BOLSTERING JUDICIAL REVIEW OF RLUIPA COMPLAINTS POST-*RAMIREZ V. COLLIER*

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INTRODUCTION

The First Amendment to the United States Constitution protects the free exercise of religion.[1] The Religious Land Use and Institutionalized Persons Act (RLUIPA) is Congress's tool for preserving that right inside prisons. Section 3 of the statute provides 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 restrictive means of furthering that compelling governmental interest."[2]

RLUIPA's drafters recognized that while incarceration necessarily diminishes some constitutional rights, religious liberty should not be one of them.[3] Religious exercise is the only means of hope, comfort, and freedom for many prisoners.[4] Therefore, constitutional protection of religious liberty should be at its zenith in prisons. This is only possible if RLUIPA is applied consistently and impartially.

Yet courts face inherent tension when reviewing alleged violations of RLUIPA. On the one hand, context is important. Prison officials have

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[1] U.S. CONST. amend. I.

[2] 42 U.S.C. § 2000cc-1(a).

[3] *See* 146 CONG. REC. 16698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) [hereinafter Joint Statement].

[4] *See, e.g.*, Kate Campbell, *A Greater Purpose Than a Life of Crime*, PRISON FELLOWSHIP (Nov. 2021), https://www.prisonfellowship.org/story/life-of-crime/.

expertise in prison administration and safety.[5] For this reason, the Supreme Court has supplemented RLUIPA's analysis with a deference requirement.[6] On the other hand, the statute's text seemingly holds the government to strict scrutiny, instructing courts to defer to prison officials' rationale cautiously and judiciously.[7]

Just how much deference courts should afford to prison officials when applying RLUIPA remains unclear. Courts have understandably struggled to uphold a standard that requires somewhere between zero and total deference. Strict scrutiny and deference to government officials are, in a sense, opposite standards.[8]

Justice Kavanaugh articulated the challenges courts face when applying RLUIPA in his concurring opinion to *Ramirez v. Collier*.[9] What does "compelling" mean?[10] When does the state's interest rise to that level?[11] And

[5] Cutter v. Wilkinson, 544 U.S. 709, 722–23 (2005); Joint Statement, *supra* note 3, at 16699.

[6] *Cutter*, 544 U.S. at 722–23; Holt v. Hobbs, 574 U.S. 352, 369 (2015).

[7] 42 U.S.C. § 2000cc-1(a).

[8] David M. Shapiro, *To Seek a Newer World: Prisoners' Rights at the Frontier*, 114 MICH. L. REV. FIRST IMPRESSIONS 124, 126 (2016).

[9] Ramirez v. Collier, 595 U.S. 411, 439–45 (2022) (Kavanaugh, J., concurring).

[10] *Id.* at 442. No one really knows. One method is to define a "compelling" interest by comparison to what it is not. Courts routinely distinguish an "important" or "legitimate" governmental interest from a compelling one and afford greater deference to governmental actions that qualify as the latter. Whatever "compelling" is, it is more persuasive than "important" or "legitimate." But as several Justices have pointed out, these ambiguous terms often lend themselves to inconsistent judicial treatment. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) ("[T]he phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough."); Robert J. Donahue, *Racial Diversity as a Compelling Governmental Interest*, 30 IND. L. REV. 523, 526–27 (1997).

[11] *Ramirez*, 595 U.S. at 442 (Kavanaugh, J., concurring).

when would less restrictive means achieve such an interest?[12] He aptly responded, "Good questions, for which there are no great answers."[13]

Seeking those answers, *Smith v. Ward* presented the Court with an opportunity to resolve the confusion.[14] The Court declined to hear the case, leaving RLUIPA's path forward as murky as ever.[15]

This comment explores how courts may bolster RLUIPA's analysis without a clarifying ruling from the Court. First, Part II reviews RLUIPA's legislative history and jurisprudence. Next, Part III explains the challenges courts face in applying RLUIPA. In response, Part IV examines what tools courts have at their disposal to help. It considers whether the known positive externalities of religious accommodations should play a role in RLUIPA's analysis and, if so, how.

I. RLUIPA HISTORY AND JURISPRUDENCE

A. Legislative History

The late twentieth century brought significant changes to free exercise law. *Sherbert v. Verner* established that government action having the effect of substantially burdening the free exercise of religion triggers strict

[12] *Id.* Defining the "least restrictive means" is a necessarily imprecise and fact-specific inquiry, but it requires a tight fit between the stated governmental purpose and the means to achieving that end. *See, e.g.*, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021) ("Under strict scrutiny, the government must adopt 'the least restrictive means of achieving a compelling state interest,' rather than a means substantially related to a sufficiently important interest."); McCutcheon v. FEC, 572 U.S. 185, 218 (2014) ("In the First Amendment context, fit matters."); NAACP v. Button, 371 U.S. 415, 433 (1963) (Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—"[b]ecause First Amendment freedoms need breathing space to survive.").

[13] *Ramirez*, 595 U.S. at 442 (Kavanaugh, J., concurring).

[14] Petition for Writ of Certiorari, Smith v. Ward, 2022 WL 1453561 (No. 21-1405) [hereinafter Smith Petition]. I thank Scott Ballenger and Sarah Shalf (Appellate Litigation Clinic at the University of Virginia School of Law) and Mark L. Rienzi, Eric C. Rassbach, Nicholas R. Reaves, Chris Pagliarella, and James J. Kim (the Becket Fund for Religious Liberty) for their dedicated work on this case.

[15] Order Denying Writ of Certiorari, Smith v. Ward, 2022 WL 4651513 (No. 21-1405). On remand from the Eleventh Circuit, the district court denied Mr. Smith's requests for the court to hold that GDOC's half-inch beard policy violates RLUIPA and grant him an injunction permitting a fist-length, or in the alternative, a three-inch beard. Smith v. Dozier, No. 12-CV-26-WLS-CHW, 2024 WL 1092534 (M.D. Ga. Mar. 13, 2024).

scrutiny.[16] The Court later changed its direction in *Oregon v. Smith*, holding that a neutral law of general applicability does not violate the free exercise clause of the First Amendment, even if it incidentally encourages or undermines religion.[17] There, the Court distinguished between laws that intentionally target religious exercise and those that incidentally impact it, the latter being presumptively constitutional.[18]

Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA) in response to *Smith*.[19] RFRA legislatively reinstated *Sherbert* and *Wisconsin v. Yoder* by requiring strict scrutiny for alleged free exercise violations.[20] The statute applied to state and federal government action in virtually all spheres of life.[21]

In response to RFRA's broad scope and contravention of *Smith*, constitutional challenges to the law quickly arose. In *City of Boerne v. Flores*, the Court held that Congress exceeded its power under the Fourteenth Amendment's Enforcement Clause when it enacted RFRA.[22] Therefore, RFRA was unconstitutional as applied to state and local governments.[23] The statute's strict scrutiny standard was neither proportional nor congruent to an actual violation of free exercise under the Fourteenth Amendment.[24]

Then came RLUIPA. In *Boerne*'s wake, the statute expanded free exercise protections in two narrow scenarios: institutionalized persons and land use regulations.[25] If government action substantially burdens an individual's religious exercise in these contexts, the claimant is entitled to an exemption unless the government can clear the strict scrutiny hurdle.[26] Thus, prison officials must demonstrate that denying the religious exemption

[16] 374 U.S. 398, 403–04 (1963).

