THE COSTS OF RELIGIOUS ACCOMMODATION IN PRISONS

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INTRODUCTION

In Cutter v. Wilkinson, the Supreme Court affirmed the constitutionality of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) in the prison context. The Act expands the protection of prisoners’ religious rights beyond that provided by the provisions of the First Amendment. Since its enactment in 2000, RLUIPA has generated a significant amount of litigation. Although the Court upheld the constitutionality of RLUIPA on its face, it suggested that the statute might violate the Establishment Clause as applied to individual instances if it were to impose serious costs on third parties, potentially including prison officials, other prisoners, and perhaps even taxpayers. Despite the persistent stream of RLUIPA litigation from prisoners, scholars have paid little attention to the costs imposed by the statute. This Note will fill that gap in the literature.

Prior studies of RLUIPA have focused on the Act’s standard of review and the stringency of its application. Commentators recognize that some federal courts apply a rigorous strict scrutiny analy-
sis in RLUIPA cases. But this Note will address a more specific question: have courts become sensitive to the costs of RLUIPA, especially in light of the Supreme Court’s suggestion that significant costs under the statute might sustain an as-applied Establishment Clause challenge? The Court issued an invitation to litigants and courts to consider costs in RLUIPA litigation. What has been their response?

To preview my conclusions, RLUIPA does impose significant costs on prisons. These burdens are more onerous than Congress intended when passing the statute and more severe than federal courts initially appreciated. Because data is scarce and costs are difficult to quantify, courts have only recently begun to recognize the magnitude of these burdens. This Note will reveal that, in response to this recognition, several circuits have concluded that the financial and administrative costs of RLUIPA accommodations outweigh the religious interests of prisoners. Thus, some lower courts have accepted the Supreme Court’s invitation to consider the costs of RLUIPA. But they have not done so in the way the Court suggested in Cutter.

Instead of framing the RLUIPA cost inquiry as an as-applied Establishment Clause challenge, courts and litigants in several circuits have taken cost into account as part of the strict scrutiny analysis under the statute. This evolution in RLUIPA jurisprudence has significant implications for both prisoners litigating RLUIPA claims and prison administrators defending those claims. First, the consideration of cost in the statutory strict scrutiny analysis may signal a retreat from the rigorous form of strict scrutiny

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1 See Derek L. Gaubatz, RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions, 28 Harv. J.L. & Pub. Pol’y 501, 507–09 (2005); Nelson, supra note 3, at 2054–56. Nelson analyzes the application by the circuit courts of strict scrutiny under RLUIPA. Conducting a comprehensive examination of all of the elements of strict scrutiny, he divides the circuits into two groups: those applying a rigorous form of strict scrutiny and those whose strict scrutiny is deferential to the assessments of prison administrators. My examination of RLUIPA cases in the circuit courts takes different criteria into account. First, I divide the cases chronologically into those decided before the Supreme Court’s decision in Cutter and those decided after it. Second, I am interested only in the circuits’ response to the Supreme Court’s invitation in Cutter to consider cost; thus I categorize the circuits only by their treatment of cost as a compelling interest under the RLUIPA strict scrutiny test. Moreover, the circuits have decided additional RLUIPA cases since Nelson conducted his study.
that courts applied after the enactment of RLUIPA but prior to *Cutter*. If this trend continues, RLUIPA may ultimately fail to provide the robust religious protections to prisoners that its supporters had hoped. Second, in circuits where courts are not taking cost into account in the strict scrutiny analysis, prison administrators may succeed if they accept the Court’s invitation in *Cutter* to argue that RLUIPA accommodations violate the Establishment Clause as applied. Ultimately, prison officials making this argument may persuade the Supreme Court to explain more fully the types and the severity of burdens imposed on third parties by religious accommodations that violate the Establishment Clause.

The analysis proceeds in five parts. Part I explains the doctrinal history of RLUIPA. In particular, it highlights the Supreme Court’s opinion in *Cutter v. Wilkinson*. Part II examines the various types of burdens that RLUIPA imposes on prisons. It explains how they combine to make the operation of prisons overly burdensome and how they actually result in the provision of fewer religious services. Part III analyzes the legislative history of RLUIPA and concludes that the congressional record supports the contention, under strict scrutiny, that cost sometimes justifies limits on the religious exercise of prisoners. Part IV analyzes whether federal circuit courts have proven receptive, particularly after *Cutter*, to prison officials’ arguments that the burdens of RLUIPA accommodations are excessive. Recent RLUIPA decisions suggest that courts are increasingly finding that administrative and financial costs outweigh substantial burdens on the religious exercise of inmates under the statute’s strict scrutiny test. Part V offers four conclusions: (1) as a factual matter, RLUIPA often proves overly burdensome on prisons; (2) courts are only now beginning to realize the full cost of the statute to prisons; (3) instead of finding religious accommodations too burdensome under the Establishment Clause, some courts are using financial and administrative burdens to overcome strict scrutiny, eroding the standard under RLUIPA; and (4) in circuits that have not found that cost may overcome strict scrutiny, prison administrators may succeed by arguing that the costs of accommodations violate the Establishment Clause.

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5 544 U.S. at 725–26.
1. DOCTRINAL HISTORY OF RLUIPA

A. Religious Rights Under the First Amendment, RFRA, and RLUIPA

In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act. The purpose of Section 3 of the statute is to provide redress for prisoners who encounter undue impediments to their religious observances.\(^7\) RLUIPA represents an attempt by Congress to elevate the protection of prisoners' religious rights above the level afforded by the First Amendment alone.\(^8\) Under the First Amendment, prison regulations that burden the religious exercise of inmates are valid as long as they are "reasonably related to legitimate penological interests."\(^9\) Thus, the First Amendment affords prison officials a great deal of discretion in setting prison policies that may interfere with the religious exercise of inmates.

In 1993, Congress enacted the precursor to RLUIPA, the Religious Freedom Restoration Act ("RFRA").\(^10\) RFRA sought to apply a strict scrutiny test to all substantial burdens imposed by the government on religious free exercise.\(^11\) In order to justify imposing a substantial burden on religious exercise, RFRA required that a government policy be the least restrictive means of serving a compelling government interest.\(^12\) In City of Boerne v. Flores, the Supreme Court invalidated RFRA as it applied to state and local governments on the grounds that it exceeded Congress's power under Section 5 of the Fourteenth Amendment.\(^13\)

\(^7\) See 146 Cong. Rec. 16,698–99 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.").

\(^8\) See Lovelace v. Lee, 472 F.3d 174, 199–200 (4th Cir. 2006) (explaining that RLUIPA provides more protection of inmates' free exercise rights than does the First Amendment); see also Nelson, supra note 3, at 2059.


\(^12\) Id. at 1264.

\(^13\) 521 U.S. 507, 536 (1997). Despite this holding, RFRA may still be applicable to the federal government. See Anthony L. Minervini, Comment, Freedom From Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial, 158 U.
Congress enacted RLUIPA in response to the Court’s decision in *City of Boerne*. The statute is a modified version of RFRA passed pursuant to Congress’s spending and commerce powers instead of Section 5 of the Fourteenth Amendment. In enacting RLUIPA, Congress retained the strict scrutiny test from RFRA. Section 3 of RLUIPA provides that

[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Congress anticipated that courts would apply the strict scrutiny test with “due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.” Initially, RLUIPA seemed to have avoided the hurdles encountered by RFRA. Under RLUIPA, prisoners have experienced considerable success in obtaining religious accommodations from prison regulations. Commentators attribute this success to the stronger constitutional hook of RLUIPA and the specific language of the statute. RLUIPA represents a permissible free exercise accom-
modation for prisoners, but one that potentially imposes significant burdens on third parties, primarily prison administrators and non-religious prisoners.

B. Cutter v. Wilkinson: The Burden Caveat

In Cutter, the Supreme Court upheld Section 3 of RLUIPA against an Establishment Clause challenge. The petitioners, inmates of institutions operated by the Ohio Department of Rehabilitation and Correction, complained that Ohio prison officials had failed to accommodate their religious exercises in violation of RLUIPA. They alleged that prison officials discriminated against them for practicing nontraditional religions, denied them access to religious literature and ceremonial items, and prohibited them from dressing according to the requirements of their religions. The prison officials responded by asserting that RLUIPA impermissibly advanced religion in violation of the Establishment Clause because it conferred a benefit unavailable to all prisoners on a select few who “clothe their demands in religious garb.” Additionally, the prison officials argued that RLUIPA “violates the federalist principle embedded in the Establishment Clause, which reserves to the States the sovereign power to control their own treatment of religion.”

Initially, the Sixth Circuit found in favor of the prison officials on the Establishment Clause claim. It held that Section 3 of RLUIPA improperly advanced religion by “giving greater protection to religious rights than to other constitutionally protected rights,” by affording religious prisoners “rights superior to those of nonreligious prisoners,” and thus “encouraging prisoners to become religious in order to enjoy greater rights.”

