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Debunking "De Minimis" Violations of Prisoners' Religious Rights: Further Problems with the Supreme Court's "Hands Off" Approach

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DEBUNKING "DE MINIMIS" VIOLATIONS OF PRISONERS' RELIGIOUS RIGHTS: FURTHER PROBLEMS WITH THE SUPREME COURT'S "HANDS OFF" APPROACH

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ABSTRACT

Circuits are split as there continues to be an inconsistent application of Supreme Court doctrine stemming from the notion of the separation of church and the state. Imprisonment does not strip a wrongdoer of his constitutionally guaranteed rights and protections. Some Circuits have held that a minor, or *de minimis*, interpretation of an inmate's religious rights can constitute a substantial burden under the Religious Land Use and Institutionalized Persons Act. In the absence of clear direction from the Supreme Court, I propose that courts should refrain from determining the value of a religious belief or practice as it relates to a religious adherent and err on the side of providing religious accommodations whenever reasonable. This would follow the intended goal of the religious-question doctrine and protect constitutionally guaranteed rights as well as likely benefit the society and the individual wrongdoer in his efforts towards maintaining a law-abiding lifestyle.

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I. INTRODUCTION

> *Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment.*[1]

Imprisonment does not strip an individual wrongdoer of his constitutionally guaranteed rights and protections.[2] The religion clauses of the First Amendment center on a controversial topic of discussion- religious practices and beliefs within correctional institutions.[3] The Constitutional framers' uncontroversial objectives of the First Amendment's Religion Clauses were "both to prevent the establishment of a national religion by the new federal government and to protect the right of individuals to freely exercise their religious beliefs."[4] A notable issue that arises when analyzing the Religion Clause is that the Supreme Court has not provided a specific definition of "religion."[5] Another crucial issue is the inconsistent application of Supreme Court doctrine stemming from the notion of the separation of church and the state.[6] This Note will argue that

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[1] United States v. Ballard, 322 U.S. 78, 87 (1944).

[2] Turner v. Safley, 482 U.S. 78, 84 (1987), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (2000) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.").

[3] *Provision of Religious Facilities for Prisoners*, 12 A.L.R.3d 1276 § 2.

[4] Jeffrey L. Oldham, *Constitutional "Religion" A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117, 118 (2001).

[5] Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D.L. REV. 123, 126 (2007).

[6] Christopher C. Lund, *Rethinking the "Religious-Question" Doctrine*, 41 PEPP. L. REV. 1013, 1014 (2014).

until the Supreme Court clarifies the proper analysis for religious exercise claims for the lower courts, the religious freedom of inmates should be protected and their needs reasonably accommodated.

Kenneth Colvin, Jr., an inmate, brought claims against prison officials, claiming they violated his constitutional rights as a Jewish prisoner.[7] Upon transfer from one state prison to another, he was mistakenly denied service in accordance with a kosher-meal program on numerous occasions.[8] Prison officials erred in believing he was instead a Muslim, and denied him kosher-meal status for a total of sixteen days.[9] Further, Colvin was served non-kosher food on multiple occasions even when he finally obtained the formal dietary status.[10] Not only did the prison officials see no wrong in their failure to assist in helping Colvin practice his religion, the trial court dismissed certain claims "because any errors in the preparation of [his] kosher meals were inadvertent and isolated."[11] Contrary to the value that a religious adherent places on his maintenance of a strict kosher diet, the Sixth Circuit noted that the actions of the prison officials "at worst, [constituted] a reasonable mistake" as to Colvin's status."[12] This is just one example of how a lack of uniformity in the analysis of religious exercise cases leads to prison officials violating prisoners' constitutional rights.

This Note will focus on the courts' inconsistencies when analyzing religious accommodations and will highlight the need for clearer principles and applications. It will address the circuit split on the issue of whether a minor, or *de minimis*, interruption of a prisoner's religious rights can constitute a substantial burden as outlined under the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[13] The Note will explain how the Supreme Court expanded its rule prohibiting courts from delving into religious questions.[14] Additionally, it will provide examples of how courts fail

[7] Colvin v. Caruso, 605 F.3d 282, 286 (6th Cir. 2010).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 288.
[12] *Id.* at 291.
[13] 42 U.S.C.A. §§ 2000cc-2000cc-5.
[14] *See Ballard*, 322 U.S. at 87 ("But if those [religious] doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that risk, they enter a forbidden domain.").

to refrain from interfering with religious questions. Lastly, the Note will highlight the importance of clarification within the judicial system with respect to religious questions.

This Note will be divided into six sections. Sections II and III will introduce the doctrine at the forefront of the religious accommodation claims and statutes pertaining to free religion claims. The Supreme Court's religious-question doctrine holds that the courts should refrain from taking positions on religious issues and has an extensive history.[15] This doctrine emerged to support the country's system of separation between church and state.[16]

Section IV will demonstrate the judicial history of religious exercise claims and will examine the circuit split, how different courts interpret religious exercise claims, and how they weigh the religious adherent's practices objectively. Lower courts are without clear direction from the Supreme Court and thus inconsistently apply the religious-question doctrine.[17] For instance, some circuit courts have answered religious questions using the term *de minimis* in denying a religious prisoner's First Amendment claim.[18] The Second and Seventh Circuits have determined that a *de minimis* violation of an inmate's free religious exercise rights may substantially burden his beliefs.[19] To the contrary, the Tenth Circuit has held that *de minimis* inadvertent mishaps that clash with a prisoner's religious rights do not rise to a substantial burden.[20]

Section V will demonstrate the conflicting issues in the balance of providing religious accommodations and penological concerns. The primary reason that courts have denied religious

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[15] Lund, *supra* note 6, at 1014.

[16] *Id.* at 1013.

[17] Bernie Pazanowski, *Muslim Inmate's Free Exercise Suit Over Being Served Pork Tossed*, BLOOMBERG L. (Apr. 24, 2020, 3:16 PM), https://www.bloomberglaw.com/bloomberglawnews/white-collar-and-criminal-law/XC3D1FDO 000000?bna_news_filter=white-collar-and-criminal-law. There is a circuit split on an issue of free exercise rights. *Id.* The Third, Sixth, and Tenth Circuits held that minor violations of an inmate's religious rights do not substantially burden his beliefs. *Id.* The Second and Seventh Circuits held that such minor violations may substantially burden an inmate's religious beliefs. *Id.*

[18] *See* McEachin v. McGuinnis, 357 F.3d 197, 203 n.6 (2d Cir. 2004) ("There may be inconveniences so trivial that they are most properly ignored. In this respect, this area of the law is no different from many others in which the time-honored maxim '*de minimis non curat lex'* applies.").

[19] *See generally* Ford v. McGinnis, 352 F.3d 582 (2d. Cir. 2003).

