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Just Another Brick In the Wall: Prisoners' Religious Dietary Claims, RLUIPA,and Navigating the "Joints" Between the Free Exercise and Establishment Clauses

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INTRODUCTION

It was Justice Brandeis who famously stated that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[1] Perhaps ironically, some of the more enriching experimentation with regard to constitutional rights occurs in our nation's prisons. With increasing litigation brought under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"),[2] the "joints between the Free Exercise Clause and Establishment Clause"[3] are receiving a thorough inspection through the judicial application of congressionally-mandated strict scrutiny.

Recent RLUIPA decisions, however, increasingly demonstrate that the degree of strict scrutiny that each prisoner is afforded with respect to their religious dietary rights is sometimes tempered by the more earthly considerations such as administrative feasibility and cost. The manner in which courts have engaged in line-drawing has produced conflicting data on whether such material considerations should be compelling enough interests to sanction a burden of prisoners' First Amendment rights. In analyzing this data, however, one is likely to conclude that "it depends." In some Circuits, courts employ a subjective analysis of sincerely held religious beliefs and whether those beliefs were substantially burdened. Other Circuits reason that the appropriate inquiry necessarily includes some degree of objective analysis. And in some Circuits—but not others—demonstrating the "least restrictive means" requires a showing that the proscription or substantial burdening of religious practice furthered rather than merely comported with a compelling interest. This vacillation of jurisprudential reasoning employed by

[1] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
[2] Codified at 42 U.S.C. § 2000cc, *et seq.*
[3] *See Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (noting that "'there is room for play in the joints between' the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause") (citation omitted).

the courts is reflective of the debate of whether RLUIPA can allow for fiscal considerations to trump strict accommodation with respect prisoners' free exercise rights.

In Part I, I will provide a brief background on the interaction between RLUIPA and the Free Exercise and Establishment Clauses of the First Amendment. In Part II, I will analyze how some Circuits treat similar dietary claims differently brought under RLUIPA and whether any lessons can be gleaned from various degrees of treatment. Finally, in Part III I will discuss whether the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.* can provide us further insight into how courts should handle cases involving prisoners' free exercise rights going forward.

I. RLUIPA AND THE ESTABLISHMENT CLAUSE: A BRIEF HISTORY

On September 22, 2000, President Clinton signed RLUIPA into law, noting "[r]eligious liberty is a constitutional value of the highest order, and the Framers of the Constitution included protection for the free exercise of religion in the very first Amendment."[4] Indeed, RLUIPA is designed to ensure that government does not "substantially burden" the free exercise of religion through legislative fiat. Clearly, RLUIPA's history does not begin in 2000 when it was first introduced in Congress, but it is still a creature of modern thought born out of a Congressional reaction to the Supreme Court's decisions in *Employment Div., Dep't of Human Res. of Oregon v. Smith*[5] and *City of Boerne v. Flores*.[6]

In *Smith*, the Supreme Court held that neutral laws of general applicability that incidentally burden religious conduct do not violate the First Amendment.[7] In so holding, the

[4] Statement on signing the Religious Land Use and Institutionalized Persons Act of 2000, Administration of William J. Clinton (September 22, 2000), http://www.justice.gov/jmd/religious-land-use-and-institutionalized-persons-act-2000-pl-106-274.
[5] *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).
[6] *City of Boerne v. Flores*, 521 U.S. 507 (1997).
[7] *Smith*, 494 U.S. at 890.

Court realized the social costs associated with an expansive religious rights regime and noted that "we cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. [Strict scrutiny] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[8] Adopting a more neutral standard, the Court further noted that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[9] Justice Blackmun criticized this reasoning as a "contorted" conclusion premised on the misguided notion that "strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford."[10] Nevertheless, the Court openly invited the legislative branch to provide more religious protection than what they deemed constitutionally required.[11]

Congress accepted this invitation in 1993 when it invoked its remedial powers under section 5 of the Fourteenth Amendment to pass the Religious Freedom Restoration Act ("RFRA").[12] In passing RFRA, Congress explicitly addressed the Court's decision in *Smith*, stating that "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[13] Designed to remedy

[8] *Id.* at 888 (emphasis in original).
[9] *Id.* at 890.
[10] *Id.* at 908-09 (Blackmun, J., dissenting). Justice Blackmun did not "believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty—and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance." *Id.* at 909.
[11] *See id.* at 890.
[12] Codified at 42 U.S.C. § 2000bb, *et seq.*
[13] 42 U.S.C. § 2000bb(a)(4).

this, RFRA provides that "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . if it demonstrates that application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[14] Essentially abrogating the Court's decision in *Smith*, RFRA was intended to apply equally to federal, state, and local authorities and served as a legislative imposition of strict scrutiny. The Supreme Court responded, however, in *City of Boerne* by invalidating RFRA as it applies to state and local governments, finding that as "[b]road as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."[15]

Undeterred, members of Congress sought to increase protection of religious rights from the policies of state and local authorities and introduced the proposed legislation that made up RLUIPA in the early summer of 2000. Senator Hatch, a sponsor of both RFRA and RLUIPA, was particularly troubled that "institutionalized persons have been prevented from practicing their faith. For example, some Jewish prisoners have been denied matzo, the unleavened bread Jews are required to consume during Passover, even though Jewish organizations have offered to provide it to inmates at no cost to the government."[16] Thus, Congress drafted section 3 of RLUIPA to provide that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least

[14] 42 U.S.C. § 2000bb—1(a)-(b).
[15] *City of Boerne*, 521 U.S. at 536.
[16] 146 Cong. Rec. S6678-02 (daily ed. July 13, 2000) (statement of Sen. Orrin Hatch).

restrictive means of furthering that compelling governmental interest."[17] Notably, RLUIPA closely mirrors RFRA in its substance; the crucial difference lies, however, in Congress' authority to pass RLUIPA under the Commerce and Spending Clauses of the Constitution, and the scope of section 3 is narrowly tailored to persons institutionalized in facilities that receive federal funding.[18]

