to meet the RLUIPA or RFRA standards than the First Amendment standards, and you are therefore more likely to receive relief under RLUIPA or RFRA than under the First Amendment.¹²

6. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–cc-5 (2012) (*hereinafter* the "RLUIPA") (codifying that no government shall impose a substantial burden on the religious exercise of a person in jail, unless the government demonstrates that the burden serves a compelling governmental interest and does so by the least restrictive means);

7. Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb–bb-4 (2012).

8. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a) (2012); Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb-(1)(a)–(b) (2012). *See* Lovelace v. Lee, 472 F.3d 174, 182 (4th Cir. 2006) (finding that Congress enacted the RLUIPA in response to restrictions on religious liberties in prisons that were "egregious and unnecessary," and applying the statute such that, when a prison substantially burdens an inmate's exercise of religion, the prison must demonstrate that imposing the burden serves a compelling government interest and does so by the least restrictive means).

9. *See, e.g.*, Fowler v. Crawford, 534 F.3d 931, 938 (8th Cir. 2008) (holding that a RFRA case "dictate[d] the outcome" in the RLUIPA case before the court).

10. *See* Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997(e) (2012) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."); *Cutter v. Wilkinson*, 544 U.S. 709, 723 n.12, 125 S. Ct. 2113, 2123 n.12, 161 L. Ed. 2d 1020, 1035 n.12 (2005) ("[A] prisoner may not sue under RLUIPA without first exhausting all available administrative remedies."); *Jackson v. D.C.*, 254 F.3d 262, 266–67 (D.C. Cir. 2001) (holding that PLRA's requirement that prisoners exhaust all available administrative remedies applies in actions brought under RFRA).

11. A *Bivens* action allows prisoners to sue federal officials for constitutional violations. See Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief From Violations of Federal Law," for a detailed discussion. *See also* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72, 122 S. Ct. 515, 522, 151 L. Ed. 2d 456, 467 (2001) (finding that a federal prisoner alleging a constitutional violation can bring a *Bivens* claim against the offending federal officer).

12. *See* *Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008) ("RLUIPA . . . mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard [used to review regulations under the 1st Amendment]."); *see also* *Smith v. Allen*, 502 F.3d 1255, 1266, 21 Fla. L. Weekly Fed. C. 54

If you are a state prisoner, you can also file an action in a state court. If you are in a New York state prison, you can either file an action in the Court of Claims, or you can file an Article 78 petition, depending on what kind of relief you want. More information on all of these types of cases can be found in Chapter 5 of the *JLM*, “Choosing a Court and a Lawsuit,” Chapter 14 of the *JLM*, “Prison Litigation Reform Act,” Chapter 16 of the *JLM*, “42 U.S.C. § 1983 and *Bivens* actions,” Chapter 17 of the *JLM*, “The State’s Duty to Protect You and Your Property: Tort Actions,” and Chapter 22 of the *JLM*, “How To Challenge Decisions Using Article 78 of the New York Civil Practice Law and Rules.”

If you end up pursuing any claim in federal court, you should make sure to read Chapter 14 of the *JLM*, “The Prison Litigation Reform Act,” on the Prison Litigation Reform Act (PLRA) before you file your claim. If you do not follow PLRA requirements, you can, among other things, lose your good time credit and your right to bring future claims in federal court without paying the full filing fee.

B. The First Amendment Establishment Clause

The Establishment Clause of the First Amendment states that “Congress shall make no law respecting an establishment of religion.”¹³ This means that neither the federal government nor the states may set up a religion, aid all religions, aid one religion, or favor one religion over another.¹⁴ Thus, prison officials violate the Establishment Clause if they give special treatment to certain religious groups. For example, if prison officials were to set up a church within the prison and then force prisoners to attend religious services, their actions would violate the Establishment Clause.¹⁵

In order for your Establishment Clause claim to succeed, you will first need to prove that there was “government action,” often referred to as “state action.” The Supreme Court has held that “state action may be found ... only if ... there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”¹⁶ In other words, the connection between the State and the behavior of the private individual or organization must be so close that it seems as if the State caused the individual or organization to perform the action.

Generally, courts will consider actions by prison officials and private groups acting under the authority of prison officials to be state action.¹⁷ For example, in 2007 the Court of Appeals for the Seventh Circuit held

(11th Cir. 2007) (noting that RLUIPA affords more “protection from government-imposed burdens” than the First Amendment does), *abrogated on other grounds by* *Sossamon v. Texas*, 131 S. Ct. 1651, 1663, 179 L. Ed. 2d 700, 714 (2011); *Desimone v. Bartow*, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *11 (E.D. Wis. Aug 12, 2008) (*unpublished*) (noting that RLUIPA provides more expansive protections than the First Amendment does for those in the custody of the state, as it prohibits “institutions that receive federal funding from substantially burdening an inmate’s exercise of religion, even by a rule of general applicability, unless that burden is the least restrictive means of furthering a compelling governmental interest.”).

13. U.S. Const. amend. I.

14. *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 216, 8 S. Ct. 1560, 1568, 10 L. Ed. 2d 844, 855 (1963) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15, 67 S. Ct. 504, 511, 91 L. Ed. 711, 723 (1947)) (“[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another”); *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) (stating “Government may not favor one legitimate faith group over another or question the rationale of honestly held beliefs.”); *Buckley v. Valeo*, 424 U.S. 1, 92, 96 S. Ct. 612, 669, 46 L. Ed. 2d 659, 729 (1976) (stating the government may not aid one religion at the harm of another religion; the government may not place a burden on one religion that is not placed on others; and the government may not even help all religions), *overruled on other grounds by* *Citizens United v. Federal Election Com’n*, 558 U.S. 301, 130 S. Ct. 876 (2010); *Cantwell v. Conn.*, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 1218 (1940) (applying the Establishment Clause to the states).

15. *See Campbell v. Cauthron*, 623 F.2d 503, 509 (8th Cir. 1980) (holding that allowing religious volunteers into a cell block did not violate the Establishment Clause, but that prison officials were required to make sure that no prisoners were subjected to forced religious indoctrination).

16. *Brentwood Acad. v. Tenn. Sec. Sch. Athletic Ass’n*, 531 U.S. 288, 295, 121 S. Ct. 924, 930, 148 L. Ed. 2d 807, 817 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351, 95 S. Ct. 449, 453 (1974)) (finding that a not-for-profit athletic association’s enforcement of penalties against a private school’s violation of athletic recruiting rules constituted “state action” because of the association’s significant connections to public institutions and public officials).

17. *See Monroe v. Pape*, 365 U.S. 167, 184, 81 S. Ct. 473, 482, 5 L. Ed. 2d 492, 503 (1961) (finding that constitutional violations committed by state officers in performance of their duties were committed “under color of” state law, and rejecting the argument “that under color of state law included only action taken by officials pursuant to state law”), *overruled on other grounds by* *Monell v. Dep’t of Soc. Serv. of the City of N.Y.*, 436 U.S. 658, 663, 98 S. Ct. 2018, 2022, 56 L. Ed. 2d 611, 619 (1978); *Ancata v. Prison Health Services*, 769 F.2d 700, 703 (11th Cir. 1985) (“Although [the defendant] and its employees are not strictly speaking public employees, state action is clearly present. Where a function

that when a department of corrections gave private religious organizations the power to incarcerate, treat, and discipline prisoners, as well as access to facilities and substantial aid to support a faith-based program, those religious organizations were considered to be state actors.¹⁸

Unauthorized actions by individuals, on the other hand, may be less likely to constitute state action. For example, in 1998 the Court of Appeals for the Ninth Circuit held that there was no state action when a prison officer, who was also a Christian minister, brought his Bible to work and put it in the prisoners' view, sang Christian songs, debated and discussed religion with prisoners, and tried to convert prisoners to Christianity.¹⁹ The court found no Establishment Clause violation because the officer had no authority to make religious policies for the jail, and the jail had not ratified or endorsed the officer's actions, had trained its staff to avoid such conduct, and had transferred the officer soon after the plaintiff complained.²⁰

Once you have shown that the practice or regulation you are challenging constitutes government action, you will need to prove that this action violated the Establishment Clause. To determine whether a prison regulation or practice violates the Establishment Clause, courts have used different tests,²¹ including the *Lee* coercion test²² and the *Lemon* test.²³ Both tests are explained below. While some courts have combined these tests,²⁴ the Supreme Court has yet to rule that either of these tests represents the sole constitutional standard.²⁵ So you should try to argue in your complaint that the challenged prison regulation or practice fails both of the Establishment Clause tests.

1. The *Lee* Coercion Test

To determine whether a prison regulation or practice violates the First Amendment's Establishment Clause, a court may ask whether it amounts to "coercion." In *Lee v. Weisman*, the U.S. Supreme Court announced that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise"²⁶ Applying this rule, the Court held in *Lee* that it was unconstitutional for public schools to force students at their graduation ceremonies to participate in prayer. The policy that allowed public schools to invite clergy members to say prayer at graduation failed the coercion test because it constituted forced participation in religion.²⁷

which is traditionally the exclusive prerogative of the state ... is performed by a private entity, state action is present.").

18. *Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 421–23 (8th Cir. 2007).

19. *Canell v. Lightner*, 143 F.3d 1210, 1214 (9th Cir. 1998).

20. *Canell v. Lightner*, 143 F.3d 1210, 1213–14 (9th Cir. 1998).

21. *See Ross v. Keelings*, 2 F. Supp. 2d 810, 816–18 (E.D. Va. 1998) (noting that courts have sometimes used the *Lemon* test and other times declined to apply *Lemon* in favor of the *Lee* test).

22. *See Lee v. Weisman*, 505 U.S. 577, 578, 112 S. Ct. 2649, 2655, 120 L. Ed. 2d 467, 480 (1992); *Warner v. Orange County Dept. of Probation*, 115 F.3d 1068, 1074–75 (2d Cir. 1997) (applying the *Lee* coercion test to determine whether a probation practice violates the Establishment Clause); *Warburton v. Underwood*, 2 F. Supp. 2d 306, 318 (W.D.N.Y. 1998) (holding that while proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient).

23. *See Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971); *Kaufman v. McCaughtry*, 419 F.3d 678, 683–84 (7th Cir. 2005) (applying the *Lemon* test to determine whether a prison practice violates the Establishment Clause). *But see Gray v. Johnson*, 436 F. Supp. 2d 795, 800 n.4 (W.D. Va. 2006) ("When deciding similar cases, the Second Circuit, the Seventh Circuit, and the Eastern District of Virginia have opted to apply a more basic coercion test in lieu of *Lemon*. These courts have simply examined whether the challenged program accomplished coerced religious participation, finding each time that the program did.").

24. *See, e.g., Gray v. Johnson*, 436 F. Supp. 2d 795, 800 n.4 (W.D. Va. 2006) (explaining how the Fourth Circuit has incorporated both the coercion and endorsement tests into the *Lemon* test's second prong).

25. *See Van Orden v. Perry*, 545 U.S. 677, 685–86, 125 S. Ct. 2854, 2860–61, 162 L. Ed. 2d 607, 615–16 (2005) (explaining that in many cases, the Supreme Court has either not relied on the *Lemon* test or has applied it only after concluding that a regulation was invalid under a different First Amendment Establishment test); *Lynch v. Donnelly*, 465 U.S. 668, 679, 104 S. Ct. 1355, 1362, 79 L. Ed. 2d 604, 613 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."); *County of Allegheny v. ACLU*, 492 U.S. 594, 595, 109 S. Ct. 3086, 3102, 106 L. Ed. 2d 472, 496 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694, 104 S. Ct. 1355, 1370, 79 L. Ed. 2d 604, 623 (1984)) ("Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion."); *Lee v. Weisman*, 505 U.S. 577, 597, 112 S. Ct. 2649, 2660–61, 120 L. Ed. 2d 467, 487 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one.").

26. *Lee v. Weisman*, 505 U.S. 577, 587, 112 S. Ct. 2649, 2655, 120 L. Ed. 2d 467, 480 (1992).

27. *Lee v. Weisman*, 505 U.S. 577, 599, 112 S. Ct. 2649, 2661, 120 L. Ed. 2d 467, 488 (1992).

Although *Lee* dealt with religious freedom in the school context, other lower courts have held that a showing of coercion alone may be sufficient to prove an Establishment Clause violation in the prison or probation context.²⁸

For instance, in *Kerr v. Farrey*, a prisoner brought a federal civil rights claim against state corrections officials.²⁹ The prisoner alleged that the officials required him to attend religious-based Narcotics Anonymous meetings as part of his rehabilitation.³⁰ The Seventh Circuit Court of Appeals applied the *Lee* coercion rule by asking three questions: (1) whether there was state action, (2) whether the action was coercive or forceful, and (3) whether the object of the coercion was religious or secular (meaning non-religious).³¹

In answering these three questions, the court found that the prison program violated the Establishment Clause's prohibition against the state's favoring religion over non-religion because (1) there was state action, since the state had acted through the prison officials by forcing the prisoner to participate in the Narcotics Anonymous meetings; (2) the state action was coercive or forceful, since the penalty for not attending the meetings was a higher security risk classification and negative effects on the prisoner's parole eligibility; and (3) the object of the coercion was religious, since the Narcotics Anonymous meetings contained a religious element.³² Similarly, in *Warner v. Orange County Department of Probation*, the Second Circuit Court of Appeals concluded that because the department of probation had required a prisoner to attend a religious Alcoholics Anonymous program as a condition of probation, it "plainly constituted coerced participation in religious exercise" and thus violated the Establishment Clause.³³

2. The *Lemon* Test

If you are unable to show that the prison regulation or practice amounted to coercion, you might still have a valid First Amendment claim under the *Lemon* test.³⁴ This test, which comes from the U.S. Supreme Court's decision in *Lemon v. Kurtzman*,³⁵ is a "central tool" in the court's analysis of Establishment Clause cases³⁶ and is frequently cited. Therefore, you should be prepared to argue that the regulation that you are complaining about fails the *Lemon* test.

In order to demonstrate a violation of the Establishment Clause under the *Lemon* test, you must show one or more of the following:

- (1) The regulation has a non-secular (religious) purpose,
- (2) Its principal or primary effect is to advance or inhibit religion, or
- (3) It fosters excessive government entanglement with religion.³⁷

28. See, e.g., *Warburton v. Underwood*, 2 F. Supp. 2d 306, 318 (W.D.N.Y. 1998) (holding proof of government coercion is sufficient but not necessary to prove an Establishment Clause violation).

29. *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996).

30. *Kerr v. Farrey*, 95 F.3d 472, 473–74 (7th Cir. 1996). For a more detailed discussion of faith-based addiction treatment options, see Part E of this Chapter.

31. *Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir. 1996).

32. *Kerr v. Farrey*, 95 F.3d 472, 479–80 (7th Cir. 1996). See also *Warner v. Orange County Dept. of Prob.*, 115 F.3d 1068, 1074–75 (2d Cir. 1996), *vacated on other grounds by* 115 F.3d 1068 (2d Cir. 1997) (holding that the county probation department could be held liable for violating the Establishment Clause by requiring a probationer to attend Alcoholics Anonymous meetings that contained religious content); *Ross v. Keelings*, 2 F. Supp. 2d 810 (E.D. Va. 1998) (holding that prison officials violated the Establishment Clause by forcing a prisoner to attend a drug rehabilitation program that included a religious study component). *But see Quigg v. Armstrong*, 106 F. App'x 555, 556 (9th Cir. 2004) (holding that a privately-run pre-release program that served as an alternative to prison was free to offer religion-based treatment without providing nonreligious alternatives because the program employees were not state actors).

33. *Warner v. Orange County Dept. of Probation*, 115 F.3d 1068, 1076 n.8 (1996), *vacated on other grounds by* 115 F.3d 1068 (2d Cir. 1997).

34. See *Alexander v. Schenk*, 118 F. Supp. 2d 298, 301 (N.D.N.Y. 2000) ("In cases not involving coercion courts are required to examine whether practice [satisfies the *Lemon* test].").

35. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) (finding that the state cannot give direct aid to parochial schools), *noted in Zelman v. Simmons-Harris*, 536 U.S. 639, 668–70, 122 S. Ct. 2460, 2476, 153 L. Ed. 2d 604, 627–28 (2002). The *Lemon* test has not been used recently by the Supreme Court, and some authors have suggested that the Supreme Court may abandon it. However, as recently as 2005, the Supreme Court affirmed a district court judge's use of the first factor of the test, and refused to abandon the "purpose" factor. See *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859, 125 S. Ct. 2722, 2733, 162 L. Ed. 2d 729, 746 (2005).

36. *Zelman v. Simmons-Harris*, 536 U.S. 639, 668, 122 S. Ct. 2460, 2476, 153 L. Ed. 2d 604, 627 (2002) (O'Connor, J., concurring).

37. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745, 755 (1971).