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20 544 U.S. at 713–14 (2005). Section 3 of RLUIPA is concerned with institutionalized persons, while § 2 governs land use and church property.
21 Id. at 712–13.
22 Id. at 713.
24 Id. at 2. The respondents in Cutter also argued that Congress exceeded its spending and commerce powers by passing RLUIPA. See id.
The Supreme Court granted certiorari to decide the Establishment Clause issue and unanimously reversed the Sixth Circuit’s judgment, holding that RLUIPA does not violate the Establishment Clause.\textsuperscript{26} The Court found in favor of the inmates on the Establishment Clause question for three reasons. First, the Court found Section 3 of RLUIPA consistent with the Establishment Clause because “it alleviates exceptional government-created burdens on private religious exercise.”\textsuperscript{27} Second, the Court determined that RLUIPA, properly applied, does not run afoul of precedent prohibiting undue burdens on third parties.\textsuperscript{28} And finally, the Court was satisfied that RLUIPA is neutral and treats different faiths equally.\textsuperscript{29}

The Court’s second concern, burdens on third parties, is the central focus of this Note. The Court acknowledged this concern several times, recognizing that “[a]t some point, accommodation may devolve into ‘an unlawful fostering of religion.’”\textsuperscript{30} Later in the opinion, the Court tempered its affirmation of the protections RLUIPA affords prisoners, explaining, “[w]e do not read RLUIPA to elevate accommodation of religious observances over an institution’s need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests.”\textsuperscript{31} Finally, at the conclusion of the opinion, the Court inserted a caveat implying that the burdens of accommodation imposed by RLUIPA might amount to impermissible fostering of religion in individual cases:

Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order.\textsuperscript{32}

\textsuperscript{26} \textit{Cutter}, 544 U.S. at 713–14.
\textsuperscript{27} Id. at 720.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 723–24.
\textsuperscript{30} Id. at 724 (quoting Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 334–35 (1987)).
\textsuperscript{31} Id. at 722.
\textsuperscript{32} Id. at 726.
Although the Court held that RLUIPA does not facially violate the Establishment Clause, it suggested that if the statute were to place particularly heavy burdens on prisons in individual instances, those accommodations might be unconstitutional. In effect, Cutter invites prison officials to argue that RLUIPA imposes excessive burdens on state prisons.

II. TYPES OF BURDENS IMPOSED BY RLUIPA

Prison officials assert that accommodations required by RLUIPA impose a wide variety of administrative and financial burdens on prisons. Section A of this Part examines each type of burden faced by prisons. They are grouped into four categories: (1) burdens on security, (2) administrative burdens, (3) financial burdens, and (4) burdens on the provision of religious services. Section B explains how the flood of demands for accommodation under RLUIPA has magnified the cost of each of these types of burdens to prisons. Finally, Section C explains the manner in which many states are financially coerced into complying with RLUIPA.

Some of the sources in this Part refer to the burdens imposed by RFRA, rather than RLUIPA. Because RFRA applied to state prisons prior to City of Boerne, data regarding the administrative and financial burdens imposed by RFRA is instructive in evaluating the burdens imposed by RLUIPA. The distinction between RFRA and RLUIPA is inconsequential because the burdens imposed on prisons by RLUIPA are precisely the same as those imposed by RFRA. In fact, RFRA and RLUIPA employ the same strict scrutiny test with identical language. In addition, the senators who co-sponsored RLUIPA actually read part of RFRA’s legislative history into the legislative history of RLUIPA, further strengthening the connection between the two statutes. Finally, if there is any difference in the burdens imposed by RFRA and RLUIPA, it is of no consequence because those generated by the latter are likely to be more onerous. There is some indication that

courts under RFRA applied a watered-down version of strict scrutiny that favored prisons. But under RLUIPA, some courts have applied the strict scrutiny test more rigorously and, as a result, prisoners have experienced moderate success in obtaining religious accommodations. Thus, if courts are applying true strict scrutiny under RLUIPA, the burdens are perhaps even more significant than those imposed by RFRA.

A. Burdens on Security

A paramount concern of any prison is security, and the tangle of administrative burdens RLUIPA imposes on prisons appears inextricably tied to prison security. In his dissent in Lovelace v. Lee, Judge Wilkinson wrote that

[It is hard to imagine . . . how these general administrative interests, when advanced in the prison setting, could be other than sufficiently intertwined with the more serious interests in safety and security so as to render them compelling . . . [I]t is simply impossible to divorce a prison’s compelling interests in safety and security from internal administration and order.]

1. Facilitation of Gang Activity

Exploitation of RLUIPA accommodations by prison gangs is a problem that especially plagues prisons. In Cutter, the Ohio Department of Rehabilitation and Correction relied heavily on an affidavit from David Schwarz, its religious services administrator for the south region (“Schwarz affidavit”). In his affidavit, Schwarz condemned the burdens RFRA imposed on prisons and explained

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36 See Gaubatz, supra note 5, at 557–72; Nelson, supra note 3, at 2113.
37 Lovelace v. Lee, 472 F.3d at 212 (4th Cir. 2006) (Wilkinson, J., concurring in part and dissenting in part); see also Cutter, 544 U.S. at 723, 726.
39 Although the affidavit concerns burdens imposed on Ohio state prisons by RFRA rather than RLUIPA, this difference is immaterial. See supra text accompanying notes 33–36. The Schwarz affidavit is referred to in Cutter, 544 U.S. at 721; Brief for the States of New York and Washington as Amici Curiae in Support of Petitioners at 15, Cutter v. Wilkinson, 544 U.S. 709 (2008) (No. 03-9877) [hereinafter NY and WA
how prison gangs adopt religious postures in order to obtain protection for illicit activities. Similarly, the Office of the Attorney General of the State of Florida conducted a survey in 1996 examining the impact of RFRA on the correctional systems of all fifty states. In a memorandum to the Florida attorney general summarizing the preliminary results of the survey ("Tucker Memorandum"), the Florida deputy general counsel who oversaw the survey confirmed that prison gangs exploit RFRA in order to create a legitimate front for their groups. Inmates’ claims of religious status for their groups and religious motivations for their activities significantly hindered prison officials’ efforts to crack down on gang activity. For example, the Tucker Memorandum explained that “[w]here previously prison officials successfully prevented gangs from wearing colors or emblems, these same groups now assert the right to wear special clothing or medallions as expressions of religious freedom.” States argue, however, that “[t]he strong statutory preference for religion codified in the RLUIPA/RFRA standard . . . has forced abandonment” of policies that prohibited prisoners from wearing clothing and symbols denoting gang membership based on religious pretenses.

The gang activity concerns that were prevalent under RFRA continue to resonate under RLUIPA. An amicus brief in Cutter supporting the Ohio Department of Rehabilitation and Correction states that “[g]ang members are well aware of the legal protections afforded to religious practice, and unfortunately, seek to take advantage of these special privileges. In one survey of prison gang

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40 Schwarz, supra note 38, at 4.
42 Id.
43 Id.; see also Brief of Ohio and Ten Other States as Amici Curiae Supporting Appellants at 17, Benning v. Georgia, 391 F.3d 1299 (11th Cir. 2004) (Nos. 04-10979, 04-11044) [hereinafter Ohio and Ten Other States as Amici].
44 Ohio and Ten Other States as Amici, supra note 44, at 17.
members, one third of the members admitted that their groups had used ‘religion as a ‘front’ for gang business.”  

Furthermore, an amicus brief in support of the prison in Benning v. Georgia confirmed that the pattern of gang exploitation of RLUIPA has been well-documented in studies commissioned by both the federal government and fifty state governments.  

2. Inmate Presence in Sensitive Areas of Prison

Prisons also assert that RLUIPA accommodations undermine prison security when they permit inmates to enter sensitive areas of prison facilities. For example, in Andreola v. Wisconsin, a prisoner demanded that he be allowed to supervise the preparation of his kosher meals in the prison kitchen to ensure that specific methods were followed by the kitchen staff. The prison administration refused the request on the ground that allowing a prisoner out of his cell at irregular times and supervising him in the kitchen posed significant security risks. The Andreola court agreed, finding for the prison and recognizing the security risks inherent in permitting a prisoner in the kitchen.

3. Demands for Dangerous Items

Other accommodations threaten security by requiring potentially dangerous religious paraphernalia. For example, the court in Fowler v. Crawford held that RLUIPA did not require a prison to accommodate a Native American prisoner’s sweat lodge ceremony. In addition to construction of the sweat lodge itself, the prisoner demanded fire, rocks, shovels, deer antlers, split wood, and other items for use in his religious ritual. Prison officials were

48 211 F. App’x 495, 497 (7th Cir. 2006).
49 Id.
50 Id. at 498.
51 534 F.3d 931, 942 (8th Cir. 2008).
52 Id. at 939.
concerned that such items could be used as weapons.\textsuperscript{53} Moreover, the prison emphasized the fact that the sweat lodge would shield inmate participants in the ceremony from the view of the guards, essentially leaving prisoners at the maximum security facility unsupervised.\textsuperscript{54} The court found that the considerable security concerns presented by the sweat lodge ceremony simply outweighed the prisoner’s religious rights.