Despite this narrowed scope, RLUIPA's constitutionality was nevertheless challenged in multiple cases and facial challenges to section 3 culminated in the Supreme Court's decision in *Cutter v. Wilkinson*.[19] In that case, state officials contended, *inter alia*, that section 3 of RLUIPA violated the Establishment Clause. The Supreme Court held that RLUIPA did not offend the Establishment Clause, noting that RLUIPA "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion."[20] The Court also dismissed contentions that RLUIPA impermissibly advanced religion[21] in the prison context because prisoners would be encouraged to "get religion" in order to receive the "benefits" guaranteed by RLUIPA, pointing out that "congressional hearings on RLUIPA revealed that one state corrections system served as its kosher diet 'a fruit, a vegetable, a granola bar, and a liquid

[17] 42 U.S.C. § 2000cc—1(a)(1)-(2).
[18] *See* 42 U.S.C. § 2000cc—1(b)(1)-(2).
[19] *Cutter v. Wilkinson*, 544 U.S. 709 (2005).
[20] *Id.* at 721. The Court was concerned with the fact that prisoners are a captive group and therefore relied on government officials to properly allow the free exercise of religion. It noted that precedents establish that captive groups, such as the armed forces, present a particular dilemma because "there is simply not the same [individual] autonomy as there is in the larger civilian community." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *see also Cutter*, 544 U.S. at 722 (linking the accommodation of prisoners' religious practices with that of the armed forces). In *Goldman*, the court held that the Air Force did not violate the Free Exercise Clause by refusing to provide an exemption to the dress code to allow soldiers to wear religious items such as a yarmulke. However, Congress later passed a law that provided such an exemption. *See* 10 U.S.C. § 774(a)-(b).
[21] One of the prongs of the Lemon test for determining whether a particular statute violates the Establishment Clause is that the law's "principal or primary effect must be one that neither advances nor inhibits religion." *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The Sixth Circuit found that RLUIPA impermissibly advanced religion and was therefore offensive to the Establishment Clause. *See Cutter v. Wilkinson*, 349 F.3d 257, 264 (6th Cir. 2003), *rev'd*, 544 U.S. 709 (2005).

nutritional supplement-each and every meal,'"[22] and therefore could not be construed as "benefits."

Although it held RLUIPA constitutionally sound, the Court nevertheless warned that accommodations under RLUIPA "must be measured so that it does not override other significant interests."[23] The Court's opinion, however, gave little guidance to courts below should try to weigh whether a requested accommodation is measured appropriately, instead placing its faith in courts because they echoed lawmakers in believing courts would appropriately "apply [RLUIPA]'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*.'"[24] The emphasized language in this passage is often cited by courts as an acknowledgement that some degree of deference must be given to prison officials in promulgating policies that may restrict religious practices for the sake of budgetary frugality.[25] Finally, it warned that although RLUIPA is facially constitutional, "[s]hould inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order."[26]

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[22] *Cutter*, 544 U.S. at 721, n. 10. While it is true that these items do not sound particularly appetizing, it forces one to wonder at what point a more satisfying diet consistent with religious scruples can impermissibly advance religion. As will be discussed *infra*, the nature of as-applied dietary challenges under RLUIPA invites confusion as to what degree of accommodation is too little or too much.

[23] *Id.* at 722.

[24] *Id.* at 723 (quoting S. Rep. No. 103-111, at 10, 1993 U.S.C.C.A.N. 1892, 1901) (emphasis added). The emphasized language in this passage is often cited by courts as an acknowledgement that some degree of deference must be given to prison officials in promulgating policies that may restrict religious practices for the sake of budgetary frugality.

[25] *See, e.g., Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007), *cert. denied*, 552 U.S. 1062 (quoting the passage and concluding "RLUIPA, in other words, is not meant to elevate accommodation of religious observances over the institutional need to maintain good order, security, and discipline or to control costs").

[26] *Id.* at 726; *see also id.* at 723 (noting that lawmakers in support of RLUIPA "anticipated courts would apply the Act's standard with 'due deference to the experience and expertise of prison and jail administrators in establishing

Currently, the Supreme Court has not yet heard an as-applied challenge to RLUIPA. But in a recent RLUIPA case, *Holt v. Hobbs*, a prisoner challenged an Arkansas Department of Corrections grooming policy that required him to shave his beard in violation of his religious beliefs.[27] While the case directly involves issues outside of the scope of this writing, Justice Kagan nevertheless queried how religious dietary claims might play out in the context of RLUIPA—hinting that the level of deference afforded to prison administrators is dependent on cost since accommodations might adversely affect resources from going toward more compelling interests, such as institutional safety—to which Justice Scalia scoffed that "[a]ll you have to do is raise more taxes."[28] It would seem, therefore, considerations of cost are indeed at the forefront of whether and to what degree prisoners ought to be accommodated under RLUIPA with respect to their religious dietary needs. Such questions may already even be answered by the Supreme Court given their stance on RFRA in *Hobby Lobby*—a contention which will be explored further *infra* at Part III. But for now, the best one can do is to explore how federal appellate courts have been treating such claims.

II. RELIGIOUS DIETARY CLAIMS UNDER RLUIPA: CIRCUIT REVIEW

Although the Supreme Court has cautioned that "it is not within the judicial function and judicial competence to inquire whether [an adherent] more correctly perceived the commands of their common faith" because "[c]ourts are not arbiters of scriptural interpretation,"[29] it is

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necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'") (quoting S. Rep. No. 103-111, at 10, 1993 U.S.C.C.A.N. 1892, 1901). The language in these passages is often cited by courts as an acknowledgement that some degree of deference must be given to prison officials in promulgating policies that may restrict religious practices in some way.

[27] *See Holt v. Hobbs*, 509 F. App'x 561 (8th Cir. 2013), *cert. granted*, 134 S. Ct. 1490, 188 L. Ed. 2d 391 (2014) *cert. limited*, 134 S. Ct. 1512, 188 L. Ed. 2d 375 (2014).

[28] Transcript of Oral Argument at 24-26, *Holt v. Hobbs*, — U.S. — (2014) (No. 13-6827), http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-6827_8758.pdf. Justice Scalia also noted that he "would not have enacted [RLUIPA], but there it is." *Id.* This is not surprising considering Justice Scalia delivered the Court's opinion in *Smith*.

[29] *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (1981).

common for courts to nonetheless engage in such an inquiry. This is so because RLUIPA claims present courts with the unique challenge of applying either an objective, subjective, or mixed analysis as to whether religious beliefs are substantially burdened. Such difficulty becomes evident when reviewing dietary cases in each Circuit as many courts apply disparate reasoning or adopt seemingly different standards to frame the same issues.