In assessing the first part, a court may be more likely to find that a prison regulation or practice has a non-religious purpose if it permits the presentation of more than one religious view. For example, in *Murphy v. Missouri Department of Corrections*, the Eighth Circuit Court of Appeals found that a prison had not violated the Establishment Clause when it allowed a “broad spectrum” of religious programming to be shown on prison television, but refused to show programs of a specific prisoner’s religious group.³⁸ A central tenet of the prisoner’s religion was that “its members must all be Caucasian because they are uniquely blessed by God and must separate themselves from all non-Caucasian persons.”³⁹ The court explained that the prison’s “purpose in providing the religious channel was to create a forum in which a large range of religious messages could air, subject only to [the department of corrections] economic and security concerns.”⁴⁰ The court found no evidence that favored any one religion in its programming; the individual prisoner’s religious programming posed a security risk that other religious programming did not.⁴¹ Therefore, the prison did not violate the Establishment Clause when it aired other religious programming but refused to air the individual prisoner’s religious programming.⁴²

Similarly, in *Gray v. Johnson*, a district court found that a prison substance abuse program that involved some discussion of religion at non-mandatory Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings and offered both secular and religious library materials did not amount to a violation of the Establishment Clause, even if some participants had sung a gospel song at a talent show and preached religion outside of the program.⁴³ The court held the residential substance abuse treatment program for prisoners passed the *Lemon* test because a reasonable observer would not interpret religious activities taking place within the broader program as advancement of religion by the state, since all activities involved free expression by program participants.⁴⁴ The program’s dominant purpose was to rehabilitate inmates with a history of substance abuse, which the court found was not a sham secular purpose.⁴⁵

By contrast, the Seventh Circuit Court of Appeals found in *Kaufman v. McCaughtry* that the Establishment Clause was violated when a prison refused to allow prisoners to organize an atheist study group.⁴⁶ The prison had failed to show why such a gathering would pose a greater security risk than meetings of prisoners of other faiths.⁴⁷ Thus, the court vacated a grant of summary judgment for the prison because it had not given a non-religious purpose for discrimination against the atheist group.⁴⁸

In assessing the second and third parts of the *Lemon* test, which some courts have treated as a single question,⁴⁹ courts have looked to whether the challenged practice either endorses or disapproves of religion.⁵⁰

In summary, to bring a successful First Amendment Establishment Claim, you should be able to show:

- (1) The practice or regulation that you are challenging is a government action, and either;
- (2) The practice or regulation fails the *Lee* test because it has the effect of coercing you to practice religion, or
- (3) If there is no coercion, the practice or regulation fails the *Lemon* test because it either (a) has a religious purpose; (b) endorses, advances, or inhibits a religion; or (c) constitutes an excessive government entanglement with religion.

38. *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 985 (8th Cir. 2004).

39. *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 981 (8th Cir. 2004).

40. *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 985 (8th Cir. 2004).

41. *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 985 (8th Cir. 2004).

42. *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 985 (8th Cir. 2004).

43. *Gray v. Johnson*, 436 F. Supp. 2d 795, 800 (W.D. Va. 2006).

44. *Gray v. Johnson*, 436 F. Supp. 2d 795, 801 (W.D. Va. 2006).

45. *Gray v. Johnson*, 436 F. Supp. 2d 795, 801 (W.D. Va. 2006).

46. *Kaufman v. McCaughtry*, 419 F.3d 678, 683 (7th Cir. 2005).

47. *Kaufman v. McCaughtry*, 419 F.3d 678, 684 (7th Cir. 2005).

48. *Kaufman v. McCaughtry*, 419 F.3d 678, 684 (7th Cir. 2005).

49. *See Bader v. Wren*, 532 F. Supp. 2d 308, 313 (D.N.H. 2008) (“The second and third questions have been fused into one, because the same evidence often answers both questions.”); *Zelman v. Simmons-Harris*, 536 U.S. 639, 668–69, 122 S. Ct. 2460, 2476, 153 L. Ed. 2d 604, 627 (2002) (“[T]he degree of entanglement has implications for whether a statute advances or inhibits religion.”); *Agostini v. Felton*, 521 U.S. 203, 232, 117 S. Ct. 1997, 2015, 138 L. Ed. 2d 391, 420 (1997) (combining excessive entanglement into the effects inquiry).

50. *Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S. Ct. 1355, 1368, 79 L. Ed. 2d 604, 621 (1984) (O’Connor, J., concurring) (“The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.”).

C. The First Amendment Free Exercise Clause, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), and the Religious Freedom Restoration Act (RFRA)

This section discusses your religious freedom rights under the First Amendment Free Exercise Clause and RLUIPA or RFRA.⁵¹ Although this section begins with a description of the First Amendment Free Exercise Clause, it is absolutely critical that, when drafting a complaint, you state a claim for relief under RLUIPA or RFRA first. The RLUIPA or RFRA standards are easier to meet than the First Amendment standards, so you are more likely to receive relief under RLUIPA or RFRA than under the First Amendment.⁵² After you make your RLUIPA or RFRA claim, you can then make an additional First Amendment claim.

1. First Amendment Free Exercise Clause

Prior to the enactment of the Religious Freedom Restoration Act, under the Free Exercise Clause of the First Amendment,⁵³ prison officials must provide you with a “reasonable opportunity” for you to exercise your religious freedom without fear of penalty.⁵⁴

However, in certain circumstances, prison officials may restrict this right to exercise or practice your religious beliefs.⁵⁵ Specifically, a prison may lawfully impose rules or regulations that interfere with your sincerely held religious beliefs, provided that these rules or regulations are “reasonably related” to a “legitimate penological purpose or goal” of the prison.⁵⁶ These legitimate goals might include maintaining prison order, discipline, safety, and security, among others.⁵⁷

So, in order to successfully challenge a prison regulation or practice under the Free Exercise Clause, you must be able to show that:

- (1) Your belief is religious in nature,⁵⁸
- (2) Your belief is sincerely held, and
- (3) The prison regulation is not reasonably related to a legitimate penological (prison) purpose or goal.⁵⁹

51. RLUIPA and RFRA essentially provide the same protections; the main difference is that RLUIPA applies to state and municipal prisoners, while RFRA applies to federal prisoners. *See* *Cutter v. Wilkinson*, 544 U.S. 709, 715, 125 S. Ct. 2113, 2118, 161 L. Ed. 2d 1020, 1030 (2005) (noting that courts of appeals have held that RFRA remains operative on the federal government and explaining that RLUIPA applies to state and local governments).

52. *See* *Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008) (“RLUIPA . . . mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard [used to review regulations under the 1st Amendment.]”).

53. U.S. Const. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion].”).

54. *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263, 268 (1972) (*superseded by statute, RFRA*). In the *Cruz* case, a Buddhist prisoner was not allowed to use the prison chapel and was placed in solitary confinement for sharing his Buddhist religious materials with other inmates. The court found he was “denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts.”

55. *See* *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 353, 107 S. Ct. 2400, 2407, 96 L. Ed. 2d 282, 293 (1987) (restricting prisoners who were on work detail from participating in Jumu’ah did not violate the Constitution because it was reasonably related to legitimate penological objectives of security and rehabilitation).

56. *See* *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349–50, 107 S. Ct. 2400, 2404–05, 96 L. Ed. 2d 282, 290 (1987); *Washington v. Harper*, 494 U.S. 210, 223, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 199 (1990).

57. *See* *Pell v. Procunier*, 417 U.S. 817, 822–23, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 501–02 (1974) (“[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system,” including deterrence of crime, protection of society, rehabilitation of the inmate, and internal security within corrections facilities); *Procunier v. Martinez*, 416 U.S. 396, 412, 94 S. Ct. 1800, 1810–11, 40 L. Ed. 2d 224, 239 (1974) (“The identifiable governmental interests at stake in [the maintenance of penal institutions] are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners.”), *overruled on other grounds by* *Thornburgh v. Abbott*, 490 U.S. 401, 413–14, 109 S. Ct. 1874, 1881–82, 104 L. Ed. 2d 459, 473 (1989).

58. *See* *Wisconsin v. Yoder*, 406 U.S. 205, 208, 92 S. Ct. 1526, 1530, 32 L. Ed. 2d 15, 21 (1972) (finding that the beliefs of Amish parents were (1) religious and (2) sincere enough to support their challenge of a state law that required school attendance for their children). *Yoder* was overruled by the Supreme Court in *Employment Division v. Smith*, 494 US 872 (1990). However, when Congress passed the RFRA, it intended to restore the principles of *Yoder* and prevent such burdens on religious exercise in the future. RFRA’s stated purpose is to “restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.” 42 U.S.C. § 2000bb(b)(1)(2012).

59. *See* *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 350, 107 S. Ct. 2400, 2405, 96 L. Ed. 2d 282, 291

The answer to the first two questions must be “yes” before a court will consider whether the regulation is reasonably related to a legitimate purpose or goal.⁶⁰ The following discussion looks at each of these requirements in more detail.

(a) Religious Nature of Your Beliefs

The court will first decide whether your beliefs are religious.⁶¹ The First Amendment only protects religious beliefs; therefore, if the court determines that your beliefs are simply moral or philosophical, it will not find any violation of the Free Exercise Clause.⁶²

While this rule is fairly clear, courts have had difficulty defining exactly what constitutes a religious belief.⁶³ The Supreme Court has cautioned that “[t]he determination of what is a ‘religious’ belief or practice is more often than not a difficult and delicate task,”⁶⁴ and the court has not yet authoritatively or comprehensively defined “religion.”⁶⁵

Without a fixed definition, lower courts have adopted various approaches. For example, the Third Circuit has adopted an objective test to determine whether a belief is religious. In *Africa v. Pennsylvania*, the court identified three factors that help distinguish a religion:

- (1) A religion addresses fundamental and ultimate questions having to do with deep and imponderable matters;
- (2) A religion is comprehensive in nature: it consists of a belief-system as opposed to an isolated teaching; and
- (3) A religion often can be recognized by the presence of certain formal and external signs.⁶⁶

By contrast, the Second Circuit has adopted a more subjective test, one that looks not to the external features of the belief system, but towards the “individual’s inward attitudes towards a particular belief system.”⁶⁷ In *Patrick v. LeFevre*, the court described religion as “the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they

(1987) (finding the prison’s restriction on prisoners who were on work detail from weekly Muslim religious services was reasonably related to legitimate penological goals. In addition, prisoners were able to participate in other religious ceremonies.).

60. See *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 983 (8th Cir. 2004) (“In analyzing [a First Amendment Free Exercise Claim], we consider first the threshold issue of whether the challenged governmental action ‘infringes upon a sincerely held religious belief,’ and then apply the *Turner* factors to determine if the regulation restricting the religious practice is ‘reasonably related to legitimate penological objectives.’” (citations omitted)).

61. See *Wisconsin v. Yoder*, 406 U.S. 205, 216, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, 25 (1972) (considering first whether beliefs of Amish parents were religious and sincere enough to support their challenge of a state law that required children to attend school before considering whether state law was reasonably related to a legitimate purpose or goal).

62. See *Wisconsin v. Yoder*, 406 U.S. 205, 215–16, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, 25 (1972) (“A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”).

63. See, e.g., *Cloutier v. Costco Wholesale*, 311 F. Supp. 2d 190, 196 (D. Mass. 2004) (“[C]ourts are poor arbiters of questions regarding what is religious and what is not.”).

64. *Thomas v. Review Bd.*, 450 U.S. 707, 714, 101 S. Ct. 1425, 1430, 67 L. Ed. 2d 624, 631 (1981).

65. See Scott C. Idleman, *The Underlying Causes of Divergent First Amendment Interpretations*, 27 Miss. C. L. Rev. 67, 71–79 (2008). The most the Supreme Court has been willing to describe religion is as in the following cases: *Davis v. Beason*, 133 U.S. 333, 342, 10 S. Ct. 299, 300, 33 L. Ed. 637 (1890), *overruled on other grounds* by *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) (“The term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.”); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593, 60 S. Ct. 1010, 1012, 84 L. Ed. 1375 (1940), *overruled on other grounds* by *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (describing religion as “the affirmative pursuit of one’s convictions about the ultimate mystery of the universe and man’s relation to it . . .”); *Wisconsin v. Yoder*, 406 U.S. 205, 216, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15 (1972) (stating that “philosophical and personal rather than religious” beliefs are not protected by the Constitution).

66. *Africa v. Pennsylvania*, 662 F.2d 1025, 1026 (3d Cir. 1981) (citing *Malnak v. Yogi*, 592 F.2d 197, 207–10 (3d Cir. 1979)) (holding that although members of the MOVE organization, a “revolutionary organization absolutely opposed to all that is wrong,” held sincere beliefs, these beliefs did not amount to a religion).

67. *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (holding that subjective issues of sincerity of belief and the perceived religious nature of that belief are questions of fact, rather than law, and reversing and remanding the lower court’s grant of summary judgment for further consideration of the prisoner’s request for religious recognition).

may consider the divine.”⁶⁸ Thus, courts in the Second Circuit will probably look to whether your beliefs are religious in your “own scheme of things.”⁶⁹

These tests are not the only ones used in state or federal courts, so be sure to research the law in your state or federal circuit. Although predicting whether a particular court will recognize a particular belief system as a religion is hard, you should be aware of some guideposts.

First, the U.S. Supreme Court has stated that the main consideration in deciding whether beliefs are religious is the role they play in the life of the person making the claim.⁷⁰ Second, the Supreme Court has emphasized that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”⁷¹ Likewise, your religion does not need to be organized like a traditional church,⁷² conform to an established doctrine,⁷³ or otherwise meet any organizational or doctrinal test.⁷⁴

For example, a federal district court recently held that a prisoner who had invented his own religion had a potentially valid claim under the First Amendment and RLUIPA.⁷⁵ In *DeSimone v. Bartow*, the prisoner argued that prison officials had violated his right to free exercise of religion when they prohibited him from keeping journals written in a language that he invented.⁷⁶ The prisoner asserted that he believed that biblical scripture commanded him to write in this language and that the act of writing was itself a religious act.⁷⁷ The court accepted his argument and allowed the suit to proceed, finding that the prisoner had set forth cognizable claims under both the First Amendment and RLUIPA.⁷⁸

Note, however, that although courts have held that non-major religions are entitled to First Amendment protection,⁷⁹ you may encounter greater difficulty if your religion is not well-known.

(b) Sincerity of Your Beliefs

If the court determines your belief is religious, it will next consider whether your belief is sincerely held.⁸⁰ Prison officials and courts may require that you demonstrate “sincerity,” meaning a true and deep commitment to your religion.⁸¹

68. *Patrick v. LeFevre*, 745 F.2d 153, 158 (2d Cir. 1984) (quoting W. James, *The Varieties of Religious Experience* 31 (1910)). This definition is similar to the Supreme Court’s description of religious belief as one “based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent.” *United States v. Seeger*, 380 U.S. 163, 176, 85 S. Ct. 850, 859, 13 L. Ed. 2d 733, 743 (1965); *accord* *Welsh v. United States*, 398 U.S. 333, 339–40, 90 S. Ct. 1792, 1796, 26 L. Ed. 2d 308, 317 (1970).

69. *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (quoting *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984); *United States v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 863, 13 L. Ed. 2d 733, 747 (1965)).

70. *See* *U.S. v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 863, 13 L. Ed. 2d 733, 747 (1965) (“[C]ourts . . . are not free to reject beliefs because they consider them ‘incomprehensible.’ Their task is to decide whether the beliefs professed by a [prisoner] are sincerely held and whether they are, in his own scheme of things, religious.”).

71. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714, 101 S. Ct. 1425, 1430, 67 L. Ed. 2d 624, 631 (1981).

72. *See* *Marria v. Broadus*, No. 97 Civ. 8297, 2003 U.S. Dist. LEXIS 13329, at *26–29 (S.D.N.Y. July 31, 2003) (*unpublished*) (finding the prisoner’s beliefs as a member of the Nation of Gods and Earths to be sincere and religious).

73. *See* *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1163 (6th Cir. 1980) (finding that “[o]rthodoxy is not an issue” and that “[t]he Cherokees have a religion within the meaning of the Constitution . . .”).

74. *See* *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1163 (6th Cir. 1980) (finding that despite having “no written creeds and no man-made houses of worship . . . [t]he Cherokees have a religion within the meaning of the Constitution . . .”).

75. *DeSimone v. Bartow*, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *13 (E.D. Wis. Aug. 12, 2008) (*unpublished*) (finding that a prisoner who had created his own religion, which he referred to as the “Religious Society of Atlantis and the Sanctuary of the Yahweh,” had a potentially valid claim under the First Amendment and RLUIPA).

76. *DeSimone v. Bartow*, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *10 (E.D. Wis. Aug. 12, 2008) (*unpublished*).

77. *DeSimone v. Bartow*, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *12 (E.D. Wis. Aug. 12, 2008) (*unpublished*).

