KEEPING THE FAITH: HOW RECENT RLUIPA DECISIONS ARE RESHAPING RELIGIOUS FREEDOM FOR INCARCERATED INDIVIDUALS

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INTRODUCTION

The freedom to practice one's faith while incarcerated is on the upswing. One could even argue that the Supreme Court's current interpretation of the legal standard set forth in the Religious Land Use and Institutionalized Persons Act (RLUIPA) is more protective of incarcerated individuals' religious freedom than free exercise law has been at any other time in our Nation's history. Nevertheless, experience shows that litigants challenging restrictions on religious exercise in prison continue to struggle to obtain even straightforward religious accommodations, often losing in administrative hearings and in the lower courts. Why? This Essay argues that a combination of factors—including ignorance of the law, skepticism of certain faith practices, and sometimes religious hostility—have prevented the Supreme Court's robust protection of religious exercise behind bars from trickling down to lower courts and prison officials. This Essay highlights two areas in which lower courts and prison officials have repeatedly ignored or misunderstood Supreme Court precedent. It then marshals support from RLUIPA's text and from Supreme Court precedent (including *Ramirez v. Collier* and *Loper Bright v. Raimondo*) to explain how these lower courts have erred and why precedent requires that they better protect religious freedom for incarcerated individuals. Finally, this Essay points out that the failure to heed the Supreme Court's guidance in this area most significantly impacts religious minorities who—for structural reasons—already bear much of the burden from the denial of religious accommodations.

This Essay will thus proceed in three parts: Part I will give a brief overview of relevant Supreme Court precedent, Part II will address two specific areas in which lower courts continue to ignore or misunderstand Supreme Court precedent, and Part III will explain why these errors are particularly harmful to religious minorities.

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I. IN A HARD BREAK FROM *CUTTER V. WILKINSON*, THE SUPREME COURT HAS TWICE CONFIRMED THAT RLUIPA'S STRICT SCRUTINY STANDARD HAS TEETH.

Thanks largely to recent Supreme Court precedent, incarcerated individuals seeking to practice their faith have stronger legal protections today than at any point in our Nation's history. As explained below, however, these strengthened legal protections do not always translate into greater practical protection due to, among other things, prison officials' ignorance of the state of the law, resistance to change, and both skepticism and outright hostility toward some incarcerated individuals' religious exercise.

When the Supreme Court upheld the constitutionality of RLUIPA as applied to religious prisoners' free exercise rights in *Cutter v. Wilkinson*, the Court suggested that lower courts should apply RLUIPA's strict scrutiny standard with "due deference to prison administrators' experience and expertise."[1] While extratextual dicta, this language spawned considerable confusion in the lower courts and created an acknowledged circuit split over how this "deference" interacts with strict scrutiny.[2] Following *Cutter*, scholars noted that "strict scrutiny and deference to the government are in a sense opposites," and that the Supreme Court's guidance therefore threatened "incoherence."[3] Lower courts too were unsure how to reconcile these contradictory commands, and the circuits split over "whether they should offer deference to prison officials or if they should take a 'harder look' at the explanations offered."[4] As the First Circuit explained in *Spratt*, "[t]he level of deference to be accorded to prison administrators under RLUIPA remains an open question."[5] This uncertainty lasted (officially) until 2015 when the Supreme Court decided *Holt v. Hobbs*.[6]

In *Holt*, the Supreme Court held that Arkansas' Department of Corrections must allow a Muslim inmate to grow a half-inch beard in accordance with his faith. The Supreme Court noted that the lower courts had "thought that they were bound to defer to the [government's] assertion that allowing petitioner to grow such a beard would undermine its interest in suppressing contraband."[7] This, *Holt* confirmed, was wrong: "RLUIPA, like RFRA, 'makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.'"[8] Accordingly, prison officials are required "not merely to explain why [they] denied the exemption but to *prove* that denying the exemption is the least restrictive means of furthering a compelling governmental interest."[9] *Holt* explained that prison officials deserve "respect" as "experts in running prisons," but made clear "that respect does not justify the abdication of the

[1] 544 U.S. 709, 710 (2005).