Courts also face great difficulty with engaging in or refraining from considering cost in determining the level of accommodation of the religious dietary needs of individual prisoner-adherents. The Fifth Circuit is the only Circuit to have fully endorsed the view that consideration of costs alone serves as a compelling governmental interest.[30] The other Circuits tend to fall just short, with many placing an emphasis on the government's burden to establish primarily security interests supported by the consideration of cost as compelling governmental interests.[31] And yet, no Circuit has yet gone so far as to hold that consideration of costs alone is *not* a compelling governmental interest. In order to map how courts have generally applied RLUIPA in the context of religious dietary claims, it is therefore appropriate to analyze cases through the lens of how some Circuits treat such claims.

A. SECOND CIRCUIT

The Second Circuit enjoys a rich judicial history with respect to religious dietary claims brought under the Free Exercise Clause.[32] A particularly intriguing case is *Jova v. Smith*,[33]

[30] *See* discussion of the Fifth Circuit's case law on point, *infra*, at 16-19.
[31] *See, e.g.*, *Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006) (noting "[t]he defendants have not adequately demonstrated on this record that the Ramadan policy is the least restrictive means of furthering a compelling governmental interest. They assert simply a 'legitimate interest in removing inmates from religious dietary programs where the inmate flouts prison rules reasonably established in order to accommodate the program.' They do not elaborate how this articulated 'legitimate interest' qualifies as compelling; they do not present any evidence with respect to the policy's security or budget implications.") (citation omitted).
[32] Indeed, the Second Circuit has protected the dietary rights of religious adherents as far back as 1975, well before the enactment of RLUIPA. *See Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975) (requiring prison officials to provide plaintiff with a Kosher diet commensurate with his observance of Jewish dietary laws).
[33] *See Jova v. Smith*, 582 F.3d 410 (2d Cir. 2009), *cert. denied sub nom. Keesh v. Smith*, 559 U.S. 1077 (2010).

wherein a prisoner—who had established his own religion called "Tulukeesh"—sought protection under RLUIPA to allow him access to meals commensurate with the tenets of his religion.[34] The *Jova* court vacated the district court's grant of summary judgment to the prison officials as to the prisoner-adherents' dietary claims, noting that they had failed to "demonstrate that the religious/meatless alternative menu was the least restrictive means of furthering their compelling administrative interests" because "there is no indication that the [officials] discussed, let alone demonstrated, why they cannot provide an entirely vegetarian menu to inmates who request it."[35] Moreover, the parties agreed in *Jova* that Tulukeesh practices—although the product of a "holy" book written by one of the plaintiffs—necessarily involved "religious exercise" within the meaning of RLUIPA and both parties assumed at the get-go that plaintiffs were substantially burdened.

The independent observer might query why prison officials might concede that the practices under Tulukeesh are uniquely religious and therefore implicate RLUIPA. Indeed, some of the practices of Tulukeesh, such as the requirement of obtaining professional training in martial arts,[36] are distinctly non-religious at first blush. However, this may be due in part to the Second Circuit placing an emphasis on not engaging in an assessment as to whether a particular belief, held sincerely, is mandated within the framework of a particular system of religious beliefs.[37] Furthermore, it appears that a plaintiff that generally sets forth a sincerely held

[34] According to the plaintiffs' beliefs, the Tulukeesh religion requires "a vegan diet that did not include soybeans or soy-related products with the exception of soy milk." *Id.* at 417.
[35] *Id.*
[36] *Id.* at 416.
[37] *See Ford v. McGinnis*, 352 F.3d 582, 588-594 (2d Cir. 2003) (observing that "[t]o confine the protection of the First Amendment to only those religious practices that are mandatory would necessarily lead us down the unnavigable road of attempting to resolve intra-faith disputes over religious law and doctrine" and that "[n]either the Supreme Court nor we … have ever held that a burdened practice must be mandated in order to sustain a prisoner's free exercise claim. Nor do we believe that substantial burden can or should be so narrowly defined.").

religious belief is entitled to some form of subjective analysis in the Second Circuit.[38] Thus, the Second Circuit is highly critical of prison policies and appears to largely apply strict scrutiny in broad strokes by challenging prison officials to show that their policies truly are the least restrictive means of furthering the compelling interests invoked by the policy.

B. THIRD CIRCUIT

Since its enactment on September 22, 2000, RLUIPA claims filed in the Third Circuit by prisoners seeking religious dietary accommodations have already had a palpable impact on corresponding prison policies. In *DeHart v. Horn*—a particularly influential case which spanned almost a decade—a prisoner in Pennsylvania filed claims under RLUIPA alleging that denying him access to a vegan diet as a practicing Mahayana Buddhist violated his free exercise rights.[39] While the Third Circuit eventually upheld the trial court's denial of his constitutionally-derived free exercise claims, it nevertheless reversed and remanded the trial court's dismissal of his claim brought under RLUIPA, noting "[t]he Prison has had its opportunity to correct its own errors under the compelling interest/least restrictive alternative test of RFRA and RLUIPA."[40] Possibly as a response to the Third Circuit's decision in *DeHart*, the Pennsylvania Department of

[38] *See id.* at 588-591 (summarizing that the Second Circuit has "employed a subjective test to evaluate the free exercise claims of prisoners"); *see also Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (observing "[p]roperly cognizant of the judiciary's incapacity to judge the religious nature of an adherent's beliefs, courts have jettisoned the objective, content-based approach previously employed to define religious belief . . . in favor of a more subjective definition of religion, which examines an individual's inward attitudes towards a particular belief system").

[39] *See DeHart v. Horn*, 390 F.3d 262 (3d Cir. 2004). The Third Circuit heard Mr. DeHart's case four times: the initial appeal of the trial court's denial of preliminary injunctive relief in 1997, the appeal of the trial court's granting of summary judgment in favor of the state defendants in 2000, the rehearing *en banc* of the same appeal in 2000, and finally the appeal on remand of the trial court's second grant of summary judgment in favor of the state defendants in 2004. It should be noted that DeHart originally filed claims under RFRA in the Western District of Pennsylvania in 1995, prior to the Supreme Court's decision in *City of Boerne*, but later amended his complaint in 2001 to state a claim under RLUIPA.