[17] Emp. Div. v. Smith, 494 U.S. 872, 878–82 (1990).

[18] *Id.*

[19] 42 U.S.C. § 2000bb.

[20] *Id.*; *Sherbert*, 374 U.S. at 403–04; Wisconsin v. Yoder, 406 U.S. 205, 214 (1975) (holding the parents' fundamental right to the free exercise of religion under the First Amendment outweighed the State's interests in compelling school attendance beyond the eighth grade); Luke Meier, *RLUIPA and Congressional Intent*, 70 ALB. L. REV. 1435, 1435–36 (2007).

[21] 42 U.S.C. § 2000bb; Meier, *supra* note 20.

[22] 521 U.S. 507, 532–36 (1997); U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[23] *Boerne*, 521 U.S. at 532–36.

[24] *Id.*

[25] Meier, *supra* note 20, at 1435–38.

[26] *Id.*

furthers a compelling governmental interest in the least restrictive manner possible.[27] This is true even for neutral laws of general applicability.[28]

Congress carefully crafted RLUIPA to hold up where RFRA fell short.[29] Anticipating challenges to RLUIPA, Congress tailored the statute's applicability to closely conform with its enumerated powers.[30] As to institutionalized persons, RLUIPA applies where Congress's spending or commerce clause powers are implicated.[31]

RLUIPA's plain text and legislative history demonstrate its framers intended to raise the bar for religious liberty in prison.[32] The statute's drafters believed that "frivolous or arbitrary" barriers restricted institutionalized persons' religious freedom in "egregious and unnecessary ways," whether from "indifference, ignorance, bigotry or lack of resources."[33] Congress explicitly carried over *Sherbert*'s "compelling governmental interest" and "least restrictive means" standard to secure redress for institutionalized persons.[34] This made sense given the established strict scrutiny standard for other First Amendment freedoms.[35]

That said, RLUIPA's drafters anticipated that courts would defer to prison administrators' expertise in maintaining discipline, order, and security.[36] Thus, RLUIPA proclaims two seemingly contrary propositions: governmental restrictions on institutionalized persons' religious exercise are presumptively unconstitutional, yet still merit some degree of deference.

B. The Court's RLUIPA Jurisprudence

Since its enactment, RLUIPA has weathered constitutional challenges and gained a few prudential appendages. In *Cutter v. Wilkinson*, the Court upheld the "compelling interest" and "least restrictive means" standards in

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Joint Statement, *supra* note 3, at 16698; Cutter v. Wilkinson, 544 U.S. 709, 716–23 (2005).

[33] Joint Statement, *supra* note 3, at 16699; *Cutter*, 544 U.S. at 716–17.

[34] Joint Statement, *supra* note 3, at 16698; *Cutter*, 544 U.S. at 717.

[35] *See, e.g.*, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503 (1969).

[36] Joint Statement, *supra* note 3, at 16699 (quoting S. REP. NO. 103-111, at 10 (1993), U.S. Code Cong. & Admin. News 1993, pp. 1892, 1899, 1900); *Cutter*, 544 U.S. at 717, 723.

§ 3 as a permissible accommodation not barred by the Establishment Clause.[37] Instead, § 3 is compatible with the Establishment Clause because it "alleviates exceptional government-created burdens on private religious exercise."[38] The provision is more likely to be perceived as an accommodation to religious exercise than a government endorsement of religion.[39] Despite the statute's applicability to state and federal institutions, the Court concluded that RLUIPA's narrow scope and clear ties to enumerated congressional powers distinguished it from RFRA.[40]

Yet in *Cutter*'s dicta, the Court suggested that RLUIPA's "compelling interest" and "least restrictive means" language did not impose real strict scrutiny because it does not prioritize religious accommodations over prison safety.[41] Instead, the Court explained that prison security is a compelling state interest and context matters in applying the standard.[42] Thus, religious accommodations should not override other significant interests inside prisons.[43] Accordingly, the Court instructed lower courts to give "due deference" to prison officials' expertise when applying RLUIPA's strict scrutiny standard.[44]

After *Cutter*, it was unclear what this relaxed strict scrutiny required from courts and litigants.[45] In the years that followed, lower courts cited *Cutter*'s deference dicta hundreds of times to uphold various restrictions on religious practice inside prison.[46]

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[37] 544 U.S. at 713.

[38] *Id.* at 720.

[39] *Id.*; Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 349 (1987).

[40] *Cutter*, 544 U.S. at 715.

[41] Shapiro, *supra* note 8, at 126; 544 U.S. at 723, 725 n.13.

[42] *Cutter*, 544 U.S. at 722–23 (quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003)); *id.* at 725 n.13.

[43] *Cutter*, 544 U.S. at 722–23; *Grutter*, 539 U.S. at 327; Est. of Thornton v. Caldor, Inc., 472 U.S. 704, 710 (1985); Joint Statement, *supra* note 3, at 16699.

[44] *Cutter*, 544 U.S. at 722–23.

[45] *See, e.g.*, Spratt v. R.I. Dep't. of Corr., 482 F.3d 33, 42 n.14 (1st Cir. 2007) ("The level of deference to be accorded to prison administrators under RLUIPA remains an open question. RLUIPA's statutory requirement that we apply strict scrutiny to prison policies that substantially burden religious exercise may be in tension with the legislative history which suggests that courts should continue to defer to the expertise of prison administrators. Obviously, courts will need to find some balance between scrutiny of and deference to prison regulations.").

