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NOTES

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NOTES

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INTRODUCTION

> "*There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation.*"[1]

At the time of the United States' founding and the ratification of the Bill of Rights, some Framers considered the addition of the Free Exercise Clause unnecessary, arguing against its inclusion in the First Amendment.[2] They believed that religious liberties were so ingrained in the American dogma that the government would not have the power to limit free religious exercise.[3] In fact, worries were raised that the inclusion of the Free Exercise Clause might provide future governments an impetus to restrain religious liberties.[4] Ultimately, the clause was included in the First Amendment, stating with succinct clarity that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*."[5] Yet there is one group of citizens whose religious freedom and exercise are repeatedly abridged—incarcerated persons.

The religious liberties of incarcerated persons are restricted as a consequence of their crimes;[6] however, the First Amendment guarantees that their religious liberties cannot and must not be taken away.[7] It must be recognized that some religious exercise may be restricted as a means of effectively carrying out a prison's duties.[8] But quite often when such restrictions exceed what is reasonably allowable,

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[1] James Madison, *General Defense of the Constitution* (June 12, 1788), *reprinted in* 11 THE PAPERS OF JAMES MADISON 129, 130 (Robert A. Rutland & Charles F. Hobson eds., 1977).

[2] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1475–77 (1990).

[3] *Id.*; *see* Daniel T. Judge, Note, *A Different Kind of Prisoner's Dilemma: The Right to the Free Exercise of Religion for Incarcerated Persons*, 95 NOTRE DAME L. REV. 2119, 2121–23 (2020).

[4] McConnell, *supra* note 2, at 1475–76.

[5] U.S. CONST. amend. I (emphasis added).

[6] *See* Brenda S. Riley, Religious Accommodations in Prison: The States' Policies v. The Circuit Courts 1, 1 (Aug. 2019) (Ph.D. dissertation, Sam Houston State University) (on file with Sam Houston State University).

[7] Turner v. Safley, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.").

[8] *Id.* at 84–85.

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prisoners have no recourse to recovery.[9] Due to the contradicting standards set out in the two statutes utilized by prisoners to bring free exercise claims against prisons—the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA")[10] and § 1983[11]—many prisoners' free exercise rights are tossed aside.

This Note emphasizes the need for guidance from the Supreme Court as to the applicable standards and remedial provisions in religious exercise claims brought by prisoners. This Note contemplates the issues of mootness that have plagued prisoners' free exercise claims since the promulgation of RLUIPA[12] and discusses the continued use of the deferential *Turner* test in § 1983 claims.[13] The Court's guidance in resolving these points of tension is imperative to providing incarcerated persons the unabridged opportunity to freely practice their chosen religion. Providing such guidance will not only reestablish prisoners' fundamental rights but will also assist in accomplishing one of the sought-after purposes of incarceration—rehabilitation and reintegration into society.[14]

Part I of this Note will describe the history of claims brought by prisoners regarding their religious rights while also providing context for religious protections outside of the penal system. The Part will briefly go over many of the Court's landmark prisoner religious exercise cases, further detailing how the fluctuating standards applied by the Court eventually led to the need for legislative interruption.

Part II of this Note will follow with how the passage of the Religious Freedom Restoration Act of 1993 ("RFRA")[15] and RLUIPA has afforded prisoners greater religious protections over the last two decades. The Part will also analyze the issue of mootness in RLUIPA claims, and the conflicting standards amid a lacking precedent in First Amendment claims brought via § 1983.

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[9] *See infra* Section I.B.

[10] 42 U.S.C. §§ 2000cc-1–5.

[11] *Id.* § 1983.

[12] *See infra* Section II.B.

[13] *See infra* Section II.C; Elyse Slabaugh, Note, *Dignity, Deference, and Discrimination: An Analysis of Religious Freedom in America's Prisons*, 49 BYU L. REV. 269, 292 (2023).

[14] *See* Sung Joon Jang & Byron R. Johnson, *Religion and Rehabilitation as Moral Reform: Conceptualization and Preliminary Evidence*, 49 AM. J. CRIM. JUST. 47 (2024).

[15] 42 U.S.C. §§ 2000bb–2000bb-4.

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Finally, Part III of this Note will explain the current tension between claims brought by prisoners under RLUIPA and claims brought under the First Amendment. This Part brings forth potential solutions to resolve issues of mooted claims and inaccessibility of recovery for plaintiffs claiming that their religious exercise was violated while a prisoner.

I. A HISTORY OF RELIGIOUS RIGHTS CLAIMS

The road to the broader religious rights for prisoners, seen today under RLUIPA, is long and twisting. A brief review of the history of religious rights claims is necessary to fully understand how the existing tension in the courts occurred.[16] Though it is often stated that "[t]he degree of civilization in a society can be judged by entering its prisons,"[17] the United States has not always followed such ideology in the treatment of its prisoners' religious rights.[18] This Part discusses the Supreme Court's free exercise jurisprudence, both in and out of the penal context. The Part will describe the phases of analysis that the Court developed over time, leading to the passage of RLUIPA in 2000.

A. The Sherbert *Framework and Strict Scrutiny*

Before the 1960s, the Court took an "out of sight, out of mind" approach to the religious rights of incarcerated individuals.[19] This approach resulted in a wide grant of deference to prison administrators and manifested in the "Hands-Off" doctrine.[20] This wide grant of deference—along with the seeming disregard for the constitutional rights of prisoners—came to an end via a 1963 case, *Sherbert v. Verner*.[21] The Court therein took a steep turn, deciding that the Free Exercise Clause demanded that neutral, generally applicable laws imposing a burden on religious exercise face strict scrutiny review.[22] In other words, "any incidental burden on the

[16] *See generally* Riley, *supra* note 6, at 7–23.

[17] *Changing Times, Changing Crimes*, COLO. COLL., https://sites.coloradocollege.edu/hip/criminality-and-criminalization/changing-times-changing-crimes/ [https://perma.cc/G6HL-QJVX] (last visited Mar. 16, 2025).

[18] Riley, *supra* note 6, at 7.

[19] See *Johnson v. California*, 543 U.S. 499, 528 n.2 (2005) (Thomas, J., dissenting), for a historical explanation of the hands-off deferential approach.

[20] *Id.*; Ryan Francis Pollock, Note, *The Eyes-On Doctrine*, 134 YALE L.J. 200, 206 (2024).

[21] 374 U.S. 398 (1963).

[22] *Id.* at 403.

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free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"[23]

Although *Sherbert* did not arise in the penal context—instead dealing with the denial of unemployment benefits[24]—cases involving the religious rights of prisoners soon followed after this momentous shift in jurisprudence. The following year, *Cooper v. Pate* extended greater religious protections against federal and state laws, regulations, and actions to prisoners.[25] In *Cooper*, a prisoner alleged that as retaliation for his religious beliefs, prison officials had denied him the ability to purchase religious publications.[26] The Court determined that such a claim was actionable under § 1983.[27] This decision signaled to the lower courts that § 1983 claims were a viable avenue for recovery when correctional officers and state prison workers allegedly violated prisoners' constitutional rights.[28]

Religious rights and protections for prisoners peaked with the Court's decision in *Cruz v. Beto*.[29] The Court held that if other prisoners were afforded reasonable opportunities to exercise their religious freedoms, then similar opportunities could not be denied to prisoners wishing to exercise their unique religious freedoms.[30] In the same year, the Court again affirmed the application of strict scrutiny for religious claims in *Wisconsin v. Yoder*.[31] These decisions led to a period in which prisoners

[23] *Id.* (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

[24] *Id.* at 399–401.

[25] 378 U.S. 546 (1964) (per curiam); *see* Lee v. Washington, 390 U.S. 333, 334 (1968) (per curiam) (affirming a ruling that applied the Fourteenth Amendment to prisons and jails, thus allowing for the prohibition of racial segregation of prisoners).

[26] 378 U.S. at 546.

[27] *Id.*

[28] *See id.*

[29] 405 U.S. 319, 322 n.2 (1972) (per curiam) ("[R]easonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty."); *see* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 507 (2005) ("In the 15 years following *Cruz v. Beto*, prisoners enjoyed the highest level of protection for their First Amendment religious exercise rights in the nation's history.").

[30] *Cruz*, 405 U.S. at 322 (where a Buddhist inmate was denied certain privileges and retaliated against for attempting to pursue his faith while Catholic, Protestant, and Jewish inmates were encouraged to pursue their religions).

[31] 406 U.S. 205 (1972).

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enjoyed the highest level of protection for their First Amendment religious exercise rights in the history of the United States penal system.[32]

B. A Lowered Threshold and Lowered Scrutiny (The "Reasonableness" Standard)

This period of heightened protection for incarcerated persons prevailed for fifteen years, ending with the Supreme Court's decision in *Turner v. Safley*.[33] *Turner* solidified an end to the application of strict scrutiny for assessing prisoners' free exercise claims.[34] Though the Court opined that prisoners' constitutional rights could not be stripped away due to their status as a prisoner of the state, it concluded that the religious protections afforded to prisoners had expanded too far in the context of their penal surroundings.[35] Instead, the test developed in *Turner* hinged on the consideration of four factors: (1) The prison regulation must be justified by a "legitimate government interest"; (2) the prison system must offer an "alternative means to exercise the right"; (3) there must be consideration of the effect any accommodation of the right would have on the prison system's effective management of its offenders and the impact on available resources; and (4) there must be consideration of any alternative that provides full accommodation of the right with a minimum cost to prison operations/efficiency, and the rule cannot be an "exaggerated response."[36]

This test—though seemingly stricter than a pure rational basis standard—set the standard of review for constitutional challenges brought against prison rules and regulations as a "reasonableness" standard.[37] In essence, the new test meant that in defense of their burdensome actions and regulations, prison officials must merely show a reasonable relationship between the impinging restriction and a legitimate penological goal.[38] The Court believed that the application of strict scrutiny too greatly undermined the judgment of prison administrators.[39] The Court further

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[32] *See* Gaubatz, *supra* note 29, at 507.

[33] 482 U.S. 78 (1987).

[34] *Id.* at 89.

[35] *Id.* at 84, 89.

[36] *Id.* at 89–91.

[37] *See* Lorijean Golichowski Oei, Note, *The New Standard of Review for Prisoners' Rights: A* "Turner" *for the Worse?* Turner v. Safley, 33 VILL. L. REV. 393, 396 (1988).

[38] *Turner*, 482 U.S. at 89–90.

[39] *Id.* at 89.

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reasoned that prison administrators are in a better position to determine administrative needs in the prison related to promotion of security, order, and rehabilitation.[40] This new standard provided a great deal of deference, proving fatal to many free exercise claims brought by prisoners.[41]

Only eight days later, the Court made clear its intention to rid prisoners' claims of being afforded strict scrutiny in *O'Lone v. Estate of Shabazz*.[42] The *O'Lone* Court held that a prison rule or regulation would be deemed reasonable even if it negatively affected a prisoner's religious exercise as long as it was related to a "legitimate penological interest[]."[43] The Court addressed the question of whether a prison regulation could prevent Muslim inmates from being excused from a work crew to attend their Friday daytime prayer.[44] The only argument the prison administrators provided as to why this regulation should be permissible (i.e., their penological interest) was a broad and unspecified interest in "institutional order and security."[45] Such a floundering and unarticulated justification most certainly would have proved insufficient under strict scrutiny. But, under the deferential "reasonableness" standard, the Court impliedly declared that the Constitution "permits prison officials to substantially restrict or absolutely deprive prisoners' religious practices with only minimal justification."[46]

During this time, the Court not only made changes in the religious exercise jurisprudence within the penal context but also began stripping scrutinous protections for non-institutionalized persons. The redeployment of deference and the

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[40] *Id.* ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."); *see* Kristen Schnell, Note, Turner*'s Insurmountable Burden: A Three-Circuit Survey of Prisoner Free Speech Claims*, COLUM. HUM. RTS. L. REV. ONLINE, Mar. 16, 2022, at 124, 167; *see also* David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 1021–25 (2016) (speaking to the nature of deference courts grant to prison officials generally).

[41] *See* David L. Hudson, Jr., Turner v. Safley*: High Drama, Enduring Precedent*, PRISON LEGAL NEWS (May 1, 2008), https://www.prisonlegalnews.org/news/2008/apr/15/turner-v-safley-high-drama-enduring-precedent/ [https://perma.cc/URZ6-PA7X]; Schnell, *supra* note 40, at 131.

[42] 482 U.S. 342, 349 (1987).

[43] *Id.* (quoting *Turner*, 482 U.S. at 89).

[44] *Id.* at 345.

[45] *Id.* at 350.

[46] Matthew P. Blischak, Note, O'Lone v. Estate of Shabazz*: The State of Prisoners' Religious Free Exercise Rights*, 37 AM. U. L. REV. 453, 478 (1988).

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pseudo-rational basis standard in prisons precipitated the Court's controversial decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.[47] There, the Court held that religious exercises burdened by neutral and generally applicable laws were constitutionally valid under rational basis review, making this standard the new norm for all religious freedom cases, both in and outside of prison.[48] This decision effectively reverted the religious rights of prisoners to those of the pre-*Sherbert* era, granting extreme deference to the administrators' decision making.[49] Rather than attempt to narrow or better tailor the preexisting *Sherbert* framework, the Court fully shut the door on it.

C. The Passage of RFRA and RLUIPA

Congress took great umbrage with the Court's decisions in *Turner* and *O'Lone*, believing the outcome to be a substantial infringement of the fundamental right to free exercise.[50] In response, Congress passed RFRA, three years after the decision in *Smith*.[51] RFRA was passed in an attempt to restore the strict scrutiny standard of review stemming from the *Sherbert* and *Yoder* line of cases.[52]

But in the application of the *Sherbert* test, lower courts often skirted around RFRA's statutory guidelines. Courts would do this by loosely and deferentially analyzing the "least restrictive means" prong of strict scrutiny analysis.[53] Another tactic courts used to avoid RFRA's guidelines was to not even reach a standard of review by declaring at the threshold that there had been no substantial burden on the

[47] 494 U.S. 872, 879 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *as recognized in* Alabama v. Trustees, 20 F.3d 469 (5th Cir. 1994).

[48] *Id.* The Court determined that when any law targeted or burdened a specific religious practice, the law would fall under a strict scrutiny analysis. *Id.* at 885. The Court stated that because the use of peyote was illegal for every Oregon citizen, the law did not target Native American religious practices, thus concluding that the correct standard of analysis was rational basis. *Id.* at 890. This led to a determination that the law prohibiting Native Americans from using peyote was constitutional. *Id.*

[49] Barrick Bollman, Note, *Deference and Prisoner Accommodations Post*-Holt*: Moving RLUIPA Toward "Strict in Theory, Strict in Fact,"* 112 NW. U. L. REV. 839, 844 (2018).

[50] *See* Ramirez v. Collier, 595 U.S. 411, 424 (2022) (discussing Congress's reaction to the decisions in *Employment Division* and *City of Boerne v. Flores*).

[51] Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb.

[52] *See* James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2058 (2009).

[53] Bollman, *supra* note 49, at 845–46 (citations omitted).

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prisoner-claimant's free exercise.[54] When answering whether a substantial burden was present, courts commonly narrowed the question to whether the affected practice was "central" or "mandated" by the religion.[55] Often this interpretation of substantial burden led to failed RFRA claims because courts had little, if any, knowledge of the unique aspects of different religions.[56] Courts applied these standards in such a way that over ninety percent of prisoner-brought RFRA claims failed.[57]

RFRA's applicability against the states would not last long. Four years after the passing of the Act, the Court decided in *City of Boerne v. Flores* that RFRA was constitutionally deficient when applied to the states.[58] In yet another rebuttal, Congress passed RLUIPA in 2000.[59] Because of the failed applicability of RFRA, Congress ensured a more detailed writing in RLUIPA that included heightened specificity in its guidance to the courts.[60]

RLUIPA, similar to RFRA, set forth a statutory cause of action applying a pre-*Turner* strict scrutiny standard of review to First Amendment free exercise challenges brought by persons situated in penal institutions.[61] A structural change written into RLUIPA is that it does not require that the allegedly burdened religious practice or exercise be central or mandatory to the religion itself.[62] This differentiation in the sister Act was made as a response to how lower courts had avoided the standards set out in RFRA by answering the centrality test in the

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[54] *Id.*

[55] *Id.*

[56] *See* Gaubatz, *supra* note 29, at 518–19.

[57] *Id.* at 504, 509.

[58] 521 U.S. 507, 532 (1997). Congress had passed RFRA under the Fourteenth Amendment's Equal Protection Clause, but the Court found this constitutional footing to be deficient for application to state and local governments. *Id.* at 516, 536.

[59] Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc-1–5.

[60] *Id.* An additional difference from RFRA is that Congress decided to invoke its Spending and Commerce Clause powers by requiring states to follow RLUIPA as a condition to their receiving federal funds. *See* Gaubatz, *supra* note 29, at 535. This way, the Act's parts dealing with protections for prisoners could not be similarly held unconstitutional by the Court as had happened when the Court had relied on the Fourteenth Amendment for the RFRA's passage. *Id.* at 534–35. Another reason for the specificity was Congress's wish to rid the "frivolous and arbitrary" barriers that prevented successful claims of free exercise by prisoners. *Id.* at 510.

[61] 42 U.S.C. § 2000cc-1 (the Act also applies to land-use regulations).

[62] *Id.* § 2000cc-5(7)(A).

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negative.[63] Even though religious beliefs are very personal, courts were reluctant to recognize that intra-faith differences are a common occurrence among followers of a religion.[64]

II. POST-LEGISLATIVE ACTION AND ENSUING CONFUSION

Today, the majority of prisoner religious claims involve prison officials and systems acting under the color of state law.[65] So moving forward, this Note will primarily focus on the standards and case law stemming from RLUIPA. RLUIPA brings forth a three-part test for courts to analyze claims alleging a violation of a prisoner's religious rights and protections, stating in relevant part:

> (a) No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
> (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[66]

A. The Broadening of Prisoners' Rights Under RLUIPA

Though RLUIPA provided greater guidance than its predecessor Act, lower courts struggled with its application, often conflicting with each other on vital

[63] *See* Nelson, *supra* note 52, at 2077.

[64] *See* Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 715 (1981) ("Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences . . . .").

[65] *See* Gaubatz, *supra* note 29, at 513, 513 n.50 (describing how RLUIPA Section 3 applies to governments and persons acting under the color of state law).

[66] 42 U.S.C. § 2000cc-1. Essentially, under a RLUIPA claim, the plaintiff bears the burden at the threshold to show that the government has placed a "substantial burden" on a sincerely held religious belief. *See* Gaubatz, *supra* note 29, at 513–14. If such a burden is determined to be sufficiently substantial, then the burden of persuasion shifts in the next part of the analysis to the government, which must show that the act or omission that is placing a burden on the plaintiff is for a sufficiently compelling interest and is being carried out in the least restrictive means of achieving or advancing the stated interest. *Id.* at 514. There is little evidence that the Court's reasons for their grant of deference in *Turner* of the inability to effectively apply strict scrutiny in the penal context has rung true. *See* Bollman, *supra* note 49, at 870. There has been minimal evidence that RLUIPA's reintroduction of strict scrutiny has had a negative impact on prison security, and the federal government has outspokenly recognized that such heightened review of prison policies and regulations has not compromised prison security or public safety. *See* Shapiro, *supra* note 40, at 978; Cutter v. Wilkinson, 544 U.S. 709, 725 (2005).

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interpretations related to the deference owed to prison officials and what constituted a substantial burden.[67] With lower courts uncertain how to approach RLUIPA claims in the penal context, the Supreme Court was forced to take on the case of *Cutter v. Wilkinson* in hopes that its guidance could bring unity in RLUIPA's application.[68] However, the Court's decision in *Cutter* only resulted in further deepening the well of confusion for lower courts and plaintiffs.[69]

The Court in *Cutter* explained that when analyzing RLUIPA's "compelling interest prong," lower courts should grant at least some "due deference" to prison officials' judgments and expertise.[70] *Cutter* did not prove greatly beneficial, however, because the notion of due deference had already been made clear through the legislative history mandating that at least some deference was owed to the opinions and decision making of prison officials.[71] What lower courts needed to hear was a more specified directive on how much deference was due. Beyond this lack of guidance, the Court also failed to substantiate any formal analysis or definition as to what meaning "substantial burden" holds under the statute.[72]

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[67] *See* Bollman, *supra* note 49, at 850.

[68] 544 U.S. at 718. Additionally, the case was taken up to formally uphold the constitutionality of RLUIPA, as state officials had made attempts to have the Act meet a similar fate as its predecessor. *See id.* at 717–19.

[69] *See id.*; Bollman, *supra* note 49, at 853. In *Cutter*, the petitioners were a group of prisoners who were adherents to minority religions like Satanism, Wicca, and Asatru. 544 U.S. at 712. They claimed that the Ohio prison system was not allowing them the same latitude for group worship that was granted to followers of more mainstream religions. *Id.* at 712–13. The Court ruled unanimously in favor of the prisoners. *Id.* at 714.

[70] *Id.* at 722–23 (reasoning that such a grant of due deference was required to effectively balance the level of accommodation that prisoners receive for their religious exercise and the operation/security of the prison itself).

[71] *See* 146 CONG. REC. S7774 (July 27, 2000) (joint statement of Sens. Hatch and Kennedy) ("[C]ourts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.").

[72] See generally Nelson, *supra* note 52, for a discussion on how this lack of guidance led to varying circuit splits on interpretations of the Act. Some courts took on a plain-meaning approach and some a jurisprudential approach. Even though RLUIPA advised courts to interpret "substantial burden" through using pre-*Turner* Supreme Court jurisprudence, the plain-meaning courts relied on textualist methods to divine a meaning by using dictionary definitions and the ordinary usage of the words. *See generally Cutter*, 544 U.S. at 725. Such an interpretation commonly led to an exceedingly high threshold for plaintiffs to meet. *See id.* This group primarily consisted of the Seventh, Ninth, and Eleventh Circuits, and they argued that, among other reasons, this textualist approach ensured that the word "substantial" was not rendered meaningless. *See generally* Nelson, *supra* note 52. On the other hand, the termed jurisprudential group of

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RLUIPA, though abound with issues of uniform application, immediately jump-started the rate of successful free exercise claims brought by prisoners post-*Cutter*. For example, in a 2008 case, *Greene v. Solano County Jail*, the Ninth Circuit held that, under RLUIPA, prison administrators could not prohibit maximum-security prisoners from attending group religious worship services and that a prohibition substantially burdened such prisoners' religious exercise.[73] Unlike claims brought under the First Amendment and *Turner*, the court mandated that—under RLUIPA—prison officials cannot "justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison."[74]

The Supreme Court provided color to RLUIPA again in *Holt v. Hobbs*.[75] In *Holt*, the petitioner brought a suit challenging the grooming policy enforced in prisons run by the Arkansas Department of Corrections.[76] The prison regulation and correctional officers forced Holt to shave his beard for "security purposes" in contravention of Holt's religious beliefs and practices that mandated him not to shave or otherwise groom his beard.[77] On appeal, the Eighth Circuit determined that the prison system and administrators "had satisfied [their] burden of showing that the grooming policy was the least restrictive means of furthering [the prison's] compelling security interest[]," and that deference was owed to the prison officials' judgments regarding the security of the prison.[78] The Supreme Court reversed unanimously.[79] Justice Alito, chiding the Eighth Circuit's decision, referenced the

courts attempted to follow the pre-*Turner* jurisprudence and was able to fall more closely in line with the legislative intent through adopting the pressure-focused analysis seen in cases like *Sherbert* and *Thomas*. *Id.* This split continued after *Cutter* with little change until the Court's change of stance in 2015 with *Holt v. Hobbs*, 774 U.S. 352 (2015).

[73] 513 F.3d 982, 988 (9th Cir. 2008).

[74] *Id.* at 989–90. The Ninth Circuit in this case also analyzed a First Amendment claim under *Turner* and granted summary judgment to the defendant, finding that the plaintiff had not sufficiently showed that the prison's policies were unreasonable. *Id.* at 990.

[75] 574 U.S. 352 (2015).

[76] *Id.* at 359.

[77] *See id.* at 356; Luke W. Goodrich, *Why Religious Freedom for Prisoners Matters*, THE HILL (Oct. 7, 2014, 9:00 AM), https://thehill.com/blogs/congress-blog/religious-rights/219747-why-religious-freedom-for-prisoners-matters/ [https://perma.cc/PZ2H-43GG] ("[T]he prison in this case allowed beards for decades without any security problems. It still allows beards for medical reasons. And over forty state prison systems around the country allow beards—all without security problems.").

[78] *Holt*, 574 U.S. at 360 (quoting Holt v. Hobbs, 509 F. App'x 561, 562 (8th Cir. 2013)).

[79] *Id.* at 356.

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magistrate judge's statement that it was "almost preposterous to think that [Holt] could hide contraband in [his] beard."[80]

Though the Supreme Court's decision in *Holt* successfully expanded the reach of RLUIPA claims, it did so on an exceedingly narrow basis.[81] The decision effectively presented an upper limit of the deference that courts may grant prison officials under RLUIPA by reversing the Eighth Circuit's near "absolute" and "unquestioning" deference.[82] Litigants post-*Holt* have seen a continued uptick in success after ensuring that lower courts could no longer simply acquiesce to a prison official's post-hoc justifications for religiously burdensome regulations.

B. Issues of Mootness Through RLUIPA Claims

Though RLUIPA has restored the religious rights of many prisoners that were extinguished by the *Turner* decision, there still exist substantial problems with claims brought under the Act. A prominent issue is that monetary damages are not available in free exercise claims brought under the Act.[83] This lack of a popular, and commonly only, remedy has led to many prisoners' suits being tossed aside, sometimes after litigating the matters for years.[84] Once a burdened prisoner is released or transferred to a different prison, they no longer have any form of equitable relief under RLUIPA.[85] In fact, sometimes prison officials will transfer a prisoner for the sole reason of mooting a potential claim by that prisoner, a tactic often referred to as "strategic mooting."[86] Thus, a prisoner's religious rights can be

[80] *Id.* at 360, 363.

[81] *Id.* at 369 (holding that the "Department's grooming policy violate[d] RLUIPA insofar as it prevent[ed Holt] from growing a 1/2-inch beard in accordance with his religious beliefs").

[82] Bollman, *supra* note 49, at 877.

[83] *See* Sossamon v. Texas, 563 U.S. 277, 293 (2011).

[84] *See infra* notes 87–93 and accompanying text.

[85] *See generally Sossamon*, 563 U.S. 277.

[86] This is especially an issue because prisoners commonly litigate pro se, so governments and prison officials will let cases drag on through litigation until the prisoner is transferred or released. But they are more likely to attempt a settlement when the prisoner is represented by counsel. Tamika D. Temple, *Mooted and Booted: How the Mootness Doctrine Has Been Used to Silence Violations of Prisoners' Constitutional Rights*, 45 T. MARSHALL L. REV. 117, 132 (2021) ("There are several cases that seriously suggest that prisons strategically transfer its prisoners in order to moot their cases."); *see, e.g.*, Moussazadeh v. Tex. Dep't of Crim. Just., 703 F.3d 781, 786 (5th Cir. 2012).

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constantly impinged upon for years with little chance of any form of recovery for the prisoner or the opportunity to hold prison officials accountable for such violations.

A potent example is what occurred to Damon Landor in 2020. Landor arrived at a prison system with the expectation that he would be able to maintain his knee-length dreadlocks.[87] Though prisons commonly require prisoners to cut their hair for "security" purposes, Landor thought he would be exempted from the requirement because, as a practicing Rastafarian, Landor had vowed to not cut his hair.[88] Landor was able to keep this vow for nearly twenty years until the prison ultimately disregarded his request and forced his hair to be cut.[89] By the time Landor was released from the penal institution, he had not yet had the opportunity to bring any claim against the prison or officers involved with the impingement of his religious rights.[90] Thus, after Landor's release, he decided to file a RLUIPA claim seeking monetary damages for the violation of his religious rights sprouting from the cutting of his dreadlocks.[91] However, the court handling the case was quick to throw Landor's complaint out and dismissed the case, stating that because Landor was no longer in prison, the case was moot.[92] Because the judge had determined that monetary damages could not be recovered under a RLUIPA claim, there was no remedy left for Landor to recover from the case, as any equitable relief would be unavailable due to his free status.[93]

C. Section 1983 Free Exercise Claims Post-RLUIPA

As seen, many positive effects for prisoners have stemmed from the enactment and enforcement of RLUIPA. However, because the Act simply sought to supersede

[87] Landor v. La. Dep't of Corr. & Pub. Safety, 82 F.4th 337, 340 (5th Cir. 2023).

[88] *Id.* at 339.

[89] *Id.* at 340. Correctional officers shaved Landor's head even though he had come equipped with a 2017 decision from the Fifth Circuit that had prohibited Louisiana's Department of Corrections from cutting another Rastafarian prisoner's dreadlocks under a very similar situation. *Id.* Additionally, the decision to cut Landor's hair was increasingly inexplicable and unjustified as his head was shaved clean, against his protests, with only three weeks left on his sentence after he had been transferred to the Raymond Laborde Correctional Center. *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 340, 345.

[93] *Id.* at 345.

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Smith and *Turner* in certain areas, courts were left open to apply the rules from those cases when deliberating claims brought under § 1983.

Though the vast majority of prisoners' free exercise claims are brought under RLUIPA, due to its provision of a higher level of scrutiny, claims under RLUIPA are not always the most effective for prisoners.[94] Claims brought under § 1983 often depart from what is set out in RLUIPA and are analyzed under the aforementioned *Turner* test.[95] One might question why a prisoner would choose not to bring their claim under RLUIPA, but as seen in the previous section, oftentimes a prisoner's valid and meritorious claim will be thrown out due to lack of recourse. This leaves prisoners' last hope of validation to claims brought under § 1983, analyzed under the much harder to satisfy view of *Turner* and *O'Lone*.[96] In fact, courts have now cited to *Turner* nearly 5,000 times.[97]

Section 1983 claims maintain the advantage of avoiding RLUIPA's procedural issues involving strategic mooting and a lack of monetary damages.[98] But the greater issue with a First Amendment free exercise claim via § 1983 is that the probability of success dips exponentially. Oftentimes, prisoners who win under their RLUIPA claim simultaneously lose their free exercise claim on the same facts.[99] For example, in the Eleventh Circuit case of *Davila v. Gladden*, the plaintiff filed claims under both the First Amendment and RFRA, seeking injunctive and monetary relief.[100] Davila alleged that a prison policy that prohibited him from wearing certain religious beads and shells violated his free exercise.[101] The district court dismissed Davila's

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[94] *See supra* Part II.A.

[95] *See supra* Section I.B.; *see also* Bollman, *supra* note 49, at 845 ("'*Turner* left those delicate policy decisions largely to prison officials.' Prisoners were left with little chance for an exemption from a regulation that violated their religious expression because prison officials merely needed to point to a related penological interest to survive judicial review.").

[96] *See* Gaubatz, *supra* note 29, at 543 ("[U]nder the *Turner/O'Lone* test, the burden of proof and production fell wholly on the prisoner to establish that there was no rational relationship between the prison's asserted interest and the policy burdening religious exercise.").

[97] As of the writing of this Note, LexisNexis reports that 4,799 cases have cited to *Turner* positively.

[98] *See supra* Section II.B.

[99] Shapiro, *supra* note 40, at 1023.

[100] 777 F.3d 1198, 1202 (11th Cir. 2015). This case was decided before *Tanzin*, discussed *infra* note 110, whereby the Court granted monetary damages to a prisoner bringing a RFRA claim. Thus, though dealing with RFRA, the standards are the same in RLUIPA.

[101] *Id.* at 1202.

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claims for monetary damages under RFRA and granted summary judgment to the defendants on both the First Amendment claim and the claim for injunctive relief under RFRA.[102] The circuit court went on to reverse the district court's decision as to the injunctive relief under RFRA but affirmed on the other counts.[103]

Barring the fact that § 1983 free exercise claims are tested under a much less searching view than claims under RLUIPA, judicial confusion still exists on what standards are applicable to § 1983 claims. This judicial disagreement is shown in a circuit split revolving around the question of substantial burden.[104] A recent decision by the Second Circuit only deepened the divide on the question of whether a showing of a substantial burden is needed in a § 1983 claim.[105]

III. THE TENSION BETWEEN CLAIMS BROUGHT BY PRISONERS UNDER THE FIRST AMENDMENT AND CLAIMS BROUGHT UNDER RLUIPA

Resolution of the aforementioned issues regarding RLUIPA claims and First Amendment claims brought via § 1983 is both needed and logical to prevent further puzzling results. The two arguments this Note brings forward to resolve certain issues surrounding prisoners' free exercise claims are to (1) allow recovery of monetary damages in a RLUIPA claim; and/or (2) analyze First Amendment free exercise claims under a strict scrutiny standard. Taking one, if not both of these routes, is logical and achievable.

A. Analyzing the Argument that Monetary Damages Should Be Available in Free Exercise Claims Brought by Prisoners Under RLUIPA

The only time the Supreme Court has heard argument on the issue of monetary damages under RLUIPA was in the 2011 case, *Sossamon v. Texas*.[106] *Sossamon* affirmed that money damages against prison officials in either their individual or

[102] *Id.* at 1203.

[103] *Id.* at 1214.

[104] *See* Nelson, *supra* note 52, at 2054.

[105] *See generally* Martin Flumenbaum & Brad S. Karp, *Expanding Free Exercise Claims*, N.Y.L. J. (Dec. 27, 2023, 10:00 AM), https://www.law.com/newyorklawjournal/2023/12/27/expanding-free-exercise-claims/ [https://perma.cc/P3WN-92HU] (explaining how the Second Circuit's decision in *Kravitz v. Purcell* deepened an already existing circuit split).

[106] 563 U.S. 277 (2011).

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official capacities are disallowed under RLUIPA.[107] Though there still exist many skeptics to this opinion, sovereign immunity has proven too large an obstacle.[108] The legal theories on how Congress or the Court might be able to circumvent the issue of sovereign immunity are outside the scope of this Note, but many scholars and judges have raised the possibility.[109] This Note simply reasserts the importance of finding a way around this problem and raises why it is not illogical to allow monetary damages as relief under a RLUIPA claim. In fact, allowing recovery of at least nominal damages is the only remaining safeguard to prevent governments and prison officials from strategically mooting prisoners' cases.

Recently, the Supreme Court granted monetary damages to a prisoner bringing an RFRA claim in *Tanzin v. Tanvir*.[110] The Court unanimously held that RFRA, the sister statute of RLUIPA, allows recovery of money damages against government officials in their individual capacity as a form of "appropriate relief."[111] Because RFRA was passed by Congress as a response to *Turner* and *Smith*, it can only be assumed that Congress intended for a return to the standards and rights litigants enjoyed prior to those two cases.[112] Further, because RFRA uses the same language

[107] *Id.* at 280.

[108] *See* Landor v. La. Dep't of Corr. & Pub. Safety, 93 F.4th 259, 262–67 (5th Cir. 2024) (Oldham, C.J., dissenting).

[109] *See generally* Steven B. Dow, *The Eleventh Amendment and Corrections Litigation: The Impact of Sovereign Immunity on the Religious Land Use and Institutionalized Persons Act*, 37 NEW ENG. J. CRIM. & CIV. CONFINEMENT 247, 253–54 (2011).

[110] 592 U.S. 43 (2020). In this case, claimants, who were practicing Muslims, alleged that "[FBI] agents placed them on the No Fly List in retaliation for their refusal to act as informants against their religious communities." *Id.* at 46. Claimants then sued the agents in their official capacities, seeking injunctive relief, and in their individual capacities for money damages. *Id.* After suing, DHS informed the Claimants that they could fly, effectively "mooting the claim for injunctive relief." *Id.* Following this, the District Court dismissed the claims for monetary relief, "ruling that RFRA does not permit monetary relief." *Id.*

[111] *Id.* at 45.

[112] *Id.* at 51.

> Given that RFRA reinstated pre-*Smith* protections and rights, parties suing under RFRA must have at least the same avenues for relief against officials that they would have had before *Smith*. That means RFRA provides, as one avenue for relief, a right to seek damages against Government employees. A damages remedy is not just "appropriate" relief as viewed through the lens of suits against Government employees. It is also the *only* form of relief that can remedy some RFRA violations. For certain injuries, such as respondents' wasted plane tickets, effective relief consists of damages, not an injunction.

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as § 1983 for similar claims, "it is reasonable to believe that the terminology bears a consistent meaning."[113] In other words, since the Court had previously interpreted § 1983 to allow monetary recovery in suits, Congress's use of the same terminology indicates an intent to allow parallel forms of relief under RFRA. Such intent transfers to RLUIPA and state officials because RFRA's original language defined "government" to include an "official (or other person acting under color of law) of the US, *a State, or a subdivision of a State*" with no distinction being made between state and federal officials.[114]

Analogous to the language in § 1983 and RFRA, RLUIPA allows a court to reward relief to a plaintiff against "any other person acting under *color of State Law*."[115] After seeing the initial outcomes from RFRA litigation, prior to its partial overturning in *City of Boerne*, legislators were able to better make their intent clear while enacting RLUIPA. In hindsight, Congress clarified that RLUIPA should be read "in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[116] The legislative history indicates that Congress intended to allow monetary damages in RLUIPA cases.[117] The House Judiciary Committee went as far as saying that "[i]n the case of violation by a state, the Act must be enforced by suits against state officials and employees."[118] Furthermore, Congress could have explicitly stated that only equitable or injunctive relief is available under RLUIPA, but declined to do so.[119] Such statements clearly

Id.

[113] *Id.* at 48 (quoting ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 323 (2012)).

[114] *Id.* at 50 (citation omitted); *see* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 730 (2014) (showing the Court using RFRA and RLUIPA's case law interchangeably in interpreting the two statutes).

[115] 42 U.S.C § 2000cc-5(4)(A)(iii) (emphasis added).

[116] *Id.* § 2000cc-3(g); *see Tanzin*, 592 U.S. at 48 ("'[U]nder color of law' draws on one of the most well-known civil rights statutes: 42 U.S.C. § 1983.").

[117] See H.R. REP. NO. 106-219, 29 (1999) for a discussion on the intent to "creat[e] a private cause of action for damages, injunction, and declaratory judgement, and [to] creat[e] a defense to liability, and provid[e] for attorneys' fees."

[118] *Id.*

[119] Jennifer D. Larson, Note, *RLUIPA, Distress, and Damages*, 74 U. CHI. L. REV. 1443, 1466 (2007).

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show that Congress intended states, and their actors, to be held accountable for violations of the Act.[120]

A potential concern that could be raised if RLUIPA was to allow the recovery of damages is that it could bring a flood of litigation with prisoners seeking a monetary windfall. However, such worries are easily prevented via qualified immunity, the Prison Litigation Reform Act's capping on attorneys' fees and heightened procedural requirements, and judicial discretion.[121]

Beyond the precedential and jurisprudential arguments that some form of monetary damages should be available under RLUIPA, there also exist many logical and ethical reasons for achieving this remedial change. As previously discussed, even the simple granting of nominal damages would greatly decrease the likelihood of a prisoner's case being rendered moot. Because a large number of RLUIPA cases are mooted, whether through strategic or natural means, government and prison officials are held to a lower level of accountability with respect to incarcerated persons' constitutional rights. Additionally, allowing the recovery of damages will aid in equally protecting the rights of religious minorities. Due to a lack of knowledge, or just possibly a lack of care regarding minority faiths, prisoners following these faiths are much more vulnerable to having their religious rights abridged.[122] Because prisoners, and especially religious-minority prisoners, often do not have the means to protect their rights while incarcerated and commonly have insufficient legal representation, bringing a successful RLUIPA claim is their only hope for some slight vindication.[123] Thus, RLUIPA should be interpreted to allow the recovery of some form of damages.

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[120] These statements could be interpreted as a clear condition to the continued federal funding of states, thus potentially waiving sovereign immunity for violations of this condition. *See* South Dakota v. Dole, 483 U.S. 203, 210 (1987).

[121] *See* Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [https://perma.cc/3FNB-LKSH]. *See generally* Shapiro, *supra* note 40, at 1012–19 for a discussion on the external hurdles prisoners face in religious exercise litigation, in part because of the limitations set out in the Prison Litigation Reform Act.

[122] *See* Samantha Sparacino, Note, *Debunking "De Minimis" Violations of Prisoners' Religious Rights: Further Problems with the Supreme Court's "Hands Off" Approach*, 37 TOURO L. REV. 1673, 1696–99 (2021).

[123] *Id.*

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B. Additionally and in the Alternative, Claims Brought Under Section 1983 Require Guidance from the Supreme Court and Should Fall Under the Standards Set Out in RLUIPA Rather than the Turner *Test*

The remaining logical option to effectively protect prisoners' religious rights is to review claims brought under the First Amendment and § 1983 under strict scrutiny. Doing so would return religious protections for prisoners to the levels intended by Congress and the Constitution, because the recovery of monetary damages remains a form of relief in § 1983 claims.

Though such relief is available, claims brought by prisoners analyzed under the *Turner* standard have little chance of success.[124] Recently, however, arguments have arisen that support overturning the rulings stripping religious rights cases of strict scrutiny like *Employment Division v. Smith* and *Turner v. Safley*.[125] This argument for reversal stems from acknowledgment that the Court's reasoning for establishing the "reasonableness" standard in the late 1980s has proved untrue.[126] In fact, the successes of RFRA and RLUIPA in recent decades have clearly shown that the expansion of religious freedom does not create great imbalances or anarchy, neither in nor out of the penal context.[127]

Federal courts' continued use of the *Turner* standard in prisoner religious exercise claims runs contrary to both congressional intent and the Constitution. Congress makes clear by its continued support for RLUIPA that *Turner*'s "reasonableness" standard does not sufficiently protect the fundamental right to free exercise enshrined in the First Amendment.[128] Cases like *Smith* and *Turner* contradict the text of the Free Exercise Clause which "unconditionally protects religious exercise," whereas the *Smith* and *Turner* holdings limit religious exercise to generally applicable regulations.[129]

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[124] *See supra* Section II.C; *see also* Shapiro, *supra* note 40, at 1005–12.

[125] *See generally* Blaine Hutchison, *Revisiting* Employment Division v. Smith, 91 U. CIN. L. REV. 396 (2022).

[126] *Id.* at 399; *see supra* Section I.B.

[127] Hutchison, *supra* note 125, at 399.

[128] *See supra* Section I.B.

[129] Hutchison, *supra* note 125, at 416 (explaining that the Free Exercise Clause, unlike other constitutional clauses, does not contain any limiting terms like "unreasonable" or "excessive").

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It is not unreasonable to think that returning First Amendment free exercise claims to strict scrutiny is possible. Members of the current Court have recently signaled their substantial disagreement with the arguments made in *Smith*. Justice Gorsuch hinted as much in his concurring opinion in *Fulton v. City of Philadelphia*.[130] If such questions surround the fidelity of *Smith*, it is only reasonable to assume the same questions may be directed at prisoner religious-exercise cases like *Turner* and *O'Lone*.

CONCLUSION

Religious practice positively impacts prisoners in numerous ways, so achieving greater religious protections—through either (1) the allowance of monetary relief under RLUIPA, or (2) enforcement of a less deferential standard under § 1983 claims—is imperative to achieving the goals of incarceration. Continued practice of religion and participation in religious exercise correlates with lower rates of recidivism and fewer disciplinary issues in prisons.[131] Some studies have shown that the time to rearrest goes from 2.3 years to 3.8 years for those participating in religious practices while in prison.[132]

With such important stakes for prisoners, courts must analyze religious rights in the penal environment with a stringent eye. Religious practice by prisoners should be used as a tool to effectuate the goals of incarceration. Their incarcerated status leaves prisoners reliant on state actors to help protect their rights, but too often this vulnerability is taken advantage of by prison officials and correctional officers. Prisoners deserve the opportunity to hold accountable those who violate their religious rights.

[130] 593 U.S. 522, 626 (2021) (Gorsuch, J., concurring) ("No fewer than ten Justices—including six sitting Justices—have questioned [*Smith*'s] fidelity to the Constitution.").

[131] Elizabeth A. Clark, *The Impact of Religion and Religious Organizations*, 49 BYU L. REV. 1, 6 (2023).

[132] *Id.* at 13; *see* Goodrich, *supra* note 77.

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