

# Judicial Misreading of RLUIPA’s “Substantial Burden” and Extinguishment of Inmates’ Bodily Free Exercise

*Timothy Kowalczyk*<sup>†</sup>

## I. INTRODUCTION

Central to religious inmates’ dignity and self-constitution is the ability to adorn their bodies with religious articles while incarcerated. The Religious Land Use and Institutionalized Persons Act (RLUIPA)<sup>1</sup> arguably protects their ability to do so: if an inmate shows that a prison substantially burdens his religious exercise, his prison must show that doing so is the least restrictive means of furthering a compelling interest.<sup>2</sup> Yet RLUIPA does not define “substantial burden,” and most circuits have defined it to exclude the impossibility of bodily adornment. For inmates attempting bodily adornment, RLUIPA is too often a dead letter.

This Comment proposes that judges construe “substantial burden” to include the impossibility of bodily adornment, so that inmates attempting this practice are not excluded from RLUIPA’s protection. Part I explains the significance of bodily adornment. Part II summarizes the history of inmates’ religious liberty protections to explain why inmates must rely on showing a “substantial burden” under RLUIPA if they would vindicate their rights. Part III outlines the “substantial burden” definitions used in each Circuit, and observes their exclusion of bodily adornment. Part IV identifies the constitutional, statutory, and pragmatic shortcomings of these definitions. Part V argues that the Tenth Circuit’s definition, that a substantial burden “prevents the plaintiff from participating in an activity motivated by a sincerely held religious

---

<sup>†</sup> A.B., Duke University, 2019; J.D. Candidate, The University of Chicago Law School, 2023. My sincerest thanks to the previous and current staff of The University of Chicago Legal Forum, and to Professor Richard McAdams.

<sup>1</sup> 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

<sup>2</sup> 42 U.S.C. § 2000cc-1.

belief,”<sup>3</sup> would protect inmates against the impossibility of bodily adornment, consistent with RLUIPA’s plain meaning and purpose.

This Comment offers the first attempt in the literature to assess whether courts’ interpretations of “substantial burden” track the enacted plain meaning and purpose of RLUIPA in the penal context.<sup>4</sup> Further, this Comment advances a literature on the applications and shortcomings of RLUIPA. Commentators have assumed RLUIPA’s emancipatory potential in protecting inmates’ bodily autonomy, such as in empowering fasting and hunger-striking inmates to resist forced feeding<sup>5</sup> and to donate organs postmortem;<sup>6</sup> this Comment considers the reality of that potential, and the means to enhance it. Similarly, commentators have observed that judges afford less protection under RLUIPA to minority religions that do not align with those judges’ preconceptions of what “counts” as religion.<sup>7</sup> This Comment argues for a definition of “substantial burden” that would open courts to broader applications of RLUIPA more inclusive of rights claims by minority religionists.

Finally, this Comment suggests by demonstration a methodological turn toward the study of District Courts. Whatever the importance of Courts of Appeals’ statements of the law, District Courts overwhelmingly decide litigants’ rights and obligations. From this far greater volume of cases, we can first illustrate from many opinions, rather than extrapolate from a few, *how* appellate statements of the law function; and second, observe where appellate judges (as preachers of their sovereign) underserve legislative aims through inapt interpretations of the law. I do not suggest that the wont study of appellate jurisprudence is unimportant, only that District Courts are themselves vital sources of law and knowledge about law.

---

<sup>3</sup> *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014).

<sup>4</sup> See, e.g., Bret Matera, Note, *Divining a Definition: “Substantial Burden” in the Penal Context Under a Post-Holt RLUIPA*, 119 COLUM L. REV. 2239 (2019) (tracking how Circuits responded to the articulation of “substantial burden” in *Holt v. Hobbs*, 574 U.S. 352 (2015), and not those Circuits’ fidelity to RLUIPA’s text and history).

<sup>5</sup> Megan Wade, Note, *“For I Was Hungry and You Gave Me Something to Eat”: Utilizing RLUIPA to Prevent Force-Feeding Religiously Based Hunger-Striking Inmates*, 48 CONN. L. REV. 1231, 1261–68 (2016); Tracey M. Ohm, Note, *What They Can Do About It: Prison Administrators’ Authority to Force-Feed Hunger-Striking Inmates*, 23 WASH. U. J.L. & POL’Y 151, 165–67 (2007).

<sup>6</sup> Amanda Seals Bersinger & Lisa Milot, *Posthumous Organ Donation as Prisoner Agency and Rehabilitation*, 65 DEPAUL L. REV. 1193, 1227–28 (2016).

<sup>7</sup> See, e.g., Michael D. McNally, *Native American Religious Freedom as a Collective Right*, 2019 B.Y.U. L. REV. 205, 218–19 (2019) (land use); Clinton Oxford, Note, *Failing Native American Prisoners: RLUIPA & The Dilution of Strict Scrutiny*, 9 GEO. J.L. & MOD. RACE PERSP. 203, 212–19 (2017) (inmates).

## II. THE MEANING OF BODILY ADORNMENT

I define “bodily adornment” as the wearing or carrying of religious articles that enable the body to do religion properly—that make the body sufficient for religious exercise. Wearing a hijab for prayer,<sup>8</sup> carrying a Bible<sup>9</sup> or prayer beads,<sup>10</sup> or even wearing standard-issue garments in a certain way<sup>11</sup> are all forms of “bodily adornment.” Bodily adornment enables the believer to construct a religious identity, both actively and passively. While these items “are used during religious ceremonies and are part of the liturgy,”<sup>12</sup> they also mark the individual as a believer outside of formal ceremonies, and as apart from society generally.<sup>13</sup> This marking is active, because the item “is a collective label [identifying members of a religious community]”<sup>14</sup>—and passive, because the item “has a religious character . . . [such that] things are classified as sacred and profane by reference to [it].”<sup>15</sup> And whatever one’s inclination to think of religious inmates’ rights-claims as another claim unworthy of special consideration merely because it is religious,<sup>16</sup> or even to think of religion as wholly private,<sup>17</sup> religious inmates think of bodily adornment as inseparable from their dignity and fully-constituted and -lived religious selfhood.<sup>18</sup>

---

<sup>8</sup> *Alphonsis v. Century Reg'l Det. Facility*, No. CV 17-03650-ODW (DFM), 2021 WL 4691824, at \*8 (C.D. Cal. Sept. 8, 2021) (quoting inmate’s statement in complaint that “in Islam, ‘a woman must cover her head in order to perform the act of worship and perform her daily prayers’”), *report and recommendation adopted*, 2021 WL 4651388 (C.D. Cal. Oct. 7, 2021), *appeal filed sub nom.* *Alphonsis v. Garnica*, No. 21-56141 (9th Cir. Oct. 18, 2021).

<sup>9</sup> *Orwig v. Williams*, No. 16-cv-00781-PAB-SKC, 2019 WL 4751775, at \*5 (D. Colo. Sept. 30, 2019) (stating plaintiff’s belief that he had to “keep his Bible on his person or in his immediate vicinity at all times”); *Orwig v. Chapdelane*, No. 16-cv-00781-PAB-CBS, 2017 WL 1208802, at \*2–4 (D. Colo. Mar. 17, 2017) (same).

<sup>10</sup> *Rountree v. Aldridge*, No. 7:18CV00567, 2020 WL 1695495, at \*4 (W.D. Va. Apr. 7, 2020) (stating Buddhist inmate’s belief that “multicolored mala beads are needed to harmonize the individual’s chakras and promote healing”).

<sup>11</sup> *Muhammad v. Crosby*, No. 4:05cv193-WS, 2008 WL 2229746, at \*15–16 (N.D. Fla. May 29, 2008) (Muslim inmate not allowed to wear his shirt untucked or have a special compass to face Mecca while praying), *aff’d sub nom.* *Muhammad v. Sapp*, 388 F. App’x 892 (11th Cir. 2010).

<sup>12</sup> EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* 118 (Karen E. Fields trans., The Free Press–Simon & Schuster 1995) (1912).

<sup>13</sup> DENIS LACORNE, *THE LIMITS OF TOLERANCE* 142–44, 158–82 (C. Jon Delgou & Robin Emlein trans., Columbia Univ. Press 2019) (2016) (discussing the social significance of religious attire to Sikhs, Jews, and Muslims, as preservative of their religious identity in a secular society).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See Matthew McNeil, Note, *The First Amendment Out on Highway 61: Bob Dylan, RLUIPA, and the Problem with Emerging Postmodern Religion Clauses Jurisprudence*, 65 OH. ST. L.J. 1021, 1034–36, 1042–43 (2004).

<sup>17</sup> See Michael W. McConnell, “*God Is Dead and We Have Killed Him!*”: *Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. REV. 163, 165–66, 172–81 (1993).

<sup>18</sup> See Part III *infra* (discussing inmates’ understandings of bodily adornment’s role).

## A. Bodily Adornment in Law

Yet to many commentators, the body is a merely biomedical thing—the body is an organism, desacralized and secularized; rights claims about a body so conceptualized are necessarily claims about medical interventions and physical accommodations.<sup>19</sup>

But our common law takes a much more expansive view. The notion that adorning the body completes the self by enabling a meaningful selfhood, a “being-oneself,” is rudimentary to our common law—however unremarkable sacred objects and thinking of sacred objects as necessary for a self are in an increasingly secular society.<sup>20</sup> The *Restatement (Second) of Torts* states that “[t]here are some things such as clothing . . . indeed, anything directly grasped by the hand which are so intimately connected with one’s body as to be universally regarded as part of the person.”<sup>21</sup> This connection of what is worn or held to the body, and so to the person, “is a thing which is felt rather than . . . defined, since it depends upon an emotional reaction [to harms to the person suffered through the worn or held object].”<sup>22</sup> This personality can receive insult because it extends the body as something that has and projects dignity.<sup>23</sup> I am *x*, because I am not *y*—choices about my body’s periphery make my body meaningfully part of a *self* by making definite an identity.

---

<sup>19</sup> See, e.g., Symposium on Anita Bernstein’s *The Common Law Inside the Female Body*, 114 NW. L. REV. ONLINE 131 (2019); Symposium, *Governing Bodies: Bodily Autonomy and the Law*, DET. MERCY L. REV. (2022) (forthcoming); Symposium, *The Disability Frame: Opportunities, Costs, and Constraints in the Broad Struggle for Inclusion*, PENN. L. REV. (2022) (forthcoming); Symposium, *Are You There, Law? It’s Me, Menstruation*, 41 COLUM. J. GENDER & L. 1 (2021).

<sup>20</sup> See Jeffrey M. Jones, *U.S. Church Membership Falls Below Majority for First Time*, GALLUP (Mar. 29, 2021) <https://news.gallup.com/poll/341963/church-membership-falls-below-majority-first-time.aspx> [perma.cc/Q42T-UPLK] (fifty-three percent of American adults do not belong to a mosque, synagogue, or church; sixty-four, for those born between 1981 and 1996); see also Derek Thompson, *Three Decades Ago, America Lost Its Religion. Why?*, THE ATLANTIC (Sept. 26, 2019) <https://www.theatlantic.com/ideas/archive/2019/09/atheism-fastest-growing-religion-us/598843/> [perma.cc/Q2ZC-2659].

<sup>21</sup> RESTATEMENT (SECOND) OF TORTS § 18, cmt. c (AM. L. INST. 1965).

<sup>22</sup> *Id.*; see generally Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress*, 87 N.Y.U. L. REV. 859, 868–96 (2012) (discussing present and historical uses of dress to express one’s identity, and regulation of that dress to police self-expression).

<sup>23</sup> Arkles, *supra* note 22, at 868 (“Self-determination of dress involves the ability to make intimate decisions about one’s body and the way one is perceived, to express identities that are central to a sense of self and of group belonging . . . .”); see also Ali Ammoura, Note, *Banning the Hijab in Prisons: Violations of Incarcerated Muslim Women’s Right to Free Exercise of Religion*, 88 CHL-KENT L. REV. 657, 659–61 (2013) (explaining the hijab’s centrality to some Muslim women’s sense of identity and right relation to family, community, and the divine); Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. MIAMI L. REV. 923, 939–40 (2012) (stating the importance of beards to Jews, Muslims, Sikhs, and Rastafarians).