[46] Shapiro, *supra* note 8, at 126; *see, e.g.*, Chance v. Tex. Dep't of Crim. Just., 730 F.3d 404, 412–17 (5th Cir. 2013) (finding that prison's schedule of Native American religious services and

The Court revisited *Cutter*'s deference instruction in *Holt v. Hobbs*.[47] There, the Court held that prison officials may not be afforded "unquestioning deference."[48] Instead, courts must consider whether the prison is required to accommodate the religious exception under the strict scrutiny test set forth by Congress.[49] Prison officials must first explain their rationale for denying the exemption and articulate a compelling interest.[50] Then, they must prove that denying the exemption is the least restrictive means of furthering that interest.[51] The Court clarified that although prison officials' expertise deserves respect, that respect does not permit a court to abdicate its statutory duty to apply RLUIPA rigorously.[52]

The Court most recently considered RLUIPA in *Ramirez v. Collier*.[53] There, the Court held that Texas's restrictions on religious touch and prayer in the execution chamber violated RLUIPA.[54] While the majority upheld the status quo under *Cutter* and *Holt*, Justice Kavanaugh wrote separately to expand on the nature of the RLUIPA inquiry.[55] Justice Kavanaugh intimated that RLUIPA's analysis is *like* strict scrutiny, not that it *is* strict scrutiny.[56] He instead likened RLUIPA to a balancing test between individual liberties and governmental interests.[57]

restrictions on ritual activities did not violate RLUIPA); Van Wyhe v. Reisch, 581 F.3d 639, 657 (8th Cir. 2009) (finding that denying additional group religious study time did not violate RLUIPA).

[47] 574 U.S. 352, 364 (2015).

[48] *Id.* at 364.

[49] *Id.*; Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal, 546 U.S. 418, 434 (2006).

[50] *Holt*, 574 U.S. at 364.

[51] *Id.*

[52] *Id. Holt* clarified some, but not all, of the confusion surrounding *Cutter*. Typically, "deference" means the court gives the government official the benefit of the doubt before probing deeper. *See, e.g.*, Emp. Div. v. Smith, 494 U.S. 872, 878–82 (1990). Yet *Holt*'s interpretation of RLUIPA deference requires the government to "prove" something before any deference is due. In this sense, RLUIPA deference is more akin to *Chevron* deference. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (agency must demonstrate statute is genuinely ambiguous and that the agency's interpretation is reasonable before a court may defer to the agency's interpretation).

[53] 595 U.S. 411 (2022).

[54] *Id.* at 1284.

[55] *Id.* at 1286–87 (Kavanaugh, J., concurring).

[56] *Id.*

[57] *Id.*

Justice Kavanaugh further highlighted the specific difficulties courts face in applying RLUIPA.[58] What does "compelling" mean?[59] When does the state's interest rise to that level?[60] And when would less restrictive means still achieve the interest?[61] At bottom, the central issue is that the state's interest in mitigating the risk of harm does not easily map onto the "compelling interest" and "least restrictive means" standard.[62] Nor is it easy for a court to determine when the additional risk of harm is too significant for the state to shoulder.[63]

II. CHALLENGES IN APPLYING RLUIPA POST-*HOLT V. HOBBS*

A. Tensions Between Statutory and Precedential Requirements

With the dust on RLUIPA's constitutionality settled, incongruent statutory and precedential standards remain the biggest hurdle to free exercise in prison. Indeed, *Cutter* and *Holt* set forth seemingly irreconcilable requirements. Some suggest that the Court intended to overrule *Cutter* by implication in *Holt*.[64] Others suggest that *Cutter* is still good law because its principal holding is that RLUIPA does not violate the Establishment Clause, and *Holt* operates to reign in *Cutter*'s deference dicta.[65] Said another way, there was nothing to overrule from *Cutter* in the first place.[66]

However you spin the Court's RLUIPA jurisprudence, lower courts are left with inherent tension. Strict scrutiny and deference to government officials are conflicting standards, yet *Cutter* and *Holt* tell us that RLUIPA requires both.[67]

[58] *Id.* at 1287.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 1288.

[64] Shapiro, *supra* note 8, at 127–28. *Holt* departed significantly in substance from the Court's only other case interpreting RLUIPA at the time, without mentioning *Cutter* in the majority opinion. *Id.* at 128. No Justice joined Justice Sotomayor's concurring opinion that attempted to reconcile *Cutter* with *Holt*. *Id.*

[65] *Id.* at 128.

[66] *Id.*

[67] *Id.* at 126.

B. Circuit Splits

The Court's extratextual and inconsistent "due deference" requirements have predictably led to circuit splits. Some courts have given broad deference to prison officials, while others have taken a "hard look approach" closer to strict scrutiny.

The Third, Fourth, and Eleventh Circuits have taken a deferential approach to applying RLUIPA.[68] For example, in *Watson v. Christo*, the Third Circuit deferred to prison officials' rationale for denying a religious accommodation despite the government's failure to offer supporting evidence.[69] The State put on no evidence that the "risky attributes" of *tefillin* (leather boxes and straps used in Jewish prayer) presented an actual risk.[70] Nor did it support its assertion that its workforce was inadequate to supervise the prayer.[71] The State also failed to explain why paying existing guards overtime to supervise the prayer would be inadequate to achieve its stated interest despite authorizing about 3,000 overtime shifts per month.[72] As the dissent explained, *Holt* requires proof, and "[w]ithout any such evidence, the prison has not met its burden."[73] Instead, the panel based its rationale on *Cutter*'s dicta.[74]

[68] *See, e.g.*, Watson v. Christo, 837 F. App'x. 877, 879 (3d Cir. 2020) (deferring to prison officials' unsupported rationale for denying the religious accommodation); Faver v. Clarke, 24 F.4th 954, 957–58 (4th Cir. 2022) (justifying the Virginia Dept. of Corrections' (VDOC) exclusion of an Islamic prayer oil vendor based on government testimony that having many vendors caused safety and security issues); *Faver*, 924 F.4th at 964–65 (Motz, J., dissenting) (criticizing the panel's decision because the VDOC conceded it had not considered contracting with an Islamic vendor of prayer oils and offered no reason for why entering into a contract with an Islamic vendor would fail to provide them with the same confidence it had in its existing single vendor); Knight v. Thompson, 797 F.3d 934, 947 (11th Cir. 2015) (relying on district court findings that it was *plausible* unlimited beard lengths could be more difficult for the prison to manage and jeopardize security to conclude that it would be *actually* unmanageable for the prison to accommodate the exception; finding instead that RLUIPA's strict scrutiny standard is satisfied by a showing of potential adverse effects).

[69] *Watson*, 837 F. App'x at 879; *Watson*, 837 F. App'x at 885 (Phipps, J., dissenting); Smith Petition, *supra* note 14, at *25–26.

[70] *Watson*, 837 F. App'x at 881; Smith Petition, *supra* note 14, at *25–26.

[71] *Watson*, 837 F. App'x at 885 (Phipps, J., dissenting); Smith Petition, *supra* note 14, at *26.

[72] *Watson*, 837 F. App'x. at 885 (Phipps, J., dissenting); Smith Petition, *supra* note 14, at *26.

[73] *Watson*, 837 F. App'x at 885 (Phipps, J., dissenting); Smith Petition, *supra* note 14, at *26; Holt v. Hobbs, 574 U.S. 352, 364 (2015).