[40] *Id.* at 276. The trial court dismissed the RLUIPA claims on the basis that the prisoner did not exhaust his administrative remedies pursuant to the Prisoner Litigation and Reform Act of 1995 because the claims he did originally exhausted came under RFRA and not RLUIPA. The Third Circuit rejected this reasoning, stating that "it cannot be argued that RLUIPA does not apply the same standard to prisoner free exercise claims as did RFRA." *Id.* at 275.

Corrections later modified its policies to include provisions of vegan meals to prisoners requesting them for religious reasons.[41]

Although the Third Circuit generally requires some form of dietary accommodation of religious needs, more recent decisions indicate that it is proper for courts to engage in some degree of cost consideration to delineate the contours of how much accommodation is required. For example, in *Riley v. DeCarlo* the Circuit court found that an inmate seeking Halal meat failed to establish that he is substantially burdened where there is an alternative vegan diet that comports with "most" Muslim beliefs.[42] In so holding, the *Riley* court also noted that "the DOC does not provide a Halal meat diet because such a diet would significantly impact prison resources because of the cost of Halal meats. Additional staff would be needed to check the food deliveries for security purposes, and kosher meat would also need to be ordered for Jewish inmates to avoid equal protection problems."[43] Thus, although a "substantial burden" is actually defined in the Third Circuit as existing where "1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs," [44] what may constitute a substantial burden can nevertheless

[41] *See Riley v. DeCarlo*, 532 F. App'x 23, 28 (3d Cir. 2013) ("the record reflects that most Muslims incarcerated within the DOC eat the alternative protein diet or the *no animal products diet* to be in accord with their religious beliefs") (emphasis added).

[42] *See id.* at 29. The court noted the record indicated that many incarcerated Muslims found the vegan diet or the alternative protein diet to perfectly satisfy their religious needs, and found this fact to be persuasive in holding that the existence of such alternatives negated a finding of a substantial burden. *But see Daley v. Lappin*, 555 F. App'x 161, 164 (3d Cir. 2014) (noting "the law is clear that a religious practice is protected even if it is not deemed to be mandatory or practiced by every member of the religion" and holding that a federal Rastafari prisoner seeking protection under RFRA was substantially burdened by not having access to Ital meals, which generally mirror a vegan diet).

[43] *Id.* at 28.

[44] *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007). The Third Circuit follows the Fifth Circuit's iteration of what constitutes a substantial burden in *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004).

be dependent in part on the beliefs of others within the faith and cost considerations can similarly become a real barrier to accommodation of individual, sincerely-held religious beliefs.

Indeed, the Third Circuit has similar problems with balancing the accommodation of subjective, individual religious beliefs and the more corporeal concerns of prison administration as do other Circuits. Accommodation is warranted in cases like *DeHart* and *Daley v. Lappin*, because a wholesale denial of religious meals without the provision of some objectively agreeable alternative constitutes a substantial burden. And yet, even if the alternatives are not a complete accommodation like in *Riley*, a substantial burden may not be found even if the prisoner's subjective religious dietary needs—such as providing Halal meat—are not met. Therefore, although the substantial burden standard in the Third Circuit explicitly contemplates religious beliefs on an individual basis, the Circuit court has nevertheless had difficulty in viewing such beliefs in a subjective vacuum.

C. FOURTH CIRCUIT

There is actually a good deal of case law on religious dietary claims in the Fourth Circuit, and in one particular pre-RLUIPA case, a district court held in *Jenkins v. Angelone* that denying an adherent of the African Hebrew Israelite faith access to a vegan diet was the least restrictive means of furthering the compelling interests of prisoners' health, institutional security, administrative, and cost concerns.[45] The court validated claims made by prison officials that offering a vegan diet would incur great costs and administrative burdens in ensuring that the prisoners received enough nutrition and even create heightened security risks because "[t]he potential for inmates to make alcohol or mash would dramatically increase" due to the storage of excess amounts of fresh fruits and vegetables.[46] Although the court did credit the purported

[45] *See Jenkins v. Angelone*, 948 F. Supp. 543, 547-548 (E.D. Va. 1996).
[46] *Id.*

security risks commensurate with increasing access to fresh fruit and vegetables, considerations of cost and administrative burden seemed to drive the court's finding that denying access to a vegan diet in violation of a prisoners' sincerely held beliefs were compelling interests.[47] Yet, as one Court of Appeals observed, "the district court [in *Jenkins v. Angelone*] cited no authority for its findings that the above interests are compelling," and that "no appellate court has ever found these to be compelling interests."[48]

Although it appears that *Jenkins* stands for the proposition that the compelling interests and legitimate penological interests are sometimes treated synonymously, the Fourth Circuit has declined to allow such an inference to be drawn by district courts. In *Lovelace v. Lee*, the Court of Appeals rebuked prison officials for failing to properly explain the compelling interest served by creating a policy that denied access to Ramadan meals before sunrise and after sunset to inmates that break their fast even just once because it connotes insincerity on part of the prisoner.[49] In remanding the case, the majority instructed "the district court to do what RLUIPA commands: assess with due deference any explanation by the prison as to why denying an inmate

[47] *Id.* (finding that the "increase in fresh fruit and vegetables, as well as other grains and non-traditional food items required by a Vegan diet, would also raise the overall cost for food services. For instance, additional time and staff would be needed to prepare the food and more space and supplies would be required to store the food.").
[48] *Koger v. Bryan*, 523 F.3d 789, 800, n.7 (7th Cir. 2008). Actually, a Court of Appeals had indeed held considerations of costs and/or administrative burdens to be compelling interests in *Baranowski*, 486 F.3d at 125-26 ("we hold that this policy [denying access to a kosher meal] is related to maintaining good order and controlling costs and, as such, involves compelling governmental interests" and further holding that the "administrative and budgetary interests at stake cannot be achieved by any different or lesser means.") (citing, rather ironically, *Andreola v. Wisconsin*, 211 F. App'x 495, 499 (7th Cir. 2006)); *cf. Rich v. Sec'y, Florida Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013) (finding "while safety *and* cost *can* be compelling governmental interests, the [prison officials] have not carried their burden to show that Florida's policy in fact furthered these two interests.") (emphasis added).
[49] *See Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006) (noting "[t]he defendants have not adequately demonstrated on this record that the Ramadan policy is the least restrictive means of furthering a compelling governmental interest. They assert simply a 'legitimate interest in removing inmates from religious dietary programs where the inmate flouts prison rules reasonably established in order to accommodate the program.' They do not elaborate how this articulated 'legitimate interest' qualifies as compelling; they do not present any evidence with respect to the policy's security or budget implications.") (citation omitted).