Not only does our common law include bodily adornment in its conception of the person—bodily adornment’s role in facilitating lived religiosity was formative to our doctrines of free exercise and disestablishment.<sup>24</sup> Quakers considered signs of reverence to secular authority a kind of idolatry that violated their faith—the requirement to remove one’s hat in court was such an idolatrous act.<sup>25</sup> So, after a notorious incident in which the Quaker William Penn was punished for replacing his hat after a court officer removed it, “North Carolina and Maryland exempted Quakers from the requirement of removing their hats in court.”<sup>26</sup>

This episode is more than a *locus classicus* for the scope of religious liberty—it helped to write the Constitution.<sup>27</sup> It was accepted that what would become the Free Exercise and Establishment Clauses were to be included;<sup>28</sup> the House of Representatives debated only their wording.<sup>29</sup> When the Assembly Clause was thought redundant, one Member countered that

[The opponent of the Clause’s addition] supposes it no more essential than whether a man has a right to wear his hat or not; but let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority . . . Therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights.<sup>30</sup>

The point was clear: the privileges of free exercise and concomitant freedom from establishment *were* inserted in the declaration of rights, but the right to assemble remained to be protected. Put differently, bodily adornment was already part of the religious liberty protected in the Constitution.

---

<sup>24</sup> See U.S. CONST. amend. I.

<sup>25</sup> Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1471–72 (1990).

<sup>26</sup> *Id.* (citations omitted).

<sup>27</sup> See Brief of Professor John D. Inazu as Amicus Curiae in Support of Petitioner at 6–8, *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (Nos. 19-267, 19-348), 2020 WL 703886, at \*6–8 (explaining the episode).

<sup>28</sup> See Vincent Philip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 J. CONST. L. 585, 623–31 (2006) (detailing the debates on the text of the Establishment Clause); THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 199–215* (detailing the debates on the text of the Establishment and Free Exercise Clauses) (1987).

<sup>29</sup> See 1 ANNALS OF CONG. 757–59 (1790).

<sup>30</sup> *Id.* at 760.

## B. The (Near-)Impossibility of Bodily Adornment for Religious Inmates

Despite the importance of bodily adornment to religious inmates in forming and maintaining their identities as religious people,<sup>31</sup> prisons only inconsistently allow inmates to adorn their bodies. Suppose an inmate seeks to practice bodily adornment using an item that a prison does not allow.<sup>32</sup> That inmate has two modes of recourse. First, the inmate may plead a violation of his First Amendment right of free exercise of religion,<sup>33</sup> and the prison policy that prevents his bodily adornment will be reviewed for rationality under a test set out in *Turner v. Safley*.<sup>34</sup> Second, an inmate may raise a statutory claim under the Religious Freedom Restoration Act<sup>35</sup> (RFRA)<sup>36</sup> (for federal inmates) or the Religious Land Use and Institutionalized Persons Act<sup>37</sup> (RLUIPA)<sup>38</sup> (for federal and state inmates, and the focus here). Under RLUIPA, if the inmate can show that denying his bodily adornment imposes a “substantial burden” on his religious exercise, the prison must demonstrate that denying the inmate’s bodily adornment is the least-restrictive means of achieving a compelling interest.<sup>39</sup>

Why not file under both? Because an inmate too rarely can win under either. Suppose an inmate brings a claim under *Turner*’s rationality test. If a prison can articulate *a* reason for excluding his religious articles, the inmate will almost certainly lose.<sup>40</sup> Now suppose the inmate brings a claim under RLUIPA. He must show a “substantial burden” upon his religious exercise—but RLUIPA does not define “substantial burden,” and most courts have defined “substantial burden” such that for a prison to make bodily adornment impossible is not a substantial burden.<sup>41</sup>

<sup>31</sup> The preceding Section explains why bodily adornment is important; for inmates’ expressions of this importance, see Part III *infra* (collecting inmates’ explanations of the importance of bodily adornment).

<sup>32</sup> It is possible, but has not been argued in the cases studied here, that a prison’s approval of a list of permissible religious articles creates a typology of “proper” practice of that religion in violation of the Establishment Clause, see U.S. CONST. amend. I.

<sup>33</sup> See U.S. CONST. amend. I.

<sup>34</sup> 482 U.S. 78, 89–91 (1987) (assessing first, whether the prohibition rationally relates to a legitimate governmental interest; second, whether the inmate has other means of exercising the right; third, the effects of accommodation on inmates and the institution; and fourth, the absence or presence of other means to accommodate the governmental objective).

<sup>35</sup> 42 U.S.C. §§ 2000bb to 2000bb–4 (1993).

<sup>36</sup> Pronounced, “riff-ruh.”

<sup>37</sup> 42 U.S.C. §§ 2000cc to 2000cc–5 (2000).

<sup>38</sup> Pronounced, “rih-loop-uh.”

<sup>39</sup> 42 U.S.C. § 2000cc–1.

<sup>40</sup> See note 183 *infra* (collecting cases).

<sup>41</sup> See Part III *infra* (collecting cases).

## 1. Inmates have no first amendment recourse

First Amendment protections for inmates' bodily adornment are practically illusory. Before the late 1980s, "only [institutional] regulations based upon penological concerns of the 'highest order' could outweigh an inmate's [free exercise] claims."<sup>42</sup> Then, in 1987, the Court heard *Turner v. Safley*. Two Missouri inmates exchanged mail and attempted to marry, defying prison regulations against both activities as between inmates.<sup>43</sup> The Court announced that while "[p]rison walls do not . . . [separate] prison inmates from the protections of the Constitution,"<sup>44</sup> "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."<sup>45</sup> The Court thought that a searching review of prison officials' decisions exceeded the judiciary's competence: "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources . . ."<sup>46</sup> For similar reasons, courts would hazard separation-of-powers problems by second-guessing prison administrators' decisions, "which are peculiarly within the province of the legislative and executive branches of government."<sup>47</sup>

Hesitant to overstep its capacities or its remit, the Court developed a rational-basis review of prison regulations of constitutional rights by culling four factors from its previous cases: whether the prohibition rationally relates to a legitimate governmental (here, *prison*) interest;<sup>48</sup> whether the inmate retained other means of exercising the right;<sup>49</sup> the impact of an accommodation on other inmates and institutional order and security;<sup>50</sup> and the absence or presence of ready alternative means to accomplish the governmental objective.<sup>51</sup> The Court applied the four *Turner* factors to inmates' free exercise claims in *O'Lone v. Estate of*

---

<sup>42</sup> S. REP. NO. 103-111, at 9-11 (1993) (RFRA Judiciary Comm. Rep.) (citing *Weaver v. Jago*, 675 F.2d 116, 119 (6th Cir. 1982)); see also Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 507-08 (2005).

<sup>43</sup> See *Turner*, 482 U.S. at 83; *Safley v. Turner*, 586 F. Supp. 589, 593-94 (W.D. Mo. 1984) (describing facts), *aff'd*, 777 F.2d 1307 (8th Cir. 1985), *aff'd in part, rev'd in part*, 482 U.S. 78 (1987).

<sup>44</sup> *Turner*, 482 U.S. at 84.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 84-85.

<sup>47</sup> *Id.* at 85.

<sup>48</sup> *Id.* at 89-90.

<sup>49</sup> *Id.* at 90.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 90-91.

*Shabazz*,<sup>52</sup> upholding a prison scheduling policy that prevented Muslim inmates from attending a compulsory Jumu'ah prayer service.<sup>53</sup>

Practically, *Turner* and *O'Lone* have all but stripped inmates attempting bodily adornment of the First Amendment's protections. If religious articles *could* be confused with contraband or used to introduce contraband,<sup>54</sup> if they *could* pose a suicide hazard because they could be worn around the neck,<sup>55</sup> if allowing them *could* require "extra supervision [causing] . . . a drain on scarce human resources,"<sup>56</sup> if they *could* buttress the identity of religious groups that could unite and challenge prison authority,<sup>57</sup> or if they *could* create disorder through the appearance of favoritism to some inmates<sup>58</sup>—or if the inmate has *any* other means of religious exercise<sup>59</sup>—the prison's ban holds. Nor is this list exclusive—in the cases surveyed in the present study, all inmates raised First Amendment claims. None succeeded.<sup>60</sup>

## 2. RLUIPA aimed to protect inmates' religious exercise

So, if an inmate hopes to make a successful challenge to a prison policy that prevents bodily adornment, he must file under RLUIPA.<sup>61</sup> RLUIPA's history began with the 1990 decision *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>62</sup> Two members of

<sup>52</sup> 482 U.S. 342 (1987).

<sup>53</sup> *Id.* at 350–53.

<sup>54</sup> *See, e.g.*, *Mayfield v. Tex. Dep't of Crim. Just.*, 529 F.3d 599, 611 (5th Cir. 2008) (assessing Odinist runestones as gambling implements posing a security risk); *Dunn v. Sec'y Penn. Dep't of Corr.*, 490 F. App'x 429, 431–32 (3d Cir. 2012) (upholding denial of runes and tarot cards based on justification that they "could be used by inmates to manipulate others, posing a security concern"). *But see Williams v. Hansen*, 5 F.4th 1129, 1135 (10th Cir. 2021) (finding that the denial of tobacco for religious use violated a "clearly established constitutional right"); *Kay v. Bemis*, 500 F.3d 1214, 1219–20 (10th Cir. 2007) (allowing tarot cards). *Cf. Davis v. Davis*, 826 F.3d 258, 266–67 (5th Cir. 2016) (denying Native American inmates "personal prayer pipes" due to "logistical, health, and security concerns").

<sup>55</sup> *Kendrick v. Pope*, 671 F.3d 686, 690 (8th Cir. 2012) (Colloton, J., concurring in part and dissenting in part) (regarding rosary beads); *see also Gonzalez v. Morris*, 824 F. App'x 72, 73–74 (2d Cir. 2020) (allowing Santeria inmate no more than one strand of beads).

<sup>56</sup> *O'Lone*, 482 U.S. at 353 (internal quotations omitted).

<sup>57</sup> *Id.*; *Charles v. Frank*, 101 F.App'x 634, 635–37 (7th Cir. 2004) (finding that dhikr—prayer beads—and other religious articles could be used to signal gang affiliation).

<sup>58</sup> *Id.*; *Friend v. Kolodziejczak*, 923 F.2d 126, 128 (9th Cir. 1991); *see also McFaul v. Valenzuela*, 684 F.3d 564, 573 (5th Cir. 2012).

<sup>59</sup> *See Turner*, 482 U.S. at 90; *O'Lone*, 482 U.S. at 351–52.

<sup>60</sup> *See Part III infra* (collecting cases). *Turner* has worked a depressive effect on inmates' exercise of their rights generally. *See Justin Driver & Emma Kaufman, The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 535–39 (2021) (explaining *Turner's* metastasis from the rights it decided).

<sup>61</sup> *See, e.g.*, James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2108, 2114–15 (2009) (contrasting the permissiveness of the Ninth Circuit's *Turner* jurisprudence with the stringency of its RLUIPA jurisprudence).