[2] *Compare, e.g.*, Fegans v. Norris, 537 F.3d 897, 907 (8th Cir. 2008) (applying RLUIPA's strict scrutiny standard with "due deference to prison administrators' experience and expertise"), *with* Jova v. Smith, 582 F.3d 410, 416 (2d Cir. 2009) (holding that prisons must apply strict scrutiny to RLUIPA claims).

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

[4] Barrick Bollman, *Deference and Prisoner Accommodations Post-Holt: Moving RLUIPA Toward "Strict in Theory, Strict in Fact,"* 112 NW. U. L. REV. 839, 853 (2018).

[5] Spratt v. R.I. Dept. of Corr., 482 F.3d 33, 42 n.14 (1st Cir. 2007).

[6] 574 U.S. 352 (2015).

[7] *Id.* at 364.

[8] *Id*.

[9] *Id*. (emphasis added).

responsibility, conferred by Congress, to apply RLUIPA's rigorous standard."[10] When articulating this legal standard, the *Holt* majority never once suggested that "deference" was appropriate and conspicuously omitted any citation to *Cutter's* troublesome dicta.[11] *Holt* thus clarified RLUIPA's "expansive protection for religious liberty."[12]

If that wasn't enough, the Supreme Court offered further guidance just a few years later. In 2022, it granted review in *Ramirez v. Collier* and held that Texas likely violated RLUIPA when it barred an incarcerated individual's pastor from praying with him and laying hands on him while he was being executed.[13] *Ramirez* further clarified RLUIPA's legal standard in two respects. First, *Ramirez* held that the same burden-shifting framework used in other strict scrutiny contexts also applies to claims brought under RLUIPA. This means that once an incarcerated individual demonstrates a "substantial burden" on his or her sincere religious exercise, "the burden flips" and *the government* must "demonstrate[] that imposition of the burden on that person" is the least restrictive means of furthering a compelling governmental interest.[14] The Court also rejected the government's attempt to shift the burden back to the incarcerated individual to identify less restrictive alternatives, reiterating that this "gets things backward" because "once a plaintiff has made out his initial case under RLUIPA, it is *the government* that must show its policy is the least restrictive means of furthering a compelling governmental interest."[15]

Second, *Ramirez* clarified that this is not, as some courts continued to believe (citing *Cutter*'s dicta), a watered-down version of strict scrutiny. Rather, the same demanding test courts were already applying in other contexts applies in prisons too. For example, the Court explained that "[u]nder RLUIPA, the government cannot discharge this burden [of satisfying strict scrutiny] by pointing to 'broadly formulated interests.' It must instead 'demonstrate that the compelling interest test is satisfied through application of the challenged law to the particular claimant whose sincere exercise of religion is being substantially burdened.'"[16]

Ramirez thus further confirmed that RLUIPA means what it says: Once a substantial burden on a sincere religious exercise is shown, prison officials cannot rely on speculation or "mere say-so" to defeat the claim.[17] Instead, they must come forward with actual *evidence* to satisfy strict scrutiny. And, as both *Holt* and *Ramirez* emphasized, this burden is especially heavy when other prison systems already offer comparable accommodations.[18]

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[10] *Id*. Confirming the important difference between respect and deference, this same dichotomy was used repeatedly by the Supreme Court in *Loper Bright*, rejecting *Chevron* deference and explaining instead that respect still requires Article III courts to exercise their independent judgment. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2258 (2024) ("'Respect,' though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it.").

[11] Shapiro, *supra* note 3, at 127 ("[T]he omission of *Cutter* must have been deliberate.").

[12] Lozano v. Collier, 98 F.4th 614, 630 (5th Cir. 2024) (Oldham, J., concurring in judgment) ("Whereas *Cutter* had emphasized deference, *Holt* shifted to respect.").

[13] 595 U.S. 411, 436–37 (2022).