who breaches the fast the opportunity to participate in other religious observances is the least restrictive way to deal with a compelling problem."[50]

However, the dissent criticized the majority for "micromanaging state prisons," noting that "the majority's no-deference approach is synonymous with federal court control of routine prison policy."[51] Furthermore, the dissent stressed that the policy "seeks to accommodate, not to burden, religious freedom. The policy is not at issue because it is keyed to what the Supreme Court has told us a policy may rightly be keyed to: the sincerity of a religious belief, rather than its truth."[52] The majority responded that "our dissenting colleague . . . delves into prison policymaking by coming up with his own reasons as to why the policy's restrictions are necessary to insure safety and security. If a court could, as the dissent would have it, offer explanations on its own, then prisons would be effectively relieved of their responsibilities under RLUIPA."[53] The *Lovelace* decision presents the reader with a great example of how courts tend to struggle with the appropriate level of deference and scrutiny to apply to prison officials that seek to justify policies that place substantial burdens on religious practices. In the end, it appears the majority in *Lovelace* stood firm and declined to allow strict scrutiny to be watered down by due deference to prison officials.

D. FIFTH CIRCUIT

It should be noted that an examination of how the Fifth Circuit treats religious dietary claims under RLUIPA could constitute a treatise in and of itself as it is the only Circuit that has gone so far as to deny prisoners access to a diet consistent with their religious scruples on the basis of considerations of cost and administrative burden alone. In *Baranowski v. Hart*, the

[50] *Id.* at 192.
[51] *Id.* at 204, 210.
[52] *Id.* at 205.
[53] *Id.* at 193.

Court of Appeals held that although a policy that denied a prisoner access to a kosher diet constituted a substantial burden, it nevertheless was the least restrictive means of furthering the compelling interests of "maintaining good order and controlling costs."[54] Particularly vexing is the fact that although providing a kosher diet to prisoners certainly costs more on per-prisoner basis,[55] the court noted that "only 900 are self described as Jewish. Of those, only 70 to 75 are 'recognized' as actually practicing their faith, with 90 in the conversion process. According to [the Director of the Texas Department of Criminal Justice Chaplaincy Department], these numbers are very small when compared to the number of observant Protestants, Catholics, and Muslims."[56] Thus, it is unclear exactly how the relatively *de minimis* financial impact of providing kosher meals to such a small number of adherents of the Jewish faith could cause the court to hold as it did. Yet, the court concluded:

> "[T]he uncontroverted summary judgment evidence submitted by Defendants establishes that TDCJ's budget is not adequate to cover the increased expense of either providing a separate kosher kitchen or bringing in kosher food from the outside; that TDCJ's ability to provide a nutritionally appropriate meal to other offenders would be jeopardized (since the payments for kosher meals would come out of the general food budget for all inmates); that such a policy would breed resentment among other inmates; and that there would be an increased demand by other religious groups for similar diets."[57]

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[54] *Baranowski*, 486 F.3d at 123-26 (citing *Andreola v. Wisconsin*, 211 Fed. App'x 495, 498-99); *but see Koger v. Bryan*, 523 F.3d 789, 800 (noting that no court of appeals has held that considerations cost and administrative burden in the orderly provision of meals to prisoners, without more, constitutes a substantial burden). Indeed, *Andreola* was an unreported case that confused the RLUIPA and First Amendment standards by upholding a policy denying a prisoner access to a kosher meal under RLUIPA in part because "defendants have a *legitimate* interest in abating the costs of a prisoner's keep." *Andreola*, 211 F. App'x at 499 (7th Cir. 2006).

[55] *See id.* at 118 ("[t]he state of Florida has reported that it costs them between 12 and 15 dollars per day per offender to provide kosher meals compared with $2.46 per day the State of Texas pays for offender meals") (internal quotation marks and citation omitted).

[56] *Id.* at 117.

[57] *Id.* at 125.

It appears, therefore, the court was concerned with the proverbial "slippery slope"—that is, allowing kosher meals would necessarily open the doors to other claims that would strain the TDCJ's budget due to increased costs for providing religious meals to prisoners.[58]

Fear not, however, because the TDCJ later established a kosher kitchen at one of its facilities, transferred all of its observant Jewish prisoners to it, and provides them all with kosher meals free of charge, all at an additional cost of less than $100,000 per annum.[59] But that did not stop one of its Jewish prisoners from being denied access to a free kosher meal due to an elevation in his security level, which caused him to be transferred to another facility where he had to purchase any kosher meal from the commissary. Surprisingly—and almost in direct conflict with its decision in *Baranowski*—the Fifth Circuit held in *Moussazadeh v. Texas Dep't of Criminal Justice* that prison officials had not properly established that denying him access to a free kosher meal served compelling interests and was the least restrictive means of serving those interests.[60] Instead, it observed "TDCJ relied on bare assertions that more violent offenders would present a greater security threat if different meals were served, but this is insufficient to establish a compelling interest related to these facts" and noted that "although cost reduction, as a general matter, is unquestionably a compelling interest of TDCJ, we are skeptical that saving less than .05% of the food budget constitutes a compelling interest. We recognize, however, that the inquiry is fact-intensive, and we decline to draw a bright-line rule."[61]

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[58] At this juncture, one might recall Justice Scalia's remark suggestion during oral argument in *Holt v. Hobbs* that it would seem a lack of funding can be no shelter when all one needs to do is raise taxes. But does this mean that any policy is presumptively invalid if it places a substantial burden on an adherent as Justice Scalia posited in *Smith* simply because there's always the means to raise taxes? This question will be examined further *infra* at Section III.
[59] *See Moussazadeh v. Texas Dep't of Criminal Justice*, 703 F.3d 781, 786-87 (5th Cir. 2012), *as corrected* (Feb. 20, 2013). The cost of establishing the kosher kitchen was only $8,066.26.
[60] *Id.* at 794-96.
[61] *Id.* at 795. While it appears that *Baranowski* clearly held that consideration of cost and administrative burden alone are compelling government interests, *Moussazadeh* is unequivocal that *Baranowski* is limited to its facts and as a consequence, a bright-line rule that costs are a compelling government was not actually established.