[20] *See generally* Gallagher v. Shelton, 587 F.3d 1063 (10th Cir. 2009).

accommodation requests are safety and prison security concerns.[21] Section V will then discuss the benefits of providing justifiable religious accommodations whenever possible in accordance with an individual's First Amendment religious rights. Strong evidence has established that religious practice within prison systems helps promote rehabilitation and decrease recidivism rates.[22] "[T]he percentage of prisoners professing minority faiths tends to be larger than the proportion of those faiths among non-incarcerated adults in the United States 18 years and older."[23] Given these demographics, it is crucial that all religious adherents are provided with the reasonably necessary means to maintain their practices so that they have the support and organization to encourage them to maintain a law-abiding lifestyle following their release. Notably, prisoners adhering to minority religions are among those who file the largest number of free religious exercise claims.[24]

Lastly, Section VI will conclude the Note by proposing that in the absence of clear direction from the Supreme Court, the courts should protect constitutional rights whenever reasonable and justifiable given the potential positive force of religion in prisons and the possibility to provide the necessary additional protections to religious minorities. Whether a minor *de minimis* intrusion or, as some courts may label it, a more substantial infringement with a religious right, courts should consider the impacts of any government action and encourage religious accommodations to the fullest extent practicable. A court that analyzes *de minimis* language should follow the Second and Seventh Circuits by finding that any *de minimis* violation of a prisoner's religious rights could substantially burden his beliefs.[25]

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[21] UNITED STATES COMM'N ON CIV. RTS., ENFORCING RELIGIOUS FREEDOM IN PRISON, 1, 91 (Sept. 2008), https://www.hsdl.org/?abstract&did=231715 (providing a table that portrays the types of RLUIPA cases and reasons for their denials annually).

[22] Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 511 (2005).

[23] UNITED STATES COMM'N ON CIV. RTS., *supra* note 21, at 39.

[24] *Id.* at 102.

[25] *See infra* Section II.

II. THE FOREFRONT OF THE CONFUSION AMONG LOWER COURTS

Inmates are faced with many restrictions on their liberty as a consequence of their illegal actions. These people, however, under the First Amendment, maintain their right to free religious exercise while imprisoned.[26] As correctional facility populations overflow, so do the conflicts within these systems in regard to accommodating prisoners' religious beliefs.[27] While prisons have policies in place to guide religious practices, there have been continuous complaints from prisoners arguing that the correctional staff members have violated their constitutional religious rights.[28] The circuit courts are split on the issue of whether a *de minimis*[29] interruption of an inmate's religious rights substantially burdens his beliefs.

The First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[30] Under the Religious Land Use and Institutionalized Persons Act ("RLUIPA")[31]:

> [n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.[32]

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[26] Turner v. Safley, 482 U.S. 78, 84 (1987).

[27] UNITED STATES COMM'N ON CIV. RTS., *supra* note 21, at 78; *see also* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Ben-Levi v. Brown, 136 S. Ct. 930 (2016).

[28] *See generally Enforcing Religious Freedom in Prison*, *supra* note 21 (The United States Commission on Civil Rights must transmit this report pursuant to Public Law § 103-419. It analyzes governmental attempts to enforce federal civil rights law precluding religious discrimination within the structure of federal and state prisons. The findings from the data collected showed that there has been a steady increase in the reported RLUIPA cases annually.).

[29] (Of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case. *De minimis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

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

[31] 42 U.S.C.A. §§ 2000cc-2000cc-5.

[32] *Id.*

However, inmates' religious rights are limited due to the weight of the penological interests[33] that the courts must consider when determining whether requested religious practices can be accommodated.[34] When a plaintiff meets the threshold of demonstrating a prison's substantial burden on his religious rights, the responsibility then shifts to the defendant government to show that the substantial burden is the result of a "compelling government interest,"[35] and that the government has invoked the "least restrictive means"[36] of accomplishing its penological objectives.[37]

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[33] UNITED STATES COMM'N ON CIV. RTS., *supra* note 21, at 3 ("The Court has recognized that deterrence, rehabilitation, and institutional security are all valid penological objectives that may result in limitations on prisoners' rights."); *see also* Pell v. Procunier, 417 U.S. 817, 822-23 (1974).

[34] Beerheide v. Suthers, 286 F.3d 1179, 1189 (10th Cir. 2002).

[35] U.S. DEP'T OF JUST., Statement of the Department of Justice on the Institutionalized Persons Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), https://www.justice.gov/crt/page/file/974661/download. A "compelling governmental interest" is one that furthers "good order, security and discipline, consistent with consideration of costs and limited resources." *Id.* at 4. For example, "requiring grooming in segregated holding has been found to further the compelling interest of health and security and placing certain restrictions on the formation of organized groups has been found to serve the limited interest of preventing the growth of gangs." *Id.* at 5. A compelling governmental interest has not been found in the administration of a prison's dietary system when the correctional facility already serves meals that would satisfy the prisoner's dietary needs, as well as in instances where the government placed an arbitrary limit on the quantity of books an inmate could store in his prison cell. *Id.*

[36] *Id.* at 5. ("To satisfy the 'least restrictive means' requirement of RLUIPA, courts have required institutions to show that alternative means of satisfying the compelling government interest were considered and found insufficient. The ability of other correctional institutions to further comparable interests without using the challenged regulations is evidence that a less restrictive alternative is available. Indeed, where a significant number of other institutions allow an accommodation, an institution cannot deny that accommodation consistent with RLUIPA's strict scrutiny requirement unless the institution offers persuasive reasons why it cannot adopt the less restrictive methods used elsewhere. Less restrictive alternatives used by the Federal Bureau of Prisons (BOP) are particularly relevant to the least restrictive means analysis because BOP manages the country's largest correctional system while adhering to the comparably strict protections for religious exercise that are guaranteed by RFRA. Consequently, where BOP accommodates a particular religious exercise, an institution that forbids that exercise is unlikely to satisfy RLUIPA's strict scrutiny inquiry unless it can demonstrate that the BOP approach is unworkable.").

[37] Abdulhaseeb v. Calbone, 600 F.3d 1301, 1318 (10th Cir. 2010).

Since the Supreme Court has consistently determined that the judicial system should keep its "hands off" religious questions, the Court should then, under a strict application of the religious-question doctrine, and in the interests of the First Amendment's Religion Clauses, rule in favor of the Second and Seventh Circuits by determining that a *de minimis* violation of a prisoner's religious rights may substantially burden his beliefs.[38] Federal courts have "no business addressing" whether religious beliefs alleged in relation to free exercise claims are reasonable.[39] "It cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs."[40] Since the subjective beliefs of the religious adherents are crucial and unique, courts cannot precisely clarify the value of a person's specific beliefs and practices; thus, the judicial system cannot sufficiently determine whether a religious burden is *de minimis*. Therefore, given the Supreme Court's lack of guidance in relation to the proper application of the religious-question-doctrine to free religious exercise claims, lower courts are left uncertain as to whether violations of specific religious accommodations impede an individual's constitutionally protected rights.

III. THE RELIGIOUS QUESTION DOCTRINE: DID THE SUPREME COURT LEAVE THE LOWER COURTS TO INTERPRET THE DOCTRINE IN ACCORDANCE WITH THEIR OWN OBJECTIVE BELIEFS?