78. *DeSimone v. Bartow*, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *13 (E.D. Wis. Aug. 12, 2008) (*unpublished*) (“*DeSimone's* allegations can be understood to allege that he considers writing in Atlantean as central to his faith, and that the Defendants have targeted his writing, as opposed to the writings of other inmates in foreign languages, because of his uncommon religious beliefs. Thus, *Desimone* will be permitted to proceed with his claims that by forbidding him from writing in Atlantean, the Defendants violated the First Amendment and RLUIPA.”), *dismissed on other grounds*, No. 08-C-638, 2009 U.S. Dist. LEXIS 48689 (E.D. Wis. June 10, 2009).

79. *See* *Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981) (“[W]e must avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs.”).

In making this decision, courts are not supposed to judge whether your beliefs are “accurate or logical,”⁸² or rule on the correctness of your beliefs.⁸³ Thus, a court may still find your belief sincerely held, even if the clergy says you are not a member of the religion.⁸⁴ Indeed, “clergy opinion has generally been deemed insufficient to override a prisoner’s sincerely held religious belief.”⁸⁵

Instead, courts will look to factors including your familiarity with your faith’s teachings,⁸⁶ your demonstrated observance of its rules,⁸⁷ and the length of time that you have practiced these religious beliefs.⁸⁸ Thus, evidence that you are familiar with your religion, have practiced it for a long time, have participated in religious ceremonies when possible, or have otherwise acted on the basis of your religion can help to establish the sincerity of your religious beliefs.

(c) The Validity of Prison Rules and Regulations

If the court decides your belief is religious and sincerely held, it will then apply the *Turner* test to the prison regulation or practice that you are challenging by asking whether a prison regulation “is reasonably related to legitimate penological interests,” and therefore does not violate your constitutional rights.⁸⁹ Specifically, under *Turner*, a court will consider the following four factors:

- (1) Whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest used to justify it;
- (2) Whether there are other ways of exercising the right despite the regulation;

80. *See generally* *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (holding that Amish children could be exempted from required high school attendance because formal education beyond eighth grade violated sincerely held Amish religious beliefs).

81. *Cf.* *United States v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 863, 13 L. Ed. 2d 733, 747 (1965) (holding that a belief must be “sincerely held” to qualify a believer for exemption from service in the armed forces).

82. *See* *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (“In determining whether a prisoner’s particular religious beliefs are entitled to free exercise protection, the relevant inquiry is not whether, as an objective matter, the belief is ‘accurate or logical.’” (quoting *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996))).

83. *Cf.* *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 451–52, 89 S. Ct. 601, 607, 21 L. Ed. 2d 658, 666–67 (1969) (holding that the Constitution prohibits a court from interpreting church doctrine to settle a property dispute that depends upon whether a group is adhering to the doctrine); *Bear v. Nix*, 977 F.2d 1291, 1294 (8th Cir. 1992) (holding that a court would unconstitutionally intrude upon a good faith “application of religious doctrine by a recognized spiritual leader of the relevant faith” if it overruled a refusal to admit plaintiff into a Native American religion).

84. *See* *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (remanding case in which a lower court incorrectly evaluated the prisoner’s claim that he was Jewish by relying on a chaplain’s report that the prisoner was not Jewish, rather than determining whether the prisoner’s belief was “sincerely held”).

85. *Koger v. Bryan*, 523 F.3d 789, 799–800 (7th Cir. 2008) (citing *Ford v. McGinnis*, 352 F.3d 582, 593–94 (2d Cir. 2003)) (holding that a prisoner’s belief regarding the importance of the Eid ul Fitr feast to his practice of Islam and not the testimony of Muslim clerics as to the proper celebration of the feast was determinative of whether the prison’s decision to deprive the prisoner of a post-Eid meal constituted a substantial burden on his freedom of religion); *Jackson v. Mann*, 196 F.3d 316, 320–21 (2d Cir. 1999) (holding that it was the sincerity of a prisoner’s beliefs, and not the decision of Jewish religious authorities, that determined whether the prisoner was an adherent of Judaism entitled to a kosher meal); *cf.* *Frazee v. Ill. Dept. of Employment Sec.*, 489 U.S. 829, 834, 109 S. Ct. 1514, 1517–18, 103 L. Ed. 2d 914, 920 (1989) (holding that in the context of a denial of unemployment benefits, the plaintiff’s refusal to work on Sundays based on his personal professed religious belief was entitled to protection even though “there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work”).

86. *See, e.g.*, *Robinson v. Foti*, 527 F. Supp. 1111, 1113 (E.D. La. 1981) (ruling against a prisoner who sought an exemption from prison rules against dreadlocks in part because the prisoner failed to demonstrate familiarity with Rastafarian practice, history, or teachings, which suggested that the prisoner’s Rastafarian beliefs were not sincere).

87. *See, e.g.*, *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) (“Evidence of nonobservance is relevant on the question of sincerity, and is especially important in the prison setting, for an inmate may adopt a religion merely to harass the prison staff with demands to accommodate his new faith But the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere.”).

88. *See, e.g.*, *Iron Eyes v. Henry*, 907 F.2d 810, 813 (8th Cir. 1990) (upholding lower court’s conclusion that a prisoner’s belief was sincerely held when the lower court “noted that [the prisoner] had maintained Sioux religious beliefs throughout his life, and that he had participated in religious ceremonies whenever possible”).

89. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

- (3) If, by allowing you to exercise your right, there will be a “ripple effect” on others such as prison personnel, other prisoners, and on the allocation of prison resources; and
- (4) Whether there is a different way for the prison to meet the regulation’s goal without limiting your right in this way.⁹⁰

When evaluating the first factor, courts have deferred to the judgment of prison officials⁹¹ and found that prison security is a legitimate governmental interest.⁹² This means courts are not likely to second-guess the reasons prison officials give for prison regulations. For example, one federal court of appeals used the *Turner* test to decide that prison officials could prohibit religious items like a bear tooth necklace and a medicine bag in cells to protect the safety of other prisoners, prison guards, and the prisoner himself.⁹³

For the fourth factor, you will want to show that a different policy could meet the prison’s needs without affecting your religious exercise as severely, and therefore that the current regulation is unnecessary. However, the U.S. Constitution does not require that the prison prove that the current regulation is necessary.⁹⁴

2. RLUIPA and RFRA

In addition to the First Amendment protections described above, your right to religious freedom is also protected by federal laws. If you are in state prison, your right is protected by a law called the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).⁹⁵ If you are in federal prison, your right is protected by a law called the Religious Freedom Restoration Act (RFRA).⁹⁶

These laws prohibit the government from placing a substantial burden on the religious practices of prisoners, unless the government can demonstrate that the burden both (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.⁹⁷

90. *Turner v. Safley*, 482 U.S. 78, 89–90, 107 S. Ct. 2254, 2261–62, 96 L. Ed. 2d 64, 79–80 (1987) (“First, there must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it . . . A second factor . . . is whether there are alternative means of exercising the right that remain open to prison inmates . . . A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally . . . Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation . . . By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns.”).

91. *See Thornburgh v. Abbott*, 490 U.S. 401, 407–08, 109 S. Ct. 1874, 1878–79, 104 L. Ed. 2d 459, 469 (1989) (“Acknowledging the expertise of these officials and that the judiciary is ‘ill equipped’ to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.”); *Harbin-Bey v. Rutter*, 420 F.3d 571, 578 (6th Cir. 2005) (“Courts generally afford great deference to prison policies, regulations, and practices relating to the preservation of these interests.”).

92. *Pell v. Procunier*, 417 U.S. 817, 822–23, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495 (1974) (“[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.”).

93. *See Hall v. Bellmon*, 935 F.2d 1106, 1113 (10th Cir. 1991) (upholding a prison policy that prohibited a Native American from wearing a bear tooth necklace and medicine bag on the grounds of prison security); *see also Spies v. Voinovich*, 173 F.3d 398, 405 (6th Cir. 1999) (upholding a prison’s prohibition of certain Buddhist religious materials from a prisoner’s cell and the chapel on the grounds of prison security).

94. *See, e.g., O’Lone v. Estate of Shabazz*, 482 U.S. 342, 350, 107 S. Ct. 2400, 2405, 96 L. Ed. 2d 282, 291 (1987) (quoting *Turner v. Safley*, 482 U.S. 78, 90–91, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64, 80 (1987)) (“Though the availability of accommodations is relevant to the reasonableness inquiry, we have rejected the notion that ‘prison officials . . . have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint.’”). This case was decided before Congress passed RLUIPA and RFRA. These statutes, discussed in Part C(2) of this Chapter, provide additional statutory protections for prisoners.

95. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–cc-5. (2012).

96. Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–bb-4 (2012). In 1997, the Supreme Court held that RFRA does not apply to claims against states. *City of Boerne v. Flores*, 521 U.S. 507, 534, 117 S. Ct. 2157, 2171, 138 L. Ed. 2d 624, 648 (1997) (holding that RFRA “is a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens” and overturning it as unconstitutional in that regard). However, RFRA still applies to prisoners’ claims against federal prisons. *See, e.g., Hankins v. Lyght*, 441 F.3d 96, 105–06 (2d Cir. 2006) (noting that since *Boerne*, “every appellate court that has squarely addressed the question has held that the RFRA governs the activities of federal officers and agencies”) (citation omitted).

97. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1 (2012) (“No government shall impose a substantial burden upon the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that the imposition of the burden (1) is in the furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental

Both federal laws provide a higher level of protection for prisoners to exercise their religion than the protection provided by the First Amendment Free Exercise Clause.⁹⁸ Therefore, you should begin your complaint with an argument that the restriction violates RLUIPA, or, if you are in federal prison, RFRA. You may then make an argument that the restriction also violates the Free Exercise Clause of the First Amendment. In practice, if a court finds that a regulation does not violate RLUIPA or RFRA, it will also almost certainly find that it does not violate the First Amendment Free Exercise Clause.⁹⁹

Although RLUIPA and RFRA are separate laws, a court deciding a case under one law may also look to how a court decided a case under the other law. In other words, RLUIPA cases will be looked at by courts deciding RFRA cases and vice versa.¹⁰⁰ This is because both laws prohibit laws and policies that substantially burden the exercise of your religion, unless the restrictions further a compelling governmental interest using the least restrictive means available.¹⁰¹ Additionally, both statutes protect the same type of “religious exercise.”¹⁰² So, although this Chapter primarily refers to RLUIPA, if you are a federal prisoner, this discussion of RLUIPA should help you to determine if you have a viable claim under RFRA.

The sections below will explain what you need to show to establish a RLUIPA or RFRA violation. In general, you first need to show that you meet the jurisdictional requirements of the law. Second, you will need to show (1) you are seeking to engage in an exercise of religion, (2) the prison regulation or practice you are challenging “substantially burdens” that exercise of religion, and (3) prison officials cannot show that the regulation is the “least restrictive means” of achieving a “compelling government interest.”¹⁰³

(a) Jurisdictional Requirements

(i) RLUIPA

If you are a state prisoner bringing a claim under RLUIPA, you must first show that the law applies to the prison regulation or practice you are challenging. RLUIPA provides that its protections apply only 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 Indian tribes.”¹⁰⁴

interest.”); *see also* Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 (2012).

98. *See* *Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008) (“RLUIPA ... mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard [used to review regulations under the 1st Amendment]”; *see also* *Cutter v. Wilkinson*, 544 U.S. 709, 714, 125 S. Ct. 2113, 2117, 161 L. Ed. 2d 1020 (2005) (noting that RLUIPA provides a “heightened protection from government-imposed burdens” compared with 1st Amendment standards); *Desimone v. Bartow*, No. 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *11 (E.D. Wis. Aug. 12, 2008) (*unpublished*) (“RLUIPA provides more expansive protection [than the 1st Amendment], prohibiting institutions that receive federal funding from substantially burdening an inmate’s exercise of religion, even by a rule of general applicability, unless that burden is the least restrictive means of furthering a compelling governmental interest.”).

99. *See, e.g.*, *Fegans v. Norris*, 537 F.3d 897, 906–08 (8th Cir. 2008) (finding a prison’s grooming policy did not violate either RLUIPA or the 1st Amendment); *Borzych v. Frank*, 439 F.3d 388, 390–91 (7th Cir. 2006) (finding a prison’s refusal to provide access to books did not violate either RLUIPA or the 1st Amendment); *Nelis v. Kingston*, No. 06-C-1220, 2007 U.S. Dist. LEXIS 86036, at *17 (E.D. Wis. Nov. 19, 2007) (*unpublished*) (finding a prison’s eligibility rule for religious activities did not violate either RLUIPA or the 1st Amendment); *Daker v. Wetherington*, 469 F. Supp. 2d 1231, 1238 (N.D. Ga. 2007) (finding a prison’s shaving policy did not violate either RLUIPA or the 1st Amendment).

100. *See* *Hoevenaar v. Lazaroff*, 422 F.3d 366, 370 (6th Cir. 2005) (“RFRA cases according deference to prison decisions [are] applicable to cases brought pursuant to the RLUIPA.”); *see also* *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 987 (8th Cir. 2004) (RLUIPA and RFRA apply the same standard) (*overruled on other grounds*, *Van Wyhe v. Reisch*, 536 F. Supp. 2d 1110); *Congregation Kol Ami v. Abington Tp.*, No. 01-1919, 2004 U.S. Dist. LEXIS 16397, at *45, n.11 (E.D. Pa. Aug. 12, 2004) (*unpublished*) (“Cases involving establishment clause challenges to the RFRA are as relevant as those involving the RLUIPA.”).

101. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1 (2012); Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb–bb-4. (2012).

102. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000bb-2(4) (2012).

103. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2012).

104. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(b) (2012).

This means that you will need to show that the prison regulation you are challenging either (a) is imposed in a program or activity that receives federal funds (called “Spending Clause jurisdiction”) or (b) affects interstate commerce (called “Commerce Clause jurisdiction”).¹⁰⁵

In order to meet the Spending Clause jurisdictional requirement, the regulation that you are challenging must be imposed in the context of a program or activity that receives federal financial assistance.¹⁰⁶ “Program or activity” means “all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or local government.”¹⁰⁷ Basically, this means that whenever a state or local prison or department of corrections accepts federal funding, RLUIPA will apply to all of its programs.¹⁰⁸ Virtually every prison and jail system accepts some federal money, so you can and should plead in good faith in your complaint that the court has Spending Clause jurisdiction. After you have filed your complaint, you can then request the proof of that fact from the defendants during the discovery phase.

A court also has RLUIPA jurisdiction under the Commerce Clause if the substantial burden placed on your religious exercise “substantially affects interstate commerce.”¹⁰⁹ However, because, as explained above, nearly all prison and jail systems accept some federal funds, it is very unlikely that you will need to rely upon Commerce Clause jurisdiction.

(ii) RFRA

If you are a federal prisoner bringing a lawsuit under RFRA, these jurisdictional requirements do not apply. Instead, you must say that your free exercise of religion rights were violated at a federal prison or by a federal agent.¹¹⁰

(b) Religious Exercise

Assuming you have met the jurisdictional requirements, a court will next assess whether the activity you want to do is a religious practice. To constitute a religious practice, the activity you want to do must be (1) rooted in a sincerely held belief that is (2) religious in nature.¹¹¹

105. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1 (2012) (“[RLUIPA] 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.”). If you are a federal prisoner bringing a claim under RFRA, these jurisdictional requirements do not apply to you; instead, you must allege that your Free Exercise rights were violated at a Federal prison or by an agent of the Federal Government.

106. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(f) (2012).

107. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000d-4a (2012); 42 U.S.C. § 2000cc-5(6) (2012) (“[T]he term ‘program or activity’ means all of the operations of any entity as described in paragraph (1) or (2) or section 2000d-4a of this title.”).

108. *See* *Orafan v. Goord*, 2003 U.S. Dist. LEXIS 14277, at *24 (N.D.N.Y. Aug. 11, 2003) (*unpublished*) (“Nowhere in this definition [of program and activity] does it state that a receiver of federal funds is at liberty to decide which programs are under the auspice of RLUIPA. Quite the contrary, as the statute clearly applies to all of the operations.”).

109. *United States v. Lopez*, 514 U.S. 549, 558–59, 115 S. Ct. 1624, 1629, 131 L. Ed. 2d 626 (1995) (describing the types of commerce authority enjoyed by Congress, including “the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.”). This means that if other people in the same situation as you experienced the same burden, the total effect of all of those situations combined would affect interstate commerce. *See Wickard v. Filburn*, 317 U.S. 111, 128, 63 S. Ct. 82, 91, 87 L. Ed. 122 (1942) (holding that interstate effect is measured by evaluating the activity in question “together with that of many others similarly situated”).

110. Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-3 (2012).

