Religion Behind Bars

A Handbook

JUSTICE FELLOWSHIP®
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SECTION 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting," used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

FOREWORD

Religious freedom is the very first liberty listed in our Bill of Rights and is our most fundamental freedom.

In the prison context religious freedom raises particularly nettlesome issues. Denying religious liberty could cut off the inmates' best hope for a transformed life. However, sham religiosity might be used as a pretext to undermine institutional security and safety.

Two important federal statutes—the Religious Freedom Restoration Act of 1993 (RFRA)[1] and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[2]—apply very similar legal tests to protect the religious freedom rights of prisoners in federal and state institutions, respectively. These laws establish a high level of legal protection for inmates' practices that are part of a sincerely held religious belief.

This booklet is designed to explain those rights in a clear, understandable fashion. If you are a corrections official who deals with religious issues on a regular basis, a chaplain in need of clarification of the law, or a prisoner whose rights may have been violated, you should review it carefully.

We at Justice Fellowship, the public policy division of Prison Fellowship Ministries, believe that prisoners' rights to practice their faiths can be protected while maintaining prison safety and security. Federal statutes protecting religious freedom provide a framework for resolving inmate requests for access to religious materials and practices. These statues ensure that:

- every inmate can grow in his or her faith;

- corrections officials can maintain prison safety and security; and
- most, if not all, of prisoners' faith claims will be resolved by administrative process, thereby eliminating any need for costly and time-consuming litigation.

This Questions and Answers booklet is designed to assist religious volunteers, corrections officials, chaplains, and prisoners in understanding the rights of prisoners to practice their religion, and the reasonable limitations on those rights that may be permissible. It is designed to help resolve such issues without litigation. Our experience has shown that sincere religious convictions of prisoners can be appropriately accommodated without endangering safety and security in prisons and without placing any unworkable administrative burden on prison officials.

We pray that you find this booklet helpful.

Charles W. Colson
Chairman of the Board
Prison Fellowship Ministries

Pat Nolan
President
Justice Fellowship

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ", and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993;" after clause (iii).

SECTION 5. DEFINITIONS.

As used in this Act:

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.

SECTION 6. APPLICABILITY.

(a) IN GENERAL—This Act applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION—Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) RELIGIOUS BELIEF UNAFFECTED—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

SECTION 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF—A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SECTION 4. ATTORNEYS' FEES.

(a) JUDICIAL PROCEEDINGS—Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1993," before "or title VI of the Civil Rights Act of 1964."

(b) ADMINISTRATIVE PROCEEDINGS—Section 504(b)(1)(C) of title 5, United States Code, is amended:

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APPENDIX II
RELIGIOUS FREEDOM RESTORATION ACT OF 1993 (AS AMENDED)

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Freedom Restoration Act of 1993."

SECTION 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS—The Congress finds that:

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES—The purposes of this Act are:

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205

(A) means:

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION—The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY—The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(7) RELIGIOUS EXERCISE:

(A) IN GENERAL—The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) RULE—The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

SCOPE OF PROTECTION

What kinds of facilities are covered by RFRA and RLUIPA?

Federal and state prisons, jails, juvenile detention facilities, and facilities for people who are mentally ill, disabled, retarded, chronically ill, or handicapped. Hospitals and institutions that are not run or funded by the government are not covered.

What triggers legal relief?

Anyone confined to a prison or other government-run or sponsored institution may raise a claim under either RFRA or RLUIPA whenever a government actor or employee places a substantial burden on that person's religious exercise.

Are there any prisoners not protected by these federal laws?

It is best to assume that all prisoners are protected by either RFRA or RLUIPA. The only exception might be in a state institution that receives no federal funding of any kind. Prison administrators should seek competent legal counsel before attempting to claim that they are not covered by these laws.

DEFINITION OF RELIGION

Are non-religious activities protected by RFRA or RLUIPA?

No. Only the "religious exercise" of inmates is protected. If an inmate's claimed practice is not, in fact, a religious exercise, it need not be accommodated by the institution. Neither the Constitution nor RFRA nor RLUIPA protects prisoner activities that are motivated by

philosophy, conviction, or worldview unless firmly rooted in sincere religious faith.[3]

What is a "religion"?