The idea that courts should refrain from taking positions on religious questions has a long history.[41] The purpose of this notion emerged from our nation's system, supported by the Constitution,

[38] Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969) "Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion-the interpretation of particular church doctrines and the importance of those doctrines to religion. Plainly, the First Amendment forbids civil courts from playing such a role." *Id.* at 450.

[39] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724 (2014) (The religious claims here were that the Affordable Care Act's contraceptive mandates substantially burdened their free religious exercise constitutional rights).

[40] Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984).

[41] Lund, *supra* note 6, at 1014.

that separates the operations of church and state.[42] While simple at first glance, the hands-off doctrine becomes complicated when a court must determine a religious accommodation claim. The complexity arises because a court must analyze the religious accommodation claim before deciding on the issue. The application of the "hands off" religious questions principle becomes complex as courts must often analyze a religious accommodation claim to determine if it may even adjudicate the claim in the first place.[43] In 1871, the Supreme Court in *Watson v. Jones*[44] established that judges cannot decide "the true standard of good faith in the church organization."[45]

In 1944, the Supreme Court in *United States v. Ballard*[46] provided that while a religious claim raised may seem "incredible" to some individuals, fact finders must not enter the "forbidden domain" of determining its "truth or falsity."[47] Then, in 1969, the Court in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church*[48] determined that the religion clauses of the First Amendment direct courts to rule on disputes while refraining from resolving

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[42] *Id.* at 1013.

[43] The hands-off doctrine has been coined by legal scholars and commentators to refer to the notion that courts must refrain from deciding religious questions. *See* Samuel J. Levine, *The Supreme Court's Hands-Off Approach to Religious Doctrine: An Introduction*, 84 NOTRE DAME L. REV. 793, 795 (2009) ("[T]here is ample Supreme Court case law supporting the proposition that the Court generally eschews decision making that requires adjudication of religious doctrine."); Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1198 (2017) ("Courts refer to the prohibition on deciding disputes about religious truth as the 'religious question doctrine.' Scholars variously call it the 'no religious decision' principle of the 'hands-off approach' to religious questions."); William Bennett Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 473 (1971) ("For most of our history, the complaints of prisoners about conditions of life in prison were ignored by the courts. Judicial review was avoided under the 'hands-off' doctrine."); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998) ("Government must keep out of internal problems of religious bodies when those problems concern religious understandings.").

[44] 80 U.S. 679 (1871).

[45] *Id.* at 727.

[46] 322 U.S. 78 (1944).

[47] *Id.* at 87.

[48] 393 U.S. 440 (1969).

religious doctrine issues.[49] The Supreme Court held in *Serbian Eastern Orthodox Diocese v. Milivojevich*[50] that courts shall not contradict the religious interpretations of religious tribunals, and expanded on this ruling in *Thomas v. Review Board Indiana Employment Security Division*,[51] by determining that it should not contradict any religious authority.[52] In reaching its conclusion, the Court determined that it was "ill equipped" to resolve a religious doctrine question.[53] The *Thomas* Court reasoned that:

> it was not for [the courts] to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with clarity and precision that a more sophisticated person might employ.[54]

A substantial issue is that courts do in fact enter into the realm of religious questions, in contradiction to Supreme Court precedent, to adjudicate free exercise claims and prevent the flooding of the courts.[55] In order to protect both governmental institutions and prisoners, there are three threshold inquiries that a claimant must pass through in religious free exercise claims: (1) the claim must be based on religious grounds, (2) the claimant must show that the lack of the request sought would substantially burden her religious exercise, and (3) she must demonstrate that she is sincere in her religious beliefs.[56] The "hands-off" doctrine flows from the principle that secular courts

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[49] *Id.* at 449.
[50] 426 U.S. 696 (1976).
[51] 450 U.S. 707 (1981).
[52] Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 93 (1997).
[53] *Thomas*, 450 U.S. 707, 715 (1981).
[54] *Id.*
[55] Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2009) ("But the fact that judges charged with deciding legal questions are usually unfamiliar with religious texts, doctrines, and traditions would not seem to require, as a principled matter, a strong hands-off rule. Judges answer hard questions, untangle complicated problems, and educate themselves about new fields, all the time. They hear testimony; they listen to experts; they consider arguments.").
[56] Adeel Mohammadi, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 YALE L.J. 1836, 1848 (2020).

cannot resolve "metaphysical or theological issues."[57] While the Court has yet to specifically define "religion," it rarely challenges "members of well-recognized traditions."[58] The claimant holds the burden of establishing that her claims are grounded in religion, rather than "purely philosophical, ethical, or other nonreligious grounds."[59]

The Supreme Court, however, has yet to explicitly define and demonstrate the difference between religious and nonreligious claims.[60] In *Wisconsin v. Yoder*,[61] the Supreme Court noted that determining which requested accommodation is a constitutionally protected "religious" belief or practice "may present a most delicate question."[62] *Yoder* further explained that a claim based on solely secular considerations is not enough to be protected under the Religious Establishment Clauses - it must be rooted in religious belief.[63] The Supreme Court, in *Yoder*, helped distinguish a religious claim from a secular claim by reference to Henry Thoreau's rejection of the "social values of his time" by isolating himself at Walden Pond.[64] The Supreme Court noted that if the Amish claimants brought their religious challenge because of their "subjective evaluation and rejection of the contemporary secular values" like Thoreau did, that would fail to constitute a "religious claim."[65] "Thoreau's choice was philosophical and personal rather than

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[57] Lund, *supra* note 6, at 1013.
[58] Mohammadi, *supra* note 56, at 1849.
[59] *Id.*
[60] *Id.; see also* Ben Clements, *Defining Religion in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532, 536 (1989). The Note proposes that:

> [A] constitutional definition of religion should meet three main criteria, in addition to the criterion of general compatibility with approaches suggested by the Supreme Court. First, it should be specific enough to circumscribe the concept of religion, and allow courts to distinguish nonreligious from religious beliefs. Second, it should be flexible enough to embrace new and unorthodox forms of religion. Third, it should be applicable to both free exercise clause cases and establishment clause cases. *Id.*

[61] 406 U.S. 205 (1972).
[62] *Id.* at 215-16.
[63] *Id.*
[64] *Id.* at 216.
[65] *Id.*

religious, and such belief does not rise to the demands of the Religion Clauses."[66]

While courts are "ill equipped" to determine the truth and content of a religious belief or practice, courts must analyze a claimant's particular beliefs to determine their actual sincerity to avoid flooding the judicial system with frivolous claims.[67] Legal scholars and commentators commonly understand *United States v. Ballard*[68] as the origin of the sincerity doctrine in relation to free religious exercise claims.[69] *Ballard* stands for the proposition that while courts may never rule on the veracity of a religious claim, the sincerity of such alleged beliefs is within the judicial scope.[70]