[14] *Ramirez*, 595 U.S. at 424–25 (2022) (quoting 42 U.S.C. § 2000cc-1(a)) (cleaned up).

[15] *Id.* at 432 (emphasis added and cleaned up).

[16] *Id.* at 427.

[17] *Holt*, 574 U.S. at 369.

[18] *Id.* at 368–69 ("That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive than denying petitioner the exemption he seeks."); *Ramirez*, 595 U.S. at 444 ("[P]erhaps even more relevant, the Federal Government and some States have recently allowed inmates' religious advisors into the execution room.").

II. MANY PRISON OFFICIALS AND LOWER COURTS HAVE FAILED TO PROTECT THE RELIGIOUS EXERCISE OF INCARCERATED INDIVIDUALS DESPITE CLEAR SUPREME COURT PRECEDENT.

Two years after *Ramirez*, there are signs that lower courts have started to get the message and are applying RLUIPA consistent with its text.[19] Nevertheless, because the Supreme Court's "approach to RLUIPA has changed significantly," some pre-*Holt* precedents "are continuing to cause confusion in the district courts."[20] There are two primary areas in which lower courts continue to misunderstand the law.

A. Improperly narrowing the breadth of religious practices protected by RLUIPA.

Some prison officials and lower courts narrowly interpret RLUIPA's protections to only cover religious practices that they deem sufficiently important, central, or necessary to one's faith.

In *Davis v. Wigen*, for example, prison officials (affirmed by the district court) prohibited an incarcerated individual from entering a religious marriage—which the prison conceded was a sincere religious exercise.[21] The prison argued that denying this sincere request for a religious accommodation was not a "substantial burden" under RLUIPA because the prison neither "compelled [plaintiffs] to stop engaging in religious conduct that their faith prescribed" nor "put them to the choice of either engaging in conduct that their faith prohibits or paying a heavy price."[22] In other words, because plaintiffs' faith did not *mandate* they marry, RLUIPA did not protect their religious exercise. But, limiting RLUIPA to only a subset of sincere religious practices (and requiring courts to assess which are covered and which are not) "places enormous pressure on courts to weigh in on religious questions which no civil court should answer. And for minority faith groups with moral frameworks that do not mandate or forbid (but merely encourage or discourage) particular religious practices, such judicial inquiries are even more entangling."[23] *Davis*, unfortunately, is not an outlier—several courts have held that RLUIPA's protections are limited to religious practices that are "central," "fundamental" or "necessary" to one's faith *despite* RLUIPA's plain text.[24] And, unfortunately, this error persists today.[25]

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[19] *See, e.g.*, *Lozano*, 98 F.4th at 624 (holding prison officials to burden of proof under strict scrutiny); *id.* at 628 (Oldham, J., concurring in judgment) (explaining the evolution in Supreme Court precedent regarding RLUIPA); Fox v. Washington, 71 F.4th 533, 537–38 (6th Cir. 2023) (rejecting reliance on speculation to sustain burden of proof under strict scrutiny); *Chernetsky*, 2024 WL 1253783, at *2 (holding government to its burden of proof under strict scrutiny).

[20] *Lozano*, 98 F.4th at 629 (Oldham, J., concurring in judgment).

[21] Davis v. The Geo Grp., Inc., No. 3:16-cv-26, 2021 WL 4952571, at *11 (W.D. Pa. Oct. 25, 2021), *aff'd in part, vacated in part, remanded sub nom.* Davis v. Wigen, 82 F.4th 204 (3d Cir. 2023) ("Like Defendants, this Court does not doubt that Davis and Beckford sincerely wanted to marry, and sincerely viewed their marriage as an expression of their faith.").

[22] *Id*.

[23] Brief of Amicus Curiae Muslim Public Affairs Council (MPAC) and Dr. Jacqueline C. Rivers at 325, Davis v. The Geo Grp., Inc., 82 F.4th 204.