In order to account for the apparent discrepancy between its holdings in *Baranowski* and *Moussazadeh*, the Fifth Circuit offered the following explanation:

> "Circumstances since *Baranowski* was decided have changed, as TDCJ and the district court pointed out in their discussion of administrative exhaustion. TDCJ has now offered kosher meals in the dining hall at Stringfellow for years and has offered kosher meals for purchase. To the extent that TDCJ claimed that its least-restrictive means of achieving cost reduction was completely denying prisoners kosher food, that is no longer so. *Baranowski* therefore is instructive but not dispositive."[62]

The dissent, however, criticized the majority's attempt to distinguish the two cases on their facts, observing "*Baranowski*'s admonition that RLUIPA does not allow religious accommodation to overrun considerations of prison administration is general in scope."[63] Indeed, the stature of *Moussazadeh* is reminiscent of the Fourth Circuit's decision in *Lovelace*, only the Fourth Circuit did not have a precedent that was completely antithetical to its decision. Again, however, it provides a perfect example where a Circuit court vacillates in its reasoning as it attempts to reconcile the rigorous, Congressionally-mandated demands of strict scrutiny with the budgetary concerns of prison officials.

E. SEVENTH CIRCUIT

In reviewing decisions from the Seventh Circuit, the way in which the Court of Appeals treats religious dietary claims reminds one of how the Second Circuit treats such claims. For example, *Koger v. Bryan* mimics *Jova* in that it involved a prisoner who had changed religions while incarcerated and requested a vegetarian religious diet consistent with his beliefs as a practicing member of the Ordo Templi Orientis religion.[64] Koger also challenged a policy that

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[62] *Id.* at 795-96. It is both ironic and disconcerting that by voluntarily accommodating Jewish prisoners' religious dietary needs, the TDCJ forfeited the shield it was granted in *Baranowski* because it proved there were other alternatives to denials of a free kosher meal.
[63] *Id.* at 799 (Barksdale, C.J., dissenting in part).
[64] *Koger v. Bryan*, 523 F.3d 789, 797-98 (7th Cir. 2008). OTO "imposes no general dietary restrictions; though each individual Thelemite may, from time to time, include dietary restrictions as part of his or her personal regimen of

required him to submit verification from a member of the OTO clergy that his religion required him to be a vegetarian in order to receive meatless meals. Prison officials, however, denied him access to meatless meals primarily because his religion was "unfamiliar" to them and did not have a clergy-like hierarchy or an established dietary "requirement."[65] The court chided this approach, citing *Ford v. McGinnis* and other Second Circuit precedent to note "even if Koger belonged to a religion with traditional clergy and uniform practices, a clergy verification requirement forms an attenuated facet of any religious accommodation regime because clergy opinion has generally been deemed insufficient to override a prisoner's sincerely held religious belief."[66] The court ultimately held that the policy itself and the denial of the meals did not further any compelling interest, noting that while the orderly administration of a prison dietary system and verification of prisoners' religious affiliations are legitimate concerns of prison officials, "[t]he problem for the prison officials, however, is that no appellate court has ever found these to be compelling interests."[67] The court then went even further, observing that "even if the prison officials' asserted interests were deemed to be compelling, they do not support their assertion that a clergy verification requirement was the least restrictive means of achieving these ends," and suggested that simply requiring prisoners to provide a written statement articulating the religious animus behind a request for an accommodation would suffice.[68]

The Seventh Circuit got it wrong in *Andreola v. Wisconsin*, however, because it held that the prison officials "have a *legitimate* interest in abating the costs of a prisoner's keep," even though RLUIPA requires a heightened showing of furthering a compelling interest.[69] Yet, *Koger*

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spiritual discipline." *Id.* at 794. Koger held a sincere belief that his religion required him to consume a non-meat vegetarian diet.

[65] *Id.*

[66] *Id.* at 799 (collecting cases).

[67] *Id.* at 800.

[68] *Id.* at 801.

[69] *Andreola*, 211 F. App'x at 499-500 (citing *DeHart*, 390 F.3d at 271-72).

appears to have "set the tone" in the Seventh Circuit and the Court of Appeals again applied its reasoning in *Nelson v. Miller*—which involved a Catholic prisoner that sought a vegan diet on Fridays and during Lent in observance of his sincerely held beliefs—to hold that a policy that required a showing that one's religion required the accommodation being sought and the denial of the vegan diet during the requested periods substantially burdened his sincerely held religious beliefs.[70]

F. NINTH CIRCUIT

The district courts in the Ninth Circuit have experienced a glut of cases filed by prisoners seeking religious dietary accommodations, but only a relative few have reached the Court of Appeals.[71] One such case is *Shakur v. Schriro*, in which a Muslim prisoner sought access to a kosher diet because it provided him with meat that also comported with the Halal requirements of his faith.[72] The Arizona prison officials, however, denied him access to a kosher diet because they maintained a kosher diet is not a requirement of Islam and it allowed Muslim prisoners to receive vegetarian meals so as to avoid eating meat that is not Halal.[73] The court held, *inter alia*, that the district court erred in holding there was no substantial burden because there remained issues of material fact that Shakur was provided with a diet which caused gastrointestinal

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[70] *See generally Nelson v. Miller*, 570 F.3d 868. Like the plaintiff in *Koger*, it was impossible for Nelson to demonstrate that Catholicism required him to refrain from eating meat on Fridays and during Lent since it is not necessarily required of all Catholics.

[71] Of the 195 cases that were displayed as a result of a search on Westlaw using the terms "RLUIPA," "diet," and "prison," only 20 were decisions from the Court of Appeals and the remaining 175 cases were decisions from the district courts within the Ninth Circuit.