Justice Ginsburg's comment in the *Burwell v. Hobby Lobby Stores, Inc.*[71] dissent noted that courts were judicially incompetent to determine the merits of various religious claims *and* the sincerity of such beliefs.[72] However, as courts determine the sincerity of person's religious claims, some seek extrinsic evidence to answer religious questions.[73] This judicial evaluation often relies on the testimony of religious experts to confirm that, although not dispositive, the belief is idiosyncratic.[74] Seemingly contrary to the "hands-off" religious-question doctrine, courts also use religious text to parallel and confirm the purported religious adherent's beliefs.[75]

IV. JUDICIAL HISTORY

To demonstrate the unclear Supreme Court doctrine, it is useful to review cases and observe how the religious-question doctrine confuses the lower courts as they attempt to analyze free religious exercise challenges. In order to determine whether the substantial burden element of a RLUIPA claim is met, the courts must analyze questions relating to a claimant's religion. The circuits are split on the issue of whether a *de minimis* interruption of an

[66] *Id.*
[67] *See* United States. v. Ballard, 322 U.S. 78 (1944)
[68] *Id.*
[69] Mohammadi, *supra* note 56, at 1855.
[70] *Id.*
[71] 573 U.S. 682 (2014).
[72] *Id.* at 771 (Ginsburg, J., dissenting).
[73] Mohammadi, *supra* note 56, at 1864.
[74] *Id.* at 1867-68.
[75] *Id.* at 1871.

inmate's religious rights substantially burdens his constitutional rights under the First Amendment.[76] However, the Supreme Court's religious-question doctrine prevents courts from taking positions on religious questions. Thus, in order to analyze a RLUIPA claim, by determining how substantial a religious violation is, the lower courts must contradict the overarching Supreme Court rule and put an objective value on a governmental violation of an individual's subjective religious belief.

The Second Circuit in *Ford v. McGinnis*[77] noted that "the Circuits apparently are split over whether prisoners must show a substantial burden on their religious exercise in order to maintain free exercise claims."[78] It is apparent, however, that the courts have interpreted the *measure* of a "substantial burden"[79] to be the issue that the courts are split on. For instance, the Second Circuit agrees that a *de minimis* interruption of an inmate's religious exercise may be sufficient to go forward with a religious discrimination claim because a more strict and objective test would require courts to differentiate "important from unimportant religious beliefs, a task for which [it has] already explained courts are particularly ill-suited."[80] On the other hand, the Tenth Circuit concludes that inadvertent and isolated mistakes by correctional institutions which impact prisoners' religious rights do not constitute a substantial burden sufficient to proceed on a RLUIPA claim.[81]

Religious grievance claims relating to dietary accommodations within particular religious sects are the most prominent of the complaints received from prisoners.[82] In *Ford*, a

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[76] Mbonyunkiza v. Beasley, 956 F.3d 1048, 1054 (8th Cir. 2020) ("As the district court noted, there is extensive (but not total) agreement that an isolated, intermittent, or otherwise *de minimis* denial or interruption of an inmate's religiously required diet does not substantially burden his religious belief.").

[77] 352 F.3d 582, 592 (2d Cir. 2003).

[78] *Id.*

[79] 42 U.S.C.A. §§ 2000cc to 2000cc-5.

[80] *Ford*, 352 F.3d at 593.

[81] *See* Gallagher v. Shelton, 587 F.3d 1063, 1070 (10th Cir. 2009).

[82] UNITED STATES COMM'N ON CIV. RTS., *supra* note 21, at 22-24. The studies of the Commission found that some of the most frequently filed group of religious grievances are those relating to the dietary practices of religious adherents. *Id.* at 22. Among all of the federal prisons that were investigated combined, 33.6% of all religious grievances fell under the category relating to the "delivery/preparation of religious diet." *Id.* at 24. Among all of the federal prisons that were studied, they

Muslim inmate sued alleging a violation of his First Amendment right to free religious exercise when the prison denied his request to attend a religious feast.[83] Even though the feast was just one meal, it was significant because it was an Eid al-Fitr feast, which was celebrated only once per year to mark the conclusion of Ramadan.[84] The district court granted the correctional officials' motion for summary judgment because the prison adjourned the celebration meal to a date eight days "after the period prescribed by Muslim law and tradition" to accommodate a number of Muslim inmates who expressed their desire to hold the event on a weekend to enable their families to attend.[85]

On the day on which Eid al-Fitr was observed at Downstate Correctional Facility ("Downstate"), Ford was transferred there from another institution for a court appearance without notice that the traditional feast was postponed to a later date.[86] While temporarily housed in Downstate's Special Housing Unit, Ford learned of the new date the feast was scheduled, requested that he receive the Eid al-Fitr feast on that date, and was subsequently denied permission.[87] Despite the memorandum disbursed to the Muslim Chaplains within the Department of Correctional Services noting that Special Housing Unit inmates should be included in the "ministerial plans for Ramadan and the Ids," Ford was nevertheless not given permission to attend the feast, and was instead incorrectly informed after the passing of this date that Special Housing Unit inmates would not receive the feast.[88] After sending grievance letters to the institution, he commenced an action claiming that he was denied his First Amendment rights.[89] In granting the government defendants' motion for summary judgment, the district court agreed with the defendants' contention that Ford's religious beliefs were not substantially burdened since the feast was rescheduled beyond the three days

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accounted for 10.8% of religious grievances relating to complaints regarding "access to religious diet." *Id.*

[83] *Ford*, 352 F.3d at 584.

[84] *Id.*

[85] *Id.* at 584-85.

[86] *Id.* at 584.

[87] *Id.* at 585.

[88] *Id.* at 585-86.

[89] *Id.* at 586.

following the end of Ramadan and thus, "no longer carried any objective religious significance."[90]

On appeal, the Second Circuit noted the significance of the district court doubting Ford's sincerity in his religious beliefs.[91] The Second Circuit reversed and remanded the case because the lower court improperly held that the plaintiff's "individualized, subjective" religious beliefs were not entitled to protection after having been advised of "Islam's actual requirements" of holding the Eid al-Fitr feast within three days close of Ramadan.[92] Since it focused solely on objective views of another's religious beliefs, the lower court improvidently held that there was an absence of a substantial burden because it was a "minor" disruption, and thus, provided a basis to grant the prison's motion as a matter of law.

In *Thompson v. Holm*,[93] a Muslim inmate sued members of the prison staff, alleging that they violated his freedom of religion under the First Amendment when the staff refused to allow him to properly fast during Ramadan.[94] The district court granted the defendant's motion for summary judgment, ruling that Thompson's failure to receive two meal bags for "just two days" was not a substantial burden on his free religious exercise rights because he was still able to fast, pray, and read the Koran.[95] In reversing and remanding the case, the Seventh Circuit defined a substantial burden as an act conducted by a government employee that "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs."[96] The defendant prison argued that the inmate's

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[90] *Id.*

[91] *Id.* at 588; *see* Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 574 (2d Cir. 2002) ("An individual claiming violation of free exercise rights need only demonstrate that the beliefs professed are 'sincerely held' and in the individual's 'own scheme of things, religious." (quoting Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984))); *see also* United States v. Seeger, 380 U.S. 163, 184-85 (1965) ("Local boards and courts in this sense are not free to reject beliefs because they consider them 'incomprehensible.' Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.").

