Printed in U.S.A.
Vol. 112, No. 4

Notes

DEFERENCE AND PRISONER ACCOMMODATIONS POST-*HOLT*: MOVING RLUIPA TOWARD "STRICT IN THEORY, STRICT IN FACT"

Barrick Bollman

ABSTRACT—The Religious Land Use and Institutionalized Persons Act (RLUIPA) requires prisons to make accommodations to regulations that substantially burden a prisoner's religious exercise, unless the prison can show that the regulation is the least restrictive means to meeting a compelling interest. This language suggests strict scrutiny, and yet in *Cutter v. Wilkinson*, the Supreme Court instead intimated in dicta that courts should give prison officials "due deference" when applying this test. The 2015 case of *Holt v. Hobbs* presented the Court with an opportunity to clarify how much deference is due under RLUIPA. Though *Holt* declared that there should not be "unquestioning" deference toward prison officials, the decision failed to mention *Cutter* or draw clear lines. Questions about the viability of *Cutter*'s due deference standard thus persist. This Note provides the first comprehensive analysis of the application of RLUIPA post-*Holt* by presenting a qualitative and quantitative analysis of all lower court cases addressing RLUIPA accommodations from 2015 to 2017. This analysis shows that, while some confusion remains, the lower courts are moving towards a hard look analysis rather than deference. At the same time, this Note argues that *Cutter* was not overruled and that *Holt* in fact clarified *Cutter* to provide guidelines for the appropriate amount of scrutiny to be applied in a penal context.

AUTHOR—J.D. Candidate, Northwestern Pritzker School of Law, 2018; B.A., University of Notre Dame, 2012. Thank you to Professor Andrew Koppelman for encouraging me to pursue this project. Additional thanks to Martha Clarke and Jentry Lanza for the many hours spent helping me develop this Note. I am incredibly grateful to my family for pushing me to always give my best effort, and my friends for their support. Finally, thank you to the many editors of the *Northwestern University Law Review* for their help and guidance along the way.

INTRODUCTION

Imagine you are Billy Soza Warsoldier, a Cahuilla Native American. Your religious faith teaches that hair length symbolizes wisdom and requires that hair can only be shorn upon the death of a relative. You sincerely believe that cutting your hair will cost you knowledge and render you unable to join your ancestors in the afterlife. In fact, your hair has not been cut for over thirty years. Now, imagine that you are incarcerated, and the prison requires all prisoners' hair to be cut short because long hair could be used to hide contraband.[1] Can the prison require you to violate the tenets of your religion by cutting your hair?

The Religious Land Use and Institutionalized Person Act (RLUIPA)[2] provides that the government may not substantially burden a prisoner's religious exercise unless the burden is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that interest."[3] Therefore, if the prison failed to allow you an accommodation, you could challenge that decision in court.[4] But the location of the prison greatly impacts your chances of success. If the prison is located in the Ninth Circuit, which has closely examined prison policies to determine if they survive RLUIPA's strict scrutiny test,[5] then it is more likely that a

[1] This factual scenario is from *Warsoldier v. Woodford*, 418 F.3d 989, 991–92 (9th Cir. 2005).

[2] 42 U.S.C. §§ 2000cc–2000cc-5 (2012).

[3] *Id.* § 2000cc-1(a)(1)–(2).

[4] *Id.* § 2000cc-2(a) ("A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.").

[5] *See infra* notes 94–97 and accompanying text.

court would find RLUIPA requires an accommodation for your long hair. If the prison is located within the Sixth Circuit, on the other hand, you may be more likely to lose your claim because that particular circuit has afforded significant deference to prison officials' assertions that a given policy is the least restrictive means of furthering a compelling governmental interest.[6]

This confusion in the lower courts stems from the Supreme Court's contradictory instructions regarding the deference due to prison officials' determination under RLUIPA. The Court first addressed the constitutionality of RLUIPA in *Cutter v. Wilkinson*.[7] While holding the statute constitutional,[8] the Court noted that lower courts should apply "due deference" to prison officials' determinations of compelling interest and least restrictive means,[9] even though these two terms are traditionally understood to mean that strict scrutiny applies.[10] This contradiction led some courts to be deferential to prison officials' determinations in applying the compelling interest and least restrictive means test.[11] Other courts, however, consequently took a "hard look" approach, which is closer to true

---

[6] *See infra* note 100 and accompanying text.