<sup>62</sup> 494 U.S. 872 (1990).



the Native American Church were denied unemployment benefits after having been fired from their jobs for using peyote in a religious ceremony.<sup>63</sup> Writing for the Court, Justice Scalia held that *all* religious conduct could be regulated (here, banned) by neutral laws of general applicability—by laws without anti-religious animus, applicable to all religious and areligious conduct of the same kind.<sup>64</sup> Government burdens on religious exercise would only have to pass rational-basis scrutiny.<sup>65</sup>

Reacting to the difficulties facing civil<sup>66</sup> and penal<sup>67</sup> religious exercise because of this new susceptibility to regulation, Congress passed the Religious Freedom Restoration Act in 1993.<sup>68</sup> RFRA stated that “[g]overnment may substantially burden a person’s exercise of religion only if [government] demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering” that interest.<sup>69</sup>

But the Supreme Court held RFRA unconstitutional as applied against the states because it exceeded Congress’s remedial powers under § 5 of the Fourteenth Amendment.<sup>70</sup> Undeterred, Congress passed the Religious Land Use and Institutionalized Persons Act in 2000,<sup>71</sup> enacting the same compelling-interest test used in RFRA to protect inmates’ and congregations’ free exercise,<sup>72</sup> and authorized through Congress’s spending power to better withstand constitutional challenges.<sup>73</sup>

### 3. Making out a “substantial burden” is essential to inmates’ RLUIPA claims

To make a claim under RLUIPA, an inmate must show that a prison policy or action imposes a “substantial burden” upon his religious exercise. Courts evaluate possible RLUIPA violations in a two-stage,

<sup>63</sup> *Id.* at 874–76.

<sup>64</sup> *Id.* at 879–80.

<sup>65</sup> *See id.* at 883–84 (declining to apply compelling interest test); *see also* S. REP. NO. 103-111, at 7–8 (1993) (RFRA Judiciary Comm. Rep.).

<sup>66</sup> *See* H.R. REP. NO. 103-88, at 5–6 (1993) (RFRA Judiciary Comm. Rep.); S. REP. NO. 103-111, at 7–8.

<sup>67</sup> *See* H.R. REP. NO. 103-88, at 7; S. REP. NO. 103-111, at 9–11.

<sup>68</sup> Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb–4).

<sup>69</sup> 42 U.S.C. § 2000bb–1(b).

<sup>70</sup> *See City of Boerne v. Flores*, 521 U.S. 507, 532, 536 (1997); U.S. CONST. amend. XIV, § 5.

<sup>71</sup> *See* Pub. L. No. 106-274, 114 Stat. 806 (codified at 42 U.S.C. §§ 2000cc to 2000cc–5).

<sup>72</sup> 42 U.S.C. § 2000cc–1(b).

<sup>73</sup> *See* 42 U.S.C. § 2000cc–1(b)(1) (stating that RLUIPA applies whenever “the substantial burden is imposed in a program or activity that receives Federal financial assistance”).

three-factor test. First, the inmate challenging a policy to gain accommodation must prove “that the . . . policy implicates his religious exercise . . . grounded in a sincerely held religious belief . . . [and] substantially burden[s] that exercise.”<sup>74</sup> If the inmate meets this burden, the burden shifts to the prison. The prison must demonstrate that the policy “(1) [was] in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that . . . interest.”<sup>75</sup>

If an inmate makes out a substantial burden upon his religious exercise, the prison’s policy is subjected to searching judicial scrutiny. The Supreme Court put hard corners to the compelling interest and least-restrictive means inquiries in *Holt v. Hobbs*, where a Muslim inmate challenged a prison’s grooming policy that would have required him to shave the beard that his faith required him to wear.<sup>76</sup> A prison’s policy is in furtherance of a compelling interest only if the prison can show that the interest is furthered “through application of the challenged [policy to] . . . the particular claimant [burdened].”<sup>77</sup> The prison must show why *this* religious practice, by *this* inmate, must be burdened. Compelling interests are “regulations and procedures . . . needed to maintain good order, security and discipline, consistent with consideration of costs and limited resources,”<sup>78</sup> such as excluding contraband, easily identifying inmates, cost control, or program administration.<sup>79</sup> A prison’s policy is the least restrictive means of furthering a compelling interest only if the prison demonstrates that it “lacks other means of achieving its desired goal” without substantially burdening the inmate’s religious exercise.<sup>80</sup> A recent study suggests that following *Holt*, courts have subjected prison policies challenged under RLUIPA to more searching scrutiny and have ruled for inmates more often.<sup>81</sup>

But relevant here is what *Holt* did not do: *Holt* did not change what qualifies as a “substantial burden.” The Court found only that Holt’s religious exercise had been substantially burdened because the grooming policy put him to an impossible choice: engage in conduct that violated his religion (shaving his beard), or face disciplinary action.<sup>82</sup> So,

---

<sup>74</sup> *Holt v. Hobbs*, 574 U.S. 352, 360–61 (2015).

<sup>75</sup> *Id.* at 362 (quoting 42 U.S.C. § 2000cc-1(a)) (alterations in original).

<sup>76</sup> *Id.* at 363.

<sup>77</sup> *Id.* at 363 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014)).

<sup>78</sup> *Id.* at 370 (Sotomayor, J., concurring) (quotations omitted) (emphasis added).

<sup>79</sup> *Id.* at 356, 368.

<sup>80</sup> *Id.* at 364 (quoting *Hobby Lobby*, 573 U.S. at 726).

<sup>81</sup> Barrick Bollman, Note, *Deference and Prisoner Accommodations Post-Holt: Moving RLUIPA Toward “Strict in Theory, Strict in Fact”*, 112 NW. UNIV. L. REV. 839, 862–75 (2018).

<sup>82</sup> *Holt*, 574 U.S. at 361.

while *Holt* increased prisons' burdens under RLUIPA (and thereby increased protections for inmates' religious exercise), *Holt* did not change or destabilize lower courts' definitions of "substantial burden."<sup>83</sup>

This matters because RLUIPA nowhere defines "substantial burden." Inmates' access to RLUIPA's protections depends on whether their account of a prison's actions can be accommodated by a court's definition of "substantial burden"—exactly like lock and key.

### III. JUDICIAL DEFINITIONS OF RLUIPA'S "SUBSTANTIAL BURDEN" EXCLUDE THE IMPOSSIBILITY OF BODILY ADORNMENT

This difficulty is felt especially by inmates attempting bodily adornment. This Part describes how most district courts deploy their circuits' definitions of "substantial burden," all but one of which do not accommodate the impossibility of bodily adornment. The Fourth Circuit defines "substantial burden" as the prevention of religious exercise.<sup>84</sup> The Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits find "substantial burdens" where an inmate cannot engage in central or required religious exercise.<sup>85</sup> The First and Second Circuits define "substantial burden" as coercive pressure on the inmate to change his religious behavior or beliefs.<sup>86</sup> The Seventh Circuit's definition is plastic, but most nearly tracks and so is analyzed alongside the Fourth's. Similarly, the Third Circuit's definition is analyzed alongside the First and Second's. The constant of these Circuits' definitions is their inability to accommodate the impossibility of bodily adornment as a "substantial burden" that triggers RLUIPA's protections. The Tenth Circuit's definition is more accommodating, defining as a "substantial burden" whatever prevents an inmate from engaging in activity motivated by sincere religious belief.<sup>87</sup>

---

<sup>83</sup> Indeed, where courts have decided bodily adornment cases before *and* after *Holt*, they have not meaningfully altered their analyses. *See generally* Part III *infra*.

<sup>84</sup> *See* Section III.A *infra*.

<sup>85</sup> *See* Section III.B *infra*.

<sup>86</sup> *See* Section III.C *infra*.

<sup>87</sup> *See* Section III.D *infra*. Some of the cases cited below discuss "substantial burden" analyses in RFRA or First Amendment cases. RFRA and RLUIPA use identical substantial burden inquiries, so the analyses run together. *See* sections II.B.2 and II.B.3 *supra*. All circuits to have considered the question use the same or fungible "substantial burden" analyses for RLUIPA and First Amendment claims. *See* note 183 *infra*.

### A. “Prevention” Focuses on Prayer to the Exclusion of Bodily Adornment

In the Fourth Circuit, a “substantial burden” forces a choice “between [either] following the precepts of [an inmate’s] religion and forfeiting [governmental] benefits . . . [or] abandoning one of the precepts of [his] religion.”<sup>88</sup> In practice, the Circuit’s district courts read “forcing . . . abandon[ment of] one of the precepts of religion” to mean preventing religious exercise—if my precept is *that* I exercise, and I cannot exercise, it is unclear how I meaningfully keep the precept that I exercise. This preventing religious exercise, without more, is a “substantial burden.” This appears to hold good in the Seventh Circuit, as well.<sup>89</sup>

For example, Hare Krishna inmates required scented oils to perform deity puja, “ritualistic invocation/worship of one or more deities . . . [in which] [t]he image . . . of the deity is presented and prayers, chanting and offerings are made.”<sup>90</sup> The inmates were allowed *unscented* oils.<sup>91</sup> This substitution was not a substantial burden, because “[p]laintiffs [were] merely prevented from engaging in worship in their preferred manner”—not prevented from worshipping altogether.<sup>92</sup>

Similarly, when a Muslim inmate required a prayer rug to pray prostrate three times daily, and his prison refused to provide him with a required prayer rug, forcing him to “[pray] prostrate on a dirty floor,”<sup>93</sup> his religious exercise was not substantially burdened. Denial of a prayer rug “did not require [him] to forego prostrate prayer.”<sup>94</sup>

A final example suggests proof of the rule. A Buddhist inmate required mala beads—a string of “108 beads about 31 inches in length that a Buddhist wears around her wrist to remind her of dedication to

---

<sup>88</sup> *Lovlace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see also id.* (“We likewise follow the Supreme Court’s guidance in the Free Exercise Clause context and conclude that, for RLUIPA purposes, a substantial burden on religious exercise occurs when a state or local government, through act or omission, “put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.” (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981)) (alteration in original)). In the context of bodily adornment, the prevention of religious exercise and pressure to modify behavior and violate beliefs are fungible, *see* Section III.A.

<sup>89</sup> There, withholding articles needed for bodily adornment creates a substantial burden. *See Schlemm v. Wall*, 784 F.3d 362, 363–66 (7th Cir. 2015) (assuming that deprivation of foods needed for a religious feast and—relevantly here—a headband for prayer and meditation would create a substantial burden).

<sup>90</sup> *Blake v. Rubenstein*, No. 2:08-0906, 2016 WL 5660355, at \*1 n.5, \*22 (S.D.W. Va. Apr. 5, 2016), *report and recommendation adopted*, 2016 WL 5661233 (S.D.W. Va. Sept. 28, 2016).

<sup>91</sup> *Id.* at \*22.

<sup>92</sup> *Id.* at \*23.

<sup>93</sup> *Bone El v. Solomon*, No. 1:17CV445, 2020 WL 6546056, at \*3–5 (M.D. N.C. Nov. 6, 2020).

<sup>94</sup> *Id.* at \*5, \*4 n.7. In the event, Bone El was able to use a fellow inmate’s borrowed prayer rug. *See id.* at \*4. However, the court suggested that denial of a prayer rug altogether would not constitute a substantial burden. *See id.* at \*4.

her actions, speech, and thoughts . . . [and] are also used for meditation [and to] harmonize the individual's chakras and promote healing."<sup>95</sup> The prison chaplain's policy was to allow inmates to use donated mala beads only after *six months'* attendance at religious programming.<sup>96</sup> The court did not reach the question of whether this backdoored sincerity test was a substantial burden,<sup>97</sup> but *did* find a substantial burden where a scheduling procedure prevented Buddhist inmates from holding a sacred meal.<sup>98</sup> So, the six-month waiting policy would not substantially burden the religious exercise of a Buddhist inmate serving a seven-month sentence, because it is not an absolute ban. It merely limited the inmate's ability to exercise religion as she "preferred"—*every* day.

#### B. "Centrality" is Underinclusive of Bodily Adornment

District Courts in the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits recognize the impossibility of bodily adornment as a substantial burden only if an inmate explicitly identifies the impossible bodily adornment as central to or required by their faith as they understand it.

In the Fifth Circuit, a substantial burden "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."<sup>99</sup> While this resembles a coercion inquiry, it is applied to bodily adornment as a "centrality" test. An inmate's "wooden Thor's hammer on a cord . . . two inches by two inches"—as important in Odinism as a cross in Christianity<sup>100</sup>—was confiscated. This confiscation was not a substantial burden, because it worked no more than an "inconvenience" upon the inmate's religious practice.<sup>101</sup> However, a Muslim inmate made out a substantial burden when "he could not say his prayers *without* his prayer rug and beads,"<sup>102</sup> and those items were confiscated.<sup>103</sup> Two very similar cases were decided

---

<sup>95</sup> Rountree v. Aldridge, No. 7:18CV00567, 2020 WL 1695495, at \*4–5 (W.D. Va. Apr. 7, 2020).