[92] *Ford*, 352 F.3d at 588.

[93] 809 F.3d 376 (7th Cir. 2016).

[94] *Id.* at 378.

[95] *Id.* at 379; *see also* Thompson v. Holm, No. 13-CV-930, 2015 WL 1478523 (E.D. Wis. 2015), *vacated*, 809 F.3d 376 (7th Cir. 2016).

[96] *Thompson*, 809 F.3d at 379-80 (alteration in original) (quoting Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981)).

choice between adequate nutrition and a "central tenet" of his religion[97] was only a *de minimis* burden of his constitutionally protected right and did not rise to a "substantial burden."[98]

Thompson began fasting on August 11, 2010, the first day of Ramadan, and the day he began to receive his daily meal bags.[99] He was provided with the bags every day until a disputed[100] interruption occurred on August 21.[101] After expressing his grievances to the correctional employees, he was left with no more meals and had to decide whether to continue to not eat at all for the approximate two-thirds left of the Ramadan fasting or break his fast and go to the cafeteria.[102] The Seventh Circuit disagreed with the defendant's contention that such a choice to the plaintiff was "simply" a *de minimis* burden, explaining that:

> [n]ot only did Thompson receive no proper meal for 55 hours, leaving him
> weak and tired, he did not know if he would ever be put back on the Ramadan

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[97] *See* U.S. DEP'T OF JUST. FED. BUREAU OF PRISONS, TECHNICAL REFERENCE T5360.01, INMATE RELIGIOUS BELIEFS AND PRACTICES: ISLAM, Pages 17-18 (2002) ("Ramadhan, the ninth month of the Islamic lunar calendar, is the month where Muslims begin their period of fasting. This month is a holy month for Islam because during it Muhammad received his initial revelation, made his historic *Hijrah* from Mecca to Medina and the battle of Badr was won . . . . The fast begins with dawn and ends with sunset. Depending on the sighting of the moon, the fast may be 29 or 30 days long. Eating and drinking stops at dawn. During the day, no eating, drinking or sexual activity can take place. A Muslim must also adhere strictly to the moral code, as failure there is considered to be a violation of the requirements of fasting.").

[98] *Thompson*, 809 F.3d at 379-80.

[99] *Id.* at 378. Meal bags were distributed daily during Ramadan at sunset to each Muslim prisoner listed as eligible. *Id.* The prison's chaplain determines eligibility. *Id.* Each Ramadan meal bag contains two meals: the post-sunset dinner and the next morning's pre-sunrise breakfast. *Id.*

[100] *Id.* at 380 ("Thompson says that shortly before August 21, as he was on his way back to his cell, Randall Lashock, a prison guard, handed him a meal bag. When Thompson arrived at his cell, he found that a guard had already left a meal bag for him there. Thompson could not leave his cell to return the extra bag without risking a conduct violation, so he left one of the two bags unopened for Lashock to retrieve. Lashock asserts that when he later retrieved that extra meal bag from Thompson's cell, he found Thompson eating from both bags.").

[101] *Id.*

[102] *Id.*

> list and get regular food. This uncertainty put pressure on him to resign himself
> to the cafeteria; the anxiety left him unable to practice Ramadan properly.[103]

On the other hand, the Sixth Circuit in *Colvin v. Caruso*[104] held that an isolated or intermittent denial or interruption of an alleged religious practice did not constitute a substantial burden in relation to a free religious exercise case.[105] Colvin, a Jewish inmate, sued after he was transferred to a correctional institution and was initially denied kosher-meal status, a position he had pursuant to a settlement agreement and court order.[106] He brought this challenge, among others,[107] since the later facility incorrectly believed that he was not approved and that he was instead Muslim.[108] After the plaintiff notified the correctional officials of their error and filed two grievances, he was finally placed on the kosher-meal program.[109] Colvin was denied kosher-meal status for sixteen days and despite eventually being placed in the program, the prison nevertheless incidentally served him non-kosher food on multiple occasions.[110]

The district court in *Colvin* dismissed the claims because "any errors in the preparation of Colvin's kosher meals were inadvertent and isolated."[111] The Sixth Circuit, in affirming the decision of the lower court, determined that the chaplain unknowingly interfered with Colvin's religious practices and, "at worst, committed a 'reasonable mistake' as to Colvin's status."[112] The Sixth Circuit justified the denial of the kosher meals by reasoning that the chaplain looked into the plaintiff's eligibility to receive kosher meals but

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[103] *Id.*
[104] 605 F.3d 282 (6th Cir. 2010).
[105] *Id.* at 286.
[106] *See supra* text accompanying notes 7-12.
[107] *Id.* at 287. Colvin also alleged that his free religion exercise rights were violated by the lack of Jewish services and literature within the prison under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1. *Id.* For the purposes of narrowing my arguments within this Note, the Note will be focusing solely on the religious discrimination claims raised in the dietary practice nature.
[108] *Colvin*, 605 F.3d at 286.
[109] *Id.*
[110] *Id.* at 287-88.
[111] *Id.* at 288.
[112] *Id.* at 291.

determined that he was a Muslim.[113] Pursuant to the Federal Bureau of Prisons' Practical Guidelines for Administration of Inmate Beliefs and Practices, "Judaism places its distinctive imprint on the most ubiquitous practice, the eating experience, in what are known as kosher laws." [114] Thus, it cannot, and according to the Supreme Court, *should not* be disputed that following kosher law may, subjectively or objectively, be a means of manifesting some "central tenet" of Jewish law and religion.

The Tenth Circuit in *Abdulhaseeb v. Calbone*[115] held that the government's isolated or intermittent denial or interruption of an inmate's religious rights may not constitute a substantial burden on an inmate's religious exercise.[116] In *Abdulhaseeb*, a Muslim inmate filed suit under RLUIPA and 42 U.S.C. § 1983, bringing forward several complaints in relation to his conditions of incarceration, including his unsuccessful attempts to be provided halal foods.[117] The plaintiff claimed he was forced to accept puddings and jello that were not halal, as evidenced by the lack of halal symbols on the items.[118] He was denied an alternative after requesting one because he "had not been forced" to accept the foods, and the defendant government explained its refusal to accommodate by claiming that what he was served did not contain pork or its by-products, "thus meeting [his] Islamic beliefs."[119] The plaintiff continuously requested accommodations according to his Muslim beliefs with a supporting halal diet, and they were consistently denied.[120] The court held that he failed to present evidence that the vegetarian and pork-

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[113] *Id.*

[114] *See* U.S. DEP'T OF JUST. FED. BUREAU OF PRISONS, *supra* note 97, at 50-54.

[115] 600 F.3d 1301 (10th Cir. 2010).

[116] *Id.* at 1321.