[74] *Watson*, 837 F. App'x at 880–83.

On the other hand, the Second, Fifth, Sixth, and Ninth Circuits have taken a "hard look" approach when reviewing RLUIPA complaints.[75] These courts distinguish respect for prison officials' expertise from deference to the state's unsupported claims.[76] Under this approach, courts afford prison officials deference concerning the substantive costs of providing an accommodation.[77] But the government must first engage with that analysis in good faith.[78] Articulating a concern is insufficient to meet RLUIPA's "exceptionally demanding" legal standard.[79] Instead, prison officials must offer probative evidence to support the accommodation denial.[80] The evidence must be "detailed," "tailored to the situation before the court," and demonstrate the "failings in the alternatives advanced by the prisoner."[81] These circuits reason

[75] S*ee, e.g.*, Williams v. Annucci, 895 F.3d 180, 189–90 (2d Cir. 2018) (reaffirming its view that *Holt* does not require courts to accept the government's compelling interest claim on its face and that doing so would abdicate judicial responsibility to apply RLUIPA's rigorous standard; requiring government to demonstrate the cost of accommodating the religious diet compared to overall cost of feeding inmates); Ware v. La. Dep't. of Corr., 866 F.3d 263, 272 (5th Cir. 2017) (concluding the government failed to explain why its policies were so underinclusive, offering no evidence to support its claim that dreadlocks among parish inmates presented less of a risk than dreadlocks among DOC inmates, thus failing RLUIPA standard); Ackerman v. Washington, 16 F.4th 170, 188–91 (6th Cir. 2021) (concluding government failed to engage in cost-analysis to support its claim that the Jewish accommodation would be too expensive and explain how it provided compliant kosher meals in the past, thus failing RLUIPA standard); Johnson v. Baker, 23 F.4th 1209, 1213, 1217 (9th Cir. 2022) (government failed to meet RLUIPA standard because it did not explain why the Muslim prisoner's requested vial of scented prayer oil created more of a risk for concealing contraband with its scent than other prisoners who were allowed to keep scented products in their cells); Smith Petition, *supra* note 14, at *21–25.

[76] Smith Petition, *supra* note 14, at *22–23; *see, e.g.*, *Ackerman*, 16 F.4th at 188.

[77] Smith Petition, *supra* note 14, at *23–24; *Ackerman*, 16 F.4th at 188.

[78] Smith Petition, *supra* note 14, at *23–24; *Ackerman*, 16 F.4th at 188.

[79] *See, e.g.*, *Johnson*, 23 F.4th at 1217 ("[P]rison officials cannot 'justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison.'") (quoting *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 989–90 (9th Cir. 2008)); *Ackerman*, 16 F.4th at 191 (finding that although the government articulated a cost concern and the requested accommodation posed a plausible risk to the prison, it failed to show it lacked alternative means to achieve its interest in cost savings); Smith Petition, *supra* note 14, at *24.

[80] Smith Petition, *supra* note 14, at *21; *Ackerman*, 16 F.4th at 191; Ali v. Stephens, 822 F.3d 776, 783 (5th Cir. 2016) ("Rather than deferring to the prison's general policy regarding a matter, we have consistently tested the prison's asserted interests with regard to the risks and costs of the specific accommodation being sought.") (alteration in original) (quoting Chance v. Tex. Dep't of Crim. Just., 730 F.3d 404, 418 (5th Cir. 2013)).

[81] *Johnson*, 23 F.4th at 1217; Smith Petition, *supra* note 14, at *24–25. For example, where the prison denied the prisoner's request for religious dietary accommodation, the State failed to meet its burden of proof because it did not state precisely how much the religious accommodation would

that not requiring prison officials to meet this rigorous standard would afford the sort of "unquestioning deference" *Holt* proscribed.[82] Indeed, *Holt*'s "due deference" does not require a court to defer to the state's "mere say so."[83]

In 2022, *Smith v. Ward* presented the Court with an opportunity to resolve this circuit split.[84] Lester Smith challenged the Georgia Department of Corrections's denial of his religious accommodation request.[85] In doing so, Smith raised the circuit split concerning how much deference courts should afford prison officials when determining whether the government has met its burden of proof under RLUIPA.[86]

The Court denied Smith's petition for certiorari.[87] So, what is a court to do? The statute seemingly requires strict scrutiny. Yet the most recent word from the Court suggests the analysis is only *like* scrutiny and may be better characterized as a balancing test where courts give some unknown weight to prison officials' expertise.[88]

III. INCORPORATING SOCIOLOGICAL AND CRIMINOLOGICAL LITERATURE INTO RLUIPA'S ANALYSIS

A. Responding to Ramirez v. Collier

Courts face difficulty applying RLUIPA's criteria to real-world prisons.[89] What does "compelling" mean in this context, and when does an interest rise

cost, nor did it show the added cost, if any, of adopting the prisoner's alternative suggestions. *See* Williams v. Annucci, 895 F.3d 180, 191 (2d Cir. 2018); Smith Petition, *supra* note 14, at *21–22.

[82] *See, e.g.*, Ware v. La. Dep't. of Corr., 866 F.3d 263, 272 (5th Cir. 2017); *Ackerman*, 16 F.4th at 191; *Ali*, 822 F.3d at 783; Smith Petition, *supra* note 14, at *22–24.

[83] Smith Petition, *supra* note 14, at *23–24; *Ackerman*, 16 F.4th at 188; Holt v. Hobbs, 574 U.S. 352, 369 (2015).

[84] *See* Smith Petition, *supra* note 14.

[85] Smith v. Owens, 13 F.4th 1319, 1321 (11th Cir. 2021).

[86] Smith also raised the 7-1 circuit split as to the weight that courts should give to practices in other prison systems. *See* Smith Petition, *supra* note 14, at *13–19.

[87] Smith v. Ward, 143 S. Ct. 89, 89 (2022).

[88] Albeit via a concurring opinion. *See* Ramirez v. Collier, 595 U.S. 411, 441 (2022) (Kavanaugh, J., concurring). ("The compelling interest standard of RLUIPA—like the compelling interest standard that the Court employs when applying strict scrutiny to examine state limitations on certain constitutional rights—necessarily operates as a balancing test.").