<sup>96</sup> *Id.* at \*4.

<sup>97</sup> *Id.* at \*13–14. A sincerity test would violate the First Amendment's injunction against courts' deciding religious questions, *see* Section IV.A *infra*.

<sup>98</sup> *Id.* at \*16.

<sup>99</sup> Newby v. Quarterman, 325 F. App'x 345, 350 (5th Cir. 2009) (quoting Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004)).

<sup>100</sup> Adele v. Goff, No. 1:14-cv-463-JCG, 2017 WL 1199756, at \*6 (S.D. Miss. Mar. 31, 2017).

<sup>101</sup> *Id.* *But see* Shaw v. Norman, No. 6:07cv443, 2008 WL 5272601, at \*13 (E.D. Tex. Dec. 19, 2008) (assuming for summary judgment that confiscation of a prayer rug and beads imposed substantial burdens on a Muslim inmate).

<sup>102</sup> *Shaw*, 2008 WL at \*1 (E.D. Tex. Oct. 1, 2008) (emphasis added).

<sup>103</sup> *Id.* at \*13.

differently, in great part because one inmate said the articles that allowed him to practice bodily adornment were necessary and the other did not.

In the Sixth Circuit, “a burden is substantial where [in relevant part] . . . it forces an individual to choose between the tenets of his religion and foregoing governmental benefits or places ‘substantial pressure on an adherent to modify his behavior and to violate his beliefs,’”<sup>104</sup> or where there is an “effective [ ] bar [ ] from exercising [ ] religion.”<sup>105</sup> When inmates plead that a particular food is required for a religious observance, and are not allowed that food, inmates make out a substantial burden: access to the religious exercise of consuming such foods is barred.<sup>106</sup> Conversely, an American Methodist Episcopal inmate was not allowed to wear his wedding ring which contained three small stones, despite his belief that it “shall be the only ring [ ] until death do us part,” because “[w]hat God has joined together [in marriage], let no Man Speperate [sic].”<sup>107</sup> He could not demonstrate that his ring was *required* “by his religion.”<sup>108</sup>

In the Eighth Circuit, a substantial burden exists where policies “significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person’s] individual [religious] beliefs; [ ] meaningfully curtail a [person’s] ability to express adherence to his or her faith; or [ ] deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person’s] religion.”<sup>109</sup> In bodily adornment, this test collapses to a pleading requirement. Inmates can make out a substantial burden only if they indicate that the adornment made impossible by a prison’s policy is required by their faith. So, Muslim inmates who “believe they *must* wear a Kufi [prayer cap] at all

---

<sup>104</sup> *Townsend v. Ouellette*, No. 1:17-cv-935, 2018 WL 286427, at \*9 (W.D. Mich. Jan. 4, 2018) (quoting *Living Water Church of God v. Charter Tp. Of Meridian*, 258 F. App’x. 729, 734 (6th Cir. 2007)).

<sup>105</sup> *Alexander v. Michigan*, No. 1:13-cv-1372, 2017 WL 4334341, at \*9 (W.D. Mich. Sept. 28, 2017).

<sup>106</sup> *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014); *see also Ackerman v. Washington*, 16 F.4th 170, 184–86 (6th Cir. 2021). It is suggested by (although beyond the scope of) this Comment that there are “different” RLUIPAs for different religious practices—“substantial burdens” are conceptualized and operationalized differently when the underlying exercise is a religious diet, or bodily adornment, or religious grooming practices, etc.

<sup>107</sup> *Smith v. Thompson*, No. 3:09-48-DCR, 2010 WL 2923197, at \*2 (E.D. Ky. July 23, 2010).

<sup>108</sup> *Id.* at \*7. *But see Townsend*, 2018 WL 286427, at \*10–11 (denial of scented oils generally a substantial burden); *Totten v. Caldwell*, No. 11-12485, 2012 WL 3965045, at \*12 (E.D. Mich. July 31, 2012) (not deciding whether depriving a Buddhist inmate of prayer oils is a substantial burden), *report and recommendation adopted*, 2012 WL 3964989 (E.D. Mich. Sept. 11, 2012); *Luther v. White*, No. 5:17-CV-138-TBR, 2019 WL 511795, at \*9 (W.D. Ky. Feb. 8, 2019) (assuming for free exercise purposes that denial of incense “imperative to Rastafari worship services” is a substantial burden because the prison did not contest this).

<sup>109</sup> *Murphy v. Mo. Dep’t of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) (quoting *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997)) (alterations in original).

times” made out a substantial burden where their prison would allow kufis to be worn only in cells and group worship.<sup>110</sup> Conversely, there was no substantial burden where a Muslim inmate believed he was required to cover his head in public and was not allowed to wear a kufi at all times—the prison still allowed him to wear a state-issued head covering that was not a kufi but offered the same coverage.<sup>111</sup> What an inmate’s religion *requires*, he can do—nothing more.

In the Ninth Circuit, a substantial burden occurs where a government places “substantial pressure on an adherent to modify his behavior and to violate his beliefs;”<sup>112</sup> that government act “must have a tendency to coerce [or substantially pressure] individuals into acting contrary to their religious beliefs.”<sup>113</sup> “[A]n outright ban on a particular religious exercise” usually counts.<sup>114</sup> In bodily adornment, this outright ban operates as a centrality test. For example, a court found a substantial burden where a temporary ban on prayer oil “forced [a Muslim inmate] to abandon a practice *mandated* by his religion.”<sup>115</sup> A court similarly assumed (although without deciding) that an inmate who required a garment to “cover her head and hair during prayer in her cell” made out a substantial burden where a prison-issued kufi, rather than her requested—and longer—hijab, failed to cover as she required.<sup>116</sup> However, a Native American’s inability to hang tobacco in his cell as a purification rite, and to wear a headband elsewhere than in his cell and at scheduled group worship, was not a substantial burden. His prison’s

---

<sup>110</sup> See *Holt v. Kelley*, No. 5:19-CV-00081-BSM, 2020 WL 5821958, at \*2 (E.D. Ark. Sept. 30, 2020) (emphasis added); see also *Heikkila v. Kelley*, No. 5:16 CV00299-BSM/JTR, 2018 WL 4610141, at \*7, \*10 (E.D. Ark. Aug. 27, 2018) (finding that outright denial of a required sweat lodge substantially burdened Native American inmate’s religious exercise), *report and recommendation adopted*, 2018 WL 4610625 (E.D. Ark. Sept. 25, 2018), *aff’d*, 776 F. App’x 927 (8th Cir. 2019).

<sup>111</sup> See *Jihad v. Fabian*, No. 09-1604 (SRN/LIB), 2011 WL 1641885, at \*17 (D. Minn. Feb. 17, 2011), *report and recommendation adopted*, 2011 WL 1641767 (D. Minn. May 2, 2011); see also *Willard v. Hobbs*, No. 2:08CV00024 WRW, 2009 WL 2497637, at \*10 (E.D. Ark. Aug. 12, 2009) (finding no substantial burden where alternative articles were given); *Burke v. N.D. Dep’t of Corr. & Rehab.*, 620 F.Supp.2d 1035, 1052 (D. N.D. 2009) (same).

<sup>112</sup> *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1125 (9th Cir. 2013) (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005)).

<sup>113</sup> *Jones v. Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015) (quoting *Ohno v. Yasuma*, 723 F.3d 984, 1011 (9th Cir. 2013)).

<sup>114</sup> *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008).

<sup>115</sup> *Davis v. Powell*, 901 F. Supp. 2d 1196, 1230 (S.D. Cal. 2012) (emphasis added); see also *Keen v. Noble*, No. CV F 04-5645 AWI WMW P, 2007 WL 2789561, at \*3 (E.D. Cal. Sept. 20, 2007) (assuming for summary judgment that denial of runestones “necessary” for an Odinist’s religious exercise substantially burdened that exercise), *amended on other grounds on reconsideration*, 2008 WL 268821 (E.D. Cal. Jan. 30, 2008).

<sup>116</sup> *Alphonsis v. Century Reg’l Det. Facility*, No. CV 17-03650-ODW (DFM), 2021 WL 4691824, at \*8 (C.D. Cal. Sept. 8, 2021), *report and recommendation adopted*, 2021 WL 4651388 (C.D. Cal. Oct. 7, 2021), *appeal filed sub nom.* *Alphonsis v. Garnica*, No. 21-56141 (9th Cir. Oct. 18, 2021).

policies did not “restrict [his] religious exercise in a way that is oppressive,”<sup>117</sup> because he could participate in other purification rites and wear his headband in his cell<sup>118</sup>—the accommodation was unnecessary to his practicing his faith at all.

In the Eleventh Circuit, a substantial burden occurs where there is “significant pressure which directly coerces the religious adherent to conform his or her behavior . . . [which is] more than incidental . . . [and] must place more than an inconvenience on religious exercise.”<sup>119</sup> Once again, this test collapses to a “centrality” inquiry in bodily adornment cases. A Santeria inmate required beads to “ensure [his] closeness to the Orishas [personal patron saints], as well as protection for negative forces and events.”<sup>120</sup> He faced no substantial burden when denied a string of blue and white beads representing *his* patron saint, because he was allowed to wear beads representing *another* patron saint.<sup>121</sup> Why not? He did not (per the court) require beads for *his* patron saint, but only beads *at all*, so was not “substantially burdened” in being denied his saint’s beads.<sup>122</sup> So, while a Santeria inmate can make out a substantial burden where he was denied required beads that were “critical to his substantially held religious beliefs,”<sup>123</sup> an Odinist could be denied a quartz crystal used in his worship, because he did not demonstrate beyond a “sketchy and incomplete [account]” how his religion required using the crystal.<sup>124</sup>

---

<sup>117</sup> *Bostwick v. Or. Dep’t. of Corr.*, No. 09-657-KI, 2011 WL 1261168, at \*4–5 (D. Or. Mar. 31, 2011).

<sup>118</sup> *Id.*

<sup>119</sup> *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

<sup>120</sup> *Avila v. McDonough*, No. 3:05cv280/LAC/EMT, 2007 WL 2480246, at \*2 (N.D. Fla. Aug. 30, 2007) (internal quotations omitted).

<sup>121</sup> *Id.* at \*7.

<sup>122</sup> Under the Free Exercise Clause, an inmate could be limited to *one* strand of beads, when he claimed wearing beads was necessary to his religious exercise lest he face “life altering adverse consequences.” See *Davila v. Marshall*, No. CV112-149, 2015 WL 272593, at \*4–5 (S.D. Ga. Jan. 20, 2015), *aff’d*, 649 F. App’x. 977 (11th Cir. 2016).

<sup>123</sup> *Rosales v. Watts*, No. 2:15-cv-94, 2016 WL 53879, at \*5 (S.D. Ga. Jan. 4, 2016) (using RFRA’s identical language), *report and recommendation adopted*, 2016 WL 1064578 (S.D. Ga. Mar. 15, 2016); *accord Davila v. Gladden*, 777 F.3d 1198, 1205 (11th Cir. 2015) (same); *Perez v. Watts*, No. 2:15-cv-76, 2015 WL 9592536, at \*3–4 (S.D. Ga. Dec. 31, 2015) (same), *report and recommendation adopted*, 2016 WL 693542 (S.D. Ga. Apr. 28, 2016); see also *Muhammad v. Crosby*, No. 4:05cv193-WS, 2008 WL 2229746, at \*15 (N.D. Fla. May 29, 2008) (finding a substantial burden where a Muslim inmate was required by his faith—and not allowed—to wear his shirt untucked and have a compass to face east to Mecca while praying), *aff’d sub nom.*, *Muhammad v. Sapp*, 388 F. App’x 892 (11th Cir. 2010).