[72] *See Shakur v. Schriro*, 514 F.3d 878, 882 (9th Cir. 2008). Shakur previously received ovo-lacto vegetarian meals that included milk and eggs, but no meat. He claimed that such a diet caused gastrointestinal problems that "interferes with the state of 'purity and cleanliness' needed for Muslim prayer." *Id.*

[73] *Id.*

problems that subsequently interfered in the practice of his religion, even though a vegetarian diet technically satisfied Shakur's religious beliefs.[74]

Although it remanded the dietary RLUIPA claims to the district court for further adjudication, the Court of Appeals took the time to point out that "the district court found that ADOC's refusal to serve Shakur kosher meat furthered a compelling state interest, *i.e.*, 'avoiding the prohibitive expense of acquiring Halal meat for all Muslim inmates or providing these inmates with kosher meat,' but the court did not consider any potential effect on maintaining order and discipline."[75] Taking its admonishment of the district court's decision further, the court stated that it was "troubled" by the reliance of the district court on an affidavit submitted by a pastoral administrator rather than a food services official as to how costly it would be to provide Halal or kosher meat to Arizona's 850 Muslim inmates because the it found the pastoral administrator lacked personal knowledge of the costs of food procurement.[76] As to the least restrictive means analysis, the court found that "the record contains only conclusory assertions that denying Shakur the kosher diet was the least restrictive means of furthering its interest in cost containment," and reminded the district court that "[i]n *Warsoldier*[*v. Woodford*], 418 F.3d [989, 996 (9th Cir. 2005)], we admonished that a prison 'cannot meet its burden to prove least

[74] *Id.* at 888-89. The court distinguished *Sefeldeen v. Alameida*, 238 F. App'x 204 (9th Cir. 2007) (affirming the district court's grant of summary judgment to prison officials on a RLUIPA claim by a Muslim prisoner requesting access to Halal meat), stating that the prisoner in that case focused on nutritional adequacy rather than the diet's effect on religious practices. The court also credited Shakur's argument that "he must choose among eating the vegetarian diet that is Halal but disruptive to his religious activities, eating the regular diet that is Haram and forbidden by his religion, or changing his religious designation to Jewish simply to obtain the desired kosher meat meals." *Id.* at 889.

[75] *Id.* at 889. In holding as it did, the Court of Appeals made the distinction that some appellate courts have failed to: the Supreme Court in *Cutter* did not hold that costs and limited resources were compelling governmental interest, but instead maintaining order, security, and discipline in prisons were. *See Id.* (quoting *Cutter*, 544 U.S. at 722).

[76] *See id.* at 889-90 (concluding that "[b]ased on the record, which contains no competent evidence as to the additional cost of providing Halal or kosher meat to ADOC's Muslim prisoners, we cannot affirm the district court's grant of summary judgment.").

restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.'"[77]

The Ninth Circuit's decisions in *Shakur* and *Warsoldier* serve as some of the most robust applications of strict scrutiny in RLUIPA case law. The more rigorous demands that the Ninth Circuit places on prison officials in satisfying its burden of proof under strict scrutiny reminds the reader of the decisions in *Moussazadeh* and *Lovelace* as it stands for the proposition that courts ought not water down strict scrutiny and give prison officials the benefit of the doubt.

TENTH CIRCUIT

In another case involving a Muslim prisoner seeking access to Halal meat, the Tenth Circuit also overturned a district court's granting of summary judgment to prison officials on dietary claims brought under RLUIPA.[78] In *Abdulhaseeb v. Calbone*, the court engaged in a lengthy discussion on RLUIPA, even going so far as to appoint counsel for the plaintiff to provide supplemental briefing to help the court define what a "substantial burden" entails.[79] The court adopted the "substantial pressure" definition, wherein a substantial burden exists when government "places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief, such as where the government presents the plaintiff with a Hobson's choice—an illusory choice where the only realistically possible course of action trenches on an adherent's

[77] *Id.* at 890. *Warsoldier* involved a Native American prisoner that challenged California's grooming policy under RLUIPA and serves as one of the most oft-cited RLUIPA decisions in the Ninth Circuit. However, as it did not involve dietary claims, it is unnecessary to discuss it here.

[78] *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1320 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 469 (finding "a reasonable jury could determine that ODOC prevented Mr. Abdulhaseeb from consuming halal meats as part of his celebration of the Eid–ul–Adha in 2005, and therefore substantially burdened his religious exercise. Thus, we must remand this claim for further proceedings against the GPCF Defendants and the ODOC Defendants in their official capacities.").

[79] *Id.* at 1315. It should be noted that not all Circuits have actually taken it upon themselves to define what a "substantial burden" entails in the context of free exercise rights. For instance, it appears that the First and Second Circuits have not yet defined what a substantial burden is.

sincerely held religious belief."[80] In defining a "substantial burden," the court noted that the belief of the individual is dispositive, finding that "[c]ontrary to defendants' arguments . . . the issue is not whether the lack of a halal diet that includes meats substantially burdens the religious exercise of any Muslim practitioner, but whether it substantially burdens *Mr. Abdulhaseeb*'s own exercise of his sincerely held religious beliefs."[81] Applying this definition, the court concluded that "[i]t is a reasonable inference that ODOC's failure to provide a halal diet either prevents Mr. Abdulhaseeb's religious exercise, or, at the least, places substantial pressure on Mr. Abdulhaseeb not to engage in his religious exercise by presenting him with a Hobson's choice—either he eats a non-halal diet in violation of his sincerely held beliefs, or he does not eat."[82]

Like in *Shakur*, the court remanded the case to the district court to examine whether the policy of not providing Halal meat to Mr. Abdulhaseeb was the least restrictive means of furthering a compelling interest. Although the court did not therefore engage in conducting such an examination due to a lack of evidence in the record, it did remind the prison officials that it must do more than make conclusory statements.[83] Thus, the Tenth Circuit echoes the Ninth Circuit in applying strict scrutiny and tempering the level of deference given to prison officials in explaining policies that substantially burden the exercise of religion.

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[80] *Id.*

[81] *Id.* at 1314 (emphasis in original). This reasoning is a crucial departure from cases like Riley, *supra*, where a finding of a substantial burden is not strictly limited to the individual adherent's belief.

[82] *Id.* at 1316-17. This holding departed from some other cases where the denial of the provision of Halal meat was upheld because Oklahoma did not allow Muslim prisoners access to kosher meats and Mr. Abdulsaheeb could not afford to purchase Halal meals from the commissary. *See, e.g., Patel v. United States Bureau of Prisons*, 515 F.3d 807, 814-15 (8th Cir. 2008) (finding no substantial burden where the Muslim prisoner seeking Halal meals had access to kosher meals and could not demonstrate that he was unable to purchase Halal meals from the commissary).