[24] *E.g.*, Washington v. Klem, 497 F.3d 272, 282 (3d Cir. 2007) (recognizing split of authority over interpretation of "substantial burden" and that the proper definition under RLUIPA is an "open question"); Petition for Writ of Certiorari at 11–19, Living Water Church of God v. Meridian Charter Twp., 553 U.S. 1093 (2008) (mem.) (No. 07-cv-1158), 2008 WL 681741 (describing circuit split over definition of substantial burden in RLUIPA).

[25] *See, e.g.*, Frederic v. City of Park Hills Bd. of Adjustment, No. 2022-ca-0867-MR, 2023 WL 8286391, at *7 (Ky. Ct. App. Dec. 1, 2023) (prohibiting construction of a religious grotto is not a substantial burden under RLUIPA because denying the ability to engage in this religious exercise "is not inherently inconsistent with [the Church's] religious beliefs"); Church of Castle

In fact, Arkansas in *Holt v. Hobbs* made a similar argument, claiming that they had not substantially burdened Mr. Holt's religious exercise because—even though he was completely denied the ability to exercise his religion by growing a beard—the prison allowed him to "exercise his religion in other ways, such as by praying on a prayer rug, maintaining the diet required by his faith, and observing religious holidays."[26] The Supreme Court rejected this line of reasoning—explaining that RLUIPA's '"substantial burden' inquiry asks whether the government has substantially burdened religious exercise (here, the growing of a ½-inch beard), not whether the RLUIPA claimant is able to engage in other forms of religious exercise."[27]

The Supreme Court's approach in *Holt* is consistent with the text of RLUIPA, which defines "religious exercise" to include "any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief."[28] Were that not enough, Congress included a rule of construction in RLUIPA requiring that "[t]his Chapter 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."[29] Accordingly, RLUIPA's plain text protects all sincere religious exercise, not merely those compelled by or central to one's faith.[30] Of course, the practice must be both "sincere," and "religious."[31] But if it is, courts are not permitted to weigh the subjective significance of the religious action for the incarcerated individual to determine if it is sufficiently "important" to merit RLUIPA's protection.

Instead, when determining whether a burden is "substantial," RLUIPA requires courts to assess whether the government-imposed burden on the protected religious exercise rises to the level of substantiality, or whether the government action merely imposes a *de minimis* cost on the religious exercise.[32] This understanding fits the text of RLUIPA ("substantial" modifies the word

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Rock v. Town of Castle Rock, No. 24 cv. 1340 (DDD), ECF No. 46 (July 19, 2024) (Town argues that restrictions on religious exercise don't trigger RLUIPA protections because "the Church could find other ways to satisfy its religious compulsion to provide for the needy.").

[26] *Holt*, 574 U.S. at 360.

[27] *Id.* at 361–62.

[28] 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). The same definition holds for the Religious Freedom Restoration Act, which applies to federal prisons. *See id.* § 2000bb-2(4) (incorporating the definition in § 2000cc-5(7)(A)).

[29] *Id.* § 2000cc-3(g). *See, e.g.*, Greene v. Solano Cnty. Jail, 513 F.3d 982, 986 (9th Cir. 2008) (relying on this rule of construction to give RLUIPA a broad interpretation).

[30] Haight v. Thompson, 763 F.3d 554, 566 (6th Cir. 2014) ("RLUIPA protects a broad spectrum of sincerely held religious beliefs, including practices that non-adherents might consider unorthodox, unreasonable or not 'central to' a recognized belief system." (quoting 42 U.S.C. § 2000cc-5(7)(A))); C.L. for Urb. Believers v. City of Chicago, 342 F.3d 752, 760 (7th Cir. 2003) (similar); Jones v. Carter, 915 F.3d 1147, 1150 (7th Cir. 2019) (rejecting "the practice of offsetting against the burden imposed by the rule . . . the strength of the religious command"); Van Wyhe v. Reisch, 581 F.3d 639, 656 (8th Cir. 2009) ("RLUIPA's broad protection of 'religious exercise' extends even to religious practices that are not 'compelled by, or central to' a certain belief system.").