<sup>124</sup> *Smith v. Allen*, 502 F.3d 1255, 1277–78 (11th Cir. 2007), *overruled on other grounds*, *Hoever v. Marks*, 993 F.3d 1353 (11th Cir. 2021).



## C. “Coercion” is Inapposite for the Penal Context

Courts within the First and Second Circuits find substantial burdens where an inmate has been coerced to change his religious behaviors or beliefs. Courts of the First Circuit ask whether a policy “coerces the inmate to modify his religious behavior significantly or to violate his religious beliefs.”<sup>125</sup> In the Second Circuit, a “substantial burden” exists where “the state puts substantial pressure on an adherent to modify his behavior and to violate his beliefs,”<sup>126</sup> unlike imposing inconveniences so trivial that they are most properly ignored.<sup>127</sup> The Third Circuit’s test tracks the Second’s verbatim, but adds that a substantial burden may be found where “a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available.”<sup>128</sup>

If a prison were to deny a Native American inmate the use of tobacco, needed for “offerings to mother earth, and all creation,”<sup>129</sup> and “wear[ing] feathers in his hair [to] keep[ ] him safe [and] protect[ ] him from harm and remind[ ] him of his connection to his creator;”<sup>130</sup> there would be a substantial burden—but there would be no substantial burden if the inmate were allowed a substitute with trace amounts of tobacco and to wear feathers under his uniform.<sup>131</sup> Similarly, if an inmate is “prohibited from bringing a kufi, Dhikr beads, Quran, or prayer rug while being transported to court,”<sup>132</sup> a court will not take seriously that there was a substantial burden.<sup>133</sup> Neither inmate is forced to modify his religious behavior, because a simulacrum of religious behavior or else *no* religious behavior preexisted the prison’s denial of the requested accommodation. The *lack* of behavior—a bare imitation or outright absence—is the constant. Nor was either forced to modify his beliefs—the

---

<sup>125</sup> *Farrow v. Stanley*, No. Civ.02-567-PB, 2005 WL 2671541, at \*4 (D.N.H. Oct. 20, 2005); *see also* *Palermo v. White*, No. 08-cv-126-JL, 2008 WL 4224301, at \*1–2, \*4 (D.N.H. Sept. 5, 2008) (finding that a Wiccan inmate, against a motion to dismiss, had pleaded facts sufficient to demonstrate that his religious practice was substantially burdened when a prison did not provide religious items necessary to observe a Wiccan holiday).

<sup>126</sup> *McEachin v. McGuinnis*, 357 F.3d 197, 202 n.4 (2d Cir. 2004) (quoting *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (internal quotations omitted)).

<sup>127</sup> *Id.* at 203 n.6.

<sup>128</sup> *Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 (2016) (quoting *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007)).

<sup>129</sup> *Farrow v. Stanley*, 2005 No. Civ.02-567-PB, 2005 WL 2671541, at \*4; *see id.* at \*5 (D.N.H. Sept. 19, 2012) (ruling on substantial burden).

<sup>130</sup> *Id.* at \*6.

<sup>131</sup> *Id.* at \*5, \*6. This analysis is a near thing to the Fourth Circuit’s “prevention” inquiry. *See* Section III.A *supra*.

<sup>132</sup> *Smith v. Cnty. of Nassau*, No. 12-CV-4344 (SJF)(GRB), 2014 WL 2862849, at \*2 (E.D.N.Y. June 18, 2014).

<sup>133</sup> *Id.* at \*7.

inability to act on a belief does not clearly force one to repudiate that belief.<sup>134</sup>

#### D. “Motivation” as an Alternative Test

Courts of the Tenth Circuit find substantial burdens by asking whether “the government . . . prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief.”<sup>135</sup> This definition asks the same question as the Fourth Circuit’s “prevention” test—is religious exercise prevented?—but defines “religious exercise” as some act which the inmate sincerely believes his religion impels him to undertake. This transforms the “prevention” analysis into a two-part inquiry: first, what religious exercise does the inmate seek because his understanding of his faith impels him to do it? And second, is the inmate prevented from that exercise?

For example, a Messianic Jew believed that “he must carry the Bible on his person or in his immediate vicinity at all times.”<sup>136</sup> His prison’s refusal to allow him to carry the Bible while working in the kitchen was a substantial burden, because he “was barred [from carrying his pocket Bible], which contravene[d] his sincerely held religious beliefs.”<sup>137</sup> Just so, an Odinist inmate demonstrated a substantial burden where he required a confiscated “Thorshammer [m]edallion” “made of a natural substance in order to fulfill its religious function of drawing to the wearer the powers of the earth.”<sup>138</sup> The prison’s substitute, made of plastic, “would render the sanctity of the Thorshammer . . . impracticable and meaningless, . . . akin to asking a Christian to worship the Devil or a Moslem [sic] to eat swine.”<sup>139</sup>

The difference wrought by framing “prevention” from the perspective of the inmate religionist is evident in contrast with *Wares v. Simmons*.<sup>140</sup> A Jewish inmate was denied a copy of Tehillim, a compilation of daily Psalm readings—certain excerpts, in a certain order, for a certain devotion. He could access disaggregated Psalm readings in another

---

<sup>134</sup> *Id.* at \*7. The Third Circuit offers comparatively few bodily adornment cases, but demonstrates the application of the coercion inquiry. It may be substantially burdensome for a Muslim inmate to be made to pray in a room with icons of other religions uncovered, contrary to his beliefs. See *Thomas v. Lawler*, No. 1:CV-10-2437, 2015 WL 5567921 (Sept. 22, 2015), at \*14.

<sup>135</sup> *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014).

<sup>136</sup> *Orwig v. Williams*, No. 16-cv-00781-PAB-SKC, 2019 WL 4751775, at \*1 (D. Colo. Sept. 30, 2019) (internal quotations omitted).

<sup>137</sup> *Id.* at \*6; accord *Orwig v. Chapdelane*, No. 16-cv-00781-PAB-CBS, 2017 WL 1208802, at \*2–4 (D. Colo. Mar. 17, 2017).

<sup>138</sup> *Warner v. Patterson*, No. 2:08-CV-519 TC, 2011 WL 5117917, at \*10 (D. Utah Oct. 27, 2011), *aff’d*, 534 F. App’x 785 (10th Cir. 2013).

<sup>139</sup> *Id.*

<sup>140</sup> 524 F. Supp. 2d 1313 (D. Kan. 2007).

volume.<sup>141</sup> At that time, the Tenth Circuit's test for a substantial burden was whether a government action "(1) significantly inhibits or constrains plaintiff's religious conduct or expression, (2) meaningfully curtails plaintiff's ability to express adherence to his faith, or (3) denies plaintiff reasonable opportunity to engage in fundamental religious activities."<sup>142</sup>

Applying this standard, the court held that denying Wares his Tehillim did not substantially burden his religious exercise.<sup>143</sup> His religious exercise was neither significantly inhibited nor curtailed—he could still *read* the Psalms—and he could still engage in fundamental religious activities—he could, still, *read* the Psalms.<sup>144</sup> Had Wares' case been tried under the Tenth Circuit's current definition of "substantial burden," that "the government . . . prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief,"<sup>145</sup> he likely would have made his showing, just as had the inmate who carried a pocket Bible. Wares' religious exercise was to read the Tehillim, and he was barred from that exercise. That is the key difference worked by the Tenth Circuit's definition: the *inmate* identifies what counts as the religious activity which is burdened.

#### IV. THE DOCTRINAL AND PRACTICAL FAILURES OF DEFINING "SUBSTANTIAL BURDEN" AS "PREVENTION," "CENTRALITY," AND "COERCION"

The previous Part described how District Courts apply their Circuits' definitions of "substantial burden," to observe that these definitions almost always preclude inmates from making out "substantial burdens" by showing that they cannot practice bodily adornment. This Part considers how those definitions are suspect. The Fourth Circuit's "prevention" definition invites judges to violate the "religious question doctrine," the Constitutional prohibition against judges determining the validity of a litigant's articulation of his own creed. The "centrality" definition of the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits disregards RLUIPA's plain language, which states that substantial burdens may fall upon "*any* exercise of religion, *whether or not* compelled

---

<sup>141</sup> *Id.* at 1316–17.

<sup>142</sup> *Id.* at 1320 (citing *Vasquez v. Ley*, 70 F.3d 1282, 1995 WL 694149, at \*2 (10th Cir. Nov. 24, 1995) (unpublished decision)). *Wares* applied the same substantial burden standard to its instant free exercise claim as the Tenth Circuit would have applied in a RLUIPA suit, *see id.* at 1320, n.9.

<sup>143</sup> *Id.* at 1321.

<sup>144</sup> *Id.*

<sup>145</sup> *Yellowbear*, 741 F.3d at 55.

by, or central to, a system of religious belief.”<sup>146</sup> And the First and Second Circuit’s “coercion” definition is useless to inmates. Inmates bring RLUIPA claims because they cannot engage in religious exercise—they cannot be coerced to abandon what they are not doing. The next Part considers how the Tenth Circuit’s “motivation” definition corrects these constitutional, statutory, and pragmatic shortcomings.

#### A. “Prevention” Is Constitutionally Suspect

I begin with the Fourth Circuit’s definition of substantial burden as the prevention of religious exercise. This seems intuitive. Professor Douglas Laycock and other religious liberty scholars recently argued that “[i]f RLUIPA did not apply to prison officials simply preventing . . . religious exercise, [RLUIPA] could not begin to achieve its purpose”<sup>147</sup> of protecting inmates’ ability to practice their faiths. “Examples abound of religious exercise that would be burdened by a government that physically limits or prevents religious exercise,” such as by “exclud[ing] . . . crosses [ ] and other ritual items.”<sup>148</sup> As the Sixth Circuit said of religious food, “[t]he greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice).”<sup>149</sup>

But if a “substantial burden” is something that “physically limits or prevents religious exercise,” a judge can find a “substantial burden” only by determining what qualifies as “physically limit[ing] or prevent[ing] religious exercise.” Recall the Hare Krishna inmates who needed scented oils for their worship—does denying them scented oils prevent or limit their religious exercise? A judge cannot answer that question without determining whether the unscented oils inmates received “count” as oils sufficient for prayer—or, the judge must determine *how* the inmate must exercise his faith.

The Supreme Court instructs judges to answer this question from the perspective of the inmate litigant. The Court’s “religious question doctrine”<sup>150</sup> states that judges cannot second-guess a litigant’s articulation of his religious beliefs. “It is not within the judicial ken to question . . . the validity of particular litigants’ interpretations of [their] creeds”<sup>151</sup> or “the truth of the underlying beliefs” that motivate religious

---

<sup>146</sup> 42 U.S.C. § 2000cc–5(7)(A) (emphases added).

<sup>147</sup> Brief for Religious-Liberty Scholars Douglas Laycock et al. as Amici Curiae in Support of Petitioner at 8, *Ramirez v. Collier*, 142 S. Ct. 1264 (2022) (No. 21-5592).

<sup>148</sup> *Id.* at 7.

<sup>149</sup> *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014).

<sup>150</sup> See Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1196–98 (2017) (collecting cases and literature).