When confronted with a free-exercise claim involving inmates, one may question whether the inmate's claimed "religion," is, in fact, a religion at all. In most instances dealing with Jewish, Christian, and Islamic traditions, the answer to that question is not difficult, and correctional officials should exercise common sense.[4] For the more difficult questions, or those dealing with faiths that are unfamiliar, it is important that line correctional staff not determine "on the spot" whether a claimed practice is or is not a religion. Instead, the decision should be referred to the prison administration for appropriate review.

What about religions that are invented by inmates?

Inmates will sometimes contrive "religions" in an attempt to gain legal protection for activities that are otherwise not allowed, to make nuisances of themselves, simply to cope with sheer boredom, or for other reasons. These contrived "religions" are not protected. One interesting example of a court finding that a claimed practice is not a religion arose in the context of litigation surrounding the "Church of the New Song," a "religion" invented by an inmate in which a meal of steak and wine was claimed to be a "sacrament." The federal courts had little difficulty in identifying the sham and denying the prisoner's claims.[5]

This case is a good example of an inmate's creation of a religion not to worship any deity, but merely to obtain institutional advantages for himself and others. Correctional institutions need not be blind to the unfortunate reality that prisoners will occasionally attempt to secure

SECTION 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) DEFINITIONS—Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-2) is amended:

(1) in paragraph (1), by striking "a State, or a subdivision of a State" and inserting "or of a covered entity";

(2) in paragraph (2), by striking "term" and all that follows through "includes" and inserting "term 'covered entity' means"; and

(3) in paragraph (4), by striking all after "means" and inserting "religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.".

(b) CONFORMING AMENDMENT—Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-3(a)) is amended by striking "and State".

SECTION 8. DEFINITIONS.

In this Act:

(1) CLAIMANT—The term "claimant" means a person raising a claim or defense under this Act.

(2) DEMONSTRATES—The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE—The term "Free Exercise Clause" means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT—The term "government":

commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION—This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL—Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY—If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

SECTION 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term "granting," used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

advantages of legal protection for improper, nonreligious reasons.

Other examples of sham religions quickly rejected by the courts are found in cases in which the facade of religion was used in an effort to justify tax fraud. Typically, in these cases an individual (sometimes after buying "ordination" and a "church charter" by mail) would set up a bank account in the name of the one-person church, deposit all of his money in the "church's" account (claiming a tax deduction for the "contribution"), and use that account to pay all of his living expenses. The courts have ruled repeatedly that these schemes are not religions and therefore not protected by the First Amendment.[6] On the other hand, a professed faith that is not traditional should not be presumed to be a sham.

What if the institution determines that something is not a religion?

If, after careful analysis, an institution determines that an inmate's claimed practice is not, in fact, a religion, the best course of action is to document in writing the rationale for the negative decision as completely as possible, including exhibits. In these situations, the institution should obtain written requests from the inmate setting forth the tenets of his religious faith and explaining his sincerity. This will assist in assessing the inmate's request at upper levels of prison administration and in formulating an appropriate administrative record.

Are all burdens on religious faith prohibited?

No. In order for RFRA's or RLUIPA's protections to the triggered, the inmate must first demonstrate that the government imposes a "substantial burden" on religious exercise.

Congress included the modifier "substantial" to ensure that the strict-scrutiny standard was not applied to trivial, technical, or *de minimus* burdens on religious exercise. Although trivial burdens are not "substantial," the burdened religious activity need not be compulsory or central to a system of religious belief as a condition for the claim going forward.

SINCERITY OF BELIEF

What if the inmate is insincere in his belief?

Even if the activity in question is, in fact, religious, the law does not require prison officials to accommodate it unless the inmate is sincere in his belief. Congressman Charles Canady, the principal sponsor of RLUIPA in the U.S. House of Representatives, stated that RLUIPA's "definition does not change the rule that insincere religious claims are not religious exercise at all, and thus are not protected."[7]

Although government officials may not determine whether a particular religion is "true" or not, sincerity is essential for the belief to be protected. "[W]hile the 'truth' of a belief is not open to question, there remains the significant question …of sincerity which must be resolved in every case."[8]

How much should the institution look into the belief to determine sincerity?