[31] *See* United States v. Quaintance, 608 F.3d 717, 721 (10th Cir. 2010) (Gorsuch, J.) (rejecting RFRA claim as insincere and explaining sincerity analysis); United States v. Meyers, 95 F.3d 1475, 1482 (10th Cir. 1996) (contrasting "religious beliefs," which are protected by RLUIPA and RFRA, with "a philosophy or way of life," which is not protected, and explaining how to distinguish the two); Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185 (2017) (clarifying how courts should analyze religious sincerity).

[32] This analysis is highly context dependent—some burdens may be tolerated in the prison context (given the general restrictions imposed on incarcerated individuals) that would not be tolerated outside of the prison system, like limiting the times when prisoners may visit and pray in the chapel. *Cf.* Michael A. Helfand, *Substantial Burdens as Civil Penalties*, 108 IOWA

"burden," not "religious exercise"), and assessing the magnitude of the *burden* allows courts to avoid the entangling questions that arise when courts attempt to compare various forms of religious exercise to determine their "significance" or "importance" to the incarcerated individual. Such questions, by their nature, entangle courts in religious doctrine. For example: how spiritually significant is it for an incarcerated individual to be allowed access to scented as opposed to unscented prayer oils? What about natural prayer oils versus synthetic prayer oils?[33] Secular courts are not equipped to make determinations about the significance of various forms of religious exercise to a particular individual or faith group.

B. Deferring to Prison Officials' Bare Assertions Unsupported by Evidence.

Perhaps even less well understood than RLUIPA's substantial burden requirement is how strict scrutiny applies in the prison context. As explained above, much of this confusion stems from the Supreme Court's decision in *Cutter*, which seemed to suggest that courts could *defer* to prison officials' assertions regarding whether denying a religious accommodation was the least restrictive means of advancing the government's compelling interests instead of holding the government to the (normally very demanding) strict scrutiny standard. This, however, was a misreading of *Cutter*—which both *Holt* and *Ramirez* repudiated. Nevertheless, many prison officials and some lower courts continue to rely on *Cutter* for the proposition that prison officials should receive not only "respect" for their "expertise" in "running prisons" (as permitted by *Holt*),[34] but also legal deference in the strict scrutiny analysis. This, as *Holt* explained, is an "abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard."[35]

For example, in *Chernetsky v. Nevada,* the district court was asked to review a Muslim inmate's request for natural prayer oils, which the Nevada Department of Corrections had denied. In applying RLUIPA, the court did not make any effort to scrutinize the state's claimed interests—much less conduct the required "focused inquiry" under RLUIPA.[36] Rather, the court simply accepted, without question, the government's unproven assertion that allowing natural prayer oils would pose "a unique security threat," even though similar synthetic oils (like baby oil) were already allowed in the prison.[37] Similarly, the court did not analyze whether there were less restrictive means to achieve the government's asserted interest—much less determine whether the state had submitted any *evidence* showing that it had considered and rejected the efficacy of less restrictive measures (like strictly limiting the quantity of prayer oil).[38] Thankfully, the Ninth Circuit reversed, explaining that "the State bears the burden of proof" on strict scrutiny and finding that Nevada "has failed to produce *any evidence* substantiating its claim that [the prison's]

L. REV. 2189 (2023) (defending the view that courts should interpret the substantiality of burdens by examining the extent of government-imposed civil penalties for non-compliance).

[33] *See generally* Chernetsky v. Nevada, No. 306-cv-00252, 2021 WL 4096965, at *5 (D. Nev. Sept. 7, 2021), *rev'd and remanded*, No. 21-16540, 2024 WL 1253783 (9th Cir. Mar. 25, 2024).

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

[35] *Id.*

[36] *Holt*, 574 U.S. at 363 (cleaned up).

[37] *Chernetsky*, 2021 WL 4096965, at *5.