<sup>151</sup> *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989).

objections to government action.<sup>152</sup> When evaluating a litigant’s understanding of what his creed requires of him, “it is not for [judges] to say that the line he drew [between religiously permissible conduct and religiously impermissible conduct] was an unreasonable one,”<sup>153</sup> but only “whether the line drawn reflects ‘an honest conviction.’”<sup>154</sup>

Yet in practice, judges who define “substantial burden” as “prevention” substitute their understanding of the inmate’s creed for the inmate’s own. So long as the internal orality of prayer can occur, the external and mute use of religious articles to adorn the body is immaterial.<sup>155</sup> Judges favor and enforce a protestant typology of “private, [ ], individual, textual, and believed” religion over “enacted religion.”<sup>156</sup> If a Hare Krishna inmate is not allowed to use scented oils, he is not “prevented from engaging in worship”<sup>157</sup>—he can still *pray*, albeit not as he prefers. Even though a Muslim inmate would have to use a towel instead of a prayer rug, he “can in fact prostrate pray.”<sup>158</sup> Inmates believe the internal dialogue of prayer and external bodily adornment to be of a piece. Judges ask whether prayer can go on given the kind of worship aid a prison allows. To define “substantial burden” as prevention invites judges to climb into the pulpit and adjudicate “the validity of particular litigants’ interpretations” of what their creeds require of them.<sup>159</sup>

## B. “Centrality” Violates RLUIPA’s Plain Language

Where the Fourth Circuit’s “prevention” definition of “substantial burden” runs afoul of the Constitution, the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits’ “centrality” definition contradicts RLUIPA’s plain language. Recall that RLUIPA sets stringent conditions for when

<sup>152</sup> *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988).

<sup>153</sup> *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715 (1981).

<sup>154</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (quoting *Thomas*, 450 U.S. at 716).

<sup>155</sup> See Adeel Mohammadi, Note, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 *YALE L.J.* 1836, 1867–74 (2020) (collecting examples of judges interpreting Muslim authorities to reject Muslim inmates’ claims for religious accommodations as insincere).

<sup>156</sup> See WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* 8 (2005).

<sup>157</sup> *Blake v. Rubenstein*, No. 2:08-0906, 2016 WL 5660355, at \*23 (S.D.W. Va. Apr. 5, 2016), *report and recommendation adopted*, 2016 WL 5661233 (S.D.W. Va. Sept. 28, 2016).

<sup>158</sup> *Bone El v. Solomon*, No. 1:17CV445, 2020 WL 6546056, at \*5 (M.D.N.C. Nov. 6, 2020)..

<sup>159</sup> *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989). Nor is there great utility in *Holt*’s caution that “RLUIPA’s ‘substantial burden’ inquiry asks whether the government burdened religious exercise . . . not whether the RLUIPA claimant is able to engage in other forms of religious exercise,” *Holt*, 574 U.S. at 362. *Holt* rejected the substitution of other *kinds* of religious exercise—forcing a Muslim inmate to shave, for example, but allowing him to maintain a religious diet. *Holt* does not offer guidance on whether allowing qualitatively different examples of the *same* kind of religious exercise—scented or unscented oils, for example—creates a substantial burden.

“[g]overnment may substantially burden a person’s exercise of religion.”<sup>160</sup> RLUIPA defines “exercise of religion” as “*any* exercise of religion, *whether or not* compelled by, or central to, a system of religious belief.”<sup>161</sup> So, RLUIPA contemplates that a “substantial burden” may be imposed on “*any* exercise of religion.” But if we follow the “centrality” Circuits, RLUIPA protects only the *subset* of “required” or “central” religious exercise; the impossibility of religious exercise is a substantial burden only if the exercise prohibited is “central” or “required.”

This subversion of RLUIPA is quite clear. Suppose two inmates request to wear something on their heads outside of their cells and outside of formal worship—a Native American his headband,<sup>162</sup> and a Muslim his kufi.<sup>163</sup> They seek to perform the same activity—wearing a head covering that signals group affiliation. The Native American cannot make out a substantial burden and the Muslim can, because the Muslim pleads (as the Native American does not) that his head covering is required. So, “centrality” works a distinction nowhere in RLUIPA’s text, and against it.

### C. “Coercion” Is Inapposite in the Penal Context

While “prevention” and “centrality” are constitutionally or statutorily problematic, the First and Second Circuits’ “coercion” definition of substantial burden is simply inapposite for the penal context. Coercion *cannot* occur when (for example) a Native American inmate cannot use tobacco or a headband,<sup>164</sup> or where a Muslim inmate cannot bring prayer beads to a court hearing.<sup>165</sup> Neither inmate is forced to modify his religious behavior, because the inmate cannot perform the desired behavior in the first place. Nor is the inmate forced to modify his beliefs—whether or not one can do something, does not change his belief that he must.

---

<sup>160</sup> 42 U.S.C. § 2000cc–1(b).

<sup>161</sup> 42 U.S.C. § 2000cc–5(7)(A) (emphases added). The Court suggested this analysis in *Holt*. See *Holt*, 574 U.S. at 362.

<sup>162</sup> *Bostwick v. Or. Dep’t of Corr.*, No. 09-657-KI, 2011 WL 1261168, at \*4–5 (D. Or. Mar. 31, 2011).

<sup>163</sup> *Holt v. Kelley*, No. 5:19-CV-00081-BSM, 2020 WL 5821958, at \*2 (E.D. Ark. Sept. 30, 2020).

<sup>164</sup> *Farrow v. Stanley*, No. Civ.02-567-PB, 2005 WL 2671541, at \*4 (D.N.H. Oct. 20, 2005).

<sup>165</sup> *Smith v. County of Nassau*, No. 12-CV-4344 (SJF)(GRB), 2014 WL 2862849, at \*2 (E.D.N.Y. June 18, 2014).

V. THE CONSTITUTIONAL, STATUTORY, AND PRAGMATIC ADVANTAGES  
OF THE TENTH CIRCUIT'S DEFINITION OF SUBSTANTIAL BURDEN AS  
"MOTIVATION"

Taking the ability of inmates to adorn their bodies as an inherent normative good, the previous two Parts suggest desiderata for a definition of "substantial burden." First, Part III showed how the "prevention," "centrality," and "coercion" definitions do not accommodate the impossibility of bodily adornment as a "substantial burden"—so, a definition of "substantial burden" should not exclude bodily adornment and defeat inmates' claims on arrival. Second, Part IV showed how "prevention," "centrality," and "coercion" are constitutionally, statutorily, and pragmatically deficient, respectively—a definition of "substantial burden" should avoid these problems.

Nor is there anything necessary or predetermined about Circuits' definitions of RLUIPA's "substantial burden." RLUIPA, like RFRA before it, "codified only the 'compelling interest test' from *Sherbert [v. Verner]*<sup>166</sup> and [*Wisconsin v. Yoder*]<sup>167</sup>—the level of justification the government must provide *after* a substantial burden on religion has been found"<sup>168</sup> and *not* the predicate burden itself. So, "there is no doctrinal basis"<sup>169</sup> for limiting "substantial burden" to any one of the categories that circuits have chosen.

This Part argues that the Tenth Circuit's definition of "substantial burden" as "prevent[ing] the plaintiff from participating in an activity motivated by a sincerely held religious belief"<sup>170</sup> cures these defects, and argues for its wider adoption. Section A considers how the Tenth Circuit's definition avoids the problems of other Circuits' definitions and facilitates inmates' making their required showing. Section B considers how this definition is consistent with RLUIPA's original meaning. Section C considers how this definition furthers RLUIPA's purpose of protecting bodily adornment as a unique category of inmates' religious exercise.

The point is not to adopt a rule that inmates win every time—rather, it is to adopt a rule that supports rather than confounds RLUIPA's framing as explicitly protective of inmates' bodily adornment. Once inmates have shown a substantial burden, it would fall to prisons to show

---

<sup>166</sup> 374 U.S. 398 (1963).

<sup>167</sup> 406 U.S. 205 (1972).

<sup>168</sup> *Apache Stronghold v. United States*, 38 F.4th 742, 774 (9th Cir. 2022) (Berzon, J. dissenting).

<sup>169</sup> *Id.*

<sup>170</sup> *Yellowbear*, 741 F.3d at 55.

how that burden is the “least restrictive means” of furthering a “compelling interest.” Section D considers how these latter two inquiries would still allow prisons to prevent bodily adornment, or, to burden this religious exercise, where doing so really is necessary. The point is to give inmates a fighting chance—the chance RLUIPA gave them—of vindicating their rights.

#### A. “Substantial Burden” as “Motivation” Avoids the Problems of Other Definitions

Part IV elucidated the problems of defining “substantial burden” as “prevention,” “centrality,” and “coercion:” collision with the “religious questions doctrine,” contradiction by RLUIPA’s plain text, and inadequacy in the penal context, respectively. The Tenth Circuit’s definition, that a “substantial burden” occurs when an inmate is “prevent[ed] . . . from participating in an activity motivated by a sincerely held religious belief,”<sup>171</sup> answers each of these shortcomings.

##### 1. The religious question doctrine is not violated

The Tenth Circuit’s definition satisfies the religious question doctrine that a judge not second-guess or displace an inmate’s articulation of what “counts” as religious exercise. Recall that the Tenth Circuit effectively asks first, what religious exercise the inmate attempts, and second, whether the inmate is prevented from that exercise. The nexus between the inmate’s religiosity, and his impulsion to adorn his body in a certain manner, is left to the *inmate* to demonstrate and to elaborate. Recall Wares, the inmate who could have read from Tehillim under the Tenth Circuit’s new definition.<sup>172</sup> While a judge in the Fourth Circuit could transgress the religious questions doctrine by asking whether Wares needed Tehillim when he was able to read the Psalms elsewhere, the Tenth Circuit’s definition would foreclose such questions: by asking what “counts” as religious exercise and whether that exercise is possible from the *inmate’s* perspective, a judge insulates an inmate’s bodily adornment from judicial theologizing.

And for this reason, the Tenth Circuit’s definition is recommended by its simplicity. To make out a substantial burden, inmates need only articulate first, that they are attempting bodily adornment impelled by their faiths, and second, that they cannot do it.

---

<sup>171</sup> *Id.*

<sup>172</sup> See Part III.D *supra*.



2. The text of RLUIPA is followed

The Tenth Circuit's definition also avoids the "centrality" Circuits' contradiction of RLUIPA's plain language. The religious exercise susceptible to substantial burdens in the Tenth Circuit, "activity motivated by a sincerely held religious belief,"<sup>173</sup> is coextensive with the religious exercise susceptible to substantial burdens under RLUIPA: "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."<sup>174</sup> Under RLUIPA, as under the Tenth Circuit's test, it does not matter whether a Jew is required to read from Tehillim or whether an Odinist's wearing a Thorshammer is "more central" than (for example) using runestones—all that matters is that the bodily adornment sought is religious.

3. The impracticality of "coercion" is avoided

Finally, the Tenth Circuit's definition asks a more relevant question than the First and Second Circuits' inapposite "coercion" analysis—*whether* bodily adornment is possible. Inmates cannot be coerced to abandon activity that they cannot undertake, nor beliefs that they must undertake the activity. It *does* matter to inmates that they cannot practice bodily adornment in the first instance.

B. The Plain Meaning of "Substantial Burden" Includes the Impossibility of Religious Exercise

Beyond its doctrinal and pragmatic advantages, the Tenth Circuit's definition of "substantial burden" is consonant with the plain meaning of RLUIPA's "substantial burden."

1. The plain meaning of "substantial burden" includes bodily adornment

The plain meaning of "substantial burden" is a significant impediment to action. Recall RLUIPA's test for when a government may "impose a substantial burden on [ ] religious exercise."<sup>175</sup> To "impose" is "[t]o lay on, as something to be borne, endured, or submitted to; to inflict

---

<sup>173</sup> *Yellowbear*, 741 F.3d at 55.

<sup>174</sup> 42 U.S.C. § 2000cc-5(7)(A).

<sup>175</sup> 42 U.S.C. § 2000cc-1(a).

(something) *on* or *upon*.”<sup>176</sup> When a burden is set on an activity, “to burden” includes “restraining freedom of action.”<sup>177</sup> To “impose a . . . burden,” then, is “[t]o lay a (material) burden on,” or “[t]o [ ] encumber,”<sup>178</sup> such that freedom of action is restrained. A “substantial” burden upon an activity would be an obstacle of real significance, [or] weighty.”<sup>179</sup> So, to “impose a substantial burden on [ ] religious exercise” is to place a significant impediment that restrains the believer’s freedom of religious action. When an inmate is “prevent[ed] . . . from participating in an activity motivated by a sincerely held religious belief,”<sup>180</sup> his religious exercise is substantially burdened. This prevention restrains freedom of action absolutely, as an absolute bar to religious exercise.