[7] 544 U.S. 709, 712–13 (2005).

[8] *Id.* at 725–26.

[9] *Id*. at 722–23, 725 n.13. Strict scrutiny, in contrast to "due deference," is a test so stringent some define it as "strict in theory, fatal in fact." *See* Marci Hamilton, *The Supreme Court's New Ruling on the Religious Land Use and Institutionalized Persons Act's Prison Provisions: Deferring Key Constitutional Questions*, FINDLAW (June 2, 2005), http://supreme.findlaw.com/legal-commentary/the-supreme-courts-new-ruling-on-the-religious-land-use-and-institutionalized-persons-acts-prison-provisions-deferring-key-constitutional-questions.html [https://perma.cc/TK96-U4GM] (noting that strict scrutiny traditionally places a "very heavy burden" on those defending a contested law, and that the Supreme Court has explained strict scrutiny to mean that a law is "presumptively unconstitutional").

[10] *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321–34 (2007) (noting the three "elements of strict scrutiny": "(1) identifying the . . . fundamental rights the infringement of which triggers strict scrutiny; (2) determining which governmental interests count as compelling; and (3) giving content to the requirement of narrow tailoring" (i.e., the Court's "least restrictive alternative" demand (footnote omitted))).

[11] For examples of courts applying a deferential standard, see AlAmiin v. Morton, 528 F. App'x 838, 843–44 (10th Cir. 2013) (unpublished decision) (holding that a policy preventing a Muslim prisoner from using religious oils did not violate the RLUIPA); Smith v. Allen, 502 F.3d 1255, 1277–80 (11th Cir. 2011) (holding that an Odinist prisoner did not meet his burden of showing that a prison's denial of his request for a quartz crystal, a worship space, and a small fire constituted a "substantial burden" on the practice of his religion), *abrogated by* Sossamon v. Texas, 563 U.S. 277 (2011); Fowler v. Crawford, 534 F.3d 931, 942–43 (8th Cir. 2008) (holding that security concerns took priority over a prisoner's interest in having a sweat lodge to practice his Native American faith); Baranowski v. Hart, 486 F.3d 112, 125 (5th Cir. 2007) (holding that a prison administration's interest in "maintaining good order and controlling costs" took priority over a Jewish prisoner's request to observe the Sabbath and eat kosher meals); and Hoevenaar v. Lazaroff, 422 F.3d 366, 367 (6th Cir. 2005) (finding that the district court wrongly failed to give deference to the prison administration when the lower court granted injunctive relief to a prisoner who refused to cut his hair due to religious beliefs).

strict scrutiny, when analyzing prison policies under RLUIPA.[12] Post-*Cutter,* therefore, a prisoner might not get an accommodation to which she is statutorily entitled and may be forced to violate sincerely held religious beliefs at the behest of the government, simply due to an accident of geography.

In 2015, the Court considered RLUIPA again in *Holt v. Hobbs* to determine whether a no-facial-hair policy violated the rights of a Muslim prisoner who wished to grow a half-inch beard pursuant to his faith.[13] Though this presented an opportunity to clarify whether courts should apply strict scrutiny or be deferential to prison officials' claims, the Court failed to discuss *Cutter*'s deference instruction at all and instead only noted that "unquestioning deference" is not permitted.[14] Because *Holt* did not explicitly overrule *Cutter*, the Supreme Court has endorsed two seemingly contradictory standards. In *Cutter*, the Court asked for deference to be given to prison officials, but in *Holt*, the Court hewed closer to strict scrutiny and noted only that courts should not give officials "unquestioning deference."