[117] *Id.* at 1306; *see* Nick Eardley, *What is Halal Meat?*, BBC NEWS (May 12, 2014), https://www.bbc.com/news/uk-27324224 ("Halal is Arabic for permissible. Halal food is that which adheres to Islamic law, as defined by the Koran.").

[118] *Id.* The plaintiff filed a "grievance concerning being forced to accept puddings and jello on his tray." *Id.* He alleged that the defendants represented the food items to him as kosher but they failed to contain kosher or halal symbols, so, he claimed, they contained forbidden ingredients pursuant to his religion. *Id,* The prison challenged, claiming he was never forced to place the jello or pudding on his tray and that they were pork-free and did not contain pork by-products, "thus meeting [his] Islamic beliefs." *Id.* at 1306-07.

[119] *Id.* at 1306-07.

[120] *Id.* at 1306.

free diets that he was instead offered "forced him to modify or violate his religious beliefs."[121]

Abdulhaseeb argued that he sincerely believed that he must eat a halal diet that includes halal meats; thus, the vegetarian and pork-free alternatives that he was instead offered would not suffice.[122] The Tenth Circuit, in reviewing the case, determined that the plaintiff's subjective beliefs should be measured to determine whether such interference would substantially burden his religious exercise rights.[123] In the context of RLUIPA claims, the Tenth Circuit defined a substantial burden as when a government:

> (1) requires participation in an activity prohibited by a sincerely held religious belief, or (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief, such as where the government presents the plaintiff with a Hobson's choice—an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief.[124]

Though the Tenth Circuit found that there were genuine issues of material fact on whether the policy regarding halal foods substantially burdened the plaintiff's rights, the court explained that it will not imply that a *de minimis* interruption of a religious practice can constitute a substantial burden.[125] The court said: "we do not intend to imply that every infringement on a religious exercise will constitute a substantial burden."[126] The circuit split is likely due to the fact that courts and parties to litigation struggle to define when a certain religious accommodation refusal by correctional institutions constitutes a "substantial burden" sufficient to maintain a RLUIPA claim.[127] It is apparent from the overwhelming case law that courts

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[121] *Id.* at 1313.
[122] *Id.*
[123] *Id.*
[124] *Id.* at 1315.
[125] *Id.* at 1316.
[126] *Id.*
[127] Mbonyunkiza v. Beasley, 956 F.3d 1048, 1054 (8th Cir. 2020). *Compare* Murphy v. Missouri Dept. of Corrections, 372 F.3d 979, 988 (8th Cir. 2004)

are uncertain on their application of the overarching religious-question doctrine and they are not provided strict guidance on how to measure substantial burdens on a religious right without infringing on the Supreme Court doctrine.

V. THE NEED FOR CONSISTENCY AMONG THE COURTS REGARDING THE ANALYSIS OF FREE RELIGIOUS EXERCISE CLAIMS

As the circuit cases illustrate, ruling on RLUIPA claims in the shadow of the religious-question doctrine results in inconsistent applications and determinations. There should be no circuit split on this issue because it is not the courts' responsibility to determine the weight or burden of a governmental violation on a specific religious adherent's beliefs.[128]

Courts must not restrict religious constitutional rights on the basis of an unclear, unsettled doctrine. Until lower courts are provided with some direction on how to define and examine substantial burdens on religious rights without answering religious questions, they should err on the side of protecting religious freedom. To the extent that religious accommodations can be met in accordance with compelling state interests, reasonable religious accommodation requests should not be restricted in the absence of any clear direction in relation to the religious-question doctrine.

(defined a substantial burden as when the "government policy or actions: must 'significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual [religious] beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion."), *with* Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) (defined a substantial burden on religious exercise as "one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenant of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." This case was vacated on other grounds.).

[128] Greenawalt, *supra* note 43, at 1844.

A. The Importance of The Continuous Consideration of Penological Objectives

To avoid flooding the courts with frivolous claims, it is not reasonable for every religious accommodation to be met, especially in circumstances where such requests are outweighed by a compelling state interest.[129] The main objective of the Federal Bureau of Prisons is to protect the nation's general population by holding offenders inside of prison environments that are safe, secure, and abundant with opportunities that "assist offenders in becoming law-abiding citizens."[130] In relation to religious accommodations, governments are uniformly concerned with extremist activity[131] that could disrupt the security of its prisons.[132] Prisoners have been found to be prone to both religious and political radicalization due to factors such as "inmates' relative youth, unemployment, social alienation, and their need for self-importance and physical security which is often satisfied by the adoption of some group identity."[133] However, in order to both protect constitutional religious rights of prisoners and to ensure that prison policies are meeting their safety and organizational objectives, the government's security concerns must be "grounded on more than mere speculation, exaggerated fears, or post-hoc rationalizations."[134]

Most RLUIPA cases that are denied by federal courts are due to successful prison safety and security defenses raised by correctional institutions.[135] For instance, the Eighth Circuit found

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[129] *See* Holt v. Hobbs**,** 574 U.S. 352, 362 (2015) (the court emphasized the government's compelling interest in the case-namely, in prison safety and security).
[130] *About Our Agency*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/agency/agency_pillars.jsp (last visited Nov. 19, 2020).
[131] *See* UNITED STATES COMM'N ON CIV. RTS., *supra* note 21, at 32 (During the briefing by the United States Commission on Civil Rights, two experts demonstrated similar definitions for radicalization-the "process by which inmates adopt political or religious extremism, including 'the willingness to use, support or facilitate violence, as a method to effect societal change.'") (quoting Prepared Statement of Frank Cilluffo, USCCR Feb. 8, 2008 briefing at 3).
[132] *Id.* ("The Federal Bureau of Investigation has identified prisons as fertile breeding grounds for extremist activity.").
[133] *Id.* at 33.
[134] Fowler v. Crawford, 534 F.3d 931, 939 (2008) (quoting S. Rep. No. 103-111, at 10 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1900 (Senate Report on RFRA)).
[135] U.S. COMM'N ON CIV. RTS., *supra* note 21, at 94 ("As the number of RLUIPA cases increased, safety/prison security remained the most common reason cited for

that a compelling state interest outweighed the request for a religious accommodation in the case of a prisoner claimant challenging the prison's failure to accommodate him with a sweat lodge.[136] The prison officials did not challenge the sincerity of the religious adherent's request for a sweat lodge nor did they question the notion that their denial of the religious accommodation would substantially burden the claimant's beliefs.[137] The sweat lodge is undoubtedly religiously sacred to the claimant since he claimed his Native American beliefs require the use of a sweat lodge to participate in a fixed set of songs and prayers.[138] The compelling governmental interest instead prevailed here and the court afforded due deference to the prison officials who were concerned that a sweat lodge would pose risks of "sexual misconduct, physical assault, and drug use, as well as fire and heat-related safety concerns."[139]

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denial of prisoners' requests/complaints each year"); *see also* Jihad v. Fabian, 680 F. Supp. 2d 1021 (D. Minn. 2010). The plaintiff argued that the defendants substantially burdened his religious exercise by preventing him from wearing a Kufi, and requiring him to hide his religious medallion under his clothing, which precluded him from expressing his Islamic identity. *Id.* at 1027. The court there found that the plaintiff would likely fail on his religious garment claim since he failed to establish a substantial burden on his religious practice. *Id.* The court further noted that even if the plaintiff successfully demonstrated a substantial burden on the part of the prison, his claim would likely not succeed because it would be outweighed by a compelling governmental interest. *Id.;* Portley-El v. Zavaras, 188 F.3d 519 at *2 (10th Cir. 1999) (holding that, in Religious Establishment Clause cases, the government's restriction of religious headgear "is entirely appropriate" because it poses potential security threats, as such headgear "may be used to conceal drugs, weapons, or other contraband, and may spark internal violence among prisoners.").