Additionally, RLUIPA conflates its “substantial burden” with the First Amendment’s protections against the prohibition of religious exercise as freedom to act in the first instance. RLUIPA’s construal instructions, which passed bicameralism and presentment,<sup>181</sup> enable inmates to invoke RLUIPA’s protections by introducing “prima facie evidence . . . alleging a violation of the Free Exercise Clause or a [substantial burden]”<sup>182</sup> that is not the least restrictive means of achieving a compelling government interest. Thus, “prohibiting the free exercise of religion” and “impos[ing] a substantial burden” on religious exercise are suggested to be coextensive. Indeed, every Circuit agrees that RLUIPA and the First Amendment offer inmates recourse against the same kind of harm: government’s impingement upon an inmate’s free exercise of religion cognized as a “substantial burden”.<sup>183</sup> RLUIPA further instructs that “nothing in the Act shall be construed to affect . . . that portion of the First Amendment . . . prohibiting laws respecting an

---

<sup>176</sup> OXFORD ENGLISH DICTIONARY (2d. ed. 1989) (definition I.4).

<sup>177</sup> *Burden, burthen, n.*, OXFORD ENGLISH DICTIONARY (2d. ed. 1989) (definition I.1.c). The definition is of a monetary sense, and is the form nearest to point.

<sup>178</sup> *Burden, burthen, v.*, OXFORD ENGLISH DICTIONARY (2d. ed. 1989) (definitions 1 and 1.b).

<sup>179</sup> *Substantial, adj., n., and adv.*, OXFORD ENGLISH DICTIONARY (2d. ed. 1989) (definition A.I.4).

<sup>180</sup> *Yellowbear*, 741 F.3d at 55.

<sup>181</sup> See Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012) (“[Judges as interpreters] are governed by what the legislators enacted.”).

<sup>182</sup> 42 U.S.C. § 2000cc–2.

<sup>183</sup> See *Washington v. Gonyea*, 538 F. App’x 23, 26 (2d Cir. 2013) (quoting *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003)); see also *Williams v. Does*, 639 F. App’x 55, 56 (2d Cir. 2016); *DeHart v. Horn*, 227 F.3d 47, 51 (3d Cir. 2000); *Heleva v. Kramer*, 214 F. App’x 244, 246 (3d Cir. 2007); *Wilcox v. Brown*, 877 F.3d 161, 168 (4th Cir. 2017); *Davis v. Davis*, 826 F.3d 258, 264–65 (5th Cir. 2016); *Welch v. Spaulding*, 627 F. App’x 479, 485 (6th Cir. 2015) (McKeague, J. dissenting); *Kaufman v. Pugh*, 733 F.3d 692, 696 (7th Cir. 2013); *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 749–50 (8th Cir. 2014); *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008); *Shakur v. Schriro*, 514 F.3d 878, 884–85 (9th Cir. 2008); *Yellowbear*, 741 F.3d at 55; *Strope v. Cummings*, 381 F. App’x 878, 881 (10th Cir. 2010).

establishment of religion”—the Establishment Clause.<sup>184</sup> There is no need to clarify *which* Religion Clause is implicated unless one of them, the Free Exercise Clause, *is*.<sup>185</sup>

This matters because, for more than eighty years, the Supreme Court has held that free exercise “embrace[s] two concepts—freedom to believe and freedom to act.”<sup>186</sup> “As originally understood, the free exercise of religion included conduct required by a person’s religious identity”<sup>187</sup> as that person understood it—conduct like a Quaker’s keeping his hat on in court,<sup>188</sup> or an inmate adorning his body with religious articles.

2. The plain meaning of “substantial burden” rejected any complex substantial burden test

RLUIPA’s plain meaning not only supports defining “substantial burden” as the impossibility of activity motivated by sincere religious belief—it also demonstrates that “substantial burden” was never understood to comprehend *only* “prevention,” “centrality,” and “coercion.” Recall that RFRA and RLUIPA used identical three-part tests, beginning with the “substantial burden” inquiry. This identical language would mean the same things to the same people, because “[m]eaning depends . . . on the reaction of the contemporaneous interpretive community”<sup>189</sup> to a speaker’s pronouncement. The interpretive community of RFRA and RLUIPA included corrections officials—those whose conduct the laws would regulate. In their statements to Congress opposing RFRA, these officials made two points. First, they did not suggest that “substantial burden” was limited to narrow, rigid categories. Second, they did not suggest that they would be able to contest an inmate’s showing of a substantial burden, undermining the contention that “substantial burden” means “some burdens only.”

---

<sup>184</sup> 42 U.S.C. § 2000cc–4.

<sup>185</sup> See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788–91 (1999) (arguing that internal structure and cross-references indicate meaning).

<sup>186</sup> Brief for Religious-Liberty Scholars, *supra* note 147, at 1 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)) (internal quotations omitted).

<sup>187</sup> Brief for Religious-Liberty Scholars, *supra* note 147, at 5.

<sup>188</sup> See McConnell, *supra* note 25, at 1471–72.

<sup>189</sup> Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 91–92 (2017); see also Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 827–28 (2018).

a. *“Substantial burden” was not understood to be a closed set*

First, correctional officials did not suggest that they understood “substantial burden” to refer to a closed set of kinds of impediments to religious exercise. In a letter to then-Senator Joseph Biden, Chairman of the Senate Judiciary Committee, endorsed by the Association of State Correctional Administrators,<sup>190</sup> the “majority of state Attorneys General” argued “that the Religious Freedom Restoration Act [would] dramatically increase the number of inmate-generated lawsuits against the State and Federal governments,” because RFRA “[would] allow inmates to sue prison administrators with greater frequency.”<sup>191</sup> Corrections administrators and state Attorneys General worried that it would be “extremely difficult to quickly dismiss frivolous or undeserving inmate challenges” to prison regulations.<sup>192</sup>

But recall that to make out a claim under RFRA, an inmate needed to show a “substantial burden” upon their religious exercise. If “substantial burden” is limited to a closed set of certain burdens and not others, then the “substantial burden” inquiry would *itself* limit the number of claims that could not be quickly dismissed. If substantial burdens are *a*, *b*, or *c*, and I plead *d* or *s*, my case quickly can be dismissed—but no corrections official indicated that they thought this to be the case.

b. *“Substantial burden” was not understood by corrections officials to be contestable*

Second, prison administrators did not indicate that they believed themselves able to challenge an inmate’s showing of a “substantial burden” under RFRA’s test. Instead, corrections administrators and state Attorneys General believed that they could defend their policies only at the final step, the least restrictive means inquiry. Because “the bill’s standard includes the requirement that the prison officials use the ‘least restrictive means’ when restricting the behavior of inmates,”<sup>193</sup> “the day-to-day judgment of prison officials [will be subject] to an inflexible strict scrutiny analysis by federal courts which are ill-equipped”<sup>194</sup> to make such determinations. Corrections officials did *not* indicate that

---

<sup>190</sup> Letter from George M. Camp, Exec. Dir., Ass’n of State Corr. Admins., to Sen. Joseph Biden, Chairman, S. Judiciary Comm., in S. REP. NO. 103-111, at 35 (1993).

<sup>191</sup> S. REP. NO. 103-111, at 18 (additional views of Sen. Simpson).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 19.

<sup>194</sup> *Religious Liberty: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 176 (1999) (statement of Glenn S. Goord, Coordinator, N.Y. Dept. of Corr. Servs.).

they would be able to challenge inmates' RFRA claims at the first "substantial burden" step. Surely, had corrections officials understood "substantial burden" to refer to some burdens only, RFRA claims would have been defeasible at the substantial burden inquiry.

Granted, these two points—"substantial burden" as an open set, and "substantial burden" as incontestable—could show no more than prison administrators' gamesmanship. Perhaps corrections administrators buried "substantial burden" and waved about "least restrictive means" to advocate for a less intrusive regulatory regime. But this would be passing strange—no Member or Senator appears to have called this presumed bluff, or to have placated corrections administrators by pointing to how a narrow "substantial burden" would winnow inmates' claims. The stronger probability is that "substantial burden" just was understood to be the open-ended category of *Sherbert* and *Yoder*.

*c. No concern about "substantial burden" was raised before RLUIPA*

Corrections administrators did not understand "substantial burden" to refer to a closed set of burdens in RFRA, and none suggested so in the hearings preceding RLUIPA's enactment. Concerns about frivolous or deceitful litigation were raised and defused—but *not* by referencing ossified "forms" of "substantial burden." Instead, every reference to the possibility of frivolous suits was rendered toothless by the numbers. Before RFRA was ruled unconstitutional, "RFRA claims were only 2.7 percent of the inmate caseload, and only .23 percent (less than one-quarter of one percent) of [Texas's] total caseload."<sup>195</sup> "[O]nly 1/10 of 1 percent of all of the prisoner litigation brought during the 3 1/2 years of RFRA were based upon or contained any claim or reference to the Religious Freedom Restoration Act."<sup>196</sup>

Nor should adopting the Tenth Circuit's "motivation" definition now create any appreciable increase in litigation. Between March 31, 2019 and March 31, 2020, 425,945 cases were filed in federal district court.<sup>197</sup> Of those 425,945, only 832 concerned inmates' civil rights.<sup>198</sup> Within the subset of those cases where inmates raise RLUIPA claims,

<sup>195</sup> *Id.* at 92 (statement of Douglas Laycock, Professor, University of Texas Law School).

<sup>196</sup> *Id.* at 5 (statement of Steven T. McFarland, Center for Law and Religious Freedom, Christian Legal Society).

<sup>197</sup> Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics 2020*, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020> [perma.cc/T3B8-6C7L].

<sup>198</sup> *Id.*

judges generally produce fulsome “compelling interest” and “least restrictive means” analyses regardless of whether inmates make out substantial burdens.<sup>199</sup> Either the volume of inmate RLUIPA litigation would remain the same, with judges finding substantial burdens where they presently do not and writing the same opinions; or, the volume of inmate RLUIPA litigation would increase, but present so marginal an increase in courts’ total caseloads as to create no appreciable delay in their work.

### C. RLUIPA was Intended to Protect Bodily Adornments

Not only does RLUIPA’s plain meaning include the impossibility of bodily adornment as a substantial burden, but RLUIPA also responded to inmates’ inability to practice bodily adornment. Senator Orrin Hatch, speaking as one of and for all of RLUIPA’s sponsors, cited as motivating the bill the information of “[c]ongressional witnesses [who] have testified that institutionalized persons have been prevented from practicing their faith.”<sup>200</sup> This testimony was replete with descriptions of inmates’ inability to practice bodily adornment.<sup>201</sup>

A central theme of this testimony was the impossibility of bodily adornment as a problem RLUIPA could remedy. Rev. Donald Brooks, a Catholic Chaplain of the Diocese of Tulsa, testified to the Senate Judiciary Committee about the introduction of an Oklahoma policy that limited the amount of property inmates could possess. Before this rule, there had been “no policy regarding the possession of religious items such as the Bible, the Koran, the Talmud or items needed by Native Americans;” some prisons allowed them, others denied them as contraband.<sup>202</sup> “During shake-downs, searches routinely conducted at every prison, religious items were frequently treated with contempt and were confiscated, damaged or discarded. It should take little imagination to understand the level of rage we encountered in prisoners when this sort of thing occurred.”<sup>203</sup>

---

<sup>199</sup> Compare *Davis v. Powell*, 901 F. Supp. 2d 1196, 1230–32 (S.D. Cal. 2012) (finding a substantial burden and producing compelling-interest and least-restrictive-means analyses), with *Bostwick v. Or. Dep’t of Corr.*, No. 09-657-KI, 2011 WL 1261168, at \*5–7 (D. Or. Mar. 31, 2011) (finding no substantial burden, yet still producing compelling-interest and least-restrictive-means analyses). This propensity likely is due both to judges’ good-faith exhaustion of possible arguments and to a desire to insulate their opinions from being upset on appeal.