This Note provides the first comprehensive analysis of *Holt*'s application by the lower courts since the case was decided. A quantitative examination of each RLUIPA decision citing *Holt* and *Cutter* in this period shows that lower courts have generally heeded *Holt*'s instruction to undertake a more fact-specific inquiry once it determines a prisoner's religious exercise has been substantially burdened (a seemingly higher bar post-*Holt*). *Cutter* deference, however, has not completely been repudiated, and some confusion remains in the lower courts. This Note suggests that courts can reconcile *Cutter*, *Holt*, and RLUIPA's strict scrutiny language by asking prison officials to offer proof to the court that their policy was

[12] For examples of courts applying a hard look standard, see Koger v. Bryan, 523 F.3d 789, 800–01 (7th Cir. 2008) (finding that efficient food services was not a compelling state interest and that the prison's policy of requiring "clergy verification" of a prisoner's religious food requirements was not the least restrictive means of achieving the result); Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 39, 41 (1st Cir. 2007) (finding that the defendant prison had failed to show both that banning a prisoner from preaching served the prison's interest in security and that no alternative policy could have achieved this end); Washington v. Klem, 497 F.3d 272, 283, 285 (3d Cir. 2007) (holding that the mere assertion of a security interest is not sufficient to meet the compelling interest requirement and that the defendant prison failed to show that limiting prisoners to ten books was the least restrictive means of ensuring the security of prisoners' storage boxes); Lovelace v. Lee, 472 F.3d 174, 190–91 (4th Cir. 2006) (holding that the defendant prison had failed to articulate a compelling interest in limiting participation in Ramadan activities to prisoners who had not broken the Ramadan fast and that there were less restrictive means available even if this had been a compelling interest); and Warsoldier v. Woodford, 418 F.3d 989, 1001 (9th Cir. 2005) (finding that a prison grooming policy regarding male prisoners' hair length was not the least restrictive means of achieving safety and security).

[13] 135 S. Ct. 853, 859 (2015).

[14] *Id.* at 864.

the least restrictive means of furthering a compelling interest rather than simply asserting that that is the case.

Part I of this Note describes the development of free exercise law and RLUIPA, as well as the general arguments advanced by prisoners and prison officials in RLUIPA cases. Next, Part II discusses *Cutter*, the intervening circuit split, and *Holt*. Part III then presents the results of the quantitative analysis of the lower courts' treatment of *Holt* and *Cutter* since *Holt*, finds that lower courts are applying a more stringent standard, and suggests that *Cutter* and *Holt* are reconcilable. Lastly, this Note concludes by proposing that *Holt* has moved RLUIPA away from "strict in theory, deferential in fact" and towards "strict in theory, strict in fact."

I. DEVELOPMENT OF RELIGIOUS FREE EXERCISE PROTECTIONS

The religious freedom protections of the U.S. Constitution's Free Exercise Clause have oscillated over time, both generally and in the penal context. This Part briefly discusses the Court's relevant free exercise jurisprudence and then outlines Congress's statutory extension of broader religious protection through RLUIPA and the Religious Freedom Restoration Act (RFRA). This Section concludes by discussing the penal context, with a focus on the burdens placed on prisoners' free exercise and prison officials' arguments concerning the compelling interest served by the restrictive regulations.

A. Scrutiny of First Amendment Free Exercise Claims

The First Amendment requires that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[15] As the Supreme Court noted, "[t]he place of religion in our society is an exalted one."[16] However, religious freedom is not without limits, and the Court has rejected free exercise challenges where "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace, or order."[17] In fact, until 1963, a religious exemption to a generally applicable law was required only if Congress or a state legislature provided for the exemption.[18]

---

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

[16] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963).

[17] Sherbert v. Verner, 374 U.S. 398, 403 (1963). For example, in an earlier case the Court noted that governmental limitations on religious exercise were permitted to require vaccination of a disease due to health concerns. *See* Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.").

[18] Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1473 (1999).

In *Sherbert v. Verner*,[19] the Supreme Court held that strict scrutiny applied to a law that substantially burdened a sincere religious objector's exercise of religion and that the objector would be entitled to a religious exemption from the law if the law could not survive strict scrutiny.[20] Because strict scrutiny is generally "strict in theory, fatal in fact," this ruling presented a significant curtailment of the state's ability to impose on the practice of one's faith.[21] The Court subsequently weakened the force of *Sherbert*, however, by holding in *Employment Division, Department of Human Resources v. Smith* that religious exemptions from generally applicable laws are not "constitutionally required," and that groups seeking exemptions from such laws should turn to the political process instead.[22] The Court's decision in *Smith* effectively reverted back to the pre-*Sherbert* rule: an exemption to a generally applicable law was required only if the legislature provided for it.[23]

The development of First Amendment protections followed a similar path in the penal context, in which incarceration circumscribes a prisoner's rights.[24] Still, the Court provided greater protections for prisoners' free exercise of religion in the 1960s and 1970s.[25] These protections reached their height in *Cruz v. Beto*,[26] which held that a prison must afford prisoners "reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts."[27] Fifteen years later in *Turner v. Safley*,[28] however, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate

---

[19] 374 U.S. 398.