Institutions should carefully review inmates' claims to determine whether the inmates are sincere. Everything should be put into writing, and snap decisions should be avoided. But it is not necessary that each and every one of the inmate's actions be consistent with his professed

(b) RELIGIOUS EXERCISE NOT REGULATED—Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) CLAIMS TO FUNDING UNAFFECTED—Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED—Nothing in this Act shall:

> (1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or
>
> (2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE—A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) EFFECT ON OTHER LAW—With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect,

(d) ATTORNEYS' FEES—Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended:

(1) by inserting "the Religious Land Use and Institutionalized Persons Act of 2000," after "Religious Freedom Restoration Act of 1993"; and

(2) by striking the comma that follows a comma.

(e) PRISONERS—Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT—The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) LIMITATION—If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

SECTION 5. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

belief system in order to obtain protection. It is extremely important that prison officials be mindful of the U.S. Supreme Court's admonition that:

> 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 the clarity and precision that a more sophisticated person might employ …Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner …correctly perceived the commands of [his] faith. Courts are not arbiters of scriptural interpretation.[9]

Prison officials should be cautious in labeling a particular inmate as insincere in his religious belief, and consequently not protected. Erroneous or snap judgments about this can result in costly litigation. However, courts will uphold an accurate determination of insincerity if it is properly documented. For example, in *Jones v. Bradley*,[10] an inmate failed to request religious services for 12 years, failed to provide information about the religion in response to the institution's request, failed to file an administrative appeal after being denied religious services, and was unclear about his religious beliefs. As a result, a court found his professed religious beliefs to be insincere, and his request for religious accommodation was rejected. Under RFRA and RLUIPA, sincerity is still a key ingredient in determining whether a practice is protected. These statutes do not relax rules regarding insincerity, but are rather aimed at enhancing protection for those whose beliefs are truly sincere.

How do differences among denominations or subgroups affect sincerity analysis?

There are religious individuals who are part of denominations or subgroups within a faith that diverge from commonly held beliefs of a particular religious faith. This is not a justification to deny free-exercise rights or to make a finding of insincerity. As the Supreme Court reasons, "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."[11]

Must religious practices be "mandatory" or central to the faith in order to be protected?

No. There is no legal difference between religious practices that are required by a particular faith and religious practices that are optional under that faith. For example, saying the rosary is not a required practice of the Catholic faith. However, many Catholics find that this practice, including the use of rosary beads, assists them in prayer. A religious practice need not be viewed as essential in order to be protected.

Under RFRA, the federal courts divided on the question of whether a religious practice needed to be "mandated" or "central" to a religious faith in order to be protected.[12] However, RLUIPA's statutory language defines the term "religious exercise" broadly, as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief"—and RLUIPA also amends RFRA to apply this same broad definition to federal prisoner cases, eliminating any uncertainty as to whether "compulsion" or "centrality" of belief might be required.

As with the question of whether something is a religion, the assessment of whether an inmate is sincere about his religious faith should be made

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION—This section applies in any case in which:

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

SECTION 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION—A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION—If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT—Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION

(1) EQUAL TERMS—No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION—No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS—No government shall impose or implement a land use regulation that:

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

SECTION 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE—No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person:

by supervisory staff within the institution, after careful review of the facts and evidence. It is not a decision that line staff should make, and it should be elevated to supervisory levels as soon as possible.

ALLOCATION OF RESOURCES

There are a large number of different religious faiths represented in the United States. Correctional institutions are no different from the outside world in the diversity of faiths represented. The difference is that the residents are dependent on the government to provide opportunities to worship.

Must prison resources be allocated equally among faiths?

No. RFRA and RLUIPA do not require that each religion obtain the same resources. In the prison setting, as in the outside world, some religious groups have a large number of followers, and other groups have relatively few members. There is no legal requirement that resources be spread equally among all religious groups. As stated by one federal Court of Appeals, religious liberty protection "guarantees a liberty interest, a substantive right; [it] does not insure that all sects will be treated alike in all respects."[13]

Are prisons required to sponsor at least some program for every faith?