[38] *Id.* (no least restrictive means analysis).

ban on natural anointing oils is the least restrictive means of furthering its interests in prison security."[39]

The Eleventh Circuit has also accepted—even post-*Holt*—the mere say-so of prison officials who denied a four-inch religious beard accommodation after asserting the existence of a merely "plausible" "risk" to penological interests and claiming this was sufficient "evidence" to satisfy RLUIPA's strict scrutiny standard.[40] Instead of requiring prison officials to support their arguments with evidence (as typically required by strict scrutiny),[41] the majority in *Smith v. Owens* relied solely on the unsupported testimony of prison officials that a religious accommodation for an untrimmed beard would impose significant safety and security risks on Georgia's prison system.[42] The court ruled against Smith even though the prison official's testimony, among other deficiencies, failed to offer any "meaningful *evidence* to support [the state's] factual assertion" that Georgia's prisons were any different from the 37 other state prison systems offering the same accommodation, as Judge Martin explained in dissent.[43] "In other words, [the State] offered arguments—'mere say-so'—but not evidence."[44] This "approach is inconsistent with *Holt*."[45]

Similarly, in *Nunez v. Wolfe*, a district court in Pennsylvania rejected a Muslim prisoner's request to engage in congregate prayer and other religious practices, instead accepting as sufficient "evidence" satisfying strict scrutiny the barebones declaration of a prison official which contained generic assertions about prison security divorced from the facts of the case.[46] When questioned at oral argument about the evidence underlying some of these assertions, the attorney for the prison system *conceded* that the declaration lacked evidentiary support and was based in part on mere speculation—not on facts or evidence in the record.[47] After this Essay was written, the Third Circuit corrected this grievous error.[48] Relying largely on *Holt* and *Ramirez*, the court held that "the District Court did not put the [government] to its burden" under RLUIPA, explained that "RLUIPA demands that the government 'prove with *evidence* that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate,'" and remanded the case for further proceedings consistent with its opinion.[49]

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[39] *Chernetsky*, 2024 WL 1253783, at *2 (emphasis added).

[40] Smith v. Owens, 13 F.4th 1319, 1328–31 (11th Cir. 2021); *id.* at 1339 (Martin, J., dissenting) ("I fear the majority opinion renders the Supreme Court's command in Holt meaningless, such that prisons in Alabama, Georgia, and Florida can now unjustifiably deny prisoners religious freedoms they would enjoy almost everywhere else in the country.").

[41] "That is a demanding standard." Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011). Strict scrutiny in the Free Exercise context "is not watered down; it really means what it says." Tandon v. Newsom, 593 U.S. 61, 65 (2021) (per curiam) (quotations omitted).

[42] *Smith*, 13 F.4th at 1330–32.

[43] *Id.* at 1337 (Martin, J., dissenting) (emphasis added).

[44] *Id.*

[45] *Id.* at 1338.

[46] No. 3:15-cv-1573, 2022 WL 4866648, at *4 (M.D. Pa. Sept. 30, 2022).

[47] Transcript of Oral Argument at 36, Nunez v. Wolf, 2024 WL 3948020 (2023) (No. 22-3076) ("I would concede to the court there are no misconducts, you know, there are no particular investigations or things of that nature that would delve into the specific concerns of Mr. Nunez and the security risk that he poses.").

[48] Nunez v. Wolf, No. 22-3076, 2024 WL 3948020, at *1 (3d Cir. Aug. 27, 2024).

[49] *Id.* at *4 (emphasis added and citation omitted).