[20] *Id*. at 403–04.

[21] James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2057 (2009) ("[*Sherbert*] seemed to offer religious citizens a powerful tool to resist state impositions on the practice of their faith.").

[22] 494 U.S. 872, 890 (1990).

[23] Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. MIAMI L. REV. 923, 932 (2012).

[24] *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977) ("The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration.").

[25] Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 507 (2005).

[26] 405 U.S. 319 (1972); *see also* Gaubatz, *supra* note 25, at 507 ("In the 15 years following *Cruz v. Beto*, prisoners enjoyed the highest level of protection for their First Amendment religious exercise rights in the nation's history.").

[27] 405 U.S. at 322.

[28] 482 U.S. 78 (1987).

penological interests."[29] Thus, "[w]hile *Smith* directed courts to defer to legislative judgments, *Turner* left those delicate policy decisions largely to prison officials."[30] Prisoners were left with little chance for an exemption from a regulation that violated their religious expression because prison officials merely needed to point to a related penological interest to survive judicial review.

B. Statutory Responses to Smith *and* Turner

Following *Turner*, the people did turn to the political process. In 1993, Congress enacted RFRA to reapply *Sherbert*'s strict scrutiny test to all governmental burdens on free exercise, including in the penal context.[31] Under RFRA, a law could substantially burden an individual's free exercise of religion only if the government demonstrated that the burden (1) "is in furtherance of a compelling governmental interest" and (2) "is the least restrictive means of furthering that compelling governmental interest."[32]

While RFRA's strict scrutiny test extended to regulations that burdened a prisoner's free exercise, in practice, courts often deferred to prison officials' determinations.[33] Courts either transformed the strict scrutiny test into a reasonableness test through their analysis of "least restrictive means"[34] or found that there was no substantial burden by focusing on whether the practice was religiously mandated or central to the

---

[29] *Id*. at 89. To determine reasonableness, the Court suggested courts consider the following factors: (1) the "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) "ready alternatives" to the regulation. *Id*. at 89–90 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

[30] Nelson, *supra* note 21, at 2059 (citing Daniel J. Solove, Note, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 470 (1996)). *Turner* and its application in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), signaled the Court's broader dilution of religious liberty protections. *See id.* at 2059. Moving beyond the penal context, the Court applied the lax rational basis test to all laws of general applicability in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 882 (1990).

[31] 42 U.S.C. §§ 2000bb–2000bb-4. (2012); *see also* Taylor G. Stout, Note, *The Costs of Religious Accommodation in Prisons*, 96 VA. L. REV. 1201, 1202 (2010).

[32] 42 U.S.C. § 2000bb-1(b).

[33] Case Comment, *Religious Land Use and Institutional Persons Act — Religious Liberty —* Holt v. Hobbs, 129 HARV. L. REV. 351, 357 (2015) [hereinafter *Holt Comment*] ("[M]any courts applied the [strict scrutiny] test with a gloss that resulted in doctrinal confusion regarding the amount of deference, if any, due to prison officials.").

[34] *See* Gaubatz, *supra* note 25, at 550–51; Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 596 (1998).

belief.[35] Courts also deferred to prison officials' claims that restrictive policies were necessary to effect safety.[36] This practice meant that exemptions or other relief was rare, with less than 10% of prisoner claims granted relief.[37]

Then, in the 1997 case of *City of Boerne v. Flores*,[38] the Court found RFRA unconstitutional as applied to the states because it exceeded Congress's Fourteenth Amendment Enforcement Clause authority.[39] Thus, the provisions of RFRA no longer applied to state laws and regulations, including those made by state and local penitentiaries. In a penal context, RFRA now applies only to the federal penitentiary system. Following *City of Boerne*, some states adopted their own versions of the RFRA.[40] Many states did not, however, and laws that infringed upon an individual's religious exercise were subject only to the rational basis test put forth in *Turner* and *Smith.*[41]