Additionally, prisons assert that RLUIPA accommodations burden prison security by enabling prisoners to obtain exemptions from general policies that limit the number and type of personal possessions. For example, in\textit{Washington v. Klem}, the prison maintained a policy limiting inmates to a maximum of ten books in their cells. The prison argued that “an excess number of books can create a fire hazard, provide a place to conceal weapons or other contraband, and also create a sanitation problem in the relatively small confines of a prison cell.”\textsuperscript{55} The court, however, held that the prison policy was not the least restrictive means of furthering these interests.\textsuperscript{56} And the prison in\textit{Borzych v. Frank} banned inmates from possessing certain religious books that promoted violence.\textsuperscript{57} The Seventh Circuit upheld the prison’s policy.\textsuperscript{58}

4. Exemptions from Short Hair Restrictions

Prisons have also protested RLUIPA decisions that invalidate restrictions on hair length, because long hair permits prisoners to hide weapons. In\textit{Warsoldier v. Woodford}, the Ninth Circuit held that RLUIPA requires a prison to exempt an inmate from its short hair policy.\textsuperscript{59} The inmate’s religion permitted him to cut his hair only upon the death of a close relative.\textsuperscript{60} Prison officials asserted several security concerns in support of the short hair policy. They contended that the policy facilitated quick identification of prison-
ers by the prison staff and made hiding weapons and contraband more difficult for prisoners.\textsuperscript{61} The officials also argued that long hair required prison guards to search prisoners, which brought guards into close physical proximity to prisoners and increased their exposure to attack.\textsuperscript{62} Moreover, prison officials insisted that the policy was necessary to facilitate the identification of escaped prisoners, since a long-haired inmate may easily change his appearance by cutting his hair.\textsuperscript{63} Finally, the prison argued that the policy enhanced prisoner safety by preventing gang identification and reducing animosity between prisoners.\textsuperscript{64} Despite these concerns, however, the court found that the prison had not satisfied RLUIPA because prison officials had not considered less restrictive means or explained why other prisons were able to accommodate long hair. Thus, the prison was required to accommodate the prisoner’s demand.\textsuperscript{65} In a similar case, Hoevenaar v. Lazaroff, the Sixth Circuit upheld a prison policy prohibiting an inmate from wearing a kouplock, a “two inch square [of hair worn] at the base of the skull that is grown longer than the person’s remaining hair.”\textsuperscript{66} Prison officials cited precisely the same security concerns as the prison administration in Warsoldier.\textsuperscript{67}

5. Perceptions of Favoritism

Finally, prisons contend that RLUIPA sends a message of favoritism when religious inmates obtain benefits unavailable to their secular peers. Prison officials argue that providing accommodations for religious prisoners “results in identically situated inmates being treated very differently solely because of religion.”\textsuperscript{68} This perception creates tension among the inmates in the prison population. For example, the prison in Hoevenaar v. Lazaroff argued that

\textsuperscript{61} See Appellees’ Brief at 16–18, Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005) (No. 04-55879).
\textsuperscript{62} Id. at 16–17.
\textsuperscript{63} Id. at 17.
\textsuperscript{64} Id.
\textsuperscript{65} Warsoldier, 418 F.3d at 998–1002.
\textsuperscript{66} 422 F.3d 366, 367 (6th Cir. 2005).
\textsuperscript{67} Id. at 369 (explaining that the absolute ban on long hair “(1) promotes security by preventing inmates from hiding contraband in their hair, and (2) prevents inmates from quickly changing their appearance after a prison-break by cutting their hair”).
\textsuperscript{68} Ohio and Ten Other States as Amici, supra note 44, at 13.
“individualized exemptions are problematic because they cause resentment among the other inmates.” In prisons, where security is a paramount interest, RLUIPA hinders the ability of prison staff to perform their most fundamental function.

In summary, every religious accommodation that requires an exemption from security regulations, in addition to creating administrative and financial costs, also increases the risk of harm to prison staff and other prisoners.

B. Administrative Burdens

Administrative burdens are distinct from financial burdens in that they do not directly implicate financial resources. Instead, they primarily implicate other prison resources, such as time and personnel. Most administrative burdens, however, do involve some financial cost. The administrative burdens imposed on prisons by RLUIPA vary widely. For example, in his affidavit, David Schwarz condemned the administrative burdens caused by RFRA. He wrote that RFRA

required religious services personnel to not only examine the religious necessity of each requested accommodation, how to meet the particular requirements each religion imposed with regard to the subject matter of each request and to work with security and other institutional staff to determine whether each requested accommodation presented operational concerns.

Schwarz also asserted that RFRA caused the proliferation of new religions, which further burdened religious services staff with the task of ascertaining the authenticity of religious beliefs of prisoners. Moreover, many of the new religions demanded outrageous accommodations, such as group martial arts classes. Prisons in RLUIPA litigation consistently contend that implementing the large number and wide variety of religious accommodations required by the statute is a complex and taxing chore for prison staff.

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69 Hoevenaar, 422 F.3d at 369.
70 See generally Schwarz, supra note 38.
71 Id. at 3–4.
72 Id. at 4–5.
The burdens on prison staff that resulted from RFRA foreshadow the “administrative morass” that Fourth Circuit Judge J. Harvie Wilkinson III has warned will be the result of RLUIPA. In his dissent in *Lovelace v. Lee*, Wilkinson decries the hodgepodge of accommodations that RLUIPA forces on prisons. He protested that

> [q]uestions regarding meals, dress, hygiene, hair styles, and cell decor must now be addressed by federal courts, because all these things can bear upon religious observance. It will be the unusual activity indeed that cannot be connected to the religious tenets of some subset of the prison population.\(^73\)

RLUIPA’s broad definition of “religious exercise” further magnifies the administrative burdens. The statute states that “‘[t]he term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.’”\(^74\) RLUIPA’s definition of “religious exercise” expands the range of protected religious practices. A literal reading of this definition implies that all minor and seemingly insignificant practices, rather than merely central or core practices, must be accommodated.\(^75\) This definition greatly increases the variety and number of potential accommodations that prisons may be required to implement. Since RLUIPA protects an individual inmate’s personal interpretation of his stated religion, the statute may require prisons to tailor policies to particular prisoners, rendering the administrative burdens imposed by RLUIPA even more complex. Wilkinson anticipated this difficulty in his *Lovelace* dissent, writing that “an inmate might be sincere as to subtenet A of a religious practice and insincere with respect to subtenets B and C and administrators will have to sort through and accommodate.”\(^76\) Being forced to decipher and adequately accommodate each individual’s idiosyncratic interpretation of his own religion “will drive prison administrators crazy.”\(^77\)

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\(^75\) *Lovelace*, 472 F.3d at 187 n.2 (“[C]ourts must not judge the significance of the particular belief or practice in question.”); see also Cutter v. Wilkinson, 544 U.S. 709, 725 n.12 (2005).

\(^76\) *Lovelace*, 472 F.3d at 209 (Wilkinson, J., concurring in part and dissenting in part).

\(^77\) Id. at 209 (Wilkinson, J., concurring in part and dissenting in part).
Wilkinson even worried that “requir[ing] policies to accommodate every set of individual circumstances . . . places prison administrations on a collision course with the values embodied in the Establishment Clause and with core federalism principles.”

Finally, RLUIPA accommodations may also require significant changes to the administrative procedures of a prison. For example, Wilkinson condemned the majority’s suggestions that the prison should have expedited its review of the prisoner’s complaint and should have had an alternate accommodation in place to satisfy the prisoner in the interim. Wilkinson similarly bemoaned the majority’s emphasis on timely grievance hearings for prisoners who claim that their religious rights have been infringed. He pointed out that to satisfy the majority’s desire to accommodate Lovelace—or any inmate—individually, it would appear that prisons would have to hold hearings on dramatically different schedules in order to ensure timely disposition of grievances relating to everything from one-day observances such as Christmas, to days-long observances such as Passover, to month-long observances such as Ramadan . . . . To read into the requirement of narrow tailoring a requirement approaching individual accommodation will run administrators ragged. It will have no end.

Wilkinson closed his condemnation of the procedural burdens imposed by RLUIPA by stressing that “prison procedures in general would have to be tailored and retailed to the demands of a blinding variety of religious calendars,” which would “impose daunting administrative costs” and “rob prison procedures of perhaps the most important features of any fair process: uniformity and impartiality.”