111. *See Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008) (“RLUIPA is a guarantor of sincerely held religious beliefs”); *see also* *Porter v. Burnett*, No. 1:05-cv-562, 2008 WL 3050011, at *5, 2008 U.S. Dist. LEXIS 58993 (W.D. Mich. Aug. 4, 2008) (*unpublished*) (“While [RLUIPA’s] definition of religious exercise is broad, it does require that [p]laintiff’s religious beliefs be ‘sincerely held.’”) (citing *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691, 700 (E.D. Mich. 2004) (citation omitted); *Lovelace v. Lee*, 472 F.3d 174, 187 n.2 (4th Cir. 2006) (“In assessing this burden, courts must not judge the significance of the particular belief or practice in question . . . RLUIPA does not, however, preclude inquiry into ‘the sincerity of a prisoner’s professed religiosity.’”) (citations omitted)); *Starr v. Cox*, No. 05-cv-368-JD, 2008 U.S. Dist. LEXIS 34708, at *21 (D.N.H. Apr. 28, 2008) (*unpublished*) (“[C]ourts have construed RLUIPA to require a plaintiff to show that the exercise of religion is part of a (1) system of religious belief and (2) that the plaintiff holds a sincerely held belief in the religious exercise.”) (citing *Guzzi v. Thompson*, 470 F. Supp. 2d 17, 26 (D. Mass. 2007)).

Congress has defined “religious exercise” broadly, to mean “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”¹¹² This broad definition, which applies to both RLUIPA and RFRA,¹¹³ greatly increases the likelihood your lawsuit will succeed, or at least make it through a summary judgment motion.¹¹⁴

Under this definition, RLUIPA also protects religious practices that are not necessarily central to your religion, such as practices that are a small part of your religion or not of great importance to your religion.¹¹⁵ This means that, as a general rule, courts will not try to determine whether your religious belief is accurate or supported by your religious teachings, but will simply decide if it is a sincerely held belief and religious in nature.¹¹⁶

The current definition of religious exercise prevents courts and government officials from deciding what types or levels of religious exercise are necessary or appropriate for membership in a certain religion. This definition also incorporates the idea that the judicial system is not able (or competent) to decide whether a particular act is central to a person’s faith.¹¹⁷

(c) Substantial Burden

If the court finds that you have engaged in religious exercise, it will then evaluate whether the prison regulation that you are challenging substantially burdens this religious exercise.¹¹⁸

Although Congress did not define what “substantial burden” means, the Supreme Court has interpreted “substantial burden” to mean that the government action or regulation at issue either (1) puts great pressure on you to change your behavior and violate your beliefs, or (2) prevents you from engaging in religious actions in a way that more than just inconveniences you.¹¹⁹ The legislative history of RLUIPA indicates that Congress wanted courts to follow this interpretation.¹²⁰

112. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-5(7)(A) (2012).

113. Congress amended RFRA through § 7 of RLUIPA. This amendment ensures that the type of “religious exercise” protected by RLUIPA is identical to that protected by RFRA. *See* Pub.L. 106-274, § 7, 114 Stat. 803, (2000); 42 U.S.C. § 2000bb-2(4) (2012). As a result, RFRA now defines “exercise of religion” as “religious exercise, as defined in § 2000cc-5 [RLUIPA].” Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000bb-2(4) (2012).

114. Because the determination of whether your belief is sincere and religious in nature is a fact-specific inquiry, some courts have expressed reluctance to grant summary judgment motions. *See, e.g.*, *Porter v. Caruso*, 479 F. Supp. 2d 687, 691–92 (W.D. Mich. 2007) (holding that even when there is evidence in the record to suggest that a belief is sincerely held, summary judgment is inappropriate because the sincerity of a belief is a factual dispute that must be resolved at trial).

115. *See* Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-5(7) (2012) (“[R]eligious exercise’ includes any exercise of religion, whether or not . . . [it is] central to a system of religious belief.”).

116. *See* *Thomas v. Review Bd.*, 450 U.S. 707, 716, 101 S. Ct. 1425, 1431, 67 L. Ed. 2d 624, 632 (1981) (“[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”); *see also* *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 699, 109 S. Ct. 2136, 2148, 104 L. Ed. 2d 766, 786 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”).

117. *McEachin v. McGuinnis*, 357 F.3d 197, 201–02 (2d Cir. 2004) (“Courts have long puzzled over how best to maintain the delicate balance between, on the one hand, preserving legitimate governmental needs to legislate, regulate, and maintain order, and, on the other, protecting the right of individuals to practice their faith unfettered by the state’s definition of what constitutes a legitimate religious imperative.”).

118. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1 (2012).

119. *See* *Thomas v. Review Bd.*, 450 U.S. 707, 718, 101 S. Ct. 1425, 1432, 67 L. Ed. 2d 624, 634 (1981); *see also* *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (summarizing the Supreme Court’s interpretation of “substantial burden” and noting 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.”); *Coronel v. Paul*, 316 F. Supp. 2d 868, 880 (D. Ariz. 2004) (holding that “state action substantially burdens the exercise of religion within the meaning of the RLUIPA when it prevents a religious adherent from engaging in conduct both important to the adherent and motivated by sincere religious belief.”).

120. *See* 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy) (stating that the term “substantial burden” is to “be interpreted by reference to existing Supreme Court jurisprudence”).

Although courts have emphasized that the question of whether a regulation imposes a substantial burden is a fact-specific inquiry requiring a case-by-case determination,¹²¹ the examples discussed below in Part C(3) can help you assess whether a court would find a regulation to be a substantial burden.

(d) Compelling Government Interest and Least Restrictive Means

Once you have established that a prison rule or regulation places a substantial burden on your religious exercise, RLUIPA shifts the burden of production of evidence and the burden of persuasion to the government.¹²² This means that in order to defeat your claim, the government needs to show that:

- (1) the substantial burden it has placed on your religious exercise is necessary because of a “compelling government interest;” and
- (2) the burden it placed on your religious exercise is the “least restrictive means” of achieving its goal.¹²³

In order to meet the first of these requirements, the government must show that it has a compelling interest in restricting your religious exercise. The Supreme Court has defined “compelling interest” as “only those interests of the highest order.”¹²⁴ The government’s interest in maintaining prison safety and security is a compelling interest.¹²⁵ However, other examples of state interests, such as reducing expenses, are less likely to be considered “compelling.”¹²⁶

In order to show that the challenged rule or restriction is the least restrictive means, the government must do more than just say that there is no less restrictive means available.¹²⁷ The government must also do more than simply speculate as to the possible negative effects that could occur if it were to accommodate your religious practice.¹²⁸ Moreover, in at least some courts, the government must demonstrate that “it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.”¹²⁹ Like the compelling interest test, the least restrictive means test is very strict and well established in constitutional law.¹³⁰

121. *See, e.g.,* *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004) (“We recognize that our test requires a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a substantial burden on an adherent’s religious exercise; however, we perceive this kind of inquiry to be unavoidable under the RLUIPA and the circumstances that it addresses. This is why we make no effort to craft a bright-line rule.”).

122. *Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)*, 42 U.S.C. § 2000cc-1(a) (2012); *see also* *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008) (“Once the plaintiff establishes this prima facie case, the defendants ‘bear the burden of persuasion on any [other] element of the claim,’ namely, whether their practice ‘is the least restrictive means of furthering a compelling governmental interest.’”) (citation omitted).

123. *Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)*, 42 U.S.C. § 2000cc-1(a) (2012).

124. *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, 25 (1972).

125. *See, e.g.,* *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13, 125 S. Ct. 2113, 2124 n.13, 161 L. Ed. 2d 1020, 1036 n.13 (2005) (“[P]rison security is a compelling state interest, and . . . deference is due to institutional officials’ expertise in this area.”); *Pell v. Procunier*, 417 U.S. 817, 823, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495, 502 (1974) (“[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.”); *Jova v. Smith*, 582 F.3d 410, 415 (2d Cir. 2009) (“Where a plaintiff adduces evidence sufficient to show that the government practice substantially burdens her religious exercise, the onus shifts to the government to demonstrate that the practice furthers a compelling governmental interest, and that the burden imposed on religion is the least restrictive means of achieving that interest.”).

126. Some courts, however, have held that expense is a compelling governmental interest. *See, e.g.,* *Baranowski v. Hart*, 486 F.3d 112, 125–26 (5th Cir. 2007) (holding “controlling costs” to be a compelling governmental interest), *cert. denied*, 128 S. Ct. 707, 169 L. Ed 553 (2007).

127. *See* *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005) (finding the government’s unsupported statements insufficient to meet its burden that it had adopted the least restrictive means to achieve its interest in maintaining prison security).

128. *See* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434–36, 126 S. Ct. 1211, 1222–24, 163 L. Ed. 2d 1017, 1034–35 (2006) (holding that under the compelling interest test of the Restoration of Freedom of Religion Act (the statute that existed before RLUIPA), the government’s interest in enforcing the Controlled Substances Act uniformly was insufficient to justify the substantial burden on religious exercise imposed on a small religious group).

129. *See, e.g.,* *Spratt v. R.I. Dept. of Corr.*, 482 F.3d 33, 41 n.11 (1st Cir. 2007) (“[T]o meet the least restrictive means test, prison administrators generally ought to explore at least some alternatives.”); *see also* *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005) (citing *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 824, 120 S. Ct. 1878, 1892, 146 L. Ed. 2d 865, 886 (2000) (finding, in context of 1st Amendment challenge to speech restrictions, that “[a] court should not assume a plausible, less restrictive alternative would be ineffective”); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 507, 109 S. Ct. 706, 729–30, 102 L. Ed. 2d 854, 890–91 (1989) (holding that city’s minority set-aside program was not narrowly tailored in part because the city had not considered whether race-neutral measures

Although you do not have the burden of proof, you can, and should, challenge the government's argument that the regulation is the least restrictive means. For example, if the government allows other types of practices in the prison that harm its stated compelling interest, or if other prisons allow the religious exercise you are seeking, you can use this evidence in an effort to overcome the government's argument.¹³¹ Several courts have recognized that evidence of what other prisons have done to accommodate prisoners' religious practices is relevant to RLUIPA claims.¹³² But "[c]ourts have repeatedly recognized that 'evidence of policies at one prison is not *conclusive* proof that the same policies would work at another institution.'"¹³³

3. Examples of Common Challenges to Prison Restrictions

This Section provides examples of common challenges to prison restrictions, including restrictions on attending religious services or worship areas, receiving visits from religious advisors, sending and receiving religious mail, changing one's name or diet for religious reasons, refusing to receive medical treatment for religious reasons, and wearing special religious attire. It describes how courts have applied the *Turner* test to examine First Amendment Free Exercise claims as well as how courts have applied, or might in the future apply, the RLUIPA standards outlined above.

Because RLUIPA generally provides more protection to your religious freedom than the First Amendment Free Exercise Clause,¹³⁴ you should think of the discussion of the Free Exercise Clause as protecting your basic rights to freely exercise your religion in prison. At times, RLUIPA will provide you with more rights than the First Amendment. Also, because the law in this area is constantly changing, be sure to check for new RLUIPA cases that support your particular claim.

would have achieved the government's interest); *Hunter ex rel. Brandt v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1078 (9th Cir. 1999) (concluding that government "neglected to undertake any consideration—let alone serious, good faith consideration" of race-neutral alternatives)).

130. The "least restrictive means" test is a form of a common test used in constitutional cases known as the "narrowly tailored" test, which tells courts to evaluate whether a proposed regulation or law is carefully designed to achieve its goals. *See Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1255 (11th Cir. 2004) (noting that law could be written to meet the least restrictive means test where the "government ... tailor[s] its regulation more closely to fit ... conduct likely to threaten the harms it fears.").

131. For example, the Court of Appeals for the Ninth Circuit found that a grooming restriction that required all male prisoners to maintain their hair no longer than three inches was not the least restrictive means of ensuring prison security when other prisons did not impose such restrictions. In *Warsoldier v. Woodford*, the court noted that "other prison systems, including the Federal Bureau of Prisons, do not have such hair length policies, or, if they do, provide religious exemptions." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005). The court also noted that the Department of Corrections had failed to explain why it did not impose the same grooming restriction on female prisoners at its women's prisons. *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005).

132. *See, e.g., Washington v. Klem*, 497 F.3d 272, 285 (3d Cir. 2007) (finding that prison's limitation on the number of books allowed in a cell was not the least restrictive means to ensure safety because, in part, other prisons permitted a greater number of books); *see also Fowler v. Crawford*, 534 F.3d 931, 942 (8th Cir. 2008) (noting that policies of other prisons are "relevant" but do not determine the outcome of the "least restrictive means" inquiry).

133. *Fowler v. Crawford*, 534 F.3d 931, 941–42 (8th Cir. 2008) (quoting *Spratt v. R.I. Dept. of Corr.*, 482 F.3d 33, 41 n.11 (1st Cir. 2007) (emphasis added) (holding that officials met their burden under RLUIPA and did not have to install a sweat lodge because "prohibiting a sweat lodge at JCCC is the least restrictive means by which to further the institution's compelling interest in safety and security.")).

134. *See Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008) ("RLUIPA . . . mandates a tougher standard of review for prison regulations that burden the free exercise of religion than the reasonableness test [used to review regulations under the 1st Amendment]"); *see also Smith v. Allen*, 502 F.3d 1255, 1266 (11th Cir. 2007) (noting that RLUIPA gives more "protection from government-imposed burdens" than the 1st Amendment standards) (citation omitted); *DeSimone v. Bartow*, 08-C-638, 2008 U.S. Dist. LEXIS 64419, at *9 (E.D. Wis. Aug. 12, 2008) (*unpublished*) ("RLUIPA provides more expansive protection [than the 1st Amendment], prohibiting institutions that receive federal funding from substantially burdening an inmate's exercise of religion, even by a rule of general applicability, unless that burden is the least restrictive means of furthering a compelling governmental interest.").

(a) Restrictions on Attending Religious Services, Group Worship, and Receiving Visits from Religious Advisors

(i) First Amendment Free Exercise Clause

Under the Free Exercise Clause, prisons must provide you with a reasonable opportunity to worship according to what you think is required by your religion.¹³⁵ This right to worship applies even if there is only a minority of prisoners who practice the religion.¹³⁶ However, courts have long held that this right may be restricted in certain cases.

For example, courts have said that prison officials may limit or prohibit religious group services when these services would be a threat to prison security.¹³⁷ For example, in *Thomas v. Gunter*,¹³⁸ a federal court of appeals said prison officials could deny a Native American prisoner daily access to the prison sweat lodge for prayer. Applying *Turner*, the court held the denial was reasonably related to a legitimate prison interest in security. The sweat lodge was near a truck delivery entrance in use during weekday afternoons, and the court accepted the prison's argument that frequent use of the sweat lodge created a security risk. The court noted that daily access to the sweat lodge would also have interfered with scheduled educational and vocational activities.¹³⁹

Courts have also said that prison officials may attend prisoner religious group services, provided their presence is reasonable and consistent with prison security measures and does not unreasonably restrict the way in which the services are conducted.¹⁴⁰ Prison officials may also regulate the time, place, and sometimes the manner in which religious services are conducted, as long as the restrictions are rationally related to legitimate prison goals.¹⁴¹ Similarly, courts have said that prison officials may limit or prohibit visits by religious advisors and counselors when such visits would undermine prison security, prison administration, or both.¹⁴² The time, length, and manner of these visits are also subject to reasonable regulation by prison officials.

For example, in *Ha'min v. Montgomery County Sheriff's*,¹⁴³ a prisoner sued law enforcement officials alleging violations of his First Amendment right to freely exercise his religion. Friday Muslim prayer services were not regularly conducted during the period of the prisoner's incarceration, despite being authorized by prison regulations. Further, he was not allowed to conduct the Muslim service for himself as a

135. See *Cruz v. Beto*, 405 U.S. 319, 322 n.2, 92 S. Ct. 1079, 1081 n.2, 31 L. Ed. 2d 263, 368 n.2 (1972) (finding that where a prisoner was denied the reasonable opportunity of pursuing his faith comparable to the opportunity of prisoners who adhered to conventional religions, then there was palpable discrimination); compare *Johnson v. Moore*, 948 F.2d 517, 520 (9th Cir. 1991) (holding that the failure to provide a Unitarian Universalist chaplain for a prisoner did not violate the 1st Amendment, reasoning that “the Constitution does not necessarily require prisons to provide each inmate with the spiritual counselor of his choice,” but that “[p]risons need only provide inmates with a reasonable opportunity to worship in accord with their conscience”) (citations omitted).

136. See *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263, 268 (1972) (noting that a prisoner must be given “a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts”).

137. See *Brown v. Johnson*, 743 F.2d 408, 412 (6th Cir. 1984) (holding that a blanket ban against group religious services by a church that ministered to homosexual persons did not violate the 1st Amendment because the ban was reasonably related to the prison's interest in maintaining internal security and reducing prison violence); see also *Johnson v. Collins*, 2009 U.S. Dist. LEXIS 47844, at *14–15 (N.D. Ohio May 2, 2009) (*unpublished*) (granting summary judgment for prison officials where a prisoner claimed a violation of his right to freely exercise his religious beliefs when he was denied permission to maintain his dreadlocks in accordance with Rastafarianism principles, noting that “substantial deference is given to prison officials in terms of their discretion to impose regulations” and that “prison officials need only demonstrate potential danger, not *actual* danger.”) (citations omitted).