In 2000, Congress responded to *City of Boerne* by passing RLUIPA.[42] In a departure from Congress's trend of circumscribing prisoners' rights,[43] RLUIPA reinstated strict scrutiny for limits on prisoners' free exercise. It provided that the government "shall [not] impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability," unless the substantial burden furthers a compelling governmental interest and is the least restrictive means of doing so.[44] RLUIPA defined religious exercise broadly as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[45] This statutory change removed a barrier that had existed under RFRA:

---

[35] Nelson, *supra* note 21, at 2109–10 ("Use of the centrality and compulsion tests also worked repeatedly to the disadvantage of incarcerated claimants. Most prisoner cases involve claims by members of nontraditional religions." (footnote omitted)).

[36] *See* Gaubatz, *supra* note 25, at 551 n.225.

[37] Lupu, *supra* note 34, at 591.

[38] 521 U.S. 507 (1997)

[39] *Id*. at 536.

[40] See Sidhu, *supra* note 23, at 932–33, for identification of states and types of provisions.

[41] Nelson, *supra* note 21, at 2058–59.

[42] 42 U.S.C. §§ 2000cc–2000cc-5 (2012). To avoid the constitutional infirmity that plagued RFRA, *see supra* note 39 and accompanying text, Congress enacted RLUIPA under the spending and commerce powers, *see* Sidhu, *supra* note 23, at 933.

[43] Gaubatz, *supra* note 25, at 504–05 (noting the barriers to prisoners imposed by the Court in *Turner* and by Congress in the Prison Litigation Reform Act, which created restrictive filing requirements, intended to eliminate frivolous prisoner lawsuits).

[44] 42 U.S.C. § 2000cc-1. This provision is essentially identical to RFRA's provision. *See supra* note 32 and accompanying text.

[45] *Id.* § 2000cc-5(7)(A). The Court has held, however, that this belief must be "sincer[e]." Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005).

courts under RFRA had been permitted to ignore the personal and individual nature of religious beliefs and practices when considering the centrality of a practice.[46] For example, in *Hunter v. Baldwin*,[47] decided under RFRA, the Ninth Circuit held that withholding an arguably inflammatory religious pamphlet did not violate the inmate's free exercise because possessing the pamphlet was not mandated by his faith.[48] Under RLUIPA, a court could not consider whether possessing the pamphlet was in fact required.

A plaintiff bringing a RLUIPA claim bears the initial burden of proving that the regulation "substantial[ly] burden[ed]" his exercise of religion.[49] The Act did not define "substantial burden," leaving it to judicial interpretation.[50] Although there was some inconsistency in defining substantial burden pre-*Holt*,[51] *Holt* clarified this test by requiring an individualized assessment of the plaintiff's subjective sincerity and a determination of whether the prisoner must actually choose between following religious belief or following prison policy.[52] Once the plaintiff meets his burden of proof, the burden shifts to the government to prove the regulation is the least restrictive means of furthering a compelling state interest.[53]

The level of deference courts should pay to prison officials when determining the least restrictive means of furthering a compelling interest is not entirely clear from the text of RLUIPA. The Act's sponsors, Senators Orrin Hatch and Ted Kennedy, noted that strict scrutiny should be applied with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources."[54] This statement appears inconsistent with the principal aim of RLUIPA, which was to strengthen the deferential First

---

[46] Nelson, *supra* note 21, at 2110. Nelson suggested that this statutory change "may account for at least part of the increased success of prisoner claims" under RLUIPA. *Id.*

[47] No. 95-35330, 1996 WL 95046 (9th Cir. Mar. 5, 1996).

[48] *Id*. at *1. For additional discussion and examples of centrality determinations under the RFRA, see Solove, *supra* note 30, at 475–80.

[49] *See* 42 U.S.C. §§ 2000cc-5(2), § 2000cc-1.

[50] *See* 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy) (noting that "'substantial burden' . . . . should be interpreted by reference to Supreme Court jurisprudence" as to the "concept of substantial burden or religious exercise").