78 Id. at 214–15 (Wilkinson, J., concurring in part and dissenting in part).
79 Id. at 209 (Wilkinson, J., concurring in part and dissenting in part). Interestingly, Judge Wilkinson wrote the majority opinion in Madison v. Riter, 355 F.3d 310, 313 (4th Cir. 2003), which upheld § 3 of RLUIPA as constitutional under the Establishment Clause. He also authored the majority opinion in Madison v. Virginia, 474 F.3d 118, 122 (4th Cir. 2006), which found RLUIPA to be a constitutional exercise of Congress’s powers under the Spending Clause.
80 Lovelace, 472 F.3d at 215 (Wilkinson, J., concurring in part and dissenting in part).
81 Id. at 221 (Wilkinson, J., concurring in part and dissenting in part).
Finally, both the Tucker Memorandum and the Schwarz affidavit deplore the administrative burdens imposed by RFRA’s strict scrutiny test. Tucker wrote that the Florida study indicated that RFRA was “resulting in very significant burdens on the already overburdened corrections staffs due to the need to investigate the religious necessity and security impact of each of the growing number of demands.”\textsuperscript{82} David Schwarz echoed the results of the Florida survey: “As part of my duties I corresponded with my counterparts in the correctional systems of other states. They uniformly indicated that they were also experiencing similar operational and litigation related problems resulting from R.F.R.A.”\textsuperscript{83}

\textbf{C. Financial Burdens}

Finally, complying with RLUIPA drains the limited financial resources of penal institutions. RLUIPA does this in three ways. First, implementing RLUIPA accommodations consumes precious budgetary resources. Second, RLUIPA increases litigation costs for prisons and states. And third, prisons are financially coerced into complying with RLUIPA.

\textit{1. The Costs of Implementing Accommodations}

Complying with RLUIPA requires that prisons make exceptions to general rules, frequently costing prisons extra money while straining already limited prison budgets. For example, religious accommodations that require paying for extra guards to supervise religious activities, hiring chaplains, or providing special meals all increase the cost of operating prisons. In \textit{Baranowski v. Hart}, the Texas Department of Criminal Justice argued that its limited budget simply would not permit it to provide kosher meals for a Jewish inmate.\textsuperscript{84} The Fifth Circuit ruled in favor of the prison officials based on this argument.\textsuperscript{85} The court in \textit{Linehan v. Crosby} similarly found that providing kosher meals was too expensive an accommodation under RLUIPA.\textsuperscript{86} And in \textit{Fowler v. Crawford}, the

\begin{itemize}
  \item \textsuperscript{82} Tucker Memorandum, supra note 41.
  \item \textsuperscript{83} Schwarz, supra note 38, at 3.
  \item \textsuperscript{84} 486 F.3d 112, 125–26 (5th Cir. 2007).
  \item \textsuperscript{85} Id. at 126.
  \item \textsuperscript{86} No. 08-15780, 2009 WL 3042038, at *1 (11th Cir. 2009).
\end{itemize}
Missouri Department of Corrections stressed that “[t]he construction and maintenance of the sweat lodge and facilitating sweat lodge ceremonies would consume considerable institutional financial and personnel resources. The extended program time required for the sweat lodge ceremony would expend many institutional personnel hours.”

Virtually all of the burdens related to administration, security, and litigation result in some financial costs to prisons.

2. Costs of Litigation
   a. General Costs

   The Tucker Memorandum explains that most states experienced a significant increase in the number of prisoner lawsuits demanding religious accommodations following the enactment of RFRA. Preliminary studies demonstrate that RLUIPA has similarly resulted in an explosion of litigation. A study summarized in the Tucker Memorandum surveyed the varied costs of litigation under RFRA, finding that the “mostly redundant litigation requires correctional systems to divert employees from their normal tasks, requires State Attorneys General to devote significant staff to defend, and ties up court dockets across the country . . . .” Thus, the surge in litigation resulting from increased protection of religious rights costs state governments time, money, and resources, and causes prison officials to expend significant amounts of time dealing with issues related to the litigation.

   b. Potential for Damage Awards Under RLUIPA

   In addition to the various litigation costs, RLUIPA may permit awards of monetary damages. There is some controversy about whether RLUIPA authorizes damage claims against states and their officials. The Fourth, Fifth, Sixth, Seventh, and Eighth Cir-

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87 Brief of Appellees, supra note 53, at 14.
88 Tucker Memorandum, supra note 41.
89 See Nelson, supra note 3, at 2067 (noting that there have been over five hundred RLUIPA claims brought by prisoners since 2005).
90 Tucker Memorandum, supra note 41.
91 Compare Van Wylie v. Reisch, 581 F.3d 639, 655 (8th Cir. 2009) (holding that RLUIPA does not waive a state’s sovereign immunity from damage claims), Nelson v.
circuits have all held that damage claims against states are not permitted under RLUIPA. These courts generally assert that state sovereign immunity under the Eleventh Amendment bars damage claims against states under RLUIPA. A state may waive its immunity by “voluntarily participating in a federal spending program provided that Congress has expressed ‘a clear intent to condition participation . . . on a State’s consent to waive its constitutional immunity.” But a waiver of immunity must be clearly and unambiguously expressed in the statutory language. Courts generally construe ambiguities in the statutory language in favor of sovereign immunity.

The relevant portion of RLUIPA is the remedial provision, which states that “[a] person may assert a violation of this chapter . . . and obtain appropriate relief against a government.” The circuits holding that RLUIPA does not authorize damages have concluded that the phrase “appropriate relief” is ambiguous because it can be construed either to include or not to include damage awards. Because the statute does not explicitly refer to monetary damages, courts have found that RLUIPA “falls short of the unequivocal textual expression necessary to waive State immunity from suits for damages.”

In contrast to the circuits that do not permit monetary relief under RLUIPA, the Eleventh Circuit has held that prisoners may receive nominal damages under the statute. So far, it is the only circuit to reach this conclusion. In support of its holding, the Eleventh

Miller, 570 F.3d 868, 885–89 (7th Cir. 2009) (same), Cardinal v. Metrish, 564 F.3d 794, 801 (6th Cir. 2009) (same), Sossamon v. Texas, 560 F.3d 316, 331 (5th Cir. 2009) (same), and Madison v. Virginia, 474 F.3d 118, 131 (4th Cir. 2006) (same), with Smith v. Allen, 502 F.3d 1255, 1271 (11th Cir. 2007) (holding that RLUIPA authorizes nominal damage suits against states).

92 See Van Wyhe, 581 F.3d at 655; Nelson, 570 F.3d at 885–89; Cardinal, 564 F.3d at 801; Sossamon, 560 F.3d at 331; Madison, 474 F.3d at 131.

93 Madison, 474 F.3d at 129 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985)).


95 Madison, 474 F.3d at 131 (citing Lane, 518 U.S. at 192).


97 See, e.g., Madison, 474 F.3d at 131.

98 Id.

99 Smith v. Allen, 502 F.3d 1255, 1271 (11th Cir. 2007).
Circuit relied on the Supreme Court’s decision in *Franklin v. Gwinnett County Public Schools.* In *Franklin,* the Court explained that federal courts should presume the availability of all appropriate remedies where Congress has not clearly announced the remedies that it prescribes. In contrast, the other circuits presume that the only remedies available are those that are explicitly provided in the language of the statute.

Ultimately, monetary damages under RLUIPA will probably not prove to be a significant financial burden on states. Thus far, the majority of circuits that have ruled on the issue have barred damages on the grounds of state sovereign immunity. Furthermore, district court decisions in some of the circuits that have not ruled on the issue indicate a reluctance to permit damages under RLUIPA because of the statute’s ambiguous remedial provision. Only the Eleventh Circuit has held that RLUIPA permits damages, and that holding is tempered by its finding that the Prison Litigation Reform Act (“PLRA”) limits any damages available to nominal damages. Moreover, some circuits have distinguished *Franklin,* the key case on which the Eleventh Circuit relied, by pointing out that it involved a municipal defendant and thus did not implicate state sovereign immunity.

Because there is a circuit split on the availability of damages under RLUIPA, the Supreme Court may eventually rule on this issue. Given the heavy weight of authority disallowing damage claims and the potentially flawed reasoning of the Eleventh Circuit, it seems unlikely that the Court would agree that RLUIPA permits damages. This is reinforced by the likelihood that the conservative majority’s appreciation of federalism would favor preserving state sovereign immunity. Because this question remains unresolved, however, the permissible extent of burdens imposed on states by RLUIPA has yet to be fully clarified.