[89] *Id.* at 442.

to that level?[90] And how does the court determine whether less restrictive means would satisfy the interest?[91]

To answer these questions, the Court has sometimes examined the state's policy-based or common sense arguments, history, and contemporary state practice.[92] For example, in *Ramirez*, the Texas Department of Criminal Justice argued it had a compelling interest in ensuring the security of the execution chamber and that restricting the number of people in the room furthered that interest.[93] Any disruption from a nonessential person, such as a religious advisor, could be "catastrophic."[94] While the Court agreed with this common sense rationale, it weighed it against the historical evidence of religious advisors being present in execution chambers.[95] The Court also noted that the federal prison system and several states permit the presence of religious advisors in death chambers without apparent issue.[96] Thus, *Ramirez* demonstrated that history and state practice may assist courts in assessing the state's arguments under RLUIPA.[97]

B. The Missing Ingredient? Positive Impacts of Religious Accommodations

Perhaps history and state practice are not the only potential tools in a court's toolbox. Robust literature demonstrates the positive effects of religious accommodations on prisoners, prisons, and society.[98] Studies overwhelmingly show that religious practice benefits prisoners, increases peaceful behavior, and improves post-release outcomes, particularly when prisoners perceive religious accommodations as fairly granted.[99] Courts should consider this criminological and sociological research, alongside Justice Kavanaugh's other recommendations, when applying RLUIPA. Granting religious accommodations may improve prison safety rather than

[90] *Id.*

[91] *Id.*

[92] *Id.*; *see, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 785–87 (2002).

[93] *Ramirez*, 595 U.S. at 442.

[94] *Id.*

[95] *Id.* at 444.

[96] *Id.*

[97] *Id.*

[98] *See* Brief for Prison Safety and Religion Scholars as Amici Curiae Supporting Petitioner, Smith v. Ward, (No. 21-1405), 2022 WL 2078140 [hereinafter Brief for Amici Scholars].

[99] *See infra* Section III.B.1.

diminish it.[100] In many instances, religious liberty and prison safety need not compete.[101]

1. Benefits of Religious Practice to Prisoners

Religious practice benefits prisoners, operating as a "major hook" for inner change.[102] Research shows that promoting religious practice among prisoners is not only good for religious freedom but also for prisoners' flourishing and constructive behavior.[103]

Religion can help people rewrite their narrative, allowing them to embrace new behaviors, goals, and worldviews.[104] These changes may happen through a cognitive process known as the "crystallization of discontent," where a person recognizes failures or dissatisfactions throughout their life and collectively attributes them to their criminal identity.[105] Religious practices, like repentance and self-reflection, weaken a person's attachment to criminal identity by allowing them to separate past mistakes from the possibility of a future with an "anti-criminal" identity.[106]

Numerous studies support the transformational impacts of religion on prisoners. For example, researchers have found that religious conversion and practice positively relate to cognitive and emotional transformation, the crystallization of discontent, and perceived self-meaning in life.[107] A 2003 Texas study found that former prisoners who participated in religious

[100] *See infra* Section III.B.2.

[101] *See infra* Section III.B.3.

[102] *Id.* at *8; Peggy C. Giordano et al., *A Life-Course Perspective on Spirituality and Desistance from Crime*, 46 CRIMINOLOGY 99, 100 (2008).

[103] Brief for Amici Scholars, *supra* note 98, at *12.

[104] Brief for Amici Scholars, *supra* note 98, at *7.

[105] Roy Baumeister, *The Crystallization of Discontent in the Process of Major Life Change*, *in* CAN PERSONALITY CHANGE? (Todd Heatherton & Joel Weinberger, eds., 1994); Ray Paternoster & Shawn Bushway, *Desistance and the Feared Self: Toward an Identity Theory of Criminal Desistance*, 99 J. CRIM. LAW & CRIMINOLOGY 1103, 1123–24 (2009); Brief for Amici Scholars, *supra* note 98, at *8–9.

[106] Baumeister, *supra* note 105; Brief for Amici Scholars, *supra* note 98, at *9.

[107] *See* Sung Joon Jang et al., *Religion and Misconduct in "Angola" Prison: Conversion, Congregational Participation, Religiosity, and Self-Identities*, JUST. Q., Apr. 17, 2017, at 1, 2; *see also* MICHAEL HALLETT ET AL., THE ANGOLA PRISON SEMINARY: EFFECTS OF FAITH-BASED MINISTRY ON IDENTITY TRANSFORMATION, DESISTANCE, AND REHABILITATION 2 (2017); Sung Joon Jang et al., *The Effect of Religion on Emotional Well-Being Among Offenders in Correctional Centers of South Africa: Explanations & Gender Differences*, 38 JUST. Q. 1154, 1154 (2021); Brief for Amici Scholars, *supra* note 98, at *9–10.

programming while incarcerated were characterized by a new identity and commitment to prosocial values and purposes post-release.[108] Another 2006 study found that religious conversion led prisoners to develop a new self-narrative that (1) "[c]reates a new social identity to replace the label of prisoner or criminal"; (2) "[i]mbues the experience of imprisonment with purpose and meaning"; (3) "[e]mpowers the largely powerless prisoner by turning him into an agent of God"; (4) "[p]rovides the prisoner with a language and framework for forgiveness"; and (5) "[a]llows a sense of control over an unknown future."[109]

These benefits extend beyond the moment of conversion. For example, 349 prisoners participating in a one-week faith-based program in Virginia experienced "reduce[d] post-traumatic stress disorder" and "enhance[d] prosocial and virtuous behavior among jail inmates."[110] These positive results persisted three months after the short program concluded.[111]

2. Religiosity's Effect on Prison Safety

Internal transformations have external impacts. Religious accommodations support prisoner rehabilitation by meeting intrinsic human needs, like a sense of meaning, purpose, and moral character.[112] Research shows that religion tends to reduce the risk of interpersonal aggression by meeting these needs.[113]

Studies have shown that specific markers of rehabilitation, such as identity transformation and displays of forgiveness, empathy, gratitude, and

[108] BYRON R. JOHNSON & DAVID B. LARSON, THE INNERCHANGE FREEDOM INITIATIVE: A PRELIMINARY EVALUATION OF A FAITH-BASED PRISON PROGRAM 30 (2003), https://media4.manhattan-institute.org/pdf/crrucs_inner-change.pdf; Brief for Amici Scholars, *supra* note 98, at *6.

[109] Shadd Maruna et al., *Why Is God Often Found Behind Bars: Prison Conversions and the Crisis of Self-Narrative*, 3 RSCH IN HUM. DEV. 161, 174 (2006); Brief for Amici Scholars, *supra* note 98, at *7.

[110] BYRON R. JOHNSON ET AL., NEW HOPE FOR OFFENDER REHABILITATION: ASSESSING THE CORRECTIONAL TRAUMA HEALING PROGRAM 5–6 (2021), https://perma.cc/FC23-Q5PW; Brief for Amici Scholars, *supra* note 98, at *17.

[111] Johnson, *supra* note 110, at 6; Brief for Amici Scholars, *supra* note 98, at *17.

[112] Brief for Amici Scholars, *supra* note 98, at *10–11; Sung Joon Jang et al., *The Effect of Religion on Emotional Well-Being Among Offenders in Correctional Centers of South Africa: Explanations & Gender Differences*, 38 JUST. Q. 1154, 1154–55 (2021).