138. *Thomas v. Gunter*, 103 F.3d 700 (8th Cir. 1997).

139. *Thomas v. Gunter*, 103 F.3d 700, 703 (8th Cir. 1997).

140. See *Butler-Bey v. Frey*, 811 F.2d 449, 452 (8th Cir. 1987) (holding, in part, that a prison regulation requiring a guard to be present at religious meetings did not violate the 1st Amendment where the regulation applied to all prison group meetings, both secular and non-secular).

141. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 358, 107 S. Ct. 2400, 2409, 96 L. Ed. 2d 282, 296 (1987) (“[I]f a regulation merely restricts the time, place, or manner in which prisoners may exercise a right, a prison regulation will be invalidated only if there is no reasonable justification for official action.”).

142. See *Brown v. Johnson*, 743 F.2d 408, 412 (6th Cir. 1984) (affirming that prison authorities can restrict visits by officials of a church that ministers to the spiritual and religious needs of homosexuals because “a strong correlation existed between inmate homosexuality and prison violence”).

143. *Ha'min v. Montgomery County Sheriff's*, 440 F. Supp. 2d 715 (M.D. Tenn. 2006).

result of a rule that only volunteer religious leaders from outside could perform such services, regardless of the religion. Since the prisoner could keep his Holy Quran in his cell and pray, he had alternative means to exercise his religion. In light of this, the court held that the prisoner's First Amendment rights were not violated.¹⁴⁴

Note that although your right to attend services or receive visits from ministers may be restricted, you do not have to be a presently affiliated or professed member of a religion to attend such services and receive visits from ministers of that faith. You may also receive visits from the clergy of your choice even if you were not a member of that faith before being incarcerated.¹⁴⁵ Instead, you may simply be thinking about joining the religion and want to attend services or talk to a minister in order to learn about the religion. However, a religious advisor may examine the sincerity of your belief and restrict your access to religious services of that particular faith.¹⁴⁶

Finally, although prisons must provide a reasonable opportunity to prisoners whose religious practices are observed by a minority of prisoners,¹⁴⁷ many courts have held that the accommodation a prison must make for a particular religion is proportional to the number of believers of that particular faith.¹⁴⁸ For example, in *Cruz v. Beto*,¹⁴⁹ a Buddhist prisoner alleged that prison officials violated his constitutional rights when they prohibited him from conducting Buddhist services in the prison chapel, offering religious materials to other prisoners, and corresponding with his religious advisor. The U.S. Supreme Court reversed the decision of the federal court of appeals, which had dismissed the prisoner's claims. The Court held that the prison must give Cruz the same reasonable opportunity to pursue his faith as the prison gives to followers of more traditional religions.¹⁵⁰ However, the Court also stated that prisons were not required to provide every religion with identical facilities and accommodate each equally.¹⁵¹

(ii) RLUIPA

A federal law known as RLUIPA prohibits prisons from imposing a "substantial burden" on your access to religious services and/or worship areas, except under certain circumstances.¹⁵² The prison *can* substantially limit your access to religious services and/or worship areas if (1) the limitation furthers a "compelling" interest of the prison, and (2) the prison limits your access to religious services and/or worship areas in the least restrictive way possible.¹⁵³ However, if a court determines that a regulation does not impose a substantial burden or that the activity you are pursuing is not a religious exercise, it will dismiss your challenge and uphold the requirement.¹⁵⁴

144. *Ha'min v. Montgomery County Sheriff's*, 440 F. Supp. 2d 715, 718–19 (M.D. Tenn. 2006) (finding that the government showed a "valid, rational connection between the jail's action in not providing a regular Friday Muslim service and the legitimate governmental interest" and that plaintiff had an "alternative means of exercising his right to the free exercise of religion").

145. *See Pell v. Procunier*, 417 U.S. 817, 824–25, 94 S. Ct. 2800, 2805, 41 L. Ed. 2d 495, 503 (1974) (allowing restricted visits from "members of their families, the clergy, their attorneys, and friends of prior acquaintance" as long as "such visits will aid in the rehabilitation of the inmate").

146. *See Montano v. Hedgepeth*, 120 F.3d 844, 850–51 (8th Cir. 1997) (allowing a prison chaplain to deny participation in Protestant services to a Messianic Jew).

147. *See, e.g., Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008) ("We have long held that '[t]he rights of inmates belonging to minority or non-traditional religions must be respected to the same degree as the rights of those belonging to larger and more traditional denominations.'") (quoting *Al-Alamin v. Gramley*, 926 F.2d 680, 686 (7th Cir. 1991)).

148. *See Cruz v. Beto*, 405 U.S. 319, 322 n.2, 92 S. Ct. 1079, 1082 n.2, 31 L. Ed. 2d 263, 268 n.2 (1972) ("[The Court does not suggest] that every religious sect or group within a prison—however few in number—must have identical facilities or personnel [N]or must a chaplain, priest, or minister be provided without regard to the extent of the demand.").

149. *Cruz v. Beto*, 405 U.S. 319, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972).

150. *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081–82, 31 L. Ed. 2d 263, 268 (1972).

151. *Cruz v. Beto*, 405 U.S. 319, 322 n.2, 92 S. Ct. 1079, 1082 n.2, 31 L. Ed. 2d 263, 268 n.2 (1972) ("We do not suggest, of course, that every religious sect or group within a prison—however few in number—must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size").

152. 42 U.S.C. § 2000cc-1(a) (2012).

153. 42 U.S.C. § 2000cc-1(a)(1)–(2) (2012).

154. *See* Part C(2) above. For example, the Court of Appeals for the Fifth Circuit has dismissed at least two RLUIPA challenges based on a finding that a prison policy that required an outside volunteer to attend prisoner group religious meetings did not impose a substantial burden on the prisoners' religious exercise. *See Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004) ("The requirement of an outside volunteer – which is a uniform requirement for all religious assemblies at Coffield with the exception of Muslims – does not place a substantial burden on Adkins's religious exercise.");

Keep in mind, however, that a court's determination of whether a rule imposes a substantial burden on your right to religious worship will depend on the specific facts of your case. In at least two instances, the Court of Appeals for the Fifth Circuit has found that a policy requiring volunteers to attend prisoner religious group meetings did not impose a substantial burden, when the prisoners were able to engage in other means of worship.¹⁵⁵ For example, in *Baranowski v. Hart*,¹⁵⁶ the court found that a volunteer requirement did not impose a substantial burden on Jewish prisoners who wanted more meetings on Sabbaths and other Jewish holy days than their volunteer could attend. In a more recent case, however, the same Court of Appeals concluded that a volunteer requirement could impose a substantial burden, in a case where: there was evidence that no new volunteers would be available to provide group religious worship, the prison applied the volunteer requirement differently for different religious groups, and the prisoner did not have access to other options for worship.¹⁵⁷

If you are able to show there is a substantial burden on your religious exercise, the government will need to demonstrate that the restriction on group worship or religious services is the least restrictive way to promote the compelling government interest.¹⁵⁸ Although the court will require the prison to provide some evidence showing that the policy meets this standard, the Supreme Court has told courts to give “due deference to the experience and expertise of prison and jail administrators” while interpreting RLUIPA.¹⁵⁹

For example, in *Murphy v. Missouri Department of Corrections*,¹⁶⁰ the Eighth Circuit Court of Appeals found that the prison had not met its burden when the only reason it gave for denying a prisoner the right to practice group worship was that the prisoner was a racist whose religion limited participation to Anglo-Saxons. In contrast, the Eighth Circuit Court of Appeals found the prison had met its burden in a case involving a Native American prisoner who had been denied access to a sweat lodge.¹⁶¹ There, the prison provided the court with evidence that it had suggested alternative religious means to the prisoner. In that case, officials had offered the prisoner an outdoor area where he could smoke a ceremonial pipe, suggested a medicine wheel, and sought to locate a volunteer to oversee a Native American group.¹⁶² Based in part on this evidence, the court concluded that the ban on accessing the sweat lodge was the least restrictive means to furthering the prison's interest in security.

These cases suggest that if you can show that the prison denied your request for group worship or attendance of religious services, and did not offer you any other options to your preferred method of worship, you may have a better chance of defeating the government's arguments that the restriction is the least restrictive means of furthering a compelling interest.

(b) Mail Censorship

(i) First Amendment Free Exercise Clause

Under the First Amendment Free Exercise Clause, a prison may censor the religious mail that you receive or send, depending on the purpose the censorship serves. For a summary of the Supreme Court's decisions on prisoners' use of the postal system, including receipt of religious materials and correspondence about religious materials, see Chapter 19 of the *JLM*, “Your Right to Communicate with the Outside World.”

Baranowski v. Hart, 486 F.3d 112, 124–25 (5th Cir. 2007) (finding that there was not a substantial burden on the prisoner's free exercise of his faith within the meaning of RLUIPA because, on the days that services were not provided, no rabbi or approved religious volunteer was available to lead the services).

155. *Adkins v. Kaspar*, 393 F.3d 559, 564 (5th Cir. 2004); *Baranowski v. Hart*, 486 F.3d 112, 121 (5th Cir. 2007).

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

157. *Mayfield v. Tex. Dept. of Corr.*, 529 F.3d 599, 614–15 (5th Cir. 2008) (finding that summary judgment was inappropriate when there was evidence that no new volunteers would be available, the prisoner did not have alternative means of worship, and prison officials were unevenly applying the requirement).

158. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a) (2012). See *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008) (“Once the plaintiff establishes this prima facie case, the defendants ‘bear the burden of persuasion on any [other] element of the claim,’ namely whether their practice ‘is the least restrictive means of furthering a compelling governmental interest.’”) (alteration in original) (citation omitted).

159. *Cutter v. Wilkinson*, 544 U.S. 709, 723, 125 S. Ct. 2113, 2123, 161 L. Ed. 2d 1020, 1035 (2005).

160. *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 989 (8th Cir. 2004).

161. *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008).

162. *Fowler v. Crawford*, 534 F.3d 931, 939–40 (8th Cir. 2008).

In general, prison officials may censor *incoming* religious mail in any manner reasonably related to the legitimate needs of prison administration.¹⁶³ To determine whether the censorship is appropriate, courts apply the *Turner* test.¹⁶⁴ Under this test, courts have allowed prison officials to withhold mail that advocates racial violence and hatred, even if the mail contains religious content or is from a religious organization. For example, in *Chriceol v. Phillips*, the Fifth Circuit Court of Appeals allowed a Louisiana prison to withhold mail that the Aryan Nation and its affiliate church, the Church of Jesus Christ Christian, had sent to prisoners.¹⁶⁵ The court explained that the mail encouraged racial violence and hatred, and that the “purpose of the rule [was] to eliminate potential threats to the security or order of the facility,” which “[c]learly ... is a legitimate interest.”¹⁶⁶

Similarly, in *Shabazz v. Parsons*, the Tenth Circuit Court of Appeals applied the *Turner* test and held that Oklahoma prison officials had a rational basis for denying a prisoner access to an entire issue of a religious magazine, which officials determined would create a danger of violence based on racial, religious, and national hatred.¹⁶⁷ Furthermore, the court denied the prisoner’s claim that merely deleting the offending portions of the magazine was a good alternative. The court reached this decision because such deletions would be very expensive and would “prevent the prisoner from obtaining meaningful administrative review.”¹⁶⁸

Prison officials may also regulate *outgoing* mail, provided that the regulation is “generally necessary” to protect one or more legitimate governmental interests.¹⁶⁹ Note that it may be easier for you to successfully challenge a restriction on outgoing mail, as the Supreme Court has recognized that outgoing correspondence that includes “grievances or contains inflammatory racial views cannot reasonably be expected to present a danger to the community *inside* the prison.”¹⁷⁰

Note also that although prisons can censor mail if there are legitimate prison interests at stake, indiscriminate censorship or an absolute ban on correspondence with a religious advisor is unconstitutional. See Chapter 19 of the *JLM*, “Your Right to Communicate with the Outside World.”

(ii) RLUIPA

Under RLUIPA, a prison may censor the religious mail you receive or send, provided that if the censorship substantially burdens your religious exercise, it (1) furthers a compelling government interest (2) by the least restrictive means available.¹⁷¹ The Supreme Court has noted that “[l]awmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions” and “anticipated that courts would apply the Act’s standard with due deference to the experience and expertise of prison and jail administrators”¹⁷² Thus, it is unclear whether courts are likely to reach different outcomes under a RLUIPA standard than they would under a Free Exercise standard.

(c) Shaving, Haircuts, and Grooming Restrictions

(i) First Amendment Free Exercise Clause

The First Amendment does not generally prevent a prison from restricting how you choose to wear your hair or beard, even if this choice is part of your religious practice. To determine whether a prison grooming restriction is acceptable under the Free Exercise Clause, a court will look at various factors to ask whether the

163. See *Thornburgh v. Abbott*, 490 U.S. 401, 404–05, 109 S. Ct. 1874, 1876–77, 104 L. Ed. 2d 459, 467 (1989) (applying the *Turner* standard to determine whether regulations censoring incoming mail are constitutional).

164. *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (holding that the rule banning correspondence between prisoners was reasonably related to legitimate security concerns of prison officials and was not invalid).

165. *Chriceol v. Phillips*, 169 F.3d 313, 314–15, 317 (5th Cir. 1999).

166. *Chriceol v. Phillips*, 169 F.3d 313, 316 (5th Cir. 1999); see also *Murphy v. Mo. Dep’t of Corr.*, 814 F.2d 1252, 1256–57 (8th Cir. 1987) (finding that a complete ban on Aryan Nation materials is too restrictive, but that a mail policy restricting materials that advocate violence or that are racially inflammatory is valid).

167. *Shabazz v. Parsons*, 127 F.3d 1246, 1247, 1249 (10th Cir. 1997).

168. *Shabazz v. Parsons*, 127 F.3d 1246, 1249 (10th Cir. 1997).

169. See *Thornburgh v. Abbott*, 490 U.S. 401, 411–12, 109 S. Ct. 1874, 1880–81, 104 L. Ed. 2d 459, 472 (1989) (the regulation of restricting outgoing mail must closely fit the interest it is supposed to serve).

170. *Thornburgh v. Abbott*, 490 U.S. 401, 411–12, 109 S. Ct. 1874, 1881, 104 L. Ed. 2d 459, 472 (1989).

171. 42 U.S.C. § 2000cc-1(a)(1)–(2) (2012).

172. *Cutter v. Wilkinson*, 544 U.S. 709, 723, 125 S. Ct. 2113, 2123, 161 L. Ed. 2d 1020, 1035 (2005) (internal quotation marks omitted).

prison's restriction is "reasonably related" to a legitimate interest of the prison.¹⁷³ For example, one court upheld a rule that banned prisoners from having a beard longer than ¼-inch because the rule was "reasonably related" to promoted prison security. Specifically, the ban was allowed under the First Amendment because the rule made it harder for inmates to hide contraband, because prisoners could participate in their religion in other ways, because guards would need to conduct more searches if prisoners could have long beards, and other reasons.¹⁷⁴ If the prison grooming requirement does not reasonably relate to a legitimate penological interest, then the prison cannot keep the rule.

Although all courts apply the same test, the results of cases have differed. Some courts have recognized the rights of prisoners to grow beards or wear their hair in accordance with their religious beliefs.¹⁷⁵ For example, the Court of Appeals for the Second Circuit upheld a Rastafarian prisoner's right to avoid getting an initial haircut when first received as a prisoner in a New York prison.¹⁷⁶

Other courts, however, have been less willing to recognize these types of religious practices. For example, in *Fromer v. Scully*,¹⁷⁷ the Court of Appeals for the Second Circuit upheld a New York Department of Correctional Services (now the Department of Corrections and Community Supervision) directive forbidding prisoners from wearing beards longer than one inch. The *Fromer* court also noted that other courts had "recognized a 'valid, rational connection' between beard restrictions and a legitimate penological interest in inmate identification," emphasizing that the plaintiff had the burden of proving that the prison's concerns were irrational.¹⁷⁸ Explaining its decision to defer to the judgment of the prison administrators, the court noted that "[i]t is certainly not irrational to believe that a full beard, which may well extend for significant lengths sideways from the cheeks as well as downwards from the chin, may impede identification more than a one-inch beard."¹⁷⁹

(ii) RLUIPA

Under RLUIPA, even if a grooming requirement substantially burdens your religious exercise, a prison may restrict how you choose to style your hair or beard if it (1) furthers a compelling governmental interest (2) by the least restrictive means.¹⁸⁰ These dual requirements may make it easier for you to challenge prison regulations regarding shaving, haircuts, and grooming under RLUIPA than under the First Amendment.