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101 Id. at 68–69.
102 See supra notes 91–98 and accompanying text.
104 Smith, 502 F.3d at 1271.
105 Van Wyhe v. Reisch, 581 F.3d 639, 654 (8th Cir. 2009); Cardinal v. Metrish, 564 F.3d 794, 800–801 (6th Cir. 2009).
3. Financial Coercion

States that accept federal money must comply with the requirements of RLUIPA. Although RLUIPA is expensive, states are unable to avoid its requirements since some portion of the budget of every state prison comes from federal funding. Courts nonetheless generally maintain that states possess the freedom to decline federal funding if they wish to avoid the burdens associated with making religious accommodations required by RLUIPA. Sacrificing federal funding may, however, be prohibitively expensive for many states. In order to avoid the burdens of RLUIPA, states must forfeit an entire block of federal funding, not merely a portion thereof. Admittedly, federal funding may not comprise a significant percentage of the total prison budget in all states. For instance, in 2005, the Virginia Department of Corrections received only 1.3% of its total budget from federal funding. But for other states, federal funding may be crucial. For example, from 2001 through 2006, South Dakota received between 9.5% and 17.35% of its total Department of Corrections budget from federal funding. Although federal statutes that “threaten the loss of an entire block of federal funds upon a relatively minor failing by a state are constitutionally suspect,” it is not generally considered coercive to force states to choose whether to forfeit as much as sixty percent of the operating budget of an entire state agency.

Although courts may not believe that it is coercive to force prisons to comply with RLUIPA by jeopardizing a large percentage of their prison budgets, this is not consistent with reality for cash-strapped states. These states cannot realistically consider forfeiting significant percentages of their prison budgets in order to avoid the

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106 Section 3 of RLUIPA applies when “the substantial burden [on religious exercise] is imposed in a program or activity that receives Federal financial assistance . . . .” 42 U.S.C. § 2000ce-1(b)(1); see also Cutter, 544 U.S. at 715–16; Madison v. Virginia, 474 F.3d 118, 128 (4th Cir. 2006).
107 Cutter, 544 U.S. at 716 n.4.
108 See Madison, 474 F.3d at 128.
109 Id.
110 Id.
111 Van Wyhe v. Reisch, 581 F.3d 639, 652 (8th Cir. 2009).
112 Madison, 474 F.3d at 128 (citing West Virginia v. U.S. Dep’t of Health & Human Servs., 289 F.3d 281, 291 (4th Cir. 2002)).
113 See, e.g., Van Wyhe, 581 F.3d at 652.
burdens of RLUIPA.\textsuperscript{114} Although one may argue that states should simply calculate whether the costs of RLUIPA compliance exceed the costs of forfeiting federal grant money, the actual costs of RLUIPA are very difficult to measure because they are so varied and difficult to quantify. Indeed, this Note contends that the total cost of RLUIPA remains unclear even ten years after its passage.

C. Aggregated Burdens

The root of the problem of the administrative burdens that RLUIPA imposes on prisons lies in the sheer number of accommodations that a prison may be forced to implement. Exempting a solitary prisoner from a general prison policy by itself might be a manageable burden. In the aggregate, however, implementing a large number of accommodations may prove overwhelming from both an administrative and financial standpoint.

The Schwarz affidavit provides an excellent example of the significant challenges prisons face as a result of increased demand for religious accommodations.\textsuperscript{115} In support of its opposition to RLUIPA in \textit{Cutter}, the Ohio Department of Rehabilitation and Correction included the affidavit as part of its “comprehensive record of the real world effects of RLUIPA in prisons.”\textsuperscript{116} In the affidavit, Schwarz explains that the enactment of RFRA drastically increased the amount of time he spent working with prison staff to conform to legal requirements. He states that he “spent between sixty to seventy percent of [his] time working with institutional staff to determine how to comply with R.F.R.A.”\textsuperscript{117} According to


\textsuperscript{115} See generally Schwarz, supra note 38.

\textsuperscript{116} NY and WA as Amici, supra note 39, at 15. The affidavit was written and signed by David Schwarz, the Religious Services Administrator for the South Region of the Ohio Department of Rehabilitation and Correction. His primary duties included consulting with prison staff regarding “the delivery of religious services and operational issues involving religious matters.” He supervised the implementation of religious services in fourteen prisons, set religious policy for the prisons within his jurisdiction, developed new religious programming, and recruited staff and volunteers to deliver religious services. Schwarz, supra note 38, at 1.

\textsuperscript{117} Schwarz, supra note 38, at 2.
Schwarz, the number of inmate requests for religious accommodations soared following the passage of RFRA.\textsuperscript{118} A major contributing factor that magnifies the burdens of RLUIPA is that some courts have stringently applied the strict scrutiny test.\textsuperscript{119} In particular, courts have compared prison policies, searching for inconsistencies, to determine what constitutes a compelling governmental interest.\textsuperscript{120} For example, in \textit{Warsoldier v. Woodford}, the Ninth Circuit concluded that regulating the length of male prisoners’ hair was not a compelling governmental interest because the prison did not also regulate the hair length of female prisoners.\textsuperscript{121} And in \textit{Washington v. Klem}, the Third Circuit found that a limit on the number of books did not implicate a compelling governmental interest because there were no analogous restrictions on magazines or other personal property.\textsuperscript{122}

Similarly, some courts have rigorously applied the least restrictive means element of the strict scrutiny test under RLUIPA. In applying this element of the test, courts have compared contested prison policies with those employed by other prisons. In \textit{Spratt v. Rhode Island Department of Corrections}, the First Circuit rejected a restriction on preaching by inmates by pointing out that other prisons did not prohibit inmate preaching.\textsuperscript{123} In another example, the Eighth Circuit in \textit{Fowler v. Crawford} explained that requiring a maximum security prison to provide an inmate with a sweat lodge would effectively require every prison in the jurisdiction to make the same provision.\textsuperscript{124} Because no other institution could conceivably have greater security concerns than a maximum security prison, other prisons in the same jurisdiction would have trouble explaining how their security interests were somehow different and more significant than those of the prison in \textit{Fowler}.\textsuperscript{125} If the court construed RLUIPA to require one prison to make such an excessive

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\textsuperscript{118} Id. at 3. \\
\textsuperscript{119} See, e.g., Nelson, supra note 3, at 2053–56. \\
\textsuperscript{120} See id. \\
\textsuperscript{121} 418 F.3d 989, 1000 (9th Cir. 2005). \\
\textsuperscript{122} 497 F.3d 272, 283–84 (3rd Cir. 2007). \\
\textsuperscript{123} 482 F.3d 33, 42 (1st Cir. 2007). \\
\textsuperscript{124} 534 F.3d 931, 942 (8th Cir. 2008); see also Shakur v. Schriro, 514 F.3d 878, 890–91 (9th Cir. 2008) (finding that a prison refusing to serve Halal meals did not employ the least restrictive means because other prisons made such accommodations). \\
\textsuperscript{125} See \textit{Fowler}, 534 F.3d at 942. \\
\end{flushright}
accommodation, other prisoners would demand and receive the same benefit.

The way in which some courts are employing RLUIPA’s strict scrutiny test magnifies the burdens imposed by the statute. By comparing challenged policies with other internal policies and with the policies of other prisons, these courts multiply the effects of their decisions. When these courts overturn the policy of one prison, they render similar policies of other prisons vulnerable to challenge. The cumulative effect of courts comparing prison policies over time thus exponentially increases the burdens of RLUIPA on prison administration, and the full effect of this comparative reasoning is only now coming to light.

D. Decreased Provision of Religious Services

In addition to the administrative and financial burdens imposed by RLUIPA, prisons assert that litigation under the statute actually results in decreased administration of religious services.\textsuperscript{126} In his affidavit, David Schwarz explained that the passage of RFRA forced him to spend between fifteen and twenty percent of his time working with the Office of the Ohio Attorney General in connection with lawsuits filed under RFRA.\textsuperscript{127} This time, combined with the sixty to seventy percent of his time spent helping prisons comply with RFRA, demonstrates that RFRA almost completely consumed his job, leaving him little time to attend to his primary duty of facilitating the provision of religious services for inmates.\textsuperscript{128} Schwarz wrote: “[T]he enactment of R.F.R.A. forced me to change from taking a proactive approach to the delivery of religious services and other religious matters to adopting a reactive stance because of the need to respond to the increased litigation and operational problems caused by R.F.R.A.”\textsuperscript{129} Prior to the enactment of

\textsuperscript{126} Note that RLUIPA contains a provision explicitly stating that lawsuits under RLUIPA are subject to the Prisoner Litigation Reform Act of 1995 (“PLRA”), 42 U.S.C. § 1997(e) (1995). See 42 U.S.C. § 2000cc-2(e) (stating that nothing in RLUIPA shall be construed as amending or repealing the PLRA). This provision of RLUIPA attempts to limit frivolous prisoner litigation. Thus, prisoners must first exhaust all administrative remedies before bringing suit.

\textsuperscript{127} Schwarz, supra note 38, at 2.

\textsuperscript{128} Id.

\textsuperscript{129} Id. at 3.
RFRA, Schwarz emphasized that he spent very little time responding to litigation.130 Because some courts have applied strict scrutiny more rigorously under RLUIPA than under RFRA, there is every reason to believe that RLUIPA also hinders the provision of religious services.