[113] Brief for Amici Scholars, *supra* note 98, at *11; Jang, *supra* note 112, at 1159.

self-control, reduce the risk of personal aggression.[114] These findings are consistent across Western countries.[115] Further, the emotional transformation inherent to identity transformation can lead to "an increased ability to regulate [prisoner] emotions in socially acceptable ways."[116] This decreases the likelihood of a person displaying harmful or disruptive behaviors out of impulse.[117]

Religious devotion can also increase peaceful behavior. In 2012, Byron Johnson and Sung Joon Jang conducted a comprehensive review of 270 religion-crime studies published between 1944 and 2010.[118] Approximately ninety percent of the studies reported "prosocial effects of religion and religious involvement on various measures of crime and delinquency."[119] The strength of these findings was even more pronounced amongst the methodologically and statistically sophisticated studies relying on nationally representative samples.[120]

Despite the solitary nature of the quintessential prison cell, prisoners are not islands unto themselves. Prisons are communities, much like the towns beyond the chain-link fences. The individual fruits of free exercise create

[114] Brief for Amici Scholars, *supra* note 98, at *11; BYRON R. JOHNSON ET AL., THE RESTORATIVE PRISON: ESSAYS ON INMATE PEER MINISTRY AND PROSOCIAL CORRECTIONS 43–44 (2022); Jang, *supra* note 107, at 1, 3–6; Hallett, *supra* note 107; Kent Kerley & Heith Copes, *"Keepin' My Mind Right": Identity Maintenance and Religious Social Support in the Prison Context*, 53 INT. J. OFFENDER THERAPY & COMP. CRIMINOLOGY 228 (2008); SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM & REBUILD THEIR LIVES 8–9 (2001).

[115] Brief for Amici Scholars, *supra* note 98, at *11; Johnson, *supra* note 110, at 5; Jang, *supra* note 112; Hallett, *supra* note 107; Kerley & Copes, *supra* note 114; Maruna, *supra* note 114.

[116] Peggy C. Giordano et al., *Emotions and Crime over the Life Course: A Neo-Meadian Perspective on Criminal Continuity and Change*, 112 AM. J. SOCIO. 1603, 1610 (2007); Brief for Amici Scholars, *supra* note 98, at *8.

[117] *See* Giordano, *supra* note 116, at 1611; Brief for Amici Scholars, *supra* note 98, at *8.

[118] Byron R. Johnson & Sung Joon Jang, *Crime and Religion: Assessing the Role of the Faith Factor*, *in* CONTEMPORARY ISSUES IN CRIMINOLOGICAL THEORY AND RESEARCH: THE ROLE OF SOCIAL INSTITUTIONS: PAPERS FROM THE AMERICAN SOCIETY OF CRIMINOLOGY 2010 CONFERENCE 117, 120 (Richard Rosenfeld et al., eds., 2012); Brief for Amici Scholars, *supra* note 98, at *12–13.

[119] Johnson & Jang, *supra* note 118; Brief for Amici Scholars, *supra* note 98, at *12–13.

[120] Johnson & Jang, *supra* note 118; Byron R. Johnson et al., *A Systematic Review of the Religiosity and Delinquency Literature: A Research Note*, 16 J. OF CONTEMP. CRIM. JUS. 32, 46 (2000); Christopher P. Salas-Wright et al., *Buffering Effects of Religiosity on Crime: Testing the Invariance Hypothesis Across Gender and Developmental Period*, 41 CRIM. JUS. & BEHAV. 673, 688 (2014); Brief for Amici Scholars, *supra* note 98, at *19.

safer communities marked by the prosocial behaviors of prison inhabitants, like self-control, empathy, and motivation toward a better future.

3. Effect of Prisoner Perception

A prisoner's perspective on the system that controls them impacts their behavior. Research shows that a prisoner's sense of perceived fairness increases respect for correctional authority and self-regulation, thus enhancing community safety.[121] Conversely, restricting religious liberty in a way that prisoners perceive as unfair can undermine the goal of prison safety, particularly for those who practice the Islamic faith.[122]

There is a correlation between positive prisoner perceptions of institutional policies and reduced instances of misconduct.[123] Prisoners are more likely to comply with institutional policies and view prison officials as legitimate sources of authority when prisoners perceive the policies as fair.[124] These perceptions are the "strongest and most consistent predictor" of "decisional acceptance, rule compliance, and grievances across organizational settings."[125] Perceptions of fairness are predicated on the belief that prison officials render decisions impartially.[126] When prisoners perceive their overall order as legitimate and fair, they may trust and uphold it even if they find specific policies disagreeable.[127]

This correlation is particularly strong for prison policies that accommodate religious practice.[128] Studies show that this relationship persists across various types of religious practice and levels of participation, reducing indicators of negative behavior like infractions, solitary confinement, and inter-prisoner conflicts.[129]

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[121] Brief for Amici Scholars, *supra* note 98, at *19.

[122] *Id.*

[123] *Id.* at *20.

[124] *Id.*

[125] *Id.*; Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXP. SOC. PSYCH. 115, 131–32 (1992).

[126] Tyler, *supra* note 125; Brief for Amici Scholars, *supra* note 98, at *20–21.

[127] Vanessa A. Baird, *Building Institutional Legitimacy: The Role of Procedural Justice*, 54 POL. RSCH. Q. 333, 334 (2001); Brief for Amici Scholars, *supra* note 98, at *20.

[128] Brief for Amici Scholars, *supra* note 98, at *21.

[129] *Id.*; Todd Clear & Melvina Sumter, *Prisoners, Prison, and Religion*, 35 J. OF OFFENDER REHAB. 125, 152 (2002); Thomas O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. OFFENDER REHAB. 11, 26, 28 (2002); Kent

Research also suggests that perceptions of fairness are significant for Muslims. Studies conducted in the United Kingdom and the United States found that differential treatment and restrictions on practicing the Islamic faith may increase the risk of ideological radicalization.[130] These outcomes are inapposite to the tenets of Islam.[131] Islamic practice tends to foster peace among Muslim prisoners.[132] Unfortunately, some prisons that restricted these practices for prison safety instead stoked radicalization that generated violent behavior.[133] This is not to say that Muslim prisoners are inherently more likely to become radicalized than prisoners of other faiths. Instead, this research suggests that in *Smith v. Ward*, the prison's policy of limiting beard length without accommodation for Muslim prisoners like Smith may undermine prison safety rather than further it.[134]

4. Effect on Post-Release Outcomes

A prisoner's preparation for reentry begins on the first day of their sentence. Over 1.7 million Americans are incarcerated, the vast majority in state prisons.[135] Ninety-five percent of the people incarcerated in state prisons will reenter society.[136] Indeed, today's prisoners will be tomorrow's neighbors. But nationwide recidivism statistics are not good; two out of three people released from state prisons will be arrested again within three years.[137]

Kerley et al., *Religiosity, Religious Participation, and Negative Prison Behaviors*, 44 J. FOR SCI. STUDY RELIGION 443, 453 (2005).