No. The government's obligation not to substantially burden religious freedom is not the same as a requirement to provide special programs and facilities for all faiths. The U.S. Supreme Court has stated that "[a] special chapel or place of worship need not be provided for

every faith, regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand."[14]

Must the allocation of resources be proportional to size of various faith groups within the inmate population?

No. Courts recognize that constant counting and assessment of the religious faiths represented in the inmate population would present unmanageable burdens to the reasonable functioning of the institution. Prisons need not be in the business of attempting to constantly evaluate inmates' religious preferences and adjust programs to meet these numbers, nor should a "quota" system be in place for religious programs. In *Thompson v. Commonwealth of Kentucky*,[15] a group of Muslim inmates challenged, under the First and Fourteenth Amendments, the prison's practice of providing 6½ hours of prison chapel time per week to Muslim inmates while allowing Christian inmates 23½ hours of chapel time per week. Further, the institution did not provide a Muslim chaplain, while it did fund three Christian chaplains, two full-time and one part-time. The Court of Appeals held that, since the Muslim inmates were a much smaller group within the institution, the differential resource allocation was entirely appropriate.

Can prisoners' religious practices be temporarily suspended during lockdown?

Occasionally, in some institutions, it will be necessary to suspend some religious activities if the facility is in lockdown or some other security-related precaution. Such a temporary suspension would be a result of inmate unrest or some other urgent condition. This would, in most instances, be a threat to safety, life, or health, and the government is allowed to temporarily infringe upon religious freedom in these situations.

APPENDIX I
RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Land Use and Institutionalized Persons Act of 2000."

SECTION 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS

(1) GENERAL RULE—No 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.

(2) SCOPE OF APPLICATION—This subsection applies in any case in which:

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

11. *Thomas,* 450 U.S. at 715-716.

12. Compare *Bryant v. Gomez,* 46 F.3d 948 (9th Cir. 1995) with *Mack v. O'Leary,* 80 F.3d 1175 (7th Cir. 1996), and *Jolly v. Coughlin,* 76 F.3d 468 (2d Cir. 1996).

13. *Butler-Bey v. Frey*, 811 F.2d 449, 453 (8th Cir. 1987).

14. *Cruz v. Beto,* 405 U.S. 319, 322 n. 2 (1972).

15. 712 F.2d 1078 (6th Cir. 1983).

16. Boothby and Miller, *Prisoner Claims for Religious Freedom and State RFRAs*, 32 U.C. Davis L. Rev. 573 (1999).

17. Letter from Wallace H. Cheney, Assistant Director/General Counsel, Federal Bureau of Prisons, to Rev. Oliver Thomas, Esq., Co-Chair, Coalition for the Free Exercise of Religion (Nov. 6, 1998).

18. *Sasnett v. Sullivan,* 197 F.3d 290 (7th Cir. 1999).

19. *Mockaitis v. Harcleroad,* 104 F.3d 1522 (9th Cir. 1997).

20. *Love v. Reed,* 216 F.3d 682 (8th Cir. 2000).

21. *See dissent from denial of reh'g en banc, Rich v. Woodford*, 210 F.3d 961 (9th Cir. 2000).

However, if there is a less restrictive means to accomplish the safety interests, such as locking down only the sectors in which the problem arose, the institution should accommodate the other inmates' religious needs.

THE STRICT SCRUTINY LEGAL STANDARD

How strong is "compelling interest" protection?

The "compelling governmental interest/least restrictive means" test is the highest level of protection for individual liberty under American law. Of course, in the context of prisons, which have powerful needs for safety and security, the test applies differently than it would outside of the prison context.

What is a "compelling interest"?

Religious liberty can be restricted if the institution has a "compelling interest" in doing so. A compelling interest is an essential need, such as the protection of life, health, or safety. In the context of prisons, compelling interests include protecting the life and safety of inmates, correctional officers, and visitors. If an inmate's religious practice endangers himself or others, then the practice may be curtailed. For example, a prison would clearly have a compelling interest in preventing Sikh prisoners from carrying ceremonial knives, but would not have a compelling interest in forbidding inmate groups from studying the Bible, Torah, or Q'uran together.

What is a "least restrictive means"?