[51] *See infra* notes 105–106, 128–130 and accompanying text; *see also* Gaubatz, *supra* note 25, at 516 n.65 (detailing inconsistent lower court determinations of substantial burden).

[52] Holt v. Hobbs, 135 S. Ct. 853, 862 (2015).

[53] *See* 42 U.S.C. §§ 2000cc-5(2), 2000cc-1.

[54] 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

Amendment standard established in *Turner*.[55] Such inconsistencies in RLUIPA's legislative history may explain some of the difficulties courts have faced in considering prison officials' explanations while applying the Act's (supposed) strict scrutiny test.[56] Thus, while RLUIPA has provided an avenue for relief for prisoners demanding religious exemptions from prison policies,[57] the results of these suits have varied due to confusion as to the level of deference that should be afforded to prison officials.[58]

C. Religious Freedom in Prisons

Prison regulations often burden a prisoner's free exercise of religion, and prisoners have challenged these regulations in the courts. Challenges under RLUIPA fall into three main categories.[59] First, prisoners from a variety of religious faiths have challenged grooming regulations that prevent them from growing their hair or beard or from wearing religious head coverings or clothing.[60] Second, prisoners have challenged prison regulations that prohibit certain types of religious ceremonies or services.[61] Finally, prisoners have challenged policies that restrict access to religious materials, including food types.[62]

---

[55] Morgan F. Johnson, Comment, *Heaven Help Us: The Religious Land Use and Institutionalized Persons Act's Prisoners Provisions in the Aftermath of the Supreme Court's Decision in* Cutter v. Wilkinson, 14 AM. U. J. GENDER SOC. POL'Y & L. 585, 598 (2006).

[56] *See infra* Part II. In *Cutter v. Wilkinson*, the Court cited the Hatch–Kennedy statement while noting in dicta that "due deference" should be accorded to determinations by prison officials because "context matters." 544 U.S. 709, 723 (2005).

[57] *See* Sidhu, *supra* note 23, at 934 ("Given its stricter standard, and *Smith's* alleged 'emasculation' of free exercise, RLUIPA is, understandably, the preferred avenue for relief for inmates demanding religious exemptions to or contesting the validity of state prison grooming policies." (footnote omitted)). In fact, RLUIPA led to a marked increase of inmate suits. *See* Nelson, *supra* note 21, at 2054 (noting that in 2008, "federal courts heard well over one hundred RLUIPA prisoner claims, including over a dozen appeals").

[58] *See infra* Part II. The Court had the opportunity to consider this issue in *Holt*, and Part III of this Note, *infra*, considers whether the Court was sufficiently clear in its instruction.

[59] *See* Gaubatz, *supra* note 25, at 557 (outlining "four general categories" of RLUIPA claims, two of which—restrictions on diet and restrictions on access to religious items—I have grouped into one category).

[60] *Id.* at 560; *see, e.g.*, Mayweathers v. Terhune, 328 F. Supp. 2d 1086, 1095–96 (E.D. Cal. 2004) (ruling in favor of Muslim prisoners who desired to wear beards); Toles v. Young, No. 7:00-CV-210, 2002 WL 32591568, at *9 (W.D. Va. Mar. 6, 2002) (requiring Jewish prisoner to cut hair and beard).

[61] Gaubatz, *supra* note 25, at 562–66. For example, in *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008), a Native American petitioner challenged a prison's refusal to accommodate his request for material such as rocks and shovels to be used to create a sweat lodge. *Id.* at 942.

[62] Gaubatz, *supra* note 25, at 558–59, 566–68. For example, in *Madison v. Riter*, 240 F. Supp. 2d 566, 569 n.2 (W.D. Va. 2003), the court held that a prison's denial of a kosher diet to a Jew did not survive strict scrutiny. In *Patel v. United States Bureau of Prisons*, 515 F.3d 807, 815 (8th Cir. 2008), the Eighth Circuit held that the petitioner was not substantially burdened by the prison's failure to provide a halal meal outside of the regular vegetarian meal because it was only inconvenient for the