[136] *Fowler*, 534 F.3d at 939 ("But no reasonable jurist, affording due deference to prison officials, can dispute that serious safety and security concerns arise when inmates at a maximum security prison are provided ready access to (1) burning embers and hot coals, (2) blunt instruments such as split wood and large scalding rocks, (3) sharper objects such as shovels and deer antlers, and (4) an enclosed area inaccessible to outside view.").

[137] *Id.* at 935.

[138] *Id.* at 934.

[139] *Id.* at 935. ("[Defendant] Wood also explained that the sweat lodge would 'consume considerable institutional financial and personnel resources' and 'expend many institutional personnel hours.' Finally, Wood indicated that extending unique privileges such as a sweat lodge to one group of inmates to the exclusion of others creates the risk of resentment among the inmate population leading to the potential for unrest and disturbance.").

To the contrary, other courts have decided that there are instances in which it will protect free religious exercise by accommodating prisoners.[140] In *Fegans v. Norris,*[141] the claimant formally notified the detention center he was housed in that he was a follower of the Assemblies of Yahweh and began submitting requests for a kosher diet.[142] The detention center informed him that kosher meals were not available and instead placed him on a pork-free diet.[143] After challenging the prison's meal policies and exhausting his administrative remedies, he brought suit against the prison officials.[144] The district court found that because the detention center did not provide the claimant with kosher meals from December 19, 2002 until March 3, 2004, the Director of Corrections "knowingly violated established law requiring kosher diets."[145]

B. The Powerful Role of Religion in Correctional Facilities

Religion can play an important role in correctional institutions and it is critical that the prison systems provide as many accommodations as possible. Prisons may further their penological goals by equipping inmates with sufficient religious accommodations. For example, by fostering prisoners' free religious exercise rights, the inmates are motivated by strict discipline and order.[146] Since there is strong evidence that "spiritual development and religious practice promote rehabilitation and reduce recidivism in inmates," it is vital that inmates are provided with the means necessary to practice their religion, as long as those means can be obtained without clashing with any compelling government interests.[147]

Evidence derived from the study of in-prison religious programs has shown that religious accommodations within

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[140] *See generally* Fegans v. Norris, 537 F.3d 897, 909 (8th Cir. 2008).
[141] 537 F.3d 897 (8th Cir. 2008).
[142] *Id.* at 900.
[143] *Id.*
[144] *Id.* at 901.
[145] *Id.*
[146] UNITED STATES COMM'N ON CIV. RTS., *supra* note 21, at 30.
[147] Gaubatz, *supra* note 22, at 511; *see also* 139 CONG. REC. S14, 465 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch) ("[E]xposure to religion is the best hope we have for rehabilitation of a prisoner . . .").

correctional facilities are a valuable asset to society as a whole.[148] Scholars have demonstrated that the role of religion in prison systems contributes positively to inmate psychology, emotions, and self-control.[149] Inmates are influenced by the strict principles and discipline that surround the practice of their particular religion which, in turn, assist them with self-control.[150] Another benefit of becoming involved with religious groups within correctional institutions is the opportunity to meet new peers with similar interests.[151] Social interaction within religious settings helps foster the acceptance of individuals by other inmates within the prison system.[152] These factors, among many others, have demonstrated that religion plays a key role in rehabilitating individual prisoners so that their likelihood of maintaining a law-abiding lifestyle increases upon release.[153]

C. The Importance of Protecting Religious Minorities

Religious adherents of non-Christian faiths must have the same degree of accommodations as provided to those who observe and practice the Christian faith. A report by the United States Commission on Civil Rights found that male inmates of Muslim, Jewish, and Native American faiths, acting *pro se*, filed the largest number of RLUIPA claims based on its studies.[154] Further, the Commission found that both state and federal systems expressed hardships in attempting to locate chaplains from minority religions such as Islam.[155]

Prejudice and the lack of enforcement of equal protection for minority religious communities continue to act as a barrier to uniform treatment among prisons notwithstanding the alleged elimination of language expressly denying religious accommodation to one minority

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[148] *See generally* Grant Duwe & Byron R. Johnson, *Estimating the Benefits of a Faith-Based Correctional Program*, INT'L J. OF CRIMINOLOGY AND SOCIO. 227-239 (2013), http://www.baylorisr.org/wp-content/uploads/benefits_faith-based_correctional_program.pdf.

[149] Harry R. Dammer, *Religion in Corrections*, U. OF SCRANTON (2002), https://www.scranton.edu/faculty/dammer/ency-religion.shtml.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] UNITED STATES COMM'N ON CIV. RTS., *supra* note 21, at 102.

[155] *Id.* at 33.

religious group and accommodating other traditional religious groups.[156] For instance, in the early 1960s, although "the general policy of the Department of Corrections [was] to encourage religious activities by inmates," those alleged guidelines were not applied across all religious communities, including Muslims.[157] As recent as sixty years ago, the State Advisory Committee on Institutional Religion determined that while those traditional well-known religious communities were permitted to pursue their spiritual activities, Muslims were not afforded this same type of freedom.[158] In *In re Ferguson*,[159] the Muslim petitioners alleged that:

> they [were] not allowed a place to worship, that their religious meetings [were] broken up, often by force, that they [were] not allowed to discuss their religious doctrines, that they [were] not allowed to possess an adequate amount of religious literature, and that their religious leaders [were] not allowed to visit them in prison.[160]

There were three instances in which one of the Muslim petitioners requested a copy of "the Muslim Bible," the Koran, and was denied such accommodation.[161] Petitioner Ferguson's Muslim religious scrapbook was in the possession of another Muslim inmate when it was confiscated by prison officials and destroyed since it was considered contraband.[162] The correctional officer, in his incident report relating to the scrapbook, stated that "this book consisted of the usual 'Muslim' trash, advocating hatred of the white race, superiority of the black man ,…."[163] The California Supreme Court ultimately denied a petition for writ of habeas corpus brought by nine inmates, noting that the correctional staff reasonably denied religious