Moreover, the Tucker Memorandum notes that “most ironically . . . RFRA has actually resulted in a decrease in religious programming for most inmates in some States.”131 In particular, Tucker pointed out that the departments of correction of Oklahoma and Colorado cancelled their state-funded chaplaincy programs in the wake of RFRA.132 Thus, Congress’s attempt to relieve burdens on prisoners’ religious exercise, manifested in RFRA and RLUIPA, actually may have had an adverse impact.

III. LEGISLATIVE HISTORY OF RLUIPA

As demonstrated later in this Note, in the wake of Cutter, courts have proven receptive to the argument that some accommodations that would otherwise be required by RLUIPA are too burdensome for prisons to implement. At least one commentator, however, has argued that the legislative history of RLUIPA weighs against denying religious accommodations based on the administrative and financial costs.133 But the legislative history of RLUIPA provides ample support for the argument that courts may take the administrative and financial burdens of providing accommodations into account when deciding RLUIPA cases.

The issue of RLUIPA’s cost to prisons pervades the legislative history of the statute. RLUIPA was co-sponsored by Senators Orrin Hatch and Ted Kennedy, who directly addressed the issue of the costs imposed on prisons. In a joint statement on RLUIPA, the senators quoted from a Judiciary Committee report on RFRA, the predecessor to RLUIPA:

130 Id. at 2.
131 Tucker Memorandum, supra note 41.
132 Id.
[T]he committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with considerations of costs and limited resources.134

The statement is ambiguous regarding whether Hatch and Kennedy intended courts or prison administrators to consider the costs of complying with RLUIPA. Perhaps Congress intended for prison administrators to take cost into account when making prison policies and assumed that courts were only meant to review the legal issue of what constitutes a compelling government interest.135 But the statement may also reasonably be read to authorize courts to take cost and resources into account. Even if Congress intended the first interpretation, courts would implicitly still have to evaluate prison administrators’ assessments of cost because those assessments would be built into whatever prison policy is challenged. Finally, it seems inconceivable that the prohibitive cost of providing a given religious accommodation could never provide a justification for impeding a prisoner’s religious exercise. Indeed, this is the type of burden the Supreme Court in Cutter suggested would violate the Establishment Clause.136

Additionally, in a hearing before the Subcommittee on the Constitution of the House Judiciary Committee, then Solicitor of the State of Ohio, Jeffrey Sutton, testified extensively regarding the financial and administrative burdens that RFRA placed on the state prisons of Ohio.137 The hearing was entitled “Protecting Religious Freedom after City of Boerne v. Flores.”138 Although the hearing

135 Indeed, this is the same argument made by Aaron Block. See Block, supra note 133, at 257–58.
136 544 U.S. at 726.
137 See Protecting Religious Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 105th Cong. 120–27 (1997) (testimony of Jeffrey Sutton, Solicitor for the State of Ohio) [hereinafter Sutton Testimony]. Judge Sutton was referring to the effect RFRA had on Ohio before RFRA was invalidated as applied to the states in City of Boerne. See supra text accompanying note 13.
138 See Sutton Testimony, supra note 137, at 1.
concerned the effects of RFRA on the states, the effects of RLUIPA are similar because, as mentioned, RLUIPA incorporated the RFRA strict scrutiny test. Since the hearing took place after the invalidation of RFRA in *City of Boerne*, it is part of the congressional debate leading up to the enactment of RLUIPA in 2000. In his testimony, Sutton asserted that RFRA resulted in a wave of prisoner litigation that “included such bizarre claims as demands for recognition of the right to burn bibles, the right to possess and distribute racist literature, the right to engage in animal sacrifices and the right to group martial arts classes.”

As a consequence, prison officials were forced to spend significant time and resources responding to discovery requests and other trial-related matters. RFRA caused prison officials to divert a significant amount of time from their primary duties to analyze these requests under the least restrictive means test. Additionally, Sutton explained that RFRA undermined safety and security inside prisons. RFRA resulted in “an exponential growth in both the number and nature of requests for alterations of normal prison routine[s]. . . .” Ultimately, Sutton concluded that RFRA hindered the provision of religious services to inmates because the chaplain staff spent so much time responding to the increased volume of RFRA demands.

Furthermore, in a statement to the Senate just prior to its passage of RLUIPA, co-sponsors Kennedy and Hatch acknowledged the concern that prisoners seeking religious accommodations could file frivolous lawsuits, although they ultimately concluded that the Prison Litigation Reform Act would check the number of such suits. In a statement grudgingly supporting passage of the statute, Senator Reid shared their concern regarding the burden of frivolous litigation, but he doubted that the PLRA would significantly reduce the number of lawsuits because it did not do so when applied to RFRA. In response to this concern, Senator Hatch

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139 See supra notes 32–36 and accompanying text.
140 Sutton Testimony, supra note 137, at 124.
141 Id.
142 Id.
143 Id.
144 Id. at 125.
146 Id. at 16,703.
agreed to hold hearings after the implementation of RLUIPA to gauge its effects on prison administration and security. He also agreed to request that the Government Accounting Office conduct a study analyzing the effects of RLUIPA on prisons. 147

IV. HOW COURTS HAVE TREATED BURDENS ON PRISONS

As discussed in Part II, prisons frequently assert that RLUIPA overly burdens their capacity to accommodate prisoners’ religious practices in a variety of ways. The real question, however, is whether the Supreme Court’s invitation in Cutter has had any effect on courts’ sympathy to the administrative and financial costs that RLUIPA imposes on prisons. The answer to that question seems to be “yes.”

A. Before Cutter

Prior to Cutter, no federal circuit court adjudicating a RLUIPA case had ruled in favor of a prison specifically because of the excessive administrative and financial burdens of an accommodation. 148 In fact, some circuits explicitly rejected arguments detailing the significant financial and administrative costs on prisons. For example, in Benning v. Georgia the state argued that the costs and burdens that RLUIPA imposes on third parties constituted an Establishment Clause violation. 149 In support of this argument, Georgia cited Estate of Thornton v. Caldor and Texas Monthly v. Bullock, two seminal cases defining when religious accommodations violate the Establishment Clause by unduly burdening third parties. 150

147 Id.
148 As of March 28, 2010, a Westlaw survey of RLUIPA cases in federal courts of appeal revealed forty-seven cases adjudicating prisoner claims by applying strict scrutiny. Prisons won thirty-three of the forty-seven cases, but none of those wins prior to Cutter turned on the cost argument.
149 391 F.3d 1299, 1312 (11th Cir. 2004).
150 Id. In Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), the Supreme Court invalidated a Connecticut statute that provided Sabbath observers with an absolute right not to work on their chosen Sabbath. The Court held that the statute violated the Establishment Clause because it imposed an absolute duty on third parties, namely the employer and other employees, to conform their business practices to the particular religious interests of individual employees. Id. at 709–10. In doing so, the statute elevated religious concerns over all other interests and thus had the impermissible primary effect of advancing a particular religious practice. Id. at 710. In Texas
Georgia asserted that the burdens RLUIPA imposed undermined the prison’s ability to provide other services. The Eleventh Circuit, however, found the state’s argument unconvincing. Although the court admitted that some religious accommodations that impose economic burdens on third parties could violate the Establishment Clause, the court distinguished *Caldor* and *Texas Monthly* because they implicated involuntary economic burdens. In contrast, the court characterized the burden imposed by RLUIPA as voluntary because states theoretically may refuse federal funding rather than comply with RLUIPA: “if Georgia finds compliance with RLUIPA impractical, Georgia can refuse federal funds.”

**B. After Cutter**

Following the Supreme Court’s invitation in *Cutter*, however, several circuit courts have appeared sympathetic to the financial and administrative burdens that RLUIPA places on prisons. These circuits have found that the administrative and financial burdens imposed on prisons by RLUIPA outweigh the substantial burdens on inmates’ religious exercise in certain circumstances. Other circuits that have not yet considered the burden of cost in this way may follow this trend.

**1. Third Circuit**

In an unpublished opinion, the Third Circuit upheld a prison policy that required group worship services to be led by chaplains or approved religious leaders. Although the prison hired chaplains for large religious groups, the prison administration refused to pay for the travel expenses of chaplains from smaller groups to perform worship services. A Rastafarian inmate challenged the policy imposed by RLUIPA to provide such religious services. *Smith v. Kyler*, 295 F. App’x 479, 481 (3d Cir. 2008). Although the opinion was unpublished and thus does not constitute binding precedent in the Third Circuit, the opinion reveals that at least some Third Circuit judges are receptive to the cost argument.

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*Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989), a plurality of the Court held that a religious accommodation violates the Establishment Clause when it “either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion.”

*Benning*, 391 F.3d at 1312.