For example, in *Fluellen v. Goord*,¹⁸¹ a prisoner brought a successful RLUIPA challenge against a New York Department of Corrections (now the Department of Corrections and Community Supervision) policy prohibiting all non-Rastafarian prisoners from wearing dreadlocks. The prisoner, a member of the Nation of Islam, argued his refusal to cut his dreadlocks was based upon a specific verse of the Quran. In response, DOCS asserted that the Nation of Islam does not mandate dreadlocks, that the prisoner's interpretation of the Quran was incorrect, and that allowing the prisoner to wear dreadlocks potentially threatened security.¹⁸²

In considering these arguments, the magistrate in *Fluellen* rejected DOCS's assertion, explaining that it is not for the courts to question the importance of particular religious beliefs or practices, nor is it proper for

173. *Turner v. Safley*, 482 U.S. 78, 89 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987).

174. *Kuperman v. Wrenn*, 645 F.3d 69, 75–77 (1st Cir. 2011); *see also* *Hines v. South Carolina Dep't of Corrections* 148 F.3d 353, 358 (4th Cir. 1998) (upholding a grooming policy that all male prisoners keep their hair short and faces shaven in order to "suppress contraband, limit gang activity, maintain discipline and security, and prevent prisoners from quickly changing their appearance"); *Zargary v. City of New York*, 607 F. Supp. 2d 609, 613 (S.D.N.Y. 2009) (holding that orthodox Jewish woman could be required to briefly remove her headscarf to further the government's legitimate interest in identification of prisoners).

175. *See, e.g.*, *Teterud v. Burns*, 522 F.2d 357, 359 (8th Cir. 1975) (Native American); *Moskowitz v. Wilkinson*, 432 F. Supp. 947, 950–52 (D. Conn. 1977) (Orthodox Jew).

176. *Benjamin v. Coughlin*, 905 F.2d 571, 577 (2d Cir. 1990) (finding the legitimate prison goal of obtaining an initial identification photograph could be accomplished by pulling back prisoner's hair rather than cutting it off).

177. *Fromer v. Scully*, 874 F.2d 69, 73–74, 76 (2d Cir. 1989).

178. *Fromer v. Scully*, 874 F.2d 69, 75 (2d Cir. 1989).

179. *Fromer v. Scully*, 874 F.2d 69, 74 (2d Cir. 1989).

180. Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1(a) (2012).

181. *Fluellen v. Goord*, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374 (W.D.N.Y. Mar. 12, 2007) (*unpublished*).

182. *Fluellen v. Goord*, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *6, 9–10 (W.D.N.Y. Mar. 12, 2007) (*unpublished*).

judges to determine the accuracy of a plaintiff's interpretation of his religion's teachings.¹⁸³ While the magistrate acknowledged that prison safety and security constituted a compelling government interest under RLUIPA, it found that the fact that DOCS permitted Rastafarians to wear dreadlocks meant that dreadlocks do "not impose an insurmountable threat to DOCS' security, safety or sanitation."¹⁸⁴ The magistrate further noted that "DOCS does not appear to have any concerns that permitting this particular plaintiff to wear dreadlocks would threaten DOCS' security, safety or sanitation,"¹⁸⁵ and therefore held that the prisoner could not be forced to cut his dreadlocks, nor could he be punished if he refused to change his religious affiliation.¹⁸⁶

Similarly, in *Smith v. Ozmint*, the Fourth Circuit Court of Appeals reviewed an RLUIPA claim brought by a Rastafarian challenging a prison policy that forced him to shave his dreadlocks.¹⁸⁷ The court reversed a grant of summary judgment for the prison on the grounds that the prison had not met its burden of proving that its policy furthered a compelling interest by the least restrictive means.¹⁸⁸

But, other courts have reached different conclusions, finding that prison grooming requirements do not violate RLUIPA. For example, in *Fegans v. Norris*, the Eighth Circuit Court of Appeals found that a prison policy prohibiting male prisoners from wearing hair below the collar and from wearing beards did not violate RLUIPA, even though the department of corrections did not impose the same requirement on women.¹⁸⁹ The court found that the grooming requirements were the least restrictive means to furthering prison safety and security. Specifically, the court noted that prisoners had used their hair to conceal contraband (banned items), and to change their appearance after escaping.¹⁹⁰ The court further concluded that there was no less restrictive means to prevent these risks, as "longer hair created a greater opportunity for inmates to conceal contraband, and because correctional officers are placed at risk of assault if required to search through the long hair of individual inmates."¹⁹¹ Applying a similar analysis to the beard restriction, the court also concluded that the prison had a compelling interest in restricting prisoners from wearing an uncut beard, as a beard could create a better guise for an escapee and allow for contraband.¹⁹² Although the court recognized that the prison did not impose the same requirement in the women's barracks, the court noted that the women were housed in a single unit and thus had less opportunity to conceal contraband.¹⁹³

(d) Name Restrictions

(i) First Amendment Free Exercise

Under the First Amendment Free Exercise Clause, a prison may refuse to recognize your choice of a religious name, provided that the refusal is "reasonably and substantially justified by considerations of prison discipline and order."¹⁹⁴ If you have legally changed your name, courts are more likely to recognize your right to be called by your new name.¹⁹⁵

183. *Fluellen v. Goord*, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *16 (W.D.N.Y. Mar. 12, 2007) (*unpublished*) (citing *McEachin v. McGuinnis*, 357 F.3d 197, 201 (2d Cir. 2004)).

184. *Fluellen v. Goord*, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *19 (W.D.N.Y. Mar. 12, 2007) (*unpublished*).

185. *Fluellen v. Goord*, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *19–20 (W.D.N.Y. Mar. 12, 2007) (*unpublished*).

186. *Fluellen v. Goord*, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *24 (W.D.N.Y. Mar. 12, 2007) (*unpublished*); *see also Warsoldier v. Woodford*, 418 F.3d 989, 991–92, 1002 (9th Cir. 2005) (holding that a Native American prisoner at a minimum-security prison, whose faith taught that hair should only be cut upon the death of a close relative, could not be punished for violating a rule prohibiting prisoners from having hair longer than three inches without the prison proving that the policy was the least restrictive way of promoting safety).

187. *Smith v. Ozmint*, 578 F.3d 246, 248–249 (4th Cir. 2009).

188. *Smith v. Ozmint*, 578 F.3d 246, 254 (4th Cir. 2009).

189. *Fegans v. Norris*, 537 F.3d 897, 900–01 (8th Cir. 2008).

190. *Fegans v. Norris*, 537 F.3d 897, 903 (8th Cir. 2008).

191. *Fegans v. Norris*, 537 F.3d 897, 903 (8th Cir. 2008).

192. *Fegans v. Norris*, 537 F.3d 897, 906 (8th Cir. 2008).

193. *Fegans v. Norris*, 537 F.3d 897, 904 (8th Cir. 2008).

194. *Barrett v. Virginia*, 689 F.2d 498, 503 (4th Cir. 1982) (holding that a Virginia statute that placed a flat ban on the recognition of religious name changes was unreasonable given that prisoners were already known by several names, and the addition of newly adopted religious names into existing records would not threaten the reliability and efficiency of correctional records).

195. *See Salahuddin v. Coughlin*, 591 F. Supp. 353, 359 (S.D.N.Y. 1984) (upholding prison policy that recognizes

For example, in *Malik v. Brown*, a federal court of appeals recognized that a prisoner has a clear constitutional interest in using his religious name, at least in addition to his committed name.¹⁹⁶ While the court did not require the prison to revise its filing system after the prisoner changed his name, the court at least recognized the prisoner's right to include his religious name on outgoing mail.¹⁹⁷

Note that although courts may be willing to recognize a religious name, courts are unlikely to question the way in which prison officials choose to organize their administrative prison records.¹⁹⁸

(ii) RLUIPA

Under RLUIPA, a prison may refuse to recognize your choice of a religious name, provided that if the refusal substantially burdens your religious exercise, it (1) furthers a compelling governmental interest and (2) uses the least restrictive means.¹⁹⁹

Some courts are reluctant to find that the refusal to recognize a name is a substantial burden on your religious exercise.²⁰⁰ Therefore, it may be difficult for you to show that the refusal to recognize your name violates RLUIPA. Remember that under RLUIPA, the government can impose rules that burden your religious exercise; it is only not allowed to adopt rules that *substantially* burden your religious exercise.

In order to show that the refusal to recognize your name constitutes a substantial burden, you should try to provide the court with concrete examples of the obstacles you face because you cannot change your name. For example, if an unchanged name will exclude you from participating in religious ceremonies, subject you to harsh treatment or exclusion by your co-believers, or make it so that you cannot “rise through the ranks” of your religion, the court may be more willing to find that the restriction constitutes a substantial burden.²⁰¹

If the court determines that not allowing your name change does significantly burden your religious exercise, the government would then be required to show that not allowing you to change your name served a “compelling governmental interest” and that it did so by the “least restrictive means.”²⁰² As noted above, prison safety and security are compelling governmental interests.²⁰³ So, if the prison claims that not

statutory court-ordered name changes but not common law name changes, in light of speedy and easily proven statutory name changes and “legitimate [state] interest in avoiding confusion and simplifying record-keeping”). *But see* Barrett v. Virginia, 689 F.2d 498, 503 (4th Cir. 1982) (finding that adding a newly adopted religious name to prison records would not be overly burdensome or disruptive to record-keeping procedures).

196. *Malik v. Brown*, 16 F.3d 330, 334 (9th Cir. 1994).

197. *Malik v. Brown*, 16 F.3d 330, 334 (9th Cir. 1994) (finding minimal burden on the prison and “no legitimate penological interest in preventing Malik from using *both* his religious and his committed name” on correspondence).

198. *See e.g.*, Barrett v. Virginia, 689 F.2d 498, 503 (4th Cir. 1982) (holding that while the prison must recognize a legally adopted religious name and add it to the prisoner's file, it does not have to reorder the files according to the new name).

199. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1(a) (2012).

200. *See* Amun v. Culliver, No. 04-0131-BH-M, 2006 U.S. Dist. LEXIS 75949, at *1 (S.D. Ala. Oct. 18, 2006) (*unpublished*) (holding that prison's refusal to add prisoner's religious name to visitor list, prisoner location list, and prison correspondence was not a “substantial burden” on prisoner's exercise of religious beliefs).

201. Two federal district court cases suggest that these factors may have supported a conclusion that a refusal to recognize a changed name constitutes a substantial burden. *Compare* Scott v. Cal. Supreme Court, No. CIV S-04-2586 LKK GGH P, 2008 U.S. Dist. LEXIS 117662 at *26–27 (E.D. Cal. July 17, 2008) (*unpublished*); *with* Ashanti v. Cal. Dept. of Corr., No. CIV S-03-0474 LKK GGH P, 2007 U.S. Dist. LEXIS 10612, at *53–54 (E.D. Cal. Feb. 15, 2007) (*unpublished*) (determining that prison's refusal to change certain prison records to reflect prisoner's religious name does not amount to a substantial burden, after noting that prisoner failed to “show that any use of his original unchanged name subjects him to ostracism from his co-believers, or that he is thereby hampered in any way in navigating the tenets of his religion”).

202. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2012).

203. *Fawaad v. Jones*, 81 F.3d 1084, 1087 (11th Cir. 1996) (“[M]aintaining security in a prison constitutes a compelling governmental interest. The control of contraband into and out of the prison is a fundamental part of maintaining prison security, and the requirement of dual names on incoming and outgoing mail is the least restrictive means of satisfying that compelling interest.”). *See also* Fegans v. Norris, 537 F.3d 897, 902 (8th Cir. 2008) (holding that deterrence of crime and institutional security are valid penological interests, and noting that “context matters” in the application of this ‘compelling governmental interest’ standard, and that RLUIPA does not ‘elevate accommodation of religious observances over an institution's need to maintain order and safety’).

allowing your name changes is the least restrictive way of maintaining safety and security, the court may uphold the prison's refusal to grant your name-change request.²⁰⁴

If you can show that other prisoners in your prison or in similar prisons were permitted to change their names, you may be able to demonstrate that not permitting you to change your name for religious reasons is not the least restrictive means by which the prison can maintain order.²⁰⁵

(e) Special Diet Restrictions

(i) First Amendment Free Exercise Clause

Under the Free Exercise Clause, a prison can refuse to accommodate your request for a special diet, provided that the restriction is rationally connected to legitimate penological goals. To determine whether a prison may refuse to accommodate your request for a special diet, a court will apply the *Turner* test.²⁰⁶ Under this test, the court will first determine whether your special diet request is based on sincerely held religious beliefs. The court may also examine whether or not your special diet is absolutely required by your religion.²⁰⁷ It will then look to whether the prison's denial of that request is rationally connected to any legitimate prison concerns. If so, the court will balance the reasonableness of the refusal with the prison's legitimate interests, looking to effects on the prison community, use of resources, and alternative means of satisfying the meal request.²⁰⁸

(ii) RLUIPA

Under RLUIPA, a prison can refuse to accommodate your request for a special diet, provided that if the refusal substantially burdens your religious exercise, the refusal (1) furthers a compelling interest and (2) uses the least restrictive means.²⁰⁹

In order for your special diet to be protected, you will first need to show your special diet is a religious exercise, one that is based on sincerely held religious beliefs and practices and not simply a concern for your bodily health.²¹⁰ Remember that your beliefs do not need to be affiliated with any organized religion to

204. *See, e.g., Fawaad v. Jones*, 81 F.3d 1084, 1087 (11th Cir. 1996) (holding that a prison may require a prisoner to use both his chosen name and the name under which he was committed on incoming and outgoing mail). Although this case was decided under RFRA, the holding would similarly apply to cases brought under RLUIPA.

205. *Cf. Fluellen v. Goord*, No. 06-CV-602E(Sr), 2007 U.S. Dist. LEXIS 95374, at *19–20 (W.D.N.Y. Mar. 12, 2007) (*unpublished*) (noting that the prison allowed some prisoners to wear dreadlocks, which suggests that refusing to allow others to wear dreadlocks was not the least restrictive means to achieving compelling government interests).

206. *See generally DeHart v. Horn*, 227 F.3d 47, 54–55 (3d Cir. 2000) (Holding that where a prison regulation limits a prisoner's ability to engage in a particular religious practice, the second prong of *Turner* requires an examination of whether there are other means available to the prisoner for expressing his religious beliefs. If the prison affords the prisoner alternative means of expressing his religious beliefs, that fact tends to support the conclusion that the regulation at issue is reasonable.)

207. *See Spies v. Voinovich*, 173 F.3d 398, 407 (6th Cir. 1999) (holding that plaintiff was not entitled to a strict vegan diet because it was not required by Zen Buddhism and because a vegetarian diet, which the prison already provided, sufficed); *see also Dawson v. Burnett*, 631 F.Supp.2d 878, 895 (W.D. Mich. 2009) (noting that “there is a legitimate fact question as to whether Plaintiff's religious beliefs require that he participate in a strict vegetarian diet”).

208. *See DeHart v. Horn*, 227 F.3d 47, 49–54, 61 (3d Cir. 2000) (balancing the *Turner* factors and holding that although there is a legitimate penological interest in having an efficient food system and avoiding prisoner jealousy, accommodating the Buddhist prisoner's request for a cup of soy milk with each meal was not administratively prohibitive and not unreasonable in light of these penological interests, but that on remand the district court was required to examine whether there were other means available to prisoner for expressing his religious beliefs); *see also Williams v. Morton*, 343 F.3d 212, 217–18 (3d Cir. 2003) (holding that the denial of a Muslim prisoner's request for Halal meals with meat, rather than prison-provided vegetarian meals, was valid in light of legitimate prison interests in “simplified food service, prison security, and budgetary constraints”). *But see McEachern v. McGuinnis*, 357 F.3d 197, 198–99, 203–04 (2d Cir. 2004) (holding that prisoner who claimed that he was subjected to a disciplinary diet of “loaf”, which happened over during Ramadan, when Muslims are required to break their fast each day with Halal food, stated a claim for violation of his religious beliefs).

209. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2012).

210. *See Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008) (hypothesizing 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”); *see also Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, 25 (1972) (holding that where fundamental claims of religious freedom are at stake, the court must searchingly examine the interests that the State seeks to promote and the impediment to those objectives that would flow from recognizing the claim).

constitute religious beliefs, and you do not need to show the religion absolutely requires you to follow a special diet.²¹¹

One way that you may try to prove that a diet is a religious exercise is to submit paperwork from your religious organization stating that adherents to the religion often choose to follow special dietary restrictions. For example, in *Koger v. Bryan*,²¹² the Seventh Circuit Court of Appeals found that a prisoner who submitted paperwork from his religious organization, stating that individual members of the faith “may, from time to time, include dietary restrictions as part of his or her personal regimen of spiritual discipline,” had established that his dietary request was “squarely within the definition of religious exercise set forth by RLUIPA.”²¹³

When determining whether you are “being sincere about your religious beliefs”, courts have also looked to how long ago you asked to have your request for a special diet accommodated. For example, in *Koger*, the court pointed to the long time that the prisoner had asked to have his request for a non-meat diet accommodated; the prisoner had first filed a request nearly eight years before the case reached the court of appeals.²¹⁴ The court also noted that the fact that the prisoner had remained committed to his original religious affiliation throughout this time—rather than changing to another religion that *required* non-meat diets—indicated that his religious belief was sincerely held.²¹⁵

Once you show you are seeking accommodation of a religious exercise based on sincerely held beliefs, you must then show that the refusal to provide the diet substantially burdens this religious exercise.²¹⁶ At least one court has found that repeated refusal to accommodate a request for a special diet adhered to by some members of a religion counts as a substantial burden, even if the religion does not actually require the diet.²¹⁷

If you are able to prove that by not providing your requested diet, the prison substantially burdens your religious exercise, the prison must then show that its reason for not fulfilling your request is based on a compelling government interest and that not permitting the diet is the “least restrictive means” of accomplishing these goals.