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[156] Sarah E. Vallely, *Criminals Are All the Same: Why Courts Need to Hold Prison Officials Accountable for Religious Discrimination Under the Religious Land Use and Institutionalized Persons Act*, 30 HAMLINE L. REV. 191, 196 (2007).
[157] *In re* Ferguson, 55 Cal. 2d 663, 667 (1961)
[158] *Id.*
[159] 55 Cal. 2d 663 (1961).
[160] *Id.* at 670.
[161] *Id.* at 668.
[162] *Id.*
[163] *Id.*

freedom given the safety and security concerns with Muslim prisoners.[164]

Data collection has shown that the percentage of prisoners eighteen years of age and older who associate themselves with minority religious groups tends to be larger in comparison to the proportion of those faiths among non-incarcerated individuals in the United States eighteen years of age and older.[165] It is necessary that correctional employees are provided with sufficient training on the various religions and their practices to ensure equality among the differing beliefs within the prison systems.[166] By providing prisoners with reasonable religious accommodations to the fullest extent possible, it is likely that those individuals will succeed more efficiently in their rehabilitation efforts, thereby reducing the recidivism rates so that prisons can instead spend their budgets on religious accommodations rather than housing repeat offenders. An individual's religious beliefs are sacred and beneficial; thus, governments must provide reasonable accommodations when requested and justifiable.

Chaplains play a crucial role in the encouragement of religion in correctional facilities.[167] These individuals generally "provide pastoral care and counseling to all inmates, regardless of the inmate's faith."[168] Prisons are not mandated to employ chaplains representing every religious association within the correctional institution.[169] However, in 2007, the Federal Bureau of Prisons employed 251 chaplains.[170] Among that total number of chaplains, unsurprisingly, "73.9% were Protestant, 17.4% were Catholic, 0.8% were Orthodox

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[164] *Id.* at 671-74.

[165] U.S. COMM'N ON CIV. RTS., *supra* note 21, at 39.

[166] *See, e.g.*, U.S. DEP'T OF JUST. FED. BUREAU OF PRISONS, *supra* note 97 ("This Technical Reference Manual (TRM) on Practical Guidelines for Administration of Inmate Beliefs and Practices has been written to assist chaplains and administrative personnel to appropriately facilitate the religious beliefs and practices of inmates within a correctional environment."); *see also* U.S. DEP'T OF JUST. FED. BUREAU OF PRISONS, PROGRAM STATEMENT P5360.09 (Dec. 31, 2004) (provides detailed religious policies pursuant to 28 CFR § 548.10 to those institutions under the Bureau of Prisons).

[167] U.S. COMM'N ON CIV. RTS., *supra* note 21, at 16.

[168] *Id.*

[169] Mary Ellen West, *Religious Practices and Materials*, 30 ILL. L. & PRAC. PRISONS § 29.

[170] U.S. COMM'N ON CIV. RTS., *supra* note 21, at 16.

Christian, and the remaining 7.9% were from non-Christian religions-Buddhism (0.4%), Judaism (2.1%), and Islam (5.4%)."[171]

To offset the imbalance among the chaplains representing the well-known religious groups in comparison to the minority religions, the Bureau of Prisons often rely heavily on contracts with outside religious leaders to perform as clergy for the underrepresented groups.[172] These religious contractors and volunteers help meet the "religious and spiritual needs of federal inmates professing non-Christian faiths or membership in smaller Christian denominations."[173] Unfortunately, however, some federal prisons, notwithstanding their best efforts, have expressed an overall challenge in employing chaplains, volunteers, and contractors of non-Christian faiths, particularly Islam.[174] In the absence of clear direction from higher courts in analyzing a prisoner's RLUIPA claim, it is crucial that governments work to allocate more resources to assist prisoners associated with minority religions to obtain access to religious resources just as the other prisoners are afforded such opportunities.

VI. CONCLUSION

The supreme law of the land provides that freedom of religion does not terminate upon the imposition of an incarceration sentence.[175] Since religious beliefs and practices tend to help guide spiritual adherents through their daily lives, it is necessary that the government offers as many justifiable accommodations as possible in the absence of clear direction from the Supreme Court. While the religious-question doctrine's purpose to keep courts from putting objective values on subjective and personal beliefs is important, the Court's approach is difficult to apply in principle. In ruling that courts should not be in the business of deciding matters in connection

[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.* at 16-17.
[175] *See* U.S. CONST. amend. I; *see also* Greenhill v. Clarke, 944 F.3d 243, 250 (4th Cir. 2019) ("Access to bona fide religious exercise is not a privilege to be dangled as an incentive to improve inmate conduct, and placing such religious exercise in the category of *privilege* to be earned is fundamentally inconsistent with the *right* to religious exercise that RLUIPA guarantees to prisoners.").

with the interpretation of religious practices and beliefs,[176] the practical reality is that lower courts must engage in religious interpretation when ruling on religious exercise claims. Thus, the courts should err on the side of prisoners' religious freedoms by protecting these rights.

Lower courts, in the absence of a clear doctrine, have clearly become willing to engage in their own determination of the importance of a particular individual's religious beliefs and practices, as evidenced by the circuit split regarding the measure of *de minimis* violations of a prisoner's religious rights. If courts were to apply the religious-question doctrine strictly, the term "*de minimis*" should never be used in relation to the alleged burden that the prison officials impose on prisoners since the burden is personal in nature. While other scholars have proposed narrow recommendations to help facilitate a clearer application of the religious-question doctrine,[177] it is clear that it would be in the best interests of all to refrain from restricting prisoners' justifiable religious requests until the Supreme Court clarifies the religious-question doctrine. Constitutional rights of religious exercise must continue to be reasonably accommodated in prison settings until the Supreme Court provides clear direction on how the lower courts should analyze religious questions. Therefore, I propose that *de minimis* should no longer be used to qualify the

[176] Levine, *supra* note 52, at 85.

[177] Mohammadi, *supra* note 56, at 1877-78 ("I am interested in trying to reorient the sincerity analysis to better capture the type of inquiry that judges are actually making when they delve into religious questions to screen accommodation claims. I propose a different understanding of the sincerity inquiry, that of *sincerity as plausibility*, which helps make sense of courts' apparent disregard for the religious-question doctrine. This reorientation of the sincerity inquiry captures the current behavior of judges, describing in better terms than pure "sincerity" what judges are evaluating when they screen religious-accommodation claims."); Garnett, *supra* note 55, at 862 ("Given this goal, Professor Smith was right, I believe, to suggest more than twenty years ago that the First Amendment's no-establishment provision has a 'two-fold' 'essential task,' namely 'to prevent government from interfering in the internal affairs of religious institutions and, conversely, to prohibit religious institutions from directly exercising governmental authority.' The hands-off rule, then, should be constructed and applied consistent with this task and, correctly understood, it seems to me that the rule serves the task well."); Greenawalt, *supra* note 43, at 1904 ("The Supreme Court should require some form of neutral principles approach, one that allows courts to consider a broad range of documents and also settled principles and practices of church authority that bear clearly on matters of governance and control of property.").

strength of a subjective prisoner's religious beliefs and courts should err on the side of such prisoners to protect their constitutional rights.