Even if the government proves that it is pursuing a compelling interest, it may infringe a prisoner's religious freedom only if the restriction is the

"least restrictive means" to accomplish its objective—that is, only if there is no way to accomplish the compelling interest without restricting religion. For example, the prison may have a compelling interest in keeping candles and matches out of prisoners' cells, but this does not mean that worship services using candles may be banned. It would be less restrictive to allow the service but keep a count of candles and require officers to control the matches, so the prison must follow that course instead.

Does "compelling interest/least restrictive means" mean that the prisoner always wins?

Certainly not! "Compelling interest" has a different meaning in prisons than it does outside, and prison officials will always, at some level, have a compelling interest in maintaining safety and security. In many cases, the real issue will be whether there is a less restrictive means—an alternative method for prison officials to do their jobs without interfering with the religious practices of inmates.

Will strict scrutiny open the door for a flood of prisoner religious freedom litigation?

Not according to evidence and experience. A study of the four-year period (1993-97) during which RFRA applied strict scrutiny to prisoners' religious claims in state prisons showed that, on average, the number of reported court decisions in such cases increased by only 1.5 per state per year.[16] During congressional debate over the bill that eventually became RLUIPA, the Federal Bureau of Prisons stated:

> [T]he Department of Justice strongly supported passage of RFRA in 1993 and opposed an exemption for corrections. The Department has also vigorously defended

ENDNOTES

1. 42 U.S.C. §§2000bb, *et seq*. (see Appendix II). In *Boerne v. Flores*, 521 U.S. 507 (1997), the U.S. Supreme Court held RFRA unconstitutional as applied to the actions of state and local government officials. Most commentators and lower courts agree that under the *Boerne* decision, RFRA is still good law with respect to the federal government.

2. 106 P.L. 274, signed into law by President Clinton on September 22, 2000 (see Appendix I).

3. *Wisconsin v. Yoder,* 406 U.S. 205, 215-19 (1972); *Thomas v. Review Board,* 450 U.S. 707, 713-718 (1981).

4. Two resources that can be helpful in determining whether a prisoner's claimed religious practice is generally accepted within the religious tradition with which the prisoner identifies are the "Handbook of Religious Beliefs and Practices" by the Washington State Department of Corrections, and the American Correctional Association's self-instructional course, "Religion in Corrections."

5. *Theriault v. Silber,* 453 F.Supp. 254 (D.Tex. 1978), *appeal dismissed,* 579 F.2d 302 (5th Cir. 1978).

6. *See, e.g., U.S. v. Jeffries*, 854 F.2d 254 (7th Cir. 1988); *Tweeddale v. Commissioner*, 841 F.2d 643 (5th Cir. 1988); *Page v. Commissioner*, 823 F.2d 1263 (8th Cir. 1987).

7. 146 Cong. Rec. E1564 (daily ed. September 22, 2000).

8. *United States v. Seeger,* 380 U.S. 163, 185 (1964).

9. *Thomas, supra* note 3, 450 U.S. at 715.

10. 590 F.2d 294 (9th Cir. 1979).

to readily dismiss claims that are frivolous, malicious, fail to state claim upon which relief can be granted, or those that seek monetary relief from a defendant immune to such relief. In addition, the PLRA limits the amount of attorneys' fees that may be collected by a prisoner who prevails in a lawsuit.

Can a prisoner file a lawsuit based on emotional harm?

Under the PLRA, prisoners cannot file litigation for mental or emotional injury, unless they also demonstrate that they suffered physical injury.

Must prisoners pay filing fees before suing?

Under the PLRA, prisoners are no longer able to file a case without payment of court filing fees. Prisoners are required to make monthly installments from their prison accounts toward filing fees.

What if a prisoner files repeated frivolous cases?

A prisoner who has had three or more frivolous cases dismissed is no longer permitted to file federal lawsuits concerning prison conditions unless he is in imminent danger of serious physical injury.

> RFRA against challenges since its passage and continues to do so regarding its application to the federal government …Although compliance with the additional requirements of RFRA certainly places limited additional administrative burdens on Bureau of Prisons staff, these burdens have been manageable.[17]

There is no reason to believe that applying the similar standard of RLUIPA will cause any more difficulty for prison administration than RFRA did at either the federal or state level.

Who has the burden of proving religious liberty violations?