[83] *See id.* at 1318-19 (citing *Beerheide v. Suthers*, 286 F.3d 1179, 1189 (10th Cir. 2002), for the purpose of reminding the defendants that they "must present credible evidence to support" their stated compelling interests were furthered in the least restrictive manner).

III. RLUIPA AFTER *HOBBY LOBBY*: HAS ANYTHING CHANGED?

By now, it should be evident that even appellate courts struggle with applying the same standard to the same problems; while it is true that the inquiry under RLUIPA in the context of prisons is often fact-intensive, we have observed different outcomes to essentially the same facts and even within the same Circuit.[84] This is due in part to a current lack of guidance from the Supreme Court as to whether there is a threshold level of deference that should be afforded to prison officials in meeting that RLUIPA's strict scrutiny standard and at what point would accommodations no longer be "measured." Yet, the Supreme Court in *Cutter* did not worry, stating that "[w]e have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns."[85] It did not however address whether cost considerations alone can be considered compelling governmental interests (if at all) in the prison context, let alone the point at which they may operate to override the religious practices of prisoners.

Although the Supreme Court will hopefully be providing such guidance when it issues its decision in *Holt v. Hobbs*, the closest case courts can currently analyze as to these cost issues is the much publicized decision in *Burwell v. Hobby Lobby Stores, Inc.*—which involved a challenge under RFRA to governmentally mandated employer insurance coverage for contraceptives. In *Hobby Lobby*, the Court compared RFRA and RLUIPA in multiple instances,[86] observing that RLUIPA "imposes the same general test as RFRA but on a more limited category of governmental actions."[87] The Court also pointed to RLUIPA to find that the

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[84] *See, e.g.*, discussion of the Fifth Circuit's treatment of dietary claims brought under RLUIPA in *Baranowski* and *Moussazadeh*, *supra*, at 15-18.
[85] *Cutter*, 544 U.S. at 722. Cognizant that "[l]awmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions," *Id.*, the *Cutter* Court acknowledged that security interests were chief compelling governmental interests.
[86] *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761-62, 2772, 2774-75, 2781, 2792 (2014).
[87] *Id.* at 2761.

"exercise of religion" under RFRA "must be given the same broad meaning that applies under RLUIPA."[88] Most crucially, however, was the Court's following observation:

> "We do not doubt that cost may be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs. *Cf.* § 2000cc–3(c) (RLUIPA: '[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.'). HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law."[89]

Indeed, one of the less restrictive means the Court found the government could employ is by "assuming the cost," noting that "[i]t seems likely . . . that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA."[90] This reasoning closely parallels the type of scrutiny that the Fifth Circuit employed in *Moussazadeh*, where it compared the cost of providing kosher meals to the overall budget and cast doubt on whether the government could truly not afford providing such meals to prisoners that requested them in accordance with their sincerely held beliefs.[91]

So has *Hobby Lobby* changed anything with regard to how courts ought to treat claims under RLUIPA? It appears that *Hobby Lobby* at least supports Justice Scalia in observing in *Smith* and again during oral argument for *Holt v. Hobbs* that as long as the cost to the government is relatively *de minimis* in proportion to its budget, the least-restrictive-means analysis would lead courts to the ultimate conclusion that as long as a substantial burden is

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[88] *Id.* at 2762, n. 5. Justice Ginsburg disagreed with this reasoning by noting "RFRA incorporates RLUIPA's definition of 'exercise of religion,' as RLUIPA does, but contains no omnibus rule of construction governing the statute in its entirety." *Id.* at 2792, n. 10 (Ginsburg, J., dissenting).
[89] *Id.* at 2781.
[90] *Id.*
[91] *See Moussazadeh*, 703 F.3d at 795; *see also* discussion, *supra*, at 17-18.

established, then a policy or law would be *per se* presumptively invalid.[92] And if taxes could always be raised to increase such a budget, then it follows that courts may effectively legislate from the bench vis-à-vis requiring prison officials to accommodate prisoners' religious dietary needs, regardless of cost. In fact, this very point was debated at length by the Supreme Court in *Hobby Lobby*, with the majority denying that its decision forces the government to create an entirely new program to subsidize all contraceptives,[93] and the dissent pointing out that there is no stopping point to this line of reasoning that the government could just "pick up the tab."[94] Justice Ginsburg—who wrote the Court's opinion in *Cutter*—strongly labored on this latter point in her dissent, positing "[d]oes it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection?"[95]

It would appear, therefore, at least the author of the Court's opinion in *Cutter* worries that as long as taxpayers can foot the bill for religious accommodations under RFRA, there may always a less restrictive alternative. However, it remains to be seen whether such fears will be vindicated. If there is any lesson that courts can glean from both *Cutter* and *Hobby Lobby*, it is that courts that err on the side of accommodation when faced with religious dietary claims under RLUIPA are likelier to be vindicated in declining to afford deference to policies implemented solely in the interest of minimizing costs.

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[92] *See generally* discussion, *supra*, at 4-9; *Smith*, 494 U.S. at 888 ("If the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.").

[93] *See Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) ("In these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government").

[94] *See id.* at 2802-2803 (Ginsburg, J., dissenting) (querying "where is the stopping point to the 'let the government pay' alternative?").

[95] *Id.* at 2802 (Ginsburg, J., dissenting).

CONCLUSION

A review of how the Circuit courts treat religious dietary claims brought by prisoners under RLUIPA reveals their apparent discomfort and lack of assuredness in applying strict scrutiny to prison policies. This is due to a number of factors, ranging from a current lack of guidance from the Supreme Court to whether considerations of cost alone can insulate a policy from judicial scrutiny. However, if the Supreme Court's decisions in *Cutter* and *Hobby Lobby* can provide any guidance, then courts would do well to adhere to Congressional mandate that RLUIPA "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution,"[96] and err on the side of accommodating prisoners' substantially burdened, sincerely-held beliefs even if it means that the government—and by extension taxpayers—must foot the bill for prisoners' specialized, religious diets.

[96] 42 U.S.C. § 2000cc-3(g).