Instead of relying on conclusory allegations and unsupported assertions, courts must require prison officials to meet the same strict scrutiny standard applicable outside the prison context.[50] As explained above, this means prison officials must advance government interests that are compelling as applied to the individual and to support those government interests with actual evidence, not "mere say-so." This also requires prison officials to show that any less restrictive alternatives—both those raised by the plaintiff and other "obvious" alternatives—would be insufficient for "the Government to achieve its goals."[51] If the government fails to make either of these showings, it has failed to satisfy strict scrutiny.[52]

III. RELIGIOUS MINORITIES SUFFER THE MOST FROM FAILURE TO PROPERLY INTERPRET AND APPLY RLUIPA.

Who is most likely to be impacted by this failure to follow existing law? Empirical data confirms that religious minorities bring a majority of RLUIPA claims and are thus disproportionately likely to be impacted when this law is misapplied.[53] This is true for likely a few reasons. *First*, "followers of minority faiths must explain and request accommodations for each aspect of their religious practice—from diet to dress—while followers of better-known religions are more easily understood and accommodated, if not already expressly provided for in institutional rules."[54] Unlike the Christian prisoner who may be able attend a religious worship service on Sunday in the prison chapel, the only practicing Buddhist in a small Montana prison likely will not have ready access to any of the materials necessary for him to practice his faith, necessitating a request for a religious accommodation. Similarly, a Jewish or Muslim prisoner may require a dietary accommodation because the standard prison fare—typically acceptable to prisoners of majoritarian faiths—does not meet the requirements of their faith.[55] In short, many minority faith practices will, almost by definition, differ from the prison system's normal operations and require an accommodation.

Second, minority faith practices may be more likely to impose added costs or slight administrative burdens on a prison system. As noted above, many prison systems have a built-in tolerance for majoritarian faith practices—many prison systems already employ a chaplain who

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[50] *Holt*, 574 U.S. at 365 (citing *Hobby Lobby* and United States v. Playboy Ent. Grp. for articulation of strict scrutiny standard).

[51] *Id.*

[52] *E.g.*, *Haight*, 763 F.3d at 564 ("[I]n the absence of evidence demonstrating (as opposed to lawyer arguments speculating) that the prison considered and rejected alternatives more tailored to its security interest, the prison's prohibition cannot withstand [the least-restrictive-means] aspect of strict scrutiny."); *Fox*, 71 F.4th at 537–38 ("[S]peculation cannot carry the Department's burden because RLUIPA requires a case-by-case inquiry."); *Lozano*, 98 F.4th at 623 ("[T]he TDCJ Defendants have not carried *their burden* to establish that [Lozano's housing conditions] are the least restrictive means of furthering a compelling government interest." (emphasis added)); *Chernetsky*, 2024 WL 1253783, at *2 ("Because the State bears the burden of proof on the RLUIPA claim, Chernetsky can prevail 'merely by pointing out that there is an absence of evidence to support the [State's] case.'" (quoting Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007))).

[53] DOJ, *Report on the Twentieth Anniversary of the Religious Land Use and Institutionalized Persons Act*, 25–26 (Sept. 22, 2020), https://perma.cc/2MAV-796Z ("RLUIPA claims in institutional settings are most often raised by people who practice minority faiths."); Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353, 376 (2018) (finding that "[o]ver half of all prisoner decisions involved non-Christian religious minorities [and] [t]he most frequently appearing were Muslims, Jews, and Native Americans").

[54] Brief of Amici Curiae Muslim Public Affairs Council (MPAC) and Dr. Jacqueline C. Rivers, *supra* note 24, at *12.

[55] *E.g.*, *Jones*, 915 F.3d at 1150 (halal meat); United States v. Fla. Dep't of Corr., 828 F.3d 1341 (11th Cir. 2016) (kosher).

is familiar with and can provide for these spiritual needs. But accommodating minority faith practices often involves added costs for the prison system—from providing dietary accommodations and religious literature to setting aside physical space for various religious practices.[56] Some prison officials remain reluctant to incur these costs, even though Congress has made clear that, absent a compelling government interest, prisons are required to "incur expenses in [their] own operations to avoid imposing a substantial burden on religious exercise" and must assess the cost of these accommodations on a case-by-case basis.[57]