*Id.*
under RLUIPA. The court did not directly address whether the policy substantially burdened the inmate’s exercise of religion, but it held that the policy was the least restrictive means of achieving a compelling state interest.\textsuperscript{154} The court found that the disproportionate impact of the policy on Rastafarians and members of other small religions resulted from a scarcity of qualified volunteer ministers in the area.\textsuperscript{155} It concluded that the policy was “a fair means of allocating scarce prison resources because . . . to pay [for a Rastafarian Chaplain] would require the Department to pay expenses for numerous other religious leaders . . . or else be exposed to a charge of religious favoritism.”\textsuperscript{156} The court explained that “hiring a Chaplain to perform religious services only for the ‘largest major faith groups within a facility,’ but permitting smaller groups to worship together under the direction of a volunteer Faith Group Leader, is the least restrictive means of furthering the DOC’s interests.”\textsuperscript{157} The prison simply could not afford to hire a chaplain for every religion that might be represented in the prison population.

2. Fifth Circuit

The Fifth Circuit has held that the financial burden of providing religious accommodations may sometimes outweigh the religious interests of an inmate. In \textit{Baranowski v. Hart}, the prison refused to provide special diets for prisoners. The inmate, a member of the Jewish faith, sued the prison under RLUIPA because, among other things, the prison did not provide kosher meals.\textsuperscript{158} The court found that the policy substantially burdened the prisoner’s religious exercise. But it also held that minimizing the cost of prisoner meals constituted a compelling interest and that the policy of not provid-

\textsuperscript{154} Id. at 483–84.
\textsuperscript{155} Id. at 483. Presumably, had a qualified Rastafarian minister been willing to perform services at the prison for free, the prison policy would have permitted group worship for Rastafarian prisoners. See id. at 480 (“A Rastafarian chaplain employed by the New York Department of Corrections indicated that he would voluntarily provide religious services at SCI-Huntington if the DOC paid his travel expenses. The DOC refused to pay those expenses.”).
\textsuperscript{156} Id. at 484 (citation omitted).
\textsuperscript{157} Id.
\textsuperscript{158} Baranowski v. Hart, 486 F.3d 112, 116–18 (5th Cir. 2007). However, the prison did provide alternative meals such as pork-free or vegetarian options. In addition, Jewish inmates were free to receive kosher items from non-profit organizations. Id.
ing kosher meals was the least restrictive means of achieving that interest.\textsuperscript{159} The court stated that:

TDCJ’s budget is not adequate to cover the increased expense of either providing a separate kosher kitchen or bringing in kosher food from the outside; that TDCJ’s ability to provide a nutritionally appropriate meal to other offenders would be jeopardized (since the payments for kosher meals would come out of the general food budget for all inmates); that such a policy would breed resentment among other inmates; and that there would be an increased demand by other religious groups for similar diets.\textsuperscript{160}

The court cited the \textit{Cutter} invitation in finding that the budgetary and administrative concerns implicated could not be overcome by less restrictive means.\textsuperscript{161}

The Fifth Circuit bolstered its position that administrative and financial burdens may supersede the religious interests of an inmate in \textit{Jones v. Shabazz}, an unpublished opinion.\textsuperscript{162} The inmate, a member of the Nation of Islam (“NOI”), asserted that the prison’s refusal to permit him to modify the weekly generic Muslim worship service violated his rights under RLUIPA.\textsuperscript{163} Jones demanded that the prison permit him and other NOI followers to (1) undertake certain rituals during the service, (2) give sermons and lectures at the service, (3) form religious study groups, and (4) pray separately at the weekly meetings.\textsuperscript{164} The court explained that permitting only the generic Muslim service was the least restrictive means of furthering the compelling government interests in security, staff resources, and space.\textsuperscript{165}

Finally, in \textit{Sossamon v. Texas}, the Fifth Circuit confirmed that affordable security may constitute a compelling government interest.\textsuperscript{166} The inmate asserted, among other things, that the prison denied him access to the prison chapel for worship.\textsuperscript{167} The court did

\textsuperscript{159} Id. at 125–26.
\textsuperscript{160} Id. at 125.
\textsuperscript{161} Id. at 125–26 (citing Cutter v. Wilkinson, 544 U.S. 709, 726 (2005)).
\textsuperscript{162} No. 08-20697, 2009 WL 3682569 (5th Cir. 2009).
\textsuperscript{163} Id. at *3.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} 560 F.3d 316, 332 (5th Cir. 2009).
\textsuperscript{167} Id. at 321.
not resolve the RLUIPA claim and instead ordered the district
court to clarify genuine issues of material fact on remand. But in
the course of explaining the “compelling governmental interest”
prong of the RLUIPA strict scrutiny test, the court acknowledged
that lowering the cost of providing security constitutes a compel-
ling governmental interest. The court explained that “[e]ffective
and affordable prison security at the chapel is a compelling gov-
ernmental interest” and that “Texas obviously has compelling gov-
ernmental interests in the security and reasonably economical op-
eration of its prisons . . . .”

3. Seventh Circuit

The Seventh Circuit has held in an unpublished opinion that a
prison is not required to permit an inmate to supervise the prepara-
tion of his meals or to spend additional money to provide him with
prepackaged kosher meals. The prison in Andreola v. Wisconsin
initially attempted to accommodate the inmate by contracting with
a food services company to provide the inmate with kosher meals.
The cost of the kosher meals, however, was nearly four times the
cost of non-kosher meals. Moreover, prison officials indicated
that the inmate was the only prisoner ever to request kosher meals
at the prison. Since the cost of providing special meals for the in-
mate would have been $2000, the court held that the prison was not
required by RLUIPA to provide such meals.

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168 Id. at 332.
169 Id. at 332, 334.
170 Andreola v. Wisconsin, 211 F. App’x 495, 498–99 (7th Cir. 2006). The prison did
offer the inmate alternative meal options besides kosher meals. Although the opinion
is unpublished and does not constitute the law of the circuit, it suggests that some
Seventh Circuit judges find the cost argument persuasive.
171 Id. at 497.
172 Id.
173 Id. at 499. It is unclear whether the Andreola court applied the correct standard in
evaluating the prisoner’s RLUIPA claim. The court held that the prison had a “le-
gitimate interest” in controlling costs. Id. Under the RLUIPA strict scrutiny test, the
court should have evaluated whether cost constituted a “compelling governmental
interest,” not merely a “legitimate interest.” The court cited an RLUIPA case in sup-
port of its finding that the prison had a legitimate interest in controlling costs, which
suggests the court meant that cost is a compelling governmental interest. Id. (citing
DeHart v. Horn, 390 F.3d 262, 271–72 (3d Cir. 2004)). The case the court cited, how-
ever, was applying the Turner test under the First Amendment, not the RLUIPA
strict scrutiny test. See DeHart, 390 F.3d at 271–72. Thus, it is unclear whether the
4. Eighth Circuit

In *Fowler v. Crawford*, the Eighth Circuit refused to require a prison to construct a sweat lodge to accommodate a Native American inmate’s religious ceremony. The prison argued that building a sweat lodge and permitting the ceremony presented significant administrative burdens, particularly related to staffing. The court agreed, noting that prisons “have limited resources to provide the services they are called upon to administer.” The court found that the lengthy ceremony would drain the prison’s security manpower. In addition to emphasizing the administrative burden, the prison asserted that providing the inmate with the sweat lodge would consume considerable financial resources. The court explained that this burden was too substantial to require the accommodation: “the sweat lodge ceremony would expend significant prison resources, undoubtedly diverting limited resources from other areas of the prison.” Although the court did not explicitly hold that the financial and administrative burdens imposed by the accommodation implicated a compelling governmental interest, the court’s significant discussion of these burdens implies sympathy for the costs RLUIPA imposes on prisons.

5. Eleventh Circuit

Finally, the Eleventh Circuit, applying an abuse of discretion standard, has held that controlling costs may constitute a compelling governmental interest. In *Linehan v. Crosby*, a Seventh-Day Adventist challenged a prison policy against providing kosher

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534 F.3d 931, 932 (8th Cir. 2008).

Id. at 939 (quoting Al-Alamin v. Gramley, 926 F.2d 680, 686 (7th Cir. 1991)). The prison went to considerable lengths to accommodate the inmate’s exercise of his religious beliefs. Prison officials offered to let the inmate smoke the ceremonial pipe outdoors, among other compromises, but the inmate refused to compromise. Id. at 939–40.

Id. at 939.

Id. at 935.

Id. at 943.

346 F. App’x 471, 472 (11th Cir. 2009). *Linehan* is an unpublished opinion, but it suggests that at least some members of the Eleventh Circuit are sympathetic to prison officials’ cost arguments.
meals. The court assumed that the policy substantially burdened the prisoner’s religious exercise, but held that the district court did not abuse its discretion in finding that the policy of providing vegan and vegetarian meals instead was the least restrictive means of serving the compelling governmental interest of controlling costs.