[130] Ryan Williams & Alison Liebling, *Do Prisons Cause Radicalization? Order, Leadership, Political Charge and Violence in Two Maximum Security Prisons*, 63 BRIT. J. CRIMINOLOGY 97, 98 (2022), https://doi.org/10.1093/bjc/azab122; FRANK CILLUFFO ET AL., OUT OF THE SHADOWS: GETTING AHEAD OF PRISONER RADICALIZATION, at i (2006), https://med.virginia.edu/ciag/wp-content/uploads/sites/313/2015/12/out_of_the_shadows.pdf; Brief for Amici Scholars, *supra* note 98, at *22–23.

[131] SpearIt, *Muslim Radicalization in Prison: Responding with Sound Penal Policy or the Sound of Alarm?*, 49 GONZAGA L. REV. 37, 37 (2014); Brief for Amici Scholars, *supra* note 98, at *23.

[132] SpearIt, *supra* note 131; Brief for Amici Scholars, *supra* note 98, at *23.

[133] SpearIt, *supra* note 131; Brief for Amici Scholars, *supra* note 98, at *23.

[134] Brief for Amici Scholars, *supra* note 98, at *19–20.

[135] *See* ELIZABETH ANN CARSON, PRISONERS IN 2020 – STATISTICAL TABLES (2021), https://bjs.ojp.gov/content/pub/pdf/p20st.pdf; *see* ZHEN ZENG & TODD MINTON, JAIL INMATES IN 2020 – STATISTICAL TABLES (2021), https://bjs.ojp.gov/content/pub/pdf/ji20st.pdf.

[136] Timothy Hughes & Doris James Wilson, *Reentry Trends in the U.S.*, BUREAU OF JUST. STAT. (Sept. 2019), https://bjs.ojp.gov/topics/recidivism-and-reentry.

[137] MARIEL ALPER ET AL., 2018 UPDATE ON PRISON RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014) at 1 (2018), https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf.

A person's likelihood of reoffending depends significantly on how they spent their days in prison.[138] When prison officials create environments of rehabilitation rather than regression, the positive effects extend far beyond the prison's walls.

Research shows that in-prison programming contributes to post-release success.[139] This is particularly true for religious programming, which provides an opportunity for religious growth and practice. There is a demonstrated connection between increased religiosity and decreased deviant behaviors, contributing to lower recidivism rates.[140] For example, a five-year study of Louisiana state prisoners found that only thirty percent of prisoners who received faith-based education before release returned to prison.[141] This rate was significantly lower than the statewide and national recidivism rates (46.6% and 65%, respectively).[142] This finding is not unique to Louisiana; studies in other states have presented similar results.[143]

In sum, prison officials may create safer communities inside and outside prisons by permitting religious exercise to flourish. Granting prisoners religious accommodations may put them on a path that leads to productive citizenship post-release.

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[138] GRANT DUWE, THE USE AND IMPACT OF CORRECTIONAL PROGRAMMING FOR INMATES ON PRE- AND POST-RELEASE OUTCOMES (2017), https://www.ncjrs.gov/pdffiles1/nij/250476.pdf.

[139] *Id.*; CHELSEA FRISKE, THE ROAD TO REDEMPTION: INCENTIVIZING REHABILITATION THROUGH PAROLE, EARNED TIME, AND GOOD TIME CREDITS (2021), https://www.prisonfellowship.org/wp-content/uploads/2021/03/RoadtoRedemptionReport.pdf.

[140] Johnson & Jang, *supra* note 118; Brief for Amici Scholars, *supra* note 98, at *12–13.

[141] Roy L. Bergeron, Jr., *Faith on the Farm: An Analysis of Angola Prison's Moral Rehabilitation Program Under the Establishment Clause,* 71 LA. L. REV. 1221, 1222 n.6 (2011); Brief for Amici Scholars, *supra* note 98, at *15.

[142] Bergeron, *supra* note 141; Brief for Amici Scholars, *supra* note 98, at *15.

[143] Brief for Amici Scholars, *supra* note 98, at *15; Byron R. Johnson, *Religious Programs, Institutional Adjustment and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 JUST. Q. 145, 145 (1997); Byron R. Johnson, *Religious Program and Recidivism Among Former Inmates in Prison Fellowship Programs: A Long-Term Follow-Up Study*, 21 JUST. Q. 329, 329 (2004); BYRON R. JOHNSON, ET AL., RECIDIVISM REDUCTION AND RETURN ON INVESTMENT: AN EMPIRICAL ASSESSMENT OF THE PRISON ENTREPRENEURSHIP PROGRAM 29 (2013); Grant Duwe et al., *Bible College Participation and Prison Misconduct: A Preliminary Analysis*, 54 J. OFFENDER REHAB. 371, 371 (2015); Sung Joon Jang et al., *Existential and Virtuous Effects of Religiosity on Mental Health and Aggressiveness Among Offenders*, 9 RELIGIONS 182, 13 (2018).

C. Applying this Literature to RLUIPA's Analysis

Without clarification from the Court on how to apply RLUIPA, where should lower courts turn? Criminological and sociological research may be a valuable tool for courts undertaking RLUIPA's challenging analysis.

At the outset, one may ask if non-legal research is permissible in RLUIPA's analysis. Indeed, this suggestion may seem textually improper. Traditional strict scrutiny is not a balancing test where courts add and subtract factors or modify the relative weight given to each.[144] Presumably, Congress already balanced the relevant factors and concluded the government may only infringe upon a constitutional right where it has a compelling governmental interest.[145] But as the Court's jurisprudence demonstrates, RLUIPA is not real strict scrutiny.[146] It may be like strict scrutiny, but it operates more like a balancing test in practice.[147] If that is the case, courts should seek new tools to aid them in RLUIPA's rigorous and murky analysis.

Bearing this in mind, the literature demonstrating the positive impacts of religious accommodations may be a helpful tool for courts applying RLUIPA. These findings have largely been absent from the statute's jurisprudence.[148] However, RLUIPA's analysis may be incomplete without devoting proper weight to the beneficial and mitigating impacts of religious accommodations.[149]

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[144] *See* Heller v. D.C., 670 F.3d 1244, 1265 (D.C. Cir. 2011) (balancing is part of neither strict nor intermediate scrutiny); D.C. v. Heller, 554 U.S. 570, 634 (2008) ("The very enumeration of the [Constitutional] right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.") (emphasis in original); Fusaro v. Howard, 19 F.4th 357, 367–68 (4th Cir. 2021) (distinguishing strict scrutiny from other judicially created balancing tests). Further, Justice Kavanaugh concluded that RLUIPA was like, but not actually, strict scrutiny because of the balancing nature of the inquiry. *See* Ramirez v. Collier, 595 U.S. 411, 441–42 (2022) (Kavanaugh, J., concurring).