Under RFRA and RLUIPA, the inmate must initially show that prison officials have substantially interfered with his religious practice. If that substantial interference is shown, the burden of proof shifts to the government to defend its policies. This "burden shifting" provision is an important protection for religious freedom.

Typically, when a lawsuit is filed, it is the plaintiff who bears the burden of proving every aspect of his case. Under RFRA and RLUIPA, an inmate is relieved of this responsibility once the inmate demonstrates that there is a substantial burden on his free exercise of religion. Congress designed the laws this way in order to simplify enforcement of free-exercise claims in situations where the facts are uncertain and difficult to prove, or in which essential information is controlled by the government.

What could happen to a prison that violates RFRA or RLUIPA?

Courts have fairly wide discretion to grant remedies in response to lawsuits under RFRA or RLUIPA. Typically, if a prison or prison officials have violated the religious freedom rights of one or more prisoners, the remedies could include an

injunction ordering the prison to stop the violations and an award of financial damages. In addition, a victorious plaintiff can recover his attorneys' fees from the government under either RFRA or RLUIPA. However, see the information later in this booklet concerning the Prison Litigation Reform Act, which places some limitations on available remedies.

SOME PARTICULAR RELIGIOUS CLAIMS FREQUENTLY RAISED BY PRISONERS

I. Worship Services and Bible Studies

Must a prison permit prisoners to meet together for religious activities?

As a general rule, prisons must permit inmates to meet together on a reasonably regular basis for worship services; to study the Bible, Torah, Q'uran, Book of Mormon, or other religious texts; and to discuss applications of their faith. There can be appropriate safeguards around these meetings to protect the prison's interests in safety and security, and the meetings may be temporarily suspended in times of emergency lockdown.

II. Evangelism and Outside Ministry to Prisoners

What about allowing outside ministry groups into the prison?

Prisons should not deny ministry and evangelism visits by outside churches, organizations, and individuals to minister to the spiritual needs of prisoners. There can be reasonable boundaries on the size and frequency of religious events in

rehearing, stating that "Darrell Keith Rich was a very bad man …But no man should be sent to his Maker without being allowed to take the spiritual steps he considers necessary to prepare for the event. A decent respect for the humanity of even the worst among us obligates us to accommodate such rituals where doing so will not impair serious governmental interests. This obligation is not diminished because the ritual does not involve a minister, a priest or a rabbi." Under RLUIPA, the result in this case would likely be different, and the inmate would have been allowed to participate in the sweat lodge ceremony.

IMPACT OF THE PRISON LITIGATION REFORM ACT (PLRA) ON PRISONER RELIGIOUS FREEDOM CLAIMS

Does the PLRA apply to prisoner religious claims?

In 1996, Congress passed legislation designed to curtail frivolous filings under federal law by prisoners. The Prison Litigation Reform Act of 1996, 18 U.S.C. § 3626, 42 U.S.C. § 1997e ("PLRA"), applies to claims brought by inmates under RFRA and RLUIPA. The PLRA has significantly curtailed frivolous litigation brought by persons in prisons and jails across the country.

What does the PLRA do?

The PLRA requires that prisoners exhaust their administrative remedies prior to filing suit. In other words, the PLRA requires the inmate to work within the system to obtain an accommodation of his religious practice prior to filing a lawsuit. The PLRA also empowers a court

Must every dietary request be met?

Once again, the institution must accommodate inmates' religious diets unless to do so would infringe upon a compelling governmental interest. Unless there is a safety, health, or life issue at stake, every effort at accommodating the inmates religious needs must be met—assuming, of course, that the request is the result of a sincere religious motivation and not merely a desire to get better food or inconvenience prison staff.

VI. Name Changes

Must institutions recognize inmates by their religious names?

Religious faith sometimes involves changing one's name. In particular, many inmates convert to the Islamic faith while they are incarcerated, which involves taking on an Arabic name. These name changes often pose management and resource issues for institutions. In general, institutions should recognize inmates by their new names. It is possible for prisons to implement a "dual-name" system using an "a.k.a." designation in order to honor the prisoner's religious convictions while maintaining continuity of identification for administrative purposes.

VII. Sweat Lodges

Must prisons allow Native American sweat lodges?