6. Analysis

Since the Supreme Court’s decision in Cutter, circuit courts have decided forty-seven RLUIPA cases on the merits. Of those cases, the courts ruled in favor of the prisoners fourteen times and in favor of prisons thirty-three times. Of the thirty-three wins for prisons, seven decisions turned on the excessive financial and administrative burdens that RLUIPA imposes on prisons. Prior to Cutter, no circuit court had been persuaded by the argument that religious accommodations overly burden prisons. As evidenced by the Baranowski court’s reliance on Cutter in finding that minimizing cost is a compelling governmental interest, however, some post-Cutter decisions appear to have responded directly to the invitation to argue that cost is impermissibly burdensome. Although the sample size of circuit court RLUIPA decisions is relatively small, only after Cutter have prisons experienced success in persuading courts that the costs of RLUIPA are excessive, which suggests that the Cutter invitation has had some influence. Moreover, this influence is not isolated to one or two rogue circuits. Four separate circuits have found that the administrative and financial costs of religious accommodation may implicate compelling governmental interests under certain circumstances. And one additional circuit

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180 Apparently Jewish inmates were sometimes given kosher meals. See id. at 472.
181 Id.
182 According to a March 28, 2010 Westlaw survey of RLUIPA cases in federal courts of appeal.
183 Id.
184 Baranowski v. Hart, 486 F.3d 112, 125–26 (5th Cir. 2007) (explicitly referring to the Supreme Court’s caveat in Cutter).
185 These circuits include the Third, Fifth, Seventh, and Eleventh. The holdings in the Third, Seventh, and Eleventh Circuits were embodied in unpublished opinions, so they do not conclusively establish the law in those circuits. The opinions do suggest, however, that these circuits are receptive to prisons’ cost arguments. See supra notes 148–180 and accompanying text.
has evinced its sympathy to the costs of religious accommodations.  

The *Cutter* invitation certainly seems to have influenced some lower courts to accept the cost-related arguments of prison officials, but this influence has not taken the form that the Supreme Court envisioned. There is a disconnect between the *Cutter* invitation and the circuit court decisions. After holding RLUIPA generally permissible under the Establishment Clause, the Court cautioned that, if the burdens of religious accommodations become excessive, “adjudication in as-applied challenges would be in order.”  

*Cutter* invites prisons to argue that the burdens imposed by RLUIPA violate the Establishment Clause in certain circumstances. But prisons are not making this argument, and courts are not finding Establishment Clause violations. Instead, some courts recognize minimizing cost as a compelling governmental interest, and prisons are winning under RLUIPA’s strict scrutiny test. The explanation for this inconsistency requires some analysis.

Prisons may win RLUIPA cases in one of three ways. First, prisons may demonstrate that the inmate has failed to present a prima facie case under RLUIPA.  

Second, prisons may show that their policy is the least restrictive means of serving a compelling governmental interest in order to overcome statutory strict scrutiny. Third, prisons may assert that the burdens imposed by RLUIPA in an individual case are so excessive that they violate the Establishment Clause, as the Supreme Court suggested in *Cutter*.

In some circuits, prisons have no need to assert the Establishment Clause claim because their administrative and financial cost arguments survive the strict scrutiny test under RLUIPA. Courts may indeed be applying a more rigorous strict scrutiny analysis under RLUIPA than they did under RFRA. But after the Supreme Court’s invitation in *Cutter*, some courts have eroded the test by...
holding that administrative and financial costs implicate compelling governmental interests in allocation of resources and in security. In other strict scrutiny contexts, administrative and financial costs do not implicate compelling governmental interests. Following *Cutter*, prisons have won twenty-eight of thirty-eight RLUIPA cases argued on the merits in the courts of appeal. Seven of those wins turned on the prisons’ cost arguments. The costs RLUIPA imposes on prisons are becoming more apparent. Courts are beginning to recognize those burdens and are responding by applying a strict scrutiny analysis that is receptive to prisons’ cost arguments.

Although prisons have experienced success under the statutory strict scrutiny test, arguing that the burdens imposed by an individual accommodation violate the Establishment Clause by unduly burdening third parties is a more difficult proposition. For example, in *Estate of Thornton v. Caldor*, the Supreme Court invalidated a Connecticut statute that provided Sabbath observers with an absolute right not to work on their chosen Sabbath. The Court held that the statute violated the Establishment Clause because it imposed an absolute duty on third parties, namely the employer and other employees, to conform their business practices to the particular religious practices of an individual employee. In doing so, the statute elevated religious concerns over all other interests and thus had the impermissible primary effect of advancing a particular religious practice. Similarly, in *Texas Monthly, Inc. v. Bullock*, a plurality of the Court held that a religious accommodation not compelled by the Free Exercise Clause violates the Establishment Clause when it “either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion.” Thus, if the burdens of a religious accommodation on third parties are significant enough, the accommodation may violate the Establishment Clause.

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190 See Nelson, supra note 3, at 2101; Block, supra note 133, at 257–59.
191 This statistic is based on the Westlaw survey conducted on March 28, 2010. See supra note 148.
192 See supra notes 148–80 and accompanying text.
194 Id. at 709–10.
195 Id. at 710.
However, RLUIPA is distinguishable from the laws at issue in cases where the Supreme Court has held that burdens on third parties violate the Establishment Clause. First, those cases have concerned *nonbeneficiary* third parties. Arguably, prisons may actually benefit from RLUIPA because complying with the statute permits them to receive federal funding. Second, RLUIPA alleviates impediments to religious exercise caused directly by the government, not by private parties as in *Caldor*, a case often cited to support the proposition that a religious accommodation that burdens third parties violates the Establishment Clause. In *Caldor*, the Court struck down a statute that removed burdens imposed on religious employees by private employers instead of the government. Finally, RLUIPA does not grant prisoners an absolute right to pursue their religious interests. In *Caldor*, the statute at issue granted employees an absolute right not to work on their chosen Sabbath. In contrast, RLUIPA’s strict scrutiny test balances the religious interests of prisoners with the interests of the prison system. Ultimately, because RLUIPA is distinguishable from the laws challenged in *Caldor* and *Texas Monthly*, it is probably easier for courts to find for prison officials under the statute’s strict scrutiny test than under the Establishment Clause. Moreover, courts may be reluctant to declare what types of burdens violate the Establishment Clause and may prefer to decide this issue under the statutory strict scrutiny test.

In summary, the *Cutter* invitation has resulted in arguments that religious accommodations are too burdensome under RLUIPA’s strict scrutiny test, not in arguments that the burdens violate the Establishment Clause. Courts are likely eager to avoid the constitutional question because the statute provides an alternative way for them to find the burdens of accommodation are too excessive. This theory comports with the canon of constitutional avoidance.

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197 This portrayal may mischaracterize the relationship between state prisons and the federal government under RLUIPA. RLUIPA primarily benefits religious inmates, not state prisons. RLUIPA does not itself grant prisons money. Compliance with RLUIPA is merely a requirement for prisons to retain federal funding.

198 See supra note 150 and accompanying text.


200 Id. at 709–10.

Given the weakened version of strict scrutiny that the courts in several circuits have applied, finding the burdens of accommodation impermissibly excessive under the statute is easier than finding them unconstitutionally excessive under the Establishment Clause. If prisons’ cost arguments continue to gain traction under RLUIPA, and if this success spreads to additional circuits, the Supreme Court may not have to address the larger doctrinal issue of when a religious accommodation becomes so burdensome on third parties that it violates the Establishment Clause. RLUIPA will essentially freeze the development of this area of Establishment Clause jurisprudence. But in those circuits where the courts have not found that cost sometimes outweighs prisoners’ religious interests,\textsuperscript{202} prison administrators defending RLUIPA claims should consider taking up the argument that the Supreme Court invited in \textit{Cutter}. These officials should argue that the costs of RLUIPA accommodations are so excessive that they violate the Establishment Clause. In making this argument, they may persuade the Supreme Court to explain the types and severity of costs to third parties that violate the Establishment Clause when required by religious accommodations.

\textbf{CONCLUSION}

Following the enactment of RLUIPA, some courts have applied a more rigorous form of strict scrutiny than they did under RFRA. But the administrative and financial costs imposed on prisons by RLUIPA have proven considerable, ironically resulting in the provision of fewer religious services. Recognizing the Supreme Court’s invitation in \textit{Cutter}, some courts have been increasingly receptive to the argument that certain religious accommodations are simply too burdensome for prisons. Instead of arguing that accommodations violate the Establishment Clause, however, prison administrators are successfully making the cost argument under the compelling interest prong of the strict scrutiny test. This development may reflect a retreat from the rigorous form of strict scrutiny that some courts have applied under RLUIPA. If this trend continues, the Act may ultimately fail to provide the robust religious protections to prisoners that its supporters had hoped. And in those cir-

\textsuperscript{202} These circuits include the First, Second, Fourth, Sixth, Ninth, and Tenth.
cuits where prison officials have not successfully argued that cost justifies substantial burdens on prisoners’ religious exercise, prison administrators should argue that some accommodations are so costly that they violate the Establishment Clause. The Supreme Court has already signaled that it is receptive to this argument, and prison officials may persuade the Court to clarify when the costs imposed on third parties by religious accommodations create a burden that violates the Establishment Clause.