[145] *See Heller*, 554 U.S. at 634–35 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad . . . [the right] is the very *product* of an interest balancing by the people.") (emphasis in original).

[146] Shapiro, *supra* note 8, at 126; *see generally* Barrick Bollman, *Deference and Prisoner Accommodations Post-Holt: Moving RLUIPA Towards "Strict in Theory, Strict in Fact,"* 112 N.W. U. L. REV. 839 (2018).

[147] *Ramirez*, 595 U.S. at 441–42 (Kavanaugh, J., concurring).

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

[149] *See supra* Section III.B.

RLUIPA's text breaks the analysis into two steps: first, whether the governmental interest is sufficiently compelling, and second, whether there are less restrictive means to achieve that compelling interest.[150] If the government clears both hurdles, it may deny the accommodation and burden the religious exercise of the institutionalized person.[151]

Courts should consider the positive impacts of granting a particular religious accommodation in the first step of RLUIPA's analysis. Here, the court assesses the government's stated interest in denying the religious accommodation and determines whether it is sufficiently compelling.[152] Prison officials frequently cite safety, order, and security as justifications for denying religious exceptions.[153] As the sociological and criminological literature demonstrates, granting the religious accommodation may be the least restrictive means to achieve such interests.[154] Suppose a prison official denies an accommodation because they believe it will jeopardize safety, but studies overwhelmingly show that the religious accommodation is likely to improve safety.[155] In that case, the prison's stated rationale for denying the accommodation would not be very compelling in the first place.

Further, it is unlikely that Congress intended RLUIPA's first step to be a categorical inquiry. RLUIPA's plain text does not suggest Congress intended the "compelling interest" inquiry to be a categorical test, by which a court merely asks whether "safety" is categorically a compelling interest in a prison setting rather than considering the specific religious practice at issue. Many courts have treated step one in this manner, but that significantly lowers the bar prison officials must clear to justify a limitation on religious exercise.[156] If the "compelling interest" inquiry is categorical, prison officials need only chant the magic word "safety," and judicial deference transforms their interest into a sufficiently compelling one. This would be inapposite to *Holt*'s direction that prison officials' "mere say so" will not be sufficient evidence to satisfy strict scrutiny.[157] Instead, the "compelling interest" and "least restrictive means" analysis traditionally signals a rigorous judicial inquiry

[150] 42 U.S.C. § 2000cc-1(a).

[151] *Id.*

[152] *See id.*

[153] *See, e.g.*, Watson v. Christo, 837 F. App'x 877, 879 (3d Cir. 2020); Faver v. Clarke, 24 F.4th 954, 957–58 (4th Cir. 2022); Knight v. Thompson, 797 F.3d 934, 947 (11th Cir. 2015).

[154] *See supra* Section III.B.3.

[155] *See supra* Section III.B.3.

[156] *E.g.*, the Third, Fourth, and Eleventh Circuits. *See supra* Section III.B.

[157] Holt v. Hobbs, 574 U.S. 352, 369 (2015).

that the government must satisfy at every step. Considering criminological and sociological research in RLUIPA's first step follows that congressional signpost.

Further, considering this literature gives weight to the drafters' intent for RLUIPA and the Constitution. The First Amendment freedom to exercise religion undergirds RLUIPA.[158] And RLUIPA embodies Congress's view that statutory protections of prisoners' religious liberty are necessary because of the unique constraints that prisons impose.[159] When courts have more tools to enforce the high bar set by RLUIPA and the Constitution fairly and zealously, the framers' intent for both laws is furthered.[160]

Courts would not break from tradition by utilizing non-legal research in judicial decision-making. For example, in *Brown v. Board of Education*, the Court relied on psychological research demonstrating that segregation created feelings of inferiority among people of color to hold state-mandated segregation in public schools unconstitutional.[161] Since then, some courts have criticized judicial decisions that lack an empirical basis.[162] Empirical evidence has also persuaded courts for standing purposes. For example, in *Department of Commerce v. New York*, the Court found standing based on empirical studies demonstrating the plaintiff's requested relief would redress their injury.[163] Therefore, a court reviewing complaints under RLUIPA would not offend judicial tradition by considering non-legal research.

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[158] 42 U.S.C. § 2000cc-1(a); Cutter v. Wilkinson, 544 U.S. 709, 714, 716–17 (2005); U.S. CONST. amend. I; Joint Statement, *supra* note 3, at 16698.

[159] Joint Statement, *supra* note 3, at 16698.

[160] *See Cutter*, 544 U.S. at 716–17; 42 U.S.C. § 2000cc-1(a); U.S. CONST. amend. I; Joint Statement, *supra* note 3, at 16698.

[161] 347 U.S. 483, 494 n.11 (1954). In the years immediately following *Brown*, federal and state courts cited the Court's reliance on the negative psychological impact of state-mandated segregation to strike down numerous forms of segregation that previously had been permitted under *Plessy*'s "separate but equal" doctrine. Kevin H. Smith, *The Jurisprudential Impact of Brown v. Board of Education*, 81 N. D. L. REV. 115, 116 (2005). Note, this approach is not without criticism, which Chief Justice Earl Warren curtly dismissed ("It's a *footnote*."). Louis Menand, *Brown v. Board of Education and the Limits of Law*, THE NEW YORKER (Feb. 2001), https://www.newyorker.com/magazine/2001/02/12/civil-actions.

[162] *See, e.g.*, State v. Flemino, No. C5-02-617, 2003 WL 21061236, at *12 (Minn. App. 2003) (Randall, J., concurring) (criticizing a decision for failing to cite sociological studies or reliable empirical data to support its finding that juries in child abuse cases are "hamstrung by the 'enormity of the charge'").

[163] 139 S. Ct. 2551, 2565 (2019).

CONCLUSION

Religious liberty should be at its zenith inside prisons. Prisons should also be places of rehabilitation, safety, and order. These are not mutually exclusive goals but symbiotic. When prisoners enjoy the freedom to exercise their faith peacefully, the benefits do not begin and end with the individual. Instead, prison systems and broader communities are made safer and more productive.

RLUIPA is Congress's tool for making these goals a reality. Courts have the challenging yet crucial task of rigorously implementing the statute's textual standards under binding precedent. In doing so, courts should consider research demonstrating religion's positive impacts on prisoner well-being and prison safety. When courts expand their horizons to protect religious liberty, everyone benefits.