Third, some minority faith practices may, unfortunately, be viewed with skepticism or even hostility by prison officials. "In the restrictive environment of prison, where nearly every action (and thus nearly every religious practice) must be pre-approved, prisoners with religious practices unfamiliar to administrators face an uphill battle."[58] Often, education and training can help prison officials better understand minority faith practices, but sometimes either overt or covert religious hostility is also at play. Muslim prisoners, for example, "are more likely to have security interests invoked in defense of restrictions on their religious practice."[59] And these "[n]on-particularized security-based rationales for restricting Islamic practices in prison may also reflect—or unintentionally encourage—a more pernicious view of Muslims generally as an inherent security threat."[60] Some prison officials, for example, have defended bans on kufis simply because a kufi signals that a person is Muslim and this public acknowledgment of Muslim identity can make the wearer vulnerable to "harassment or a physical altercation" or open them up to targeting.[61] Such arguments suggest there is an implicit association of "Muslims" with "security problems" in the minds of many prison officials—and confirm the importance of courts examining prison security arguments carefully to ensure they meet the high standards of RLUIPA.

CONCLUSION

The right of incarcerated individuals to practice their faith has changed dramatically in the past decade. Replacing *Cutter*'s "deference," *Holt* and *Ramirez* make clear that incarcerated

[56] *E.g.*, *Fla. Dep't of Corr.*, 828 F.3d at 1348 (citing cost containment as reason to deny kosher meals to inmates). *See, e.g.*, Timothy Kowalczyk, *Judicial Misreading of RLUIPA's "Substantial Burden" and Extinguishment of Inmates' Bodily Free Exercise*, 2022 U. CHI. LEGAL F. 329, 329 (2022) ("Central to religious inmates' dignity and self-constitution is the ability to adorn their bodies with religious articles while incarcerated."); Gonzalez v. Morris, 824 F. App'x 72, 74 (2d Cir. 2020) (restricting a Santerían prisoner from wearing more than one strand of beads); *see also* Smith v. Allen, 502 F.3d 1255, 1277 (11th Cir. 2007) (denying an Odinist possession of a quartz crystal), *overruled by* Hoever v. Marks, 993 F.3d 1353 (11th Cir. 2021), and *abrogated by* Sossamon v. Texas, 563 U.S. 277 (2011).

[57] 42 U.S.C. § 2000cc-3(c); *Holt*, 574 U.S. at 368 (rejecting the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 435–36 (2006))); Shakur v. Schriro, 514 F.3d 878, 889 (9th Cir. 2008) (similar).

[58] Brief of Amicus Curiae Muslim Public Affairs Council at 28, Johnson v. Baker, 23 F.4th 1209 (9th Cir. 2022). *Cf. Cutter*, 544 U.S. at 712–16 (noting "three years" of Congressional hearings showing "'frivolous or arbitrary' barriers" to minority religious practice in prison).

[59] Brief of Amicus Curiae Muslim Public Affairs Council at 31, Johnson v. Baker, 23 F.4th 1209 (9th Cir. 2022).

[60] *Id.*

[61] *Id.* at 34; *see* Hogan v. Idaho State Bd. of Corr., No. 1:16-cv-00422-CWD, 2018 WL 2224045, at *7 (D. Idaho May 15, 2018); *see also* Knott v. McLaughlin, No. 5:17-CV-36-MTT-CHW, 2018 WL 8546111, at *3–4 (M.D. Ga. Dec. 7, 2018), *report and recommendation adopted as modified*, No. 5:17-CV-36 (MTT), 2019 WL 1379943 (M.D. Ga. Mar. 27, 2019) (reversing a policy banning congregational Islamic prayers originally enacted to prevent targeting by other prisoners).

individuals still retain the basic human right to engage in religious exercise while behind bars. Nevertheless, both in the Supreme Court and in lower courts, more work remains to be done. Some courts continue to misapply RLUIPA by narrowing the scope of religious practices protected by the statute or by giving uncritical deference to prison officials. While these practices are plainly inconsistent with RLUIPA's text, it appears that further development in the lower courts (and potentially at the Supreme Court) will be necessary to make these statutory promises a reality for incarcerated individuals across the country.