Some Native American faiths use a "sweat lodge," similar to a sauna, as a purification ritual. In most cases, sweat lodges must be allowed. There is a sweat lodge located at San Quentin State Prison in California. In a recent case, a Native American on San Quentin's death row sought to participate in a sweat lodge ceremony as a purifying ritual prior to his execution. The Ninth Circuit denied him this right, and he was put to death.[21] Circuit Judge Alex Kozinski dissented from the denial of

the prison when necessary to preserve safety and security.

III. Religious Apparel and Grooming

Can an institution ban all religious apparel?

No. This type of blanket ban would not be consistent with the general rules of RFRA or RLUIPA. Many religious individuals display religious apparel as part of the fundamental tenets of their faith. In a pre-RLUIPA case, a federal appeals court struck down a Wisconsin prison rule that prohibited prisoners from wearing religious jewelry such as crosses.[18] The only way that religious apparel can be banned is if it poses a danger to the life, health, or security of prisoners, corrections officials, visitors, or the institution.

Must the prison allow yarmulkes or headgear?

Some religious faiths require their followers to cover their heads with yarmulkes or skullcaps. Some institutions argue that inmates can hide contraband in this apparel, endangering themselves and others. As a result, many institutions argue these types of headwear should be banned. If the institution can prove that yarmulkes pose a danger to health or safety—in other words, that there is a compelling interest in banning them—then yarmulkes may be restricted. The institution, however, would then need to prove that this was the least restrictive way of accomplishing its goal. Since inmates can conceal contraband in other clothing and are subject to search, an institution's ban on headgear seems unlikely to withstand legal challenge.

What about crosses and other items that could be used as weapons?

Many religious inmates wish to express their faiths by wearing religious medallions and other symbols. This would be determined on a case-by-case basis depending on the type, size, material, and other characteristics of the item, the inmate's status and history, and the level of security in the block. The religious apparel would also be compared with other items in the institution that are permitted, such as eating utensils, writing instruments, toiletries, etc. If, for example, the institution permits inmates to possess pencils for writing but outlaws a smaller wooden cross, this regulation would probably not withstand challenge. However, if a Sikh inmate wished to possess a ceremonial dagger, and sharp knives in general are prohibited, the dagger could properly be prohibited.

May the prison regulate hair length and facial hair?

Some religious faiths require their members to wear their hair a certain way, which can be inconsistent with grooming regulations in the institution. This is also subject to the case-by-case analysis of the government's reason for applying the restriction, and whether there is a less restrictive way to accomplish the same purpose. If there is a compelling reason for the hair restriction and there is no other way to achieve this purpose, the restriction is appropriate. Otherwise, the inmate must be permitted to wear his hair as his faith dictates. Some prisons have found that use of a computer-altered photograph, to show what the inmate would look like if he shaved and cut his hair, is a good alternative to restrictive hair length regulations.

IV. Confessional Communication

Can confessional communications be secret?

Yes. The Catholic Church requires strict confidentiality of confessional communications between priest and penitent. Some prison regulations require that all conversations between prisoners and visitors—other than the inmate's legal counsel—be monitored. It is quite likely that cases decided under RFRA or RLUIPA would overturn these requirements and affirm the privacy of the confessional.[19]

V. Special Religious Diets

Must the prison provide kosher food to those who request it?

Many religious faiths require a special diet either constantly or at specific times throughout the year. In a recent case, an inmate alleged that the prison's refusal to provide food from the prison facility's kitchen on Saturday for consumption in his cell on Sunday violated his free-exercise right.[20] The Court of Appeals held that: (1) the inmate's belief system, which he termed the "Hebrew religion" and which was derived from his own fundamentalist interpretation of the Old Testament, was a religion within the meaning of First Amendment; (2) the prison's refusal to provide food substantially burdened the inmate's beliefs, which prevented him from leaving his cell or working on the Sabbath, or eating food prepared by others on that day, and thus violated the First Amendment; (3) the option of fasting on the Sabbath was not a reasonable accommodation; and (4) the refusal to provide food could not be justified as having a reasonable relationship to a legitimate interest. Dietary requests must be accommodated unless there is a compelling reason to deny the request and no less restrictive alternative exists.