In response to prisoners' RLUIPA claims, prison officials offer two common reasons for these restrictions. First, they generally assert that prison security is a compelling interest served by the burdening regulation. Regulations can protect security interests by permitting the quick identification of prisoners, preventing prisoners from obtaining and hiding dangerous items, safeguarding officer safety, impeding the facilitation of gang activity, and eliminating perceptions of favoritism that might bread jealousy and hostility.[63] In *Holt*, for example, the prison justified its no-facial-hair policy because it allowed for quick identification of prisoners[64] and it prevented prisoners from hiding contraband in their beards.[65] Prison officials have also argued that grooming policies protect guards from a potential attack that could happen while searching a prisoner's hair for contraband.[66] Prison officials further assert that religious exemptions from uniform and grooming policies allow for gangs to co-opt religion for gang identification.[67]

Second, prisons also assert that general regulations serve a compelling interest by mitigating financial and administrative costs associated with making exceptions.[68] For example, in *Baranowski v. Hart*, the prison claimed that its budget would not permit the provision of kosher meals

petitioner to buy a low-cost halal meal from the prison commissary. In the case of non-diet-related religious materials, courts seem to be even more apt to find the burdens to be merely inconvenient. *See* Gaubatz, *supra* note 25, at 567.

[63] Stout, *supra* note 31, at 1209–14.

[64] 135 S. Ct. 853, 864 (2015) ("The Department tells us that the no-beard policy allows security officers to identify prisoners quickly and accurately."); *see also* Hans Toch & James R. Acker, *Invoking Ineffable Experience: The Aborted Argument for Curbing Religious Accommodation in Arkansas Prisons*, 52 CRIM. L. BULL. 434 (2016) (discussing the deficiencies of the state's arguments in *Holt*). In *Holt*, the State argued that beards could "make inmates 'resemble other inmates' who also have beards, giving rise to impersonations and the possibility that an inmate will use another inmate's identification card 'to get into areas of the prison where they [sic] do not belong.'" Toch and Acker, *supra* (quoting Brief for Respondents at 47–48, Holt v. Hobbs, 135 S. Ct. 853 (2015) (No. 13-6827)). Further, a "long-haired inmate might easily change his appearance by cutting his hair." Stout, *supra* note 31, at 1213 (citing Appellees' Brief at 17, Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005) (No. 04-55879)).

[65] *Holt*, 135 S. Ct. at 863 ("The Department worries that prisoners may use their beards to conceal all manner of prohibited items, including razors, needles, drugs, and cellular phone subscriber identity module (SIM) cards."); Stout, *supra* note 31, at 1212–13 (discussing the argument that prisoners could hide contraband in facial hair) (citing Appellees' Brief, *supra* note 64 at 16–17).

[66] *Holt*, 135 S. Ct. at 864 ("The Department suggests that requiring guards to search a prisoner's beard would pose a risk to the physical safety of a guard if a razor or needle was concealed in the beard."); *see also* Stout, *supra* note 31, at 1213 (discussing the argument that a corrections officer searching a prisoner's beard would be brought in close physical proximity to the prisoner and thus be at greater risk) (citing Appellees' Brief, *supra* note 64, at 16–17).

[67] Stout, *supra* note 31, at 1210 ("[W]here previously prison officials successfully prevented gangs from wearing colors or emblems, these same groups [of prisoners] now assert the right to wear special clothing or medallions as expressions of religious freedom.").

[68] *Id.* at 1214–17.

because that required separate kitchens.[69] Administratively, prison officials argue that they have to devote staff to implementing the large number and variety of accommodations that the statute might require.[70] Furthermore, because some courts compare prison policies with those of other similar prisons when undertaking a less deferential form of scrutiny, officials point to the burden placed on them to compare contested policies with those at other prisons and reconcile inconsistencies.[71]

* * *

In sum, although the Court found that, as a matter of constitutional analysis, a prisoner "regulation is valid if it is reasonably related to legitimate penological interests,"[72] Congress responded by passing legislation calling for a higher level of scrutiny. RLUIPA permits only regulations that use the least restrictive means to further a compelling governmental interest.[73] Common regulations challenged include grooming regulations, regulations prohibiting certain religious ceremonies, and regulations restricting access to religious materials.[74] Prison officials typically assert these regulations are justified by security needs or financial and administrative costs.[75] Courts, however, have not consistently determined how much deference is due toward the assertions of prison officials when litigating RLUIPA claims.

II. STANDARDS OF DEFