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# The First Amendment Behind Bars: Free Exercise Claims Under RFRA and RLUIPA

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## I. Introduction

Throughout the 1980's, prisoners enjoyed very little free exercise protection under Supreme Court precedent. The Supreme Court's decisions were highly deferential to prison administrators, giving almost carte blanche control over regulation of the institution's free exercise policies. Congress responded by enacting statutes requiring greater protection be given to free exercise of religion in prisons. This paper will track jurisprudence as it relates to those statutory schemes aimed at expanding prisoner free exercise rights. More specifically, it will analyze prisoners' rights to free exercise under both federal statutes as it relates to the application of strict scrutiny standard of review in cases involving grooming and religious objects regulations. The central question is whether the application of strict scrutiny is actually beneficial toward prisoners bringing free exercise claims under these federal statutes.

The two federal statutes at issue are the Religious Freedom Restoration Act[1] ("RFRA") and the Religious Land Use and Institutionalized Persons Act of 2000[2] ("RLUIPA"). After RFRA was struck down as applied to the states under Section 5 of the Fourteenth Amendment, Congress enacted RLUIPA which, like its predecessor, reviewed prison policies restricting free exercise under the most searching standard of review, strict scrutiny. Although RLUIPA attempted to fix the shortcomings of RFRA, it was not until the landmark decision in *Holt v. Hobbs*[3] where prisoners actually saw some relief. In *Holt*, the Court sent a clear signal that prison administrators would no longer receive deference as to the validity of regulations restricting religious practice and would be subject to a heavy burden of proof to show that religious accommodations could not

[1] 42 U.S.C. § 2000bb, *et. seq.*
[2] 42 U.S.C. §2000cc, *et. seq.*
[3] *Holt v. Hobbs*, 574 U.S. 353 (2015).

be made without endangering prison safety and security. This paper will discuss RFRA caselaw and both pre-*Holt* and post-*Holt* RLUIPA caselaw involving prisoner free exercise claims in the context of grooming and religious object regulations. An analysis of this caselaw will reveal that after *Holt*, prisoners have much greater success in bringing free exercise claims under RLUIPA. Prisoners are overwhelmingly more likely to succeed in cases involving grooming regulations as opposed to religious object regulations, but overall prisoners have greater protection of religious free exercise under these statutory schemes.

## II. Prisoner Rights

### a. Constitutional: *Shabazz* and Progeny

While the desire to practice religion as an incarcerated individual in the United States is widespread, prisoners historically enjoyed slim constitutional protection of religious exercise.[4] In the New Deal era, courts began to hear more constitutional claims against state prisons, but continued to show little interest in challenges to prison policies implicating free exercise.[5] Starting in the 1960s, federal courts became more amenable to prisoner free exercise claims. In *Cruz v. Beto,* the Court held that a prison had a duty to provide its Muslim prisoners with a "reasonable opportunity" of pursing their faith.[6] Prisoners enjoyed the highest level of First Amendment protection in the decade following *Cruz*, but judicial support behind prisoners' free exercise claims disappeared in 1987 with the Court's decision in *O'Lone v. Estate of Shabazz*.[7] In *Shabazz*, the Court rejected not only strict scrutiny but any kind of heightened scrutiny when reviewing prisoner

[4] Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. OFFENDER REHAB. 11, 28 (2002).
[5] See *Adams v. Ellis*, 197 F.2d 483, 485 (5th Cir. 1952) (holding that "it is not the function of the [c]ourts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined")
[6] *Cruz v. Beto*, 405 U.S. 319, 322 (1972).
[7] *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987).

free exercise claims.[8] The Court set forth a "reasonableness" standard, where the central question was whether "the prison's action in burdening religious exercise was reasonably related to legitimate penological interests." Citing *Turner v. Safley*[9], the Court laid down four factors to be used when determining reasonableness: (1) whether there is a "valid, rational connection" between the prison regulation and the legitimate governmental interest alleged and whether the connection is not so attenuated as to render the policy arbitrary or irrational; (2) whether inmates retain alternative means of exercising the circumscribed right; (3) the impact of accommodating the right on other prisoners, guards, and prison resources; and (4) whether there are alternatives to the regulation restricting exercise of religion that "fully accommodate the prisoner's rights at de minimis cost to valid penological interests."[10] Through the use of this new approach, the Court made it clear that a high degree of deference was to be given to prison administrations.

In another step in the seemingly wrong direction for prisoners' rights, the Court issued its landmark decision in *Employment Division v. Smith*.[11] Prior decisions, Sherbert v. Verner[12] and Wisconsin v. Yoder,[13] both outside of the prison context, had subjected all laws that substantially burdened religious exercise to a strict scrutiny standard of review[14], but the Court in *Smith* held that this more exacting standard of review applied only to laws that were not generally applicable, involved individualized exemptions and what the *Smith* Court called "hybrid rights."[15]

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[8] *Id.*
[9] *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). This case narrowly construed the due process rights of prisoners.
[10] *Id*.
[11] *Employment Division v. Smith*, 494 U.S. 872, 879 (1990).
[12] *Sherbert v. Verner* 374 U.S. 398, 403 (1963).
[13] *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).
[14] *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("where fundamental claims of religious freedom are at stake…we must searchingly examine the interests that the State seeks to promote…and the impediment to those objectives that would flow from recognizing the claimed exception"); *Sherbert v. Verner* 374 U.S. 398, 403 (1963) ("any incidental burden on the free exercise…may be justified by a compelling state interest…).
[15] *Smith*, 494 U.S. at 881-82 (actions "involving not only the Free Exercise alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as the freedom of speech and of the press…or the right of parents to direct the education of their children…").

### b. Statutory: RFRA and RLUIPA

In response to the Supreme Court's holding in *Smith*, Congress enacted RFRA in November of 1993.[16] RFRA attempted to overrule the Supreme Court's holding in *Smith* and restore the true compelling interest test from the *Sherbert* and *Yoder* line of jurisprudence.[17] Substantively, RFRA allowed a for substantial burden on free exercise only if the government could prove that the burden was in furtherance of a compelling governmental interest and was the least restrictive means of furthering that compelling interest.[18] In other words, RFRA established a strict scrutiny standard of review for any law or regulation which substantially burdened religious exercise. In fact, the legislative history of RFRA revealed clear legislative intent that courts apply strict scrutiny to prisoner free exercise claims.[19]

Only four years after its passage, RFRA was struck down as applied to the states in *City of Boerne v. Flores*.[20] Sent back to the drawing board, Congress sought to draft legislation that would withstand what the *Boerne* Court identified as constitutional deficiencies.[21] This culminated in 2000 with the passage of RLUIPA.[22] To avoid running into the same issues as RFRA, RLUIPA was intended to narrowly address "those areas of law where the congressional record of religious

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[16] 42 U.S.C. § 2000bb, *et. seq.*
[17] See 42 42 U.S.C. § 2000bb, 2000bb-1.
[18] *Id*.
[19] See *S.* REP. NO. 103-111, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1899 (stating intent to restore "protection afforded to prisoners to observe their religions" which was undermined by *Shabazz* decision). See also 139 CONG. REC. S14,465 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch) ("Exposure to religion is the best hope we have for rehabilitation of a prisoner. Most prisoners, like it or not, will eventually be returning to our communities.").
[20] *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (holding that RFRA exceeded Congress' Section 5 rights under the Fourteenth Amendment by defining rights rather than enforcing them).
[21] *Id*.
[22] 42 U.S.C. § 2000cc. This paper will not discuss RLUIPA as it relates to land use, that topic is outside of the scope of this comment.

discrimination and discretionary burden was the strongest: laws governing institutionalized persons and land use laws." [23] Section 3 of RLUIPA[24] states as follows:

> (A) GENERAL RULE: 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 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997) even if the burden results from a rule of general applicability, unless the government demonstrates that the imposition of the burden on that person:
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> 1. Is in furtherance of a compelling government interest; and
> 2. Is the least restrictive means of furthering that compelling government interest
>
> (B) SCOPE OF APPLICATION: This section applies in any case which:
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> 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 the substantial burden would affect, commerce with foreign nations, among the several states, or with Indian tribes.[25]

Thus, under RLUIPA if the prisoner succeeds in making a prima facie showing that his religious exercise was substantially burdened, RLUIPA shifts the burden to the defendant prison officials to demonstrate their decision satisfies strict scrutiny–that burdening free exercise is the least restrictive means to furthering the state's compelling interest.[26]

## III. Supreme Court Interpretations of the Statutes

Supreme Court interpretations of both RFRA and RLUIPA demonstrate a remarkable protectiveness over free exercise. In decisions like *Gonzales*[27], *Hobby Lobby*[28] and *Holt*[29], the Court reads statutory strict scrutiny to be sweepingly protective of religious exercise. While the mandate from the Court was clear, lower court decisions reflect confusion on the accurate

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[23] Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 944 (2001).
[24] 42 U.S.C. §2000cc(a)-(b).
[25] *Id*.
[26] *Id*.
[27] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).
[28] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
[29] *Holt v. Hobbs*, 574 U.S. 353 (2015).

application of these statutes. Confusion resulted from hesitancy to apply a potent strict scrutiny standard of review given persistent pressure to defer to prison officials and perennial concerns about prison safety and security, as well as questions as to the constitutionality of the statutes. These concerns were laid to rest after careful Supreme Court attention in *Cutter*[30], where RLUIPA was ruled constitutional, and *Holt*, where the Court clearly explained the role of prison administration in free exercise cases. With these decisive questions answered, lower court treatment of free exercise claims has shifted in prisoners' favor over the last five years.

**a. RFRA**

The Supreme Court read RFRA as vastly protective of religious free exercise. The first signal of this protectiveness came in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.[31] There, customs inspectors intercepted a shipment of *hoasca*, a sacramental tea containing dimethyltryptamine ("DMT"), an illegal hallucinogen.[32] The shipment was traced to O Centro Espirita Beneficente Uniao do Vegetal ("UDV"), a Christian Spiritist sect originating in Brazil, with an American branch containing 130 members.[33] It was the UDV's religious practice to receive the sacrament of Communion through *hoasca*.[34] The UDV argued that the seizure of the *hoasca* violated RFRA.[35] In fending off attacks from the government which craftily argued for the Court to apply a more watered-down version of strict scrutiny[36], the Court reinforced the

[30] *Cutter v. Wilkinson*, 544 U.S. 709 (2005).
[31] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425-426 (2006).
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] Although not within the prison-context of this paper, the *Gonzales* case has one of the most succinct analyses of true strict scrutiny. Lower courts applying RFRA did not seem to follow the clear mandate set out in this case.
[36] The government attempted to argue that placement of DMT on Schedule 1 of the Controlled Substances Act as having a "high potential for abuse" by users "precludes any consideration of individualized exceptions such as that sought by the UDV." The government argued that a flat-out ban was the least restrictive means of furthering the compelling government interest of public safety. In rejecting this argument, the Court noted that the compelling interest must be satisfied against application of the challenged law to the particular claimant whose sincere belief is being religiously burdened" which was not satisfied here since the Court must "look beyond broadly formulated

proposition that "Congress' express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test…" which requires the Court to "look beyond the broadly formulated interests justifying the general applicability of government mandates and scrutinize the asserted harm of granting specific exemptions to particular religious claimants."[37]

The second relevant interpretation of RFRA which called for a true strict scrutiny test was *Burwell v. Hobby Lobby Stores*.[38] At issue in this case was an HHS regulation that demanded corporations to provide coverage for methods of contraception which violated the religious beliefs of the owners.[39] The Court began its discussion by reinforcing the idea that "the least restrictive means standard is exceptionally demanding."[40] What makes this case broadly protective of free exercise is the Court's delineation of alternatives which would have been "certainly less restrictive of the plaintiff's religious liberties."[41] The fact that the Court illustrated a list of alternatives to the religiously burdensome policy at issue signals sweeping protection of free exercise.

**b. RLUIPA**

RLUIPA was intended to be similarly protective of religious exercise. As a threshold matter, RLUIPA does not define "compelling government interest" or "least restrictive means," but these terms have garnered an established meaning in constitutional jurisprudence.[42] The Court

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interests" and there was no indication that Congress, in classifying DMT, considered the harms posed by the *particular use at issue,* sacramental use of *hoasca* by the UDV. *Gonzales*, 546 U.S. at 430-433.

[37] *Id*.

[38] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

[39] *Id.* at 689-90.

[40] *Id*. at 728.

[41] *Id*. The court notes that "the most straightforward" way of achieving the government's goal would be for the government to assume the cost of providing the contraceptives to any women unable to obtain them under their health insurance policies due to religious objections of their employer. The court noted a second option was the creation of an entirely new government program to achieve the same goals.

[42] Derek L. Gaubatz, RLUIPA At Four: Evaluating the Success and Constitutionality of RLUIPA'S Prisoner Provisions, 28 Harv. J. L. & Pub. Pol'y 501 (2005). See *also Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests").

has reinforced just how searching of an inquiry this is. In *Wisconsin v. Yoder*, the Court stated that compelling interests must be interests of only the "highest order."[43] In *Sherbert v. Verner*, the Court stated that "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[44] The Court has further emphasized this point by adding that where strict scrutiny applies and the government must set forth a true compelling interest, the test "is not watered…down" and that it "…really means what it says."[45]

In terms of narrow tailoring, the Court has noted that a "searching inquiry" is required where the onus is on the government to prove that "no alternative forms" of regulation could serve the asserted interest without infringing on the protected right.[46] The regulation should be struck down under strict scrutiny where the government's compelling interest could be achieved by "narrower ordinances that burden religion to a far lesser degree."[47] In other words, if there is but one other reasonable alternative with a lesser degree of intrusiveness on free exercise, the challenged regulation cannot stand.

Predictably, the constitutionality of RLUIPA was also challenged. This challenge came in 2005 in *Cutter v. Wilkinson*, where Ohio prisoners sued under RLUIPA alleging free exercise violations of non-mainstream religions due to denial of access to literature, group worship, and other ceremonial items.[48] RLUIPA was challenged as unconstitutional on the grounds that the statute "improperly advances religion in violation of the…Establishment Clause."[49] The case rose to the Supreme Court after the Sixth Circuit issued an opinion condemning RLUIPA.[50] The

[43] *Wisconsin v. Yoder*, 406 205, 215 (1972).
[44] *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).
[45] *Id*.
[46] *Id*. at 407.
[47] *Id*.
[48] *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).
[49] *Id*.
[50] *Id*.

Supreme Court reversed, citing prior decisions where the Court held that the "government may…accommodate religious practices…without violating the Establishment Clause" given "room for play in the joints" between the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond Free Exercise requirements without offending the Establishment Clause.[51]

While the holding of *Cutter* was a step in the right direction for prisoners, the Court alluded to a proposition which had previously led to apprehensive treatment by lower courts applying RFRA. After affirming RLUIPA's constitutionality, the court doubled back by saying, "we do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety…an accommodation must be measured so that it does not override other significant interests."[52] The Court added that, "*[w]hile* the Act adopts a 'compelling governmental interest' standard, 'context matters' in the application of that standard."[53] The Court cited support from lawmakers dating back to RFRA's passage that "courts would apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline consistent with consideration of costs and limited resources."[54] As will be seen in the following section, this dictum proved damaging to prisoner's free exercise claims under RFRA and set the stage for the same quasi-strict scrutiny review during the beginning stages of RLUIPA.

### *c. Holt v. Hobbs*

The *Holt v. Hobbs* decision was nothing short of instrumental for prisoner's free exercise rights under RLUIPA. In *Holt*, a Muslim inmate challenged an Arkansas Department of

[51] *Id*. at 713-14.
[52] *Id*. at 722.
[53] *Id*. at 723.
[54] *Id*. at 723. See 139 Cong. Rec. 26190 (1993) (remarks of Sen. Hatch); S. Rep. No. 103-111 at 10.

Corrections grooming policy which prohibited inmates from growing beards.[55] The policy had no religious exemptions, but did contain an exemption for inmates with a diagnosed dermatological condition who were permitted to wear facial hair no longer than one-quarter of an inch.[56] The petitioner sought permission to grow a beard that was one-half inch long but was denied, and subsequently brought suit in district court under RLUIPA.[57] The Magistrate Judge opined that "prison officials are entitled to deference" and that "the grooming policy allowed petitioner to exercise his religion in other ways, such as by praying on a prayer rug, maintaining the diet required by his faith, and observing religious holidays" and recommended that the preliminary injunction against the policy be vacated.[58] The district court adopted the recommendation in full and it was subsequently affirmed by the Sixth Circuit.[59] The Supreme Court reversed, and in doing so, finally gave inmates the momentum they needed in order to succeed on RLUIPA claims.

This decision changed the course of prisoner's free exercise claims under RLUIPA for two main reasons. First, the *Holt* Court makes it clear they are applying *strict* scrutiny, as opposed to the quasi-strict scrutiny which lower courts had long been applying dating back to RFRA. In *Holt*, the Court refused to accept the argument that the DOC's compelling interest in safety and security of the prison would be compromised by allowing an inmate to grow a beard that is one-half inch in size, calling it an argument that is "hard to take seriously."[60] Secondly, and most importantly, the Court firmly addressed the dicta set out ten years earlier in *Cutter*:

> The magistrate Judge, the District Court and the Court of Appeals all thought that they were bound to defer to the Department's assertion that allowing petitioner to grow such a beard would undermine its interest in suppressing contraband. RLUIPA, however, does not permit such *unquestioning deference*.

[55] *Holt v. Hobbs*, 574 U.S. 353, 356 (2015).
[56] *Id.*
[57] *Id*. at 359.
[58] *Id*. at 360.
[59] *Id.*
[60] *Id*. at 363.

> RLUIPA, like RFRA, "makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress." That test requires the Department not merely to explain why it denied the exemption but to prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest. Prison official are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise. But that respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard. And without a degree of deference that is *tantamount to unquestioning acceptance*, it is hard to swallow the argument that denying petitioner a one-half inch beard actually furthers the Department's interest in rooting out contraband.[61]

Importantly, the *Holt* decision is not isolated, but rather is built on precedent from *Gonzales*[62] and *Hobby Lobby*[63]. The idea of statutorily mandated strict scrutiny had always been a concept continuously reinforced by the Court and was only further intensified in *Holt* by the Court's signal that blind deference to prison administrators is not the correct way to apply RLUIPA.[64]

## IV. Lower Court Case Law on Grooming and Religious Objects Under Statutes

While the Supreme Court has, in *Gonzales*, *Hobby Lobby*, and again in *Holt*, made clear that claims brought under RFRA and RLUIPA which state a prima facie case are to be reviewed under strict scrutiny, what was actually applied by lower courts was nothing of the sort.

### a. RFRA

While hindsight is 20/20, it is clear that RFRA failed to live up to its potential to improve prisoners' free exercise rights. Lower courts applied RFRA in such a way that 90% of all prisoner claims filed under RFRA did not succeed.[65] It is important to note that a large majority of unsuccessful RFRA claims failed at the outset because the burden on religious exercise was not

[61] *Id*. at 364 (emphasis added).
[62] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).
[63] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).
[64] *Holt*, 574 U.S. at 364.

[65] Ira C. Lupu, The Failure of RFRA, 20 U. ARK. LITTLE ROCK L.J. 575, 607-17 (1998).

found to be a substantial.[66] In other words, the claimants failed in making out a prima facie showing under RFRA.[67] However, out of the cases which did succeed at the outset, most ultimately still failed in the application of strict scrutiny.

There are two main factors attributable to RFRA's harsh application to prisoner free exercise claims. First, uncertainty surrounding the constitutionality of RFRA was present since shortly after its enactment.[68] This led lower courts to approach RFRA cases apprehensively as an initial matter. Second, many courts approached RFRA cases with legislative intent that due deference still be provided to prison officials.[69] Lower courts also did not have guidance from decisions like *Gonzales* or *Hobby Lobby*, which were not only aggressively protective of free exercise but also called for a very specific look at the possible problems caused by an exemption and the possible alternatives.[70] The product of these factors was a quasi-strict scrutiny analysis applied to prisoner's RFRA claims under which the institution almost always prevailed.

Almost all RFRA claims surviving past the substantial burden stage were subject to this quasi-strict scrutiny. The first example of this came in *Arguello v. Duckworth*.[71] There, the Seventh

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[66] *Id*.

[67] This paper analyzes free exercise claims under RFRA and RLUIPA only as it relates to the application of strict scrutiny standard of review, so an analysis of why these cases failed under the prima facie showing of a substantial burden on religious exercise is outside the scope of this paper. See *Haff v. Cooke*, 923 F. Supp. 1104 (E.D. Wis. 1996) (seizure of inmate's white supremacist books was not a substantial burden); *Lemay v. Dubois*, No. CIV. A. 95-11912-PBS, 1996 WL 463680 (D. Mass. July 29, 1996) (preventing inmate from accessing spiritual medallion, feathers, sage, and cedar was not a substantial burden); *Weir v. Nix*, 114 F.3d 817 (8th Cir. 1997) (preventing access to Protestant books was not a substantial burden); *Diaz v. Collins*, 114 F.3d 69 (5th Cir. 1997) (ban on length of hair and possession of sacred materials was not a substantial burden); *Bruton v. McGinnis*, 110 F.3d 63 (10th Cir. 1997) (denial of access to Christian objects was not a substantial burden).

[68] Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 Tex. L. Rev. 247, 296 (1994) (positing that RFRA would be found to be unconstitutional under Section Five of the Fourteenth amendment only one year after the statute was passed).

[69] 139 Cong. Rec. 26190 (1993) (remarks of Sen. Hatch); S. Rep. No. 103-111 at 10.

[70] See *Gonzales*, 546 U.S. at 430-433 ("the compelling interest must be satisfied against application of the challenged law to the particular claimant whose sincere belief is being religiously burdened" which was not satisfied here since the Court must "look beyond broadly formulated interests" and there was no indication that Congress, in classifying DMT, considered the harms posed by the *particular use at issue*"). See also *Hobby Lobby*, 573 U.S. at 728 (listing alternatives "certainly" less restrictive on plaintiff's religious exercise).

[71] *Arguello v. Duckworth*, No. 95-1222, 1997 U.S. App. LEXIS 445 (7th Cir. Jan. 9, 1997).

Circuit upheld a prison's flat ban on Native American sacred herbs.[72] The court accepted the at face-value assertion that the flat ban was the least restrictive way to prevent contraband from entering the prison, without exploring if other alternatives were actually less restrictive.[73] The court's inquiry ended shortly after it began when the court said, "there is no evidence in the record before us that Duckworth has not utilized the least restrictive means available to further these compelling interests." [74] The court failed to distinguish between lack of evidence and less restrictive alternatives by failing to require the prison to *actually explore* ways to further their compelling interests with less burdensome restrictions.

In *George v. Sullivan*, the court failed to analyze whether a flat ban on religious reading was in fact the least restrictive means to furthering prison safety,[75] and in *Reimann v. Murphy*, the court even denied the offered alternative of redacting parts of the religious literature as opposed to a flat ban because it would leave nothing more than "sentence fragments."[76] In *Harris v. Chapman*, the court held that an ambiguously drawn prison regulation prohibiting prisoners from having longer than "medium length" hair was the least restrictive means of furthering prison security, without even defining what length constituted "medium length" and thus not considering if any lesser restrictive alternatives could have achieved that same goal.[77]

Even with a more defined hair regulation of three inches, a prisoner was still denied an exemption in *Davie v. Wingard* when the court stated that the legislative history behind RFRA "shows that Congress intended for Courts to defer to the judgment of prison officials in matters of security and discipline."[78] The court even went on to say that "it could be argued that Defendants

[72] *Id*. at *2.
[73] *Id*. at *8.
[74] *Id*.
[75] *George v. Sullivan*, 896 F. Supp. 895, 898 (W.D. Wis. 1995).
[76] *Reimann v. Murphy*, 897 F. Supp. 398, 403 (E.D. Wis. 1995).
[77] *Harris v. Chapman*, 97 F.3d 499, 504 (11th Cir. 1996).
[78] *Davie v. Wingard*, 958 F. Supp. 1244, 1250 (S.D. Ohio. 1997).

could serve these goals my maintaining a policy which prohibits long hair but provides exemptions for religious genuine religious beliefs…" but afforded so much deference to the prison official's argument that the flat ban was the least restrictive means because exemptions would "greatly complicate" the jobs of the corrections officers, and upheld the restriction anyway.[79] In *Rust v. Clarke*, the court once again found that "haircutting" generally was the least restrictive means of furthering prison security, without investigating any alternative way to further such interest and dismissing alternatives as "impractical."[80]

Finally, In *Hamilton v. Schriro*, the court did not even apply strict scrutiny at all, stating that "we find the 'no greater than necessary' requirement to be functionally synonymous with the 'least restrictive means' prong of the RFRA text when applied in the prison context."[81] It is notable that courts hearing RFRA cases cited the legislative history[82] rather than the actual text of the statute when applying the compelling interest and least restrictive means standards. With the opportunity to rely on legislative intent as opposed to the plain meaning of the statute, courts were able to use RFRA to water down strict scrutiny and apply a standard of review somewhere in the middle, without inquiry into whether the restrictive policies could actually be adjusted in a way to allow prisoner free exercise as well as safety and security inside prison walls, producing across-the-board unconquerable obstacles for prisoners.

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[79] *Id*. at 1251.
[80] *Rust v. Clarke*, 89 F.3d 841, 845 (8th Cir. 1996).
[81] *Hamilton v. Schriro*, 74 F.3d. 1545, 1554 (8th Cir. 1996).
[82] *Diaz v. Collins*, 114 F.3d 69, 73 (5th Cir. 1997) (quoting S.Rep. No. 111, 103d Cong., 1st Sess. 9-11, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1900). The Senate report reflects the following notion: "the committee expects that courts 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." See also *Block v. Rutherford*, 468 U.S. 576, 593 (1984) (Blackmun, J., concurring); *Madison v. Ritter*, 240 F. Supp. 2d 566, 578 n.10 (W.D. Va. 2003), *overruled on other grounds* 355 F.3d 310 (4th Cir. 2003) ("Some courts, in examining prison regulations under RFRA and RLUIPA, have softened the compelling interest test to allow speculative administrative judgments concerning security and cost to suffice to allow the regulation to survive strict scrutiny . . . It is also an approach that is dangerous for the protection of the constitutional rights of individuals outside of prison. Watering down strict scrutiny in a result-oriented manner in the prison context could subvert its rigor in other fields where it is applied").

### b. RLUIPA Pre-*Holt*

Following RLUIPA's passage, courts faced many of the same application problems that existed under RFRA. Pre-*Holt* decisions still reflected reliance on *Cutter*'s dictum and what many courts viewed as a limited decision-making role so as not to substitute the court's judgment over that of prison officials. As a result, the majority of prisoner RLUIPA claims, although analyzed under "strict scrutiny," still failed as a result of the same issues as RFRA cases.

#### i. Grooming restrictions

While challenges to grooming regulations had more success as opposed to object regulations, pre-*Holt* challenges in this area still experienced the same issues as RFRA era cases. In *Ickstadt v. Dretke*, a Texas appellate court accepted the prison's argument that a flat out "no-beard" policy was the least restrictive means to further the prison's interest in safety and security by lessening any risk of hidden contraband hidden in the beards.[83] The court accepted this position even though prisoners with medical conditions were allowed to grow beards.[84] Allowing prisoners to maintain beards for medical reasons but not for religious ones completely undermined the prison's argument for a compelling interest, but by granting such deference to the prison wardens, the court nonetheless ruled in the institution's favor.

Another example of watered-down strict scrutiny came in *Limbaugh v. Thompson*, where an Alabama district court held that a Native American prisoner's challenge to hair length regulations could not succeed.[85] The district court similarly applied a modified strict scrutiny test which only required a showing that the defendant-prison "articulated legitimate reasons-based on

[83] *Ickstadt v. Dretke*, No. H-02 1064, slip op. at 20 (S.D. Tex. Apr. 2, 2004).
[84] *Id*.
[85] *Limbaugh v. Thompson*, No. 93-D-1404-N, slip op. at 2 (M.D. Ala. Sept. 29, 2003).

compelling interest in prison safety and security" rather than asking the defendants to show that the regulation was the least restrictive means to further a compelling government interest.[86]

In *Longoria v. Dretke*, a Native American prisoner challenged a grooming policy requiring prisoners to maintain short hair.[87] The Fifth Circuit, relying on a RFRA case in the same jurisdiction[88] involving a similar restriction, found that longer hair "facilitates" the transfer of contraband and weapons and that requiring "prisoners to have short hair" makes it more difficult for escaped prisoners to alter their appearance.[89] Like many of the RFRA cases in this area, the Fifth Circuit did not even attempt to explore less restrictive alternatives like allowing prisoners to maintain longer hair at a certain length.[90] Once again, the court drew on notions of deference even before RLUIPA's enactment, saying, "in enacting RFRA, Congress intended to continue to extend substantial deference to prison officials in legitimate security matters."[91] It is telling that courts, even in the age of RLUIPA, still refer back to and cite RFRA cases and legislative intent behind the enactment of RFRA to decide RLUIPA matters.[92] This demonstrates that the deference given to prison officials neared blind acceptance, which set in motion the same events seen in RFRA cases: deference, a failure to apply true strict scrutiny, and prisoner defeat.

In *Smith v. Ozmint*, a South Carolina district court upheld a one-inch hair length policy with no religious exemptions premised on maintaining prison safety and security.[93] The court determined that the plaintiff-prisoner would not succeed on the merits of his RLUIPA claim and denied a preliminary injunction finding that "the court must defer to the prison official's testimony

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[86] *Id*.
[87] *Longoria v. Dretke*, 507 F.3d 898, 900 (5th Cir. 2007).
[88] *Diaz v. Collins*, 114 F.3d 69, 73 (5th Cir. 1997).
[89] *Longoria*, 507 F.3d at 902.
[90] *Id*. at 904.
[91] *Id*.
[92] *Id*.
[93] *Smith v. Ozmint*, 444 F. Supp. 2d 502, 509. (D. South Car. 2006).

that the old policy has become cumbersome and impossible."[94] This grant of deference to prison officials came just a paragraph after the court opined that, "…it is far from clear that the SCDC Policy will be found to be the least restrictive means available." Even in light of this, the court continued, "[n]onetheless, the court agrees with the magistrate that Plaintiff does make the showing of a likelihood of success necessary to justify a preliminary injunction…"[95]

In *Johnson v. McCann*, an Illinois district court upheld a grooming policy which "prohibits hairstyles, including facial hair, which present a…security risk."[96] The court held that this policy satisfied the least restrictive alternative test, because the plaintiff himself did not provide any alternatives.[97] However, the court provided its own alternative, stating that "regular individual inspections of inmates with long hair would prove a less restrictive means of maintaining prison safety…" but upholding the policy because "it would not adequately address the legitimate safety concerns of prison officials."[98] Here, we see the court offering its own less restrictive alternative and still upholding the restriction not based on the prison's actual exploration of such alternatives, but solely on testimony from prison officials. Districts including Pennsylvania[99], Virginia[100], West Virginia[101], South Carolina[102], and Georgia[103] and various Circuit courts including the Fourth[104], Sixth[105], Eighth[106] and Eleventh[107] have identical holdings.

**ii. Religious objects restrictions**

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[94] *Id*.
[95] *Id*.
[96] *Johnson v. McCann*. No. 08-C-4684, 2010 U.S. Dist. LEXIS 51998 at *15 (N.D. Ill. May 21, 2010).
[97] *Id*. at *16.
[98] *Id*.
[99] *Scott v. Beard*, No. 3:02-CV-0691, 2006 U.S. Dist. LEXIS 65683 (M.D. Pa. Sept. 14, 2006).
[100] *Ragland v. Angelone*, 420 F. Supp. 2d 507 (W.D. Va. 2006).
[101] *Scible v. Miller*, No. 1:05CV166, 2006 U.S. Dist. LEXIS 51002 (N.D. Wv. Jul. 25, 2006).
[102] *Bailey v. Ozmint*, No. 4:08-1630-HFF-TER, 2010 U.S. Dist. LEXIS 87885 (D. Sc. 2010).
[103] *Daker v. Wherington*, 469 F. Supp. 2d 1231 (N.D.Ga. 2007).
[104] *McRae v. Johnson*, 261 Fed. Appx. 554 (4th Cir. 2008).
[105] *Hoevenaar v. Lazaroff*, 422 F.3d 366, (6th Cir. 2005).
[106] *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008).
[107] *Brunskill v. Boyd*, 141 Fed. Appx. 771 (11th Cir. 2005).

In the context of regulations which restricted use of religious objects, plaintiffs encountered much of the same difficulty in providing proof strong enough to overcome the deference given to prison administrators. We see the courts getting quite crafty in side-stepping application of true strict scrutiny review, instead focusing on technicalities in the facts of the cases and playing up safety and security concerns of prisons.

In *Davis v. Abercrombie*, the plaintiff's prayer object[108] was confiscated for security purposes.[109] The plaintiff argued that the prison could have used less burdensome alternatives as opposed to a confiscation, such as placing the object in the chaplain's custody or keeping it in a clear Ziploc bag, preventing concealment and allowing prison officials to inspect the item without touching it.[110] Even after the Hawaii district court cited precedent from RLUIPA stating that prison administrators must "show that they *actually considered* and rejected the efficacy of less restrictive measures before adopting the challenged practice,"[111] such evidence is nowhere to be found in the opinion. Instead, when determining if the prison used the least restrictive means, the court pointed to the plaintiff's failure to list his prayer object on a required Inventory Form, and testimony from prison officials that confiscating the religious object was their only option.[112] The court inquired into *why* the prison officials took the action they did but not *whether* that action was the least restrictive means of preserving prison safety. By relying so heavily on the testimony from prison officials, the court failed to apply the second prong of strict scrutiny with the bite mandated by RLUIPA. District courts of Virginia, Texas and Alabama have applied the same analysis.[113]

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[108] *Davis v. Abercrombie*, 903 F. Supp. 2d 975, 981 (D. Haw. 2012). The prayer object was a small cloth pouch, which contained a kuki nut.
[109] *Id.*
[110] *Id*.
[111] *Id*. at 1001.
[112] *Id*. at 1002-03.
[113] See *Holley v. Johnson*, No. 7:08CV00629, 2010 U.S. Dist. LEXIS 65356, at *17 (W.D. Va. Jun. 30, 2010 (because inmate did not argue his religious materials were not security threats, and he could "exercise" his religion in other ways, a flat ban promoted safety and security interests in the least burdensome way). See also *Thunderhose*

In *Fowler v. Crawford*[114], a Native American inmate filed a RLUIPA claim after being denied the items needed to make a sweat lodge.[115] The plaintiff relied on the correctional facility's history of successfully operating a sweat lodge for over a decade without incident, and argued that in light of this, a flat ban was not the least restrictive means of furthering the prison's security interests.[116] The defendants argued that they had met their burden in exploring alternatives by offering the plaintiff an outdoor area to "smoke a ceremonial pipe" and practice "other aspects of his Native American faith."[117] The plaintiff rejected these options, arguing that nothing short of a sweat lodge would allow him to properly practice his religion.[118] When evaluating whether a less restrictive alternative existed, the court relied on the Plaintiff's rejection to "practice" his religion using "other aspects" instead of whether lesser restrictive alternatives existed to a *flat out ban on the sweat lodge itself.*[119] The court also cited *Cutter*, claiming that "*Cutter* counsels restraint in this realm…to provide due deference to the experience and expertise of prison and jail administrators."[120] Once again, the Eighth Circuit and others[121] replace deference with blind loyalty to prison officials and in doing so, misapply the second prong of strict scrutiny.

### c. RLUIPA Post-*Holt*

The *Holt* decision marked a turning point in prisoner free exercise jurisprudence. By 2015, prisoners began to experience more success in free exercise claims. As will be further discussed,

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*v. Pierce*, 418 F. Supp. 875 (E.D. Tex. 2006) (inmate could "exercise" his religion in other ways therefore the ban on religious objects was the least restrictive*); Presley v. Scott*, No. 4:13-cv-02067, 2014 U.S. Dist. LEXIS 173464, at *30 (N.D. Al. Sept. 5, 2014) (following the reasoning of *Pierce*).

[114] *Fowler v. Crawford*, 534 F.3d 931, 939 (8th Cir. 2008).

[115] These items included split wood, large scalding rocks, deer antlers, and an enclosed area.

[116] *Id*. at 938-39.

[117] *Id*. at 940.

[118] *Id*.

[119] *Id*.

[120] *Id*. at 941.

[121] See also *Hyde v. Fisher*, 146 Idaho 782 (Idaho Ct. App. 2009) (adopting Eighth Circuit's reasoning in *Fowler*); *Alvarez v. Hill*, No. CV-04-884-BR, 2010 U.S. Dist. LEXIS 12637 (D. Or. Feb. 12, 2010).

this is attributable to the *Holt* Court "setting the record straight" that courts are not to apply blind acceptance to unsubstantiated assertions by prison officials as to the viability of less restrictive alternatives. With this clarity, lower courts were no longer able to take prison officials at their word and began holding the institutions accountable for failure to explore possible alternatives.

### i. Grooming

Prisoners experienced the greatest level of success in post-*Holt* RLUIPA challenges to grooming restrictions. A prime example of the *Holt* mandate at play came in *Ware v. La. Dep't of Corrections*, where a Rastafari prisoner challenged a Louisiana state prison restriction prohibiting prisoners from wearing dreadlocks.[122] Citing *Holt*, the Fifth Circuit stated that "the least restrictive means standard is exceptionally demanding, and it requires the government to show that it lacks other means of achieving its desired goal other than the challenged policy."[123] On the issue of deference, the Fifth Circuit continued, "in the face of contrary policies, we may not defer to prison officials 'mere say-so' that they could not accommodate the plaintiff's request because other policies indicate a less restrictive means may be available."[124] Against a backdrop drastically different than RFRA and RLUIPA policies which cited only the legislative history behind the statutes, the court rejected the prison's argument that budget and staffing cuts prevented the prison from performing hair inspections.[125] The prison provided the same assertions regarding safety and security that had long passed muster in the pre-*Holt* era, but the court rejected these claims, reasoning that given evidence that the majority of jurisdictions have a more lenient policy on the issue, the prison was required to "offer persuasive reasons for the disparity" which it failed to do,

[122] *Ware v. La. Dep't of Corr.*, 866 F.3d. 263, 266 (5th Cir. 2017).
[123] *Id*. at 269.
[124] *Id*.
[125] *Id*. at 273.

and as such it failed to show that the grooming policies were the least restrictive means.[126] Many other district courts including Georgia[127], Florida[128], Arizona[129], New Jersey[130], Louisiana[131], Illinois[132], and Kentucky[133] have issued opinions with the same reasoning, all resulting in a prisoner victory against the challenged grooming policy.

In *Casey v. Davis*, a Texas district court similarly upheld a challenge to a grooming policy prohibiting the plaintiff from wearing a kouplock[134] and smoking a prayer pipe while wearing a religiously significant "medicine bag."[135] When applying strict scrutiny, the court emphasized that deference owed to prison officials "is not unlimited…and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the Act's requirements."[136] The court acknowledged that in a pre-*Holt* era both the grooming religious object policies could prove to be the least restrictive means, but following *Holt*, courts must analyze the policy in light of the individual circumstances of the claimant.[137] The court considered the plaintiff's status as a low security risk inmate, and the fact that the prison had not affirmatively demonstrated that a total ban on the ability to wear a kouplock and use the prayer pipe and medicine bag was the least restrictive way to maintain security.[138] The court in *Cobb v. Morris* issued an opinion with the same reasoning one year later.[139]

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[126] *Id*. at 274.
[127] *Smith v. Dozier*, No. 5:12-cv26, 2018 U.S. Dist. LEXIS 227681 (M.D. Ga. May 21, 2018).
[128] *Sims v. Jones*, No. 4:16-cv-49, 2018 U.S. Dist. 54652 (N.D. Fla. Mar. 1, 2018).
[129] *Sprouse. v. Ryan*, 346 F. Supp. 3d 1347 (D. Az. Dec. 7, 2017).
[130] *Abdul-Aziz v. Lanigan*, No. 17-2806, 2020 U.S. Dist. LEXIS 106718 (D.N.J. Jun. 18, 2020)
[131] *Milon v. Leblanc*, No. 19-717-BAJ, 2020 U.S. Dist. LEXIS. 199344 (M.D. La. Aug. 14, 2020).
[132] Johnson v. Baldwin, No. 18-cv-1374, 2018 U.S. Dist. LEXIS 172669 (S.D. Ill. Oct. 5, 2018).
[133] *Luther v. White*, No. 5:17-cv-138, 2019 U.S. Dist. LEXIS 20486 (W.D. Ky. Feb. 8, 2019).
[134] A "kouplock" is a one-inch section of hair located at the base of the skull.
[135] *Casey v. Davis*, No. 2:14-CV-13, 2017 U.S. Dist. LEXIS 232039, at *3 (S.D. Tex. Sept. 20, 2017).
[136] *Id*. at *31.
[137] *Id*. at *36.
[138] *Id*. at 40-41.
[139] *Cobb v. Morris*, No. 2:14-CV-22, 2018 U.S. Dist. LEXIS 23474 (S.D. Tex. Jan. 11, 2018).

In *Ali v. Stephens*, a Muslim prisoner challenged a grooming policy which prevented him from growing a beard not shorter than fist length, as required by his faith.[140] In *Ali*, we actually see the court resolve a contested issue of fact in the prisoner's favor, instead of the prison. Testimony regarding whether or not performing searches of beard hair was feasible such that prisoners could grow longer beards without posing greater security risk was a contested issue.[141] The Fifth Circuit found that beard hair could be searched the same way as head hair, despite testimony to the contrary from the prison Warden.[142] The court expressed that, "although we must respect a prison official's expertise, the trial court in this case did not exceed its prerogative as a fact finder in resolving competing testimony in Ali's favor where, as here, its finding was supported by testimony from both Ali's experts and [the prison's] own witness.[143] Another important holding came in rejecting the prison's cost control argument. The prison argued a flat ban was the least restrictive means of maintaining security because the extra time and money spent to search each Muslim inmate's beard would be untenable.[144] In a pre-*Holt* type of case, a court would typically accept this at face-value. Here, the court not only rejected the argument but did its own independent calculation of the exact amount that the prison could reasonably be expected to pay for the extra maintenance.[145] The court noted that, the trial court was not "bound to accept TDCJ's predictions in light of the speculative nature of the testimony of [] the witnesses."[146] A New Hampshire district court used the same reasoning to invalidate a grooming policy limiting beard lengths to one-quarter of an inch, finding the policy not to be the least restrictive means because the warden had not investigated how facilities without beard restrictions managed risks associated with longer

[140] *Ali v. Stephens*, 822 F.3d 776, 780 (5th Cir. 2016).
[141] *Id*.
[142] *Id*. at 787.
[143] *Id*. at 789.
[144] *Id*. at 792.
[145] *Id*. at 793.
[146] *Id*.

beards.[147] This kind of analysis from the court is markedly different than what one would have seen in a pre-*Holt* era, especially given that any kind of language signaling legislative intent to give deference to prison officials was not included in either opinion.

### ii. Objects

The *Holt* decision did help RLUIPA challenges to regulations involving access to religious objects, but these claims are generally less successful even in a post-*Holt* era given that objects of any kind are inherently more dangerous to prison security and susceptible to abuse than restrictions concerning hair length. Especially with safety and security concerns including contraband smuggling, hidden weapons and illegal use, prisoners arguing for access to objects to be used in connection with religious services still face the uphill battle of legitimate security concerns. While the *Holt* court alluded to the idea of smuggling contraband in a one-half inch beard as laughable[148], the same can't necessarily be said to objects which prisoners have access to with limited to no supervision. That being said, the lack of blind acceptance to assertions from prison officials still allowed some claims in this area to succeed which would have previously been unsuccessful.

A prime example is *Greenhill v. Clarke*, where the Fourth Circuit held that a prison restricting an inmate's use of a television to participate in Jum'ah services to incentivize inmate participation in a program designed to improve behavior in confinement did not satisfy strict scrutiny.[149] The court reasoned that "to be valid… [the prison] must address specifically why the denial of limited television access…is necessary to maintain order, security, discipline or to control costs." In an identical television case, a Georgia district court used the same reasoning.[150] Similarly

[147] *Staples v. Gerry*, No. 14-cv-473-JL, 2015 U.S. Dist. LEXIS 86629, at *18 (D. New Hamp. May 11, 2015).
[148] *Holt*, 574 U.S. at 363 ("the argument that [the prison's] interest would be seriously compromised by allowing an inmate to grow a one-half inch beard is hard to take seriously").
[149] *Greenhill v. Clarke*, 944 F.3d 243, 250 (4th Cir. 2019).
[150] *Knott v. McLaughlin*, No. 5:17-cv-36, 2019 U.S. Dist. LEXIS 51374, at *12 (M.D. Ga. Mar. 27, 2019) (finding defendant proffered no evidence to counter plaintiff's proof that the prison allowed inmates to use the television for

in *LaPlante v. Mass. Dep't of Corr*., a Massachusetts district court invalidated a prison's ban on access to sacred herbs and teas, finding that the flat ban "require[d] more deference to the Defendants than is due to rule that their broad assertions carry the burden of proving that their flat denial of the…teas is the least restrictive means."[151] These courts used *Holt* to hold the institution to its burden of proof—something a pre-*Holt* court would likely not have done.