To date, courts have recognized orderly administration of a prison dietary system as a valid concern of prison officials.²¹⁸ In *Jova v. Smith*, the Second Circuit Court of Appeals seemed to assume that such administrative interests could be compelling.²¹⁹ The plaintiffs had requested a vegan diet, specific foods on individual days of the week, and preparation of the food by Tulukeesh adherents.²²⁰ The ability of a prison to meet your dietary needs may affect whether a court will find that the government’s interest is compelling. This idea is also supported by *Jova*. In *Jova*, the appeals court reversed the district court’s grant of summary judgment because the prison had not demonstrated that providing a vegan diet was too burdensome.²²¹ Generally, the orderly administration of a prison dietary system is not a compelling interest.²²² Moreover, if the prison already serves meals that could satisfy your request for a special diet, the court may be more likely to find that the prison did not meet its burden of showing the refusal is based on a compelling government interest.²²³

211. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-5(7)(A) (2012).

212. *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008).

213. *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008).

214. *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008).

215. *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008).

216. *See Muhammad v. Warithu-Deen Umar*, 98 F. Supp. 2d 337, 345 (W.D.N.Y. 2000) (finding that prison’s refusal to provide Muslim prisoner with a kosher cold alternative meal rather than the religious alternative meal was not a substantial burden on prisoner’s religious exercise).

217. *Koger v. Bryan*, 523 F.3d 789, 798 (7th Cir. 2008).

218. *See, e.g., Resnick v. Adams*, 348 F.3d 763, 769 (9th Cir. 2003) (“The legitimate governmental interest at stake here is the orderly administration of a program that allows federal prisons to accommodate the religious dietary needs of thousands of prisoners.”) (citations omitted); *DeHart v. Horn*, 227 F.3d 47, 52 (3d Cir. 2000) (agreeing with prison officials that “a simplified and efficient food service” is a legitimate penological interest).

219. *Jova v. Smith*, 582 F.3d 410, 416–17 (2d Cir. 2009).

220. *Jova v. Smith*, 582 F.3d 410, 416–17 (2d Cir. 2009).

221. *Jova v. Smith*, 582 F.3d 410, 416–17 (2d Cir. 2009).

222. *Koger v. Bryan*, 523 F.3d 789, 800 (7th Cir. 2008) (“[N]o appellate court has ever found these [legitimate concerns for orderly administration of a prison dietary system] to be compelling interests.”).

223. *Koger v. Bryan*, 523 F.3d 789, 798 (7th Cir. 2008).

(f) Special Attire

(i) First Amendment Free Exercise Clause

Under the Free Exercise Clause, a prison may prevent you from wearing certain attire required by your religion, like prayer hats or head coverings, or keeping facial hair in a certain way as required by your religion, provided there is a reasonable relationship between the regulation and a legitimate prison interest.²²⁴ Many courts have held the right to wear head coverings must be weighed against the state's security concern that weapons and drugs can be concealed under a hat.²²⁵

For example, a New York court held that a prison could prohibit prisoners from wearing Rastafarian "crowns" (loose fitting headgear worn over dreadlocks) in some or all areas of the prison, given the legitimate security interests of the prison, even though Jewish and Muslim prisoners could wear their respective religious headgear (that are smaller and more closely fitted) throughout the prison.²²⁶ The court determined that the prison had a legitimate security interest in the different treatment because Rastafarian crowns are large and shapeless enough to conceal weapons and contraband, as compared to the smaller, closely fitting head coverings worn by members of other religions.²²⁷

(ii) RLUIPA

Under RLUIPA, you will first need to show that the prison has substantially burdened your religious exercise by not permitting you to wear your religious attire.²²⁸ If you make such a showing, the court will then determine whether the restriction furthers compelling governmental interests by the least restrictive means available. Because prison safety and security are considered compelling governmental interests, the court will then need to determine whether the challenged regulations are the least restrictive means of accomplishing the safety and security goals. Ultimately, the outcome may be similar to raising a First Amendment challenge, where objects that threaten security are banned while those that do not are permitted.

In *Haley v. R.J. Donovan Correctional Facility*, a federal court held that while the facility's grooming regulation for male prisoners did not violate prisoners' First Amendments free expression rights, the regulation violated RLUIPA: "[A]lthough prison security constitutes a compelling government interest, the [California Department of Corrections] has failed to meet its burden of showing that this regulation is the least restrictive means of furthering that interest."²²⁹ In *Warsoldier v Woodford*, the court held that the prison's grooming policy requiring male prisoners to maintain hair no longer than three inches imposed substantial burden on Native American prisoners' religious practice within RLUIPA and that the California Department of Corrections had failed to explain "why prisons in other jurisdictions and its own women's prisons are able to meet the same compelling interests of prison safety and security without requiring short hair or permitting a religious exemption."²³⁰

224. See *Davis v. Clinton*, 74 F. App'x 452, 455 (6th Cir. 2003) (upholding prison policy prohibiting Muslim prisoner from wearing religious garb every day due to the policy's reasonable relationship to valid security concerns).

225. See, e.g., *Boles v. Neet*, 486 F.3d 1177, 1178–79 (10th Cir. Colo. 2007) (holding that the prisoner established a violation of his First Amendment rights when the prison prohibited him from wearing a yarmulke while in transport between the prison and hospital). But see *Young v. Lane*, 922 F.2d 370, 371-72 (7th Cir. 1991) (holding that the policy of allowing Jewish prisoners to wear their yarmulkes only inside cells and during religious services did not violate prisoners' First Amendment rights because this policy "reasonably relates to legitimate penological interests" and prisoners have other means for expression); *Standing Deer v. Carlson*, 831 F.2d 1525, 1526-27 (9th Cir. 1987) (holding that the ban of Native American headgear, including religious headbands, in dining hall did not violate First Amendment rights because headgear ban is "logically connected to legitimate penological interests" because of sanitation, security and safety concerns).

226. *Benjamin v. Coughlin*, 905 F.2d 571, 578–79 (2d Cir. 1990) (holding that restricting wearing of Rastafarian crowns did not violate the 1st Amendment or Equal Protection); *Bunny v. Coughlin*, 187 A.D.2d 119, 122, 593 N.Y.S.2d 354, 357 (3d Dept. 1993) (holding that wearing of Rastafarian crown was properly denied).

227. *Benjamin v. Coughlin*, 905 F.2d 571, 579 (2d Cir. 1990); *Bunny v. Coughlin*, 187 A.D.2d 119, 123, 593 N.Y.S.2d 354, 357 (3d Dept. 1993).

228. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2012).

229. *Haley v. R.J. Donovan Correctional Facility*, 152 F.App'x 637, 638 (9th Cir. 2005) For more information on the *Turner* standard, see Part C(1)(c) of this Chapter. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

230. *Warsoldier v. Woodford*, 418 F.3d 989, 998–1000 (9th Cir. 2005).

As shown in the above cases, if you can show that prison officials allow other prisoners to wear the religious attire you wish to wear, you may be able to convince the court that the prison's regulation is not the least restrictive means of achieving its desired goals.

(g) Medical Tests

(i) First Amendment Free Exercise Clause

Under the Free Exercise Clause, a prison may refuse to accommodate your request not to receive medical procedures, such as the tuberculosis skin test, based on religious objections. To determine whether an injunction is appropriate, a court will apply the *Turner* standard.²³¹ In most cases, courts have upheld mandatory tuberculosis testing policies as reasonably related to legitimate objectives of prison administration.²³²

Because medical testing and vaccination requirements affect the well-being of the entire prison population and not just the rights of an individual prisoner, courts apply an analysis that is somewhat different from the one applied to other limitations of prisoners' rights. Some courts give significant weight to the fact that vaccination and medical testing requirements are general, do not burden or support one religion over any others, and are rationally related to maintaining the health and safety of the prison population and officials.²³³

Many courts have also upheld a state statute that required a prisoner to provide a DNA sample against a religious challenge. For example, in *Shaffer v. Saffle*,²³⁴ an Oklahoma statute required individuals convicted of certain offenses (sex-related crimes, violent crimes, and other crimes where biological evidence was recovered) to provide a DNA sample for the state's DNA Offender Database for the purpose of identifying and prosecuting criminals. A prisoner challenged the statute, contending that it would force him "to submit to a practice that will require him to deny his faith and condemn him to eternal damnation."²³⁵ The court held that the prisoner's First Amendment Free Exercise right had not been violated because the statute was a neutral, generally-applicable law that did not discriminate against him based on his particular religious beliefs.

(ii) RLUIPA

Under RLUIPA, a prison may refuse to accommodate your request not to receive medical procedures, provided that, if such a refusal constitutes a substantial burden on your religious exercise, it (1) furthers a compelling government interest (2) by the least restrictive means.²³⁶

As in other RLUIPA cases, you must prove that the medical testing or vaccination requirement substantially burdens your religious exercise.²³⁷ The prison must then prove that the regulation furthers a compelling government interest by the least restrictive means.²³⁸ Because most medical procedures potentially affect the entire prison population's health, and not just the individual prisoner's rights, the court will likely conclude that many procedures protect the health of the prison population and thus further a compelling government interest. Your best chance of successfully challenging a medical testing or vaccination requirement may be that the specific medical procedure is not the least restrictive means of testing you. For example, in *Jolly v. Coughlin*, a Rastafarian prisoner was placed in medical keeplock for

231. For more information on the *Turner* standard, see Part C(1)(c) of this Chapter. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

232. See, e.g., *Ballard v. Woodard*, 641 F. Supp. 432, 437 (W.D.N.C. 1986) (holding that the free religious exercise rights of a Muslim prisoner were not violated when he was subjected to tuberculosis testing during the holy month of Ramadan since the state had a "paramount interest in maintaining the health of its prison population").

233. See generally *Ballard v. Woodard*, 641 F. Supp. 432, 437 (W.D.N.C. 1986) (holding that the free religious exercise rights of a Muslim prisoner were not violated when he was subjected to tuberculosis testing during the holy month of Ramadan since the state had a "paramount interest in maintaining the health of its prison population"); see also *McCormick v. Stalder*, 105 F.3d 1059, 1062 (5th Cir. 1997) (holding that prison officials could constitutionally quarantine a prisoner who tested positive for tuberculosis and force him to undergo treatment).

234. *Shaffer v. Saffle*, 148 F.3d 1180, 1182, 1998 Colo. J. C.A.R. 3818 (10th Cir. 1998).

235. *Shaffer v. Saffle*, 148 F.3d 1180, 1181, 1998 Colo. J. C.A.R. 3818 (10th Cir. 1998).

236. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2012).

237. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2012). See also *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996) (stating that a substantial burden exists when the state puts substantial pressure on a prisoner to modify his behavior and to violate his beliefs).

238. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-1(a)(1)–(2) (2012).

refusing to take a tuberculosis test.²³⁹ The court held that while the government's interest in preventing the spread of tuberculosis is compelling, keeping the prisoner in medical keeplock violated RFRA because even if the prisoner had tested positive for latent tuberculosis and refused to take the medication, he would have been placed back in the general population.²⁴⁰ Results like *Jolly*, however, are fact-specific, and your chance of successfully challenging a medical testing or inoculation requirement under RLUIPA, as under the First Amendment Free Exercise Clause, is probably minimal.²⁴¹

D. Your Rights Under State Statutes

In addition to federal law, many states have laws ensuring prisoners' rights to practice their religion. This Part specifically reviews relevant New York statutes that are different from what is explained in the rest of this Chapter. These statutes are not exclusive and provide some, but not all, of the remedies available. In other words, you may sue under a state statute, a federal statute, and/or the U.S. Constitution. Make sure that you check for the most recent version of the law in your state before you file a claim.

1. New York

Section 610(1) of the New York Corrections Law declares that you are entitled to the "free exercise and enjoyment of religious profession and worship, without discrimination or preference."²⁴² Subdivision (3) of this law provides that the rules and regulations of correctional institutions must allow religious services, spiritual advice, and private support from recognized clergy members.²⁴³ But, the law also authorizes correctional institutions to reasonably restrict this right if necessary for proper institutional management.²⁴⁴

A New York court applying this statute has required the redrafting of the Commissioner of Correction's rules and regulations to allow for the admission of clergy into a prison for purposes of conducting religious services.²⁴⁵ However, this allowance is subject to reasonable limitation by the Commissioner of the Department of Corrections and Community Supervision ("DOCCS") and by prison wardens for purposes of prison security or other legitimate prison interests.²⁴⁶ Note that courts have also interpreted Section 610(1) to require the presence of a "non-inmate spiritual leader" at all religious congregations in prison, and the non-inmate

239. *See Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996) (granting an injunction, pending plaintiff's claim under RFRA, to release plaintiff from a "medical keeplock" where he had been held for three-and-a-half years after he refused a tuberculosis test on religious grounds, finding that despite his confinement he was breathing the same air as other prisoners and prisoners who were found positive were not kept in a "medical keeplock"). *But see Redd v. Wright*, 597 F.3d 532 (2d Cir. 2010) (holding that the plaintiff's TB hold in 2001 was not in violation of First Amendment right or RLUIPA, distinguishing *Jolly*, saying that "while *Jolly* rejected the state's contention that the mandatory [purified protein derivative] test is a reasonable way of preventing the spread of TB in prisons, that court nevertheless recognized that administering an effective TB screening program might be a compelling state interest and that this interest might justify a TB hold policy").

240. *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996).

241. *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996). *See also Johnson v. Sherman*, No. CIV S-04-2255 LKK EFB P, 2007 U.S. Dist. LEXIS 24098, at *12 (E.D. Cal. Mar. 30, 2007) (unpublished) (denying injunction to Rastafarian prisoner challenging prison's requirement that he undergo a tuberculin skin test to test for latent tuberculosis because "[t]he tuberculosis skin test is the only medically accepted test available to discover latent tuberculosis in California's prisons."). *See also Soder v. Williamson*, No. 4:07-CV-1851, 2008 U.S. Dist. LEXIS 68513, at *14-17 (M.D. Pa. Aug. 7, 2008) (unpublished) (finding no grounds for a RLUIPA violation where prison officials had tested a prisoner for tuberculosis using a chest X-ray—the method that the prisoner requested—and observing that the state has a particularly "clear and compelling interest in detecting" highly contagious and potentially dangerous diseases).

242. N.Y. Correct. Law § 610(1) (McKinney 2011).

243. N.Y. Correct. Law § 610(3) (McKinney 2011). *See generally Brown v. McGinnis*, 10 N.Y.2d 531, 536, 180 N.E.2d 791, 793, 225 N.Y.S.2d 497, 500-01 (1962) (holding that Muslim prisoner had a right to spiritual advice from clergymen of his religion under § 610).

244. N.Y. Correct. Law § 610(3) (McKinney 2008). *See also Brown v. McGinnis*, 10 N.Y.2d 531, 535-36, 180 N.E.2d 791, 793, 225 N.Y.S.2d 497, 500 (1962) (stating that the freedom to exercise religion is not absolute because the law allows for these rights to be reasonably curtailed when necessary to manage the prison and maintain discipline).

245. *See SaMarion v. McGinnis*, 55 Misc. 2d 59, 61-02 284 N.Y.S.2d 504, 507-09 (Sup. Ct. Erie Cnty. 1967) (requiring the redrafting of paragraphs 3, 7, 16, & 17 of § 610 of the Corrections Law to permit the admission of clergy for religious ministry after Black Muslims alleged denial of their right to practice their religion).

246. *SaMarion v. McGinnis*, 55 Misc. 2d 59, 61, 284 N.Y.S.2d 504, 508 (Sup. Ct. Erie Cnty. 1967) (requiring the redrafting of the Corrections Law to permit the admission of clergy, but allowing reasonable limitation by the Commissioner and Wardens for the purposes of prison security).

spiritual leader must be registered and approved pursuant to prison directives.²⁴⁷ You should read Section 610 carefully, along with the cases cited in the corresponding Notes of Decisions, which can be found in the same volume of McKinney's Consolidated Laws as the statute, just after the statute's text.