<sup>200</sup> 146 CONG. REC. 14284 (2000) (statement of Sen. Hatch introducing RLUIPA).

<sup>201</sup> See notes 206–206 *infra* and accompanying text.

<sup>202</sup> *Protecting Religious Freedom After Boerne v. Flores (Part II): Hearing Before the H. Subcomm. on the Const.*, 105th Cong. 57 (1998) (statement of Rev. Donald W. Brooks, Chaplain, Diocese of Tulsa, Oklahoma).

<sup>203</sup> *Id.* at 56.

When Oklahoma instituted a new rule for inmate property, and amended that rule to address inmates' religious articles, inmates received short shrift:

[Wardens] began to start the process of implementation right away. And what they did was inform each of the inmates that the religious items in their possession must be returned to their homes or discarded . . . [I]nmates had simply destroyed the articles or sent them to their homes.<sup>204</sup>

Professor Douglas Laycock provided context for this de facto ban on bodily adornment to the House Subcommittee on the Constitution. RFRA provided relief “when prison rules [forbade] the distribution of religious literature or jewelry to inmates,”<sup>205</sup> and RLUIPA as a reenactment of RFRA’s test could remedy this ongoing problem. Imad A. Ahmad of the American Muslim Council related how under RFRA, “practitioners of Sufi rituals [won] a preliminary injunction in their challenge of a prison ban on the display and possession of dhikr beads. The beads, like rosaries, are used to keep count of the recitation made in the remembrance of God.”<sup>206</sup> Rabbi David Zwiebel, representing Agudath Israel of America, stated that the impossibility of bodily adornment was a reason RLUIPA was needed. He testified that Yosef Florian, a Jewish inmate in Michigan, was aware that “[some] prisons ban . . . tefillin” but lauded RFRA’s protection of his wearing a yarmulke.<sup>207</sup>

In sum, the legislative intent back of passing RLUIPA included protecting against the mere impossibility of bodily adornment.

#### D. “Motivation” as “Substantial Burden” Would Not Undermine Prison’s Interests

RLUIPA’s plain meaning and purpose support defining “substantial burden” as the Tenth Circuit does, to include the impossibility of bodily adornment. However, one may be concerned that wider adoption of this definition would undermine prisons’ interests. Recall the correctional administrators who opposed RFRA, worried that inmates would

<sup>204</sup> *Id.* at 57.

<sup>205</sup> *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the H.R. Subcomm. on the Const.*, 105th Cong. 29 (1998) (statement of Douglas Laycock, Professor, University of Texas Law School).

<sup>206</sup> *Protecting Religious Freedom After Boerne v. Flores (Part III): Hearing Before the H. Subcomm. on the Const.*, 105th Cong. 22 (1998) (statement of Imad A. (Dean) Ahmad, Ph.D., American Muslim Council).

<sup>207</sup> Letter from Rabbi David Zweibel, Chairman, Agudath Israel of America, to Sen. Orrin Hatch, Chairman, S. Judiciary Committee (July 7, 1998), in *Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the S. Comm. on the Judiciary*, 105th Cong. 125 (1998). Tefillin are small boxes containing scripture affixed to the body by long leather straps during prayer.

abuse access to the courts “to wage all out [sic] war on the system and wreck [sic] as much havoc as humanly possible.”<sup>208</sup>

I consider the two most salient concerns in turn—specious accommodation, and contraband.

### 1. Specious accommodation

Perhaps inmates would make frivolous claims for religious accommodations to receive special treatment or undermine prison order and security. There is broad consensus in the case law and the literature that courts are competent to adjudicate the sincerity of religious belief, considering (among other factors) ulterior motivations for seeking an accommodation and the litigant’s personal history of religious conduct.<sup>209</sup> For present purposes, it matters less how courts adjudicate sincerity than *that* they are competent to do so.

While there is a risk that inmates will be considered “insincere” and unable to bring claims if they imperfectly observe their own faiths,<sup>210</sup> this risk is not outsized—the sincerity inquiry operates as a rebuttable presumption *for* inmates’ sincerity, defeated if the prison produces evidence of insincerity. For example, an inmate was found insincere after changing his religious affiliation five times in six years, and five times more in the course of litigation.<sup>211</sup> Similarly, an inmate could not use RLUIPA to smoke marijuana in prison—his creed, “Stonerism,” was a pastiche of other faiths whose tenets and metaphysical beliefs he could not articulate.<sup>212</sup>

### 2. Contraband and security

One also may worry that inmates would request accommodations for bodily adornment to introduce contraband and threaten institutional security. This concern is oversold. No case reviewed here found that an inmate had used or would use religious articles to harm another inmate or a corrections officer<sup>213</sup>—the most courts have found is that *an* inmate *could* use such a kind of article for such a purpose. For example,

---

<sup>208</sup> *Id.*

<sup>209</sup> See, e.g., Chapman, *supra* note 150, at 1231–41 (collecting cases and literature); Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 60–64 (2014) (same).

<sup>210</sup> Kevin L. Brady, Comment, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431, 1447–50 (2011) (collecting cases). Overmuch focus on sincerity may hazard a religious questions problem—the court risks passing judgment on *how* one must live out one’s faith, and *whether* one has done so.

<sup>211</sup> Jean-Denis v. Inch, No. 3:19-CV-00575-RV-MAF, 2021 WL 1739877, at \*5–6 (N.D. Fla. Mar. 16, 2021), *report and recommendation adopted*, 2021 WL 1734782 (N.D. Fla. May 3, 2021).

<sup>212</sup> Braun v. Walz, No. 20-CV-331 (NEB/DTS), 2021 WL 871217, at \*4 (D. Minn. Mar. 9, 2021).

<sup>213</sup> See, e.g., Part III.D *supra* (collecting cases).



the Hare Krishna inmates who requested scented oils could have used those oils to mask the smells of contraband like drugs and cigarettes; the court made no allegation that they had, or ever would.<sup>214</sup>

### 3. “Compelling interest” and “least restrictive means” remain

Whatever the shortcomings of sincerity screenings and this anecdotal evidence of *de minimis* risks, prisons can protect their interests through RLUIPA’s compelling-interest and least-restrictive means inquiries. However many more inmates could bring RLUIPA claims using the Tenth Circuit’s definition of “substantial burden,” and whatever the range of religious articles they would request, the latter two parts of RLUIPA’s test enable prisons to maintain their compelling interests.

Suppose an incarcerated Christian takes *very* seriously Christ’s command to “take nothing for their journey except a staff,”<sup>215</sup> and requests that he be given a stout hiking stick.<sup>216</sup> His prison’s denial of this obviously weaponizable article would count as a “substantial burden” under the Tenth Circuit’s definition, yet his prison could appeal to its compelling interests in safety and security to deny the accommodation.

Recall that a prison’s “compelling interests” include “regulations and procedures . . . needed to maintain good order, security and discipline, consistent with consideration of costs and limited resources,”<sup>217</sup> such as excluding contraband, easily identifying inmates,<sup>218</sup> controlling costs, and efficient administration.<sup>219</sup> A Muslim can be denied an opaque hijab because she could use it to conceal her identity or hide weapons or contraband.<sup>220</sup> An Odinist can be denied a wooden or metallic Thorshammer because it could be weaponized, used as a lockpick, or scratch and blur cell windows.<sup>221</sup> A Native American can be denied tobacco to prevent its traffic, and a headband outside his cell to prevent gang affiliations.<sup>222</sup> A court would not call into doubt the sincerity or

---

<sup>214</sup> See *Blake v. Rubenstein*, No. 2:08-0906, 2016 WL 5660355, at \*22–23 (S.D.W. Va. Apr. 5, 2016), *report and recommendation adopted*, 2016 WL 5661233 (S.D.W. Va. Sept. 28, 2016).

<sup>215</sup> *Mark* 6:8 (New Revised Standard Version).

<sup>216</sup> My thanks to Professor Richard McAdams for this hypothetical.

<sup>217</sup> *Holt v. Hobbs*, 574 U.S. 352, 370 (2015) (Sotomayor, J., concurring) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005)) (internal quotations omitted) (emphasis added).

<sup>218</sup> *Id.* at 859, 863–64.

<sup>219</sup> *Id.* at 866.

<sup>220</sup> *Alphonsis v. Century Reg'l Det. Facility*, No. CV 17-03650-ODW (DFM), 2021 WL 4691824, at \*8 (C.D. Cal. Sept. 8, 2021), *report and recommendation adopted*, 2021 WL 4651388 (C.D. Cal. Oct. 7, 2021), *appeal filed sub nom.* *Alphonsis v. Garnica*, No. 21-56141 (9th Cir. Oct. 18, 2021).

<sup>221</sup> *Warner v. Patterson*, No. 2:08-CV-519 TC, 2011 WL 5117917, at \*10 (D. Utah Oct. 27, 2011), *aff'd*, 534 F. App'x 785 (10th Cir. 2013).

<sup>222</sup> *Bostwick v. Or. Dep't of Corr.*, No. 09-657-KI, 2011 WL 1261168, at \*6–7 (D. Or. Mar. 31, 2011).

importance of the inmate's bodily adornment; rather, a court would recognize—as RLUIPA allows courts to recognize—that an inmate's having a requested religious article cannot be reconciled with legitimate and compelling prison interests.

As to least-restrictive means, a prison might provide an inmate with substitutes for a bell that did not comport with prison regulations,<sup>223</sup> or an inferior article because it cannot source the desired one.<sup>224</sup> Or, an inmate may be made to store items outside his cell when not using them if they cannot safely be stored inside.<sup>225</sup> Thus, RLUIPA provides for—and gives prison cover to *deny*—inmates' bad-faith and infeasible accommodation requests.

## V. CONCLUSION

Religious inmates can realize their dignity and bodily autonomy by adorning their bodies with religious articles. Yet despite RLUIPA's promise of protections for inmates' religious exercise, most Circuits have defined its "substantial burden"—the showing inmates must make to invoke RLUIPA's protections—to exclude the impossibility of bodily adornment. These definitions also hazard constitutional, statutory, and practical deficiencies. The Tenth Circuit's definition of "substantial burden," as preventing an inmate from engaging in activity motivated by sincere religious belief, corrects these defects and is far easier for inmates to use. Moreover, it is consistent with RLUIPA's plain meaning and purpose, and reserves to prisons ample latitude to protect their interests.

Further work is needed—to determine (perhaps using Freedom of Information Act and state equivalent requests) how many religious accommodations *have* prejudiced a prison's compelling interests, and whether costs of accommodation have become untenable. Such information would indicate to courts whether a particular compelling interest *is* advanced by refusing various kinds of accommodation. Nor is it possible here to disambiguate "substantial" burdens from lesser burdens from which RLUIPA cannot provide relief.<sup>226</sup> Meanwhile, courts

---

<sup>223</sup> Willard v. Hobbs, No. 2:08CV00024 WRW, 2009 WL 2497637, at \*10 (E.D. Ark. Aug. 12, 2009).

<sup>224</sup> *Alphonsis*, 2021 WL 4691824, at \*8.

<sup>225</sup> Presley v. Scott, No. 4:13-cv-02067-LSC-TMP, 2014 WL 7146837, at \*22–24 (N.D. Ala. Dec. 15, 2014).

<sup>226</sup> See Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 VA. L. REV. (forthcoming 2022), at 29–32, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3912126#:~:text=Sherif%20Girgis,-Notre%20Dame%20Law&text=To%20date%2C%20courts%20applying%20exemptions,Christians%20in%20culture%2Dwar%20cases](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3912126#:~:text=Sherif%20Girgis,-Notre%20Dame%20Law&text=To%20date%2C%20courts%20applying%20exemptions,Christians%20in%20culture%2Dwar%20cases) [<https://perma.cc/RYU3-XJU3>] (suggesting a substantial burden arises where no adequate alternative exists to realize the same interest that the "first-best" exercise of the right at issue would

retain discretion to adopt a definition of “substantial burden” that realizes protections for inmates’ bodily adornment—the protections that Congress gave them in RLUIPA.