Courts have also used *Holt* to allow prisoner access to religious objects in supervised situations. In *Cox v. Stephens*, Native American prisoners were allowed use of medicine bags in cell areas and to and from religious services.[152] In *Anderson v. Dzurenda* inmates were allowed to purchase religious objects for supervised use in their cells from a source selected by the prison.[153] The same was true for a prisoner wanting to possess an Islamic fezz while in his cell[154], a kufi both inside and outside of the cell[155] and even use of a kufi inside the cell as well as in the exercise yard[156], as a flat ban on the use these objects in any of these areas was not proven to be the least restrictive means of quelling violence or improving safety and security by the prisons in any of these cases. These courts were able to use *Holt* to allow prisoners access to their sacred religious objects by removing the possibility of taking prison officials' word as gospel on overly burdensome restrictions. By actually exploring the possibility of alternatives, inmates were actually able to see relief in this area.

## V. Analysis of Cases In Part IV

other group activities in the common area which caused more tension than group prayer, and therefore the ban on using the television for prayer observance was not the least restrictive means).

[151] *LaPlante v. Mass. Dep't of Corr*., 89 F. Supp. 3d 235, 247-48 (D. Mass. 2015).

[152] *Cox v. Stephens*, No. 2:13-CV-151, 2015 U.S. Dist. LEXIS 39051, at *28-29 (S.D. Tx. Mar. 27, 2015).

[153] *Anderson v. Dzurenda*, No. 3:18-cv-00426, 2019 U.S. Dist. LEXIS 136550, at *14 (D. Nev. Jul. 24, 2019).

[154] *Marshall. v. Corbett*, No. 3:13-cv-02961, 2019 U.S. Dist. LEXIS 134520, at *22-23 (M.D. Pa. Aug. 8, 2019).

[155] *Ajala v. West*, 106 F. Supp. 3d 976, 981-82 (W.D. Wis. May 4, 2015).

[156] *Harris v. Wall*, 217 F. Supp. 3d 541, 559 (D. RI. Nov. 18, 2016).

Of course, RLUIPA claims are not impenetrable and some courts[157] do remain legitimately concerned about the safety and security of American prisons. However, an analysis of RFRA cases and both pre-*Holt* and post-*Holt* RLUIPA cases clearly demonstrates that the Court's decision in *Holt* breathed life into prisoner free exercise claims. After the Supreme Court's clear mandate in *Holt* that courts were not to place great deference onto the testimony of prison wardens and officials, but rather must hold the institutions to their burden in evaluating the possibility of less restrictive alternatives, prisoners were finally able to bring successful challenges to overly burdensome prison regulations which restricted prisoners' free exercise of religion.

After *Holt*, bare assertions of a prison's safety or security risk are no longer sufficient to withstand an RLUIPA attack. Testimony from a prison official that a proffered alternative would be unduly burdensome or impractical no longer passes muster in a post-*Holt* line of reasoning, as it was clear from *Holt* that prisons no longer receive unquestioned deference. In other words, all courts after the *Holt* decision was issued must actually apply and analyze claims under rigid strict scrutiny. As a result, post 2015, we see the court ruling in favor of prisoners where the institutional defendant had not explored alternatives or did not proffer proof that the alternatives would not further the institution's goals. We even see some courts suggest their own less restrictive alternatives when finding in favor of the prisoner.

[157] See *Blake v. Rubenstein*, No. 2:08-cv-00906, 2009 U.S. Dist. LEXIS 22073 (S.D. Wv. Mar. 17, 2009). (scented oils could completely mask occurrence of illicit activity and thus a ban was the least restrictive way to further security); *Tanksley v. Litscher*, No. 15-cv-126-jdp, 2017 U.S. Dist. LEXIS 130340, (W.D. Wis. Aug. 15, 2017) (a ban on tarot cards containing pornographic images was the least restrictive way to further security); *Knight v. Thompson*, 797 F.3d 934, 945 (11th Cir. 2015) (safety and security concerns in preventing gang-formation and hair pulling during fights as well as the concealment of weapons and contraband make the "off neck and ears haircut" policy the least restrictive means); *Mounts v. Raemisch*, No. 16-cv-02732-RBJ-KLM, 2019 U.S. Dist. LEXIS 159381, at *13 (D. Col. Sept. 19, 2019) (denial of prisoner's access to religious fedora "at all times in all places" is the least restrictive means of furthering that security interest because the prisoner never proffered an alternative such as wearing the fedora in his cell or only during services).

An analysis of the relevant caselaw also demonstrates that prisoners experience the greatest amount of success in challenges to grooming regulations. While prisoners have experienced more success in the context of challenges to regulations involving access to religious objects than under RFRA and before *Holt*, this success is limited by the fact that objects are inherently more dangerous than hair and beard regulations. It is no surprise that certain foreign objects, whether associated with religious use or not, pose unique security risks and could be subject to abuse by inmates. Put simply, *Holt* can only be stretched so far—some religious objects do realistically pose safety and security threats, and this cannot be ignored no matter how little deference a court gives to the opinion of prison officials. With the correct application of strict scrutiny, RLUIPA is now working precisely how it should be—by restricting religious exercise when such restriction *really is* the least burdensome way to achieve important state interests like keeping inmates and prison officials safe. It is undoubtedly harder for a court to justify the use of scalding rocks and wood beams for use in building a religious sweat lodge, when these items can so easily be used to incite violence or cause injury. Even in light of this, after *Holt* courts are more likely to allow prisoner access to objects for religious use under supervised conditions, or in limited areas of the prison. In a pre-*Holt* era, a court would be far more likely to uphold a flat ban on use of objects. Famously said, "prisoners do not abandon their constitutional rights at the prison door."[158] The *Holt* decision has helped this ring true in the context of prisoner free exercise claims, and prisoners no longer face an uphill battle to freely—and safely—practice and exercise their religious freedom inside prison doors.

[158] Salahuddin v. Goord, 476 F.3d 263, 274 (2d Cir. 2006).