In addition to Section 610, you may also bring claims under the New York State Constitution. In determining the legality of a restriction limiting your right to free exercise of religion under the New York State Constitution, courts will balance the "importance of the right asserted and the extent of the infringement ... against the institutional needs and objectives being promoted."²⁴⁸ In general, New York courts follow the same analysis as claims brought under the U.S. Constitution. Therefore, if you believe a New York law or DOCCS directive interferes with your right to free exercise of religion, you should be prepared to make an argument using the constitutional analysis provided earlier in this Chapter.

Although New York state courts follow the same general constitutional analysis as federal courts, there are some differences that you should be aware of when evaluating whether you have a legitimate claim.

For example, New York courts and DOCCS have adopted a specific rule concerning initial haircuts and shaves for purposes of obtaining identification photographs.²⁴⁹ Under this rule, a prison may not require all prisoners to have their haircut upon admission, as there are less intrusive alternatives available that do not increase any administrative burden (for example, tying one's hair back).²⁵⁰ An initial haircut requirement is therefore an unconstitutional violation of religious rights under New York law. But, a prison can still require prisoners to undergo an initial shave, since there are "no less intrusive alternatives for photographing the underlying facial features."²⁵¹ Note, however, that DOCCS seems to recognize computer imaging as a viable alternative to the initial shave requirement.²⁵²

DOCCS has also adopted specific rules for shaving your facial hair after being processed. Under this rule, although prisoners cannot grow facial hair longer than one inch from the face, there is a religious exemption for the one-inch requirement for those whose religious rules prohibit the cutting of facial hair.²⁵³

Likewise, DOCCS has adopted specific dietary rules. For example, in many instances, New York prisoners may avoid eating foods forbidden by their religious beliefs, and the prison must provide them with a nutritionally adequate substitute diet.²⁵⁴ Prisons must provide Muslim and Jewish prisoners with a pork-free

247. New York State Department of Corrections and Community Supervision, Directive No. 4750, Volunteer Services Program § IV-A-4 (2016), *available at* <http://www.doccs.ny.gov/Directives/4750.pdf> (last visited Mar. 13, 2017) (dealing with "Volunteer Services Programs," and including guidelines for "religious volunteer and spiritual advisor"); New York State Department of Corrections and Community Supervision, Directive 4202, Religious Programs and Practices §F-2-a-(3) (2015), *available at* <http://www.doccs.ny.gov/Directives/4202.pdf> (last visited Mar. 13, 2017) (providing that, with specific authorization of the facility Superintendent, prisoners "shall be permitted to observe their congregational worship services when led by employee chaplains or outside religious volunteers, and to attend religious study, meetings, classes, study groups, or congregational worship of their respective religious faiths.").

248. *Lucas v. Scully*, 71 N.Y.2d 399, 406, 521 N.E.2d 1070, 1073, 526 N.Y.S.2d 927, 930 (N.Y. Ct. App. 1988) (holding that the standard for determining the validity of prison rules which impinge upon prisoners' state constitutional rights "requires a balancing of the competing interests at stake: the importance of the right asserted and the extent of the infringement are weighed against the institutional needs and objectives being promoted").

249. *See* New York State Department of Corrections and Community Supervision, Directive 4914, Inmate Grooming Standards (2015) *available at*, <http://www.doccs.ny.gov/Directives/4914.pdf> (last visited Mar. 13, 2017).

250. *See* *People v. Lewis*, 115 A.D.2d 597, 598, 496 N.Y.S.2d 258, 260 (N.Y. App. Div. 1985), *aff'd*, 68 N.Y.2d 923, 502 N.E.2d 988, 510 N.Y.S.2d 73 (1986) ("[T]he identification objective would be fully achieved by pulling respondent's locks back tightly behind the head for a photograph so they could not be seen . . . the asserted objectives of a haircut can be achieved through alternatives that impinge less drastically on respondent's First Amendment rights than directing him to cut his hair.").

251. *See* *People v. Lewis*, 115 A.D.2d 597, 598, 496 N.Y.S.2d 258, 260 (N.Y. App. Div. 1985), *aff'd*, 68 N.Y.2d 923, 502 N.E.2d 988, 510 N.Y.S.2d 73 (1986); *see also* *Phillips v. Coughlin*, 586 F. Supp. 1281, 1285 (S.D.N.Y. 1984) (denying Rastafarian's claim for damages after an initial shave pursuant to Directive 4914, since a single shave is the "simplest, quickest and most comfortable method" of satisfying the security need for a clean-shaven identification photograph).

252. *See* *Helbrans v. Coombe*, 890 F. Supp. 227, 230 (S.D.N.Y. 1995) (noting that DOCS and prisoner reached an agreement in which DOCS allowed a Jewish prisoner to pay for a computer-generated photograph that displayed his image without his beard as an alternative to the initial shave requirement).

253. *See* New York State Department of Correction and Community Supervision, Directive 4914, Inmate Grooming Standards § III-B-1 (2015) *available at*, <http://www.doccs.ny.gov/Directives/4914.pdf> (last visited Mar. 13, 2017).

254. *See* New York State Department of Corrections and Community Supervision, Directive 4202, Religious Programs and Practices (2015) *available at* <http://www.doccs.ny.gov/Directives/4202.pdf> (last visited March 13, 2017). *But see* *Bunny v. Coughlin*, 187 A.D.2d 119, 123, 593 N.Y.S.2d 354, 357 (3d Dept. 1993) (holding that a Rastafarian prisoner was not entitled to dietary restrictions because the prison did not have the resources to accommodate him).

diet.²⁵⁵ DOCCS policy also provides Muslim, Buddhist, and Orthodox Jewish prisoners special meals during certain holidays.²⁵⁶ Despite these provisions, there are limitations to the religious meals and ceremonies a prisoner can get. For example, a court held a Jewish prisoner could not insist on preparing his meals himself, nor could he require that only a Jewish or Muslim cook prepare them.²⁵⁷ Since the prison provided the prisoner with pork-free meals, it did not have to meet his other preparation demands for valid budgetary reasons.²⁵⁸

E. Faith-Based Rehabilitation Programs

In the past few years, there has been an increase in the number of faith-based rehabilitation programs within state prison facilities, many initiated by volunteer evangelical Christian organizations (the Prison Fellowship Ministries in particular).²⁵⁹ What makes these faith-based programs different from other religious-based organizations within the prison is their implementation by the state and the “special treatment” participating prisoners seem to receive.

These faith-based programs raise serious constitutional questions. While the Supreme Court has not yet decided on the constitutionality of faith-based rehabilitation programs, several state and federal courts have.²⁶⁰ In *Americans United for Separation of Church and State v. Prison Fellowship Ministries*,²⁶¹ an Iowa federal district court held that the challenged faith-based program violated the Establishment Clause, which is explained above in Section B of this Chapter.²⁶²

Much of the court’s decision in that case, however, turned on the fact that the program was state-funded, conducted in a state prison by a private religious organization, and all instruction (with the exception of one subject) was presented from the viewpoint of Evangelical Christianity.²⁶³ It is unclear how a similar case would be decided if the program was privately funded, or if the program was less religiously oriented.

Courts generally treat faith-based prison addiction treatment programs differently (primarily Alcoholics Anonymous and Narcotics Anonymous, which “are rooted . . . in a regard for a ‘higher power’”).²⁶⁴ Rather than holding that these programs violate the Establishment Clause, courts tend to simply say that prisoners cannot be required to participate in faith-based programs,²⁶⁵ although some go as far as to require secular alternatives.²⁶⁶

255. See New York State Department of Corrections and Community Supervision, Directive 4202, Religious Programs and Practices (2015) available at <http://www.doccs.ny.gov/Directives/4202.pdf> (last visited Mar. 13, 2017); see also *Matter of Malik v. Coughlin*, 158 A.D.2d 833, 551 N.Y.S.2d 418 (3d Dept. 1990) (finding that Halal meals for Muslim prisoners are not required given budgetary constraints and staff resources and because pork-free meals are already provided).

256. See *Benjamin v. Coughlin*, 905 F.2d 571, 579–80 (2d Cir. 1990) (noting that under DOCS policy, alternative portions are offered to all prisoners whenever pork is served, and special kosher meals are provided for prisoners at some facilities. Muslim and Buddhist prisoners are provided special meals during certain holidays.).

257. *Malik v. Coughlin*, 158 A.D.2d 833, 834, 551 N.Y.S.2d 418, 419 (N.Y. App. Div. 1990).

258. *Malik v. Coughlin*, 158 A.D.2d 833, 834, 551 N.Y.S.2d 418, 419 (N.Y. App. Div. 1990).

259. See Daniel Brook, *When God Goes to Prison*, Legal Affairs, May–June, 2003 at 22; Samantha M. Shapiro, *Jails for Jesus*, Mother Jones, Nov.–Dec., 2003 at 54.

260. See, e.g., *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 934 (S.D. Iowa 2006) (holding that a faith-based prison program violated prisoners’ Establishment Clause rights under the 1st Amendment and the Iowa Constitution), *affirmed in part, reversed on other grounds*, 509 F.3d 406 (8th Cir. 2007); *Williams v. Huff*, 52 S.W.3d 171, 192, 44 Tex. Sup. J. 998 (Tex. 2001) (holding that a faith-based prison program violated prisoners’ Establishment Clause rights under the 1st Amendment).

261. *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862 (S.D. Iowa 2006), *affirmed in part, reversed on other grounds*, 509 F.3d 406 (8th Cir. 2007).

262. *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 933 (S.D. Iowa 2006), *affirmed in part, reversed on other grounds*, 509 F.3d 406 (8th Cir. 2007).

263. *Americans United for Separation of Church and State v. Prison Fellowship Ministries*, 432 F. Supp. 2d 862, 918–21 (S.D. Iowa 2006), *affirmed in part, reversed on other grounds*, 509 F.3d 406 (8th Cir. 2007).

264. *Inouye v. Kemna*, 504 F.3d 705, 710 (9th Cir. 2007) (holding that a parolee cannot be ordered into a treatment program that has pronounced religious overtones, including references to God, a higher power, and prayer).

265. See, e.g., *Kerr v. Farrey*, 95 F.3d 472, 478–80 (7th Cir. 1996) (holding that prisoner could not be required to participate in Narcotics Anonymous, nor could he have his security classification raised for refusing to do so); *Turner v. Hickman*, 342 F. Supp. 2d 887, 895–98 (E.D. Cal. 2004) (holding that requiring prisoner to participate in Narcotics Anonymous in order to be eligible for parole violated the Establishment Clause).

266. See, e.g., *Warner v. Orange County Dept. of Probation*, 115 F.3d 1068, 1081 (2d Cir. 1997) (holding that

F. Conclusion

The previous Parts indicate that the law is not always clear concerning your right to religious freedom. This lack of clarity is due to the difficulty of weighing the strongly opposed interests involved. On one side lies your constitutional and statutory rights to freely practice your religion, combined with the prohibition against state establishment of religion. On the other side is the prison system's desire to maintain safety and order in prisons. To bring a claim concerning any of your religious rights in prison, you must be mindful of the following criteria that courts examine.

To bring a free exercise of religion claim under RLUIPA or RFRA, you must first prove that you fall under RLUIPA or RFRA's jurisdiction. In the RLUIPA context, the easiest way to do this is to plead that RLUIPA applies to you because your prison or prison system receives federal funds. Remember that for federal prisoners to bring a RFRA claim, you must simply allege that your rights were either violated while you were a federal prisoner, or violated by an agent of the federal government acting in his or her official capacity.

After making this jurisdictional showing, you must then convince the court that your religious exercise has been substantially burdened. If you succeed, the court will then require the government to show that the burden upon your religious exercise furthers a compelling governmental interest by the least restrictive means. While this is the government's burden, you will want to argue that their interest is not compelling, the means used are not the least restrictive, or both.

To bring a free exercise claim under the First Amendment of the Constitution, you must first convince the court that your religion is authentic and that your beliefs are sincere. The court will then apply the *Turner* test to determine (1) whether there is a rational connection between the prison regulation and the governmental interest claimed to justify it, (2) whether there are other ways of exercising your right despite the regulation, (3) if allowing you to exercise your right will cause a "ripple effect" on others in the prison and on the allocation of prison resources, and (4) whether there is an easier way for the prison to meet the regulation's goal without limiting your right in this way. Remember that unlike in the RLUIPA or RFRA context, here you have the burden of proving the fourth element under the *Turner* test.

If you feel that your prison has violated the Establishment Clause, you must convince the court that the prison's regulations fail the *Lemon* test and the *Lee* coercion rule. Remember that the courts will recognize both tests until the Supreme Court clarifies which test is proper. Therefore, you should try to show that the prison regulation you are challenging fails both tests.

APPENDIX A

LIST OF RELIGIOUS ORGANIZATIONS

Below is a list of organizations that might be able to assist you in exercising your freedom to practice your religion while in prison. Most of these organizations do not provide legal assistance, and unless otherwise stated, probably do not have an outreach program specifically for prisoners. The *JLM* makes no endorsement or recommendation of any of the following organizations or religions and does not guarantee that they will be able to help you.

Antiochian Orthodox Christian

Orthodox Christian Prison Ministry

P.O. Box 468
Fleetwood, PA 19522
(610) 777-1552

Armenian Apostolic

Armenian Church of America, Eastern Diocese

630 Second Ave.
New York, NY 10016
(212) 686-0710; FAX: (212) 779-3558

Bahá'í

National Spiritual Assembly of the Bahá'ís
of the United States

536 Sheridan Road
Wilmette, IL 60091
(847) 733-3400

Buddhist

Tu An Zen Temple

4310 W. 5th St.
Santa Ana, CA 92703
(714) 265-2357
Vietnamese and Chinese speakers available.

Byzantine Catholic

Byzantine Catholic Church

Most Rev. Archbishop Basil Schott
66 Riverview Ave.
Pittsburgh, PA 15214-2253
(412) 231-4000; FAX: (412) 231-1697

Chinese Catholic

Ascension Chinese Catholic Church

4605 Jetty Lane
Houston, TX 77072
(281) 575-8855; FAX: (281) 575-6940

Croatian Catholic

Croatian Church of St. Cyril & Methodius

502 W. 41st St.
New York, NY 10036
(212) 563-3395; FAX: (212) 868-1203

Roman Catholic (including Spanish and French-Speaking)

Catholic League for Religious and Civil Rights

450 Seventh Ave.
New York, NY 10123
(212) 371-3191; FAX: (212) 371-3394

This group does not provide legal assistance. However, it will advocate informally on your behalf by contacting your prison warden if you are Roman Catholic and prevented in some way from practicing your religion.

Asociación Nacional de Sacerdotes

Hispanos en USA

(The National Association of Hispanic
Priests of the USA)
2472 Bolsover, Suite 442
Houston, TX 77005
(713) 528-6517; FAX: (713) 528-6379

Coptic Christian

St. Mark's Coptic Orthodox Church

1600 S. Robertson Blvd.
Los Angeles, CA 90035
(310) 275-3050; FAX: (310) 276-6333

Greek Orthodox

Greek Orthodox Church

Archdiocese of America
8 E. 79th St.
New York, NY 10075
(212) 570-3500; FAX: (212) 570-3569

HinduHinduism Today

Kauai's Hindu Monastery
107 Kaholalele Rd.
Kapaa, HI 96746-9304
(808) 822-3012; FAX: (808) 822-4351

Subscriptions are available to Hinduism Today.

Hindu Temple Society of Southern California

1600 Las Virgenes Canyon Rd.
Calabasas, CA 91302
(818) 880-5552; FAX: (818) 880-5583

IslamicIslamic Society of North America

P.O. Box 38
Plainfield, IN 46168
(317) 839-8157; FAX: (317) 839-1840

JainistFederation of Jain Associations in North America (JAINA)

JAINA Headquarters
43-11 Ithaca Street
Elmhurst, NY 11373
(718) 606-2885

JewishAleph Institute

Executive Director of Legal Affairs
9540 Collins Ave.
Surfside, FL 33154
(305) 864-5553; FAX (305) 864-5675

This organization serves the needs of Jews of all backgrounds who are in institutional environments, including the military, hospitals, and prisons. Volunteers conduct prison visits, particularly in conjunction with religious holidays. It provides religious education, legal advocacy on behalf of religious rights, and assistance to prisoners' families.

Native American/Indigenous

See Appendix IV of the *JLM* for a list of several organizations that work with Native Americans and address some Native American religious concerns.

Serbian OrthodoxSaint Steven's Serbian Orthodox Cathedral

1621 W. Garvey Ave.
Alhambra, CA 91803
(626) 284-9100; FAX: (626) 281-5045

Shi'a MuslimShi'a Ithna Asheri Jamaat of New York

48-67 58th St.
Woodside, NY 11377
(718) 507-7680

Miscellaneous/**Interdenominational**Prison Ashram Project

Human Kindness Foundation
P.O. Box 61619
Durham, NC 27715
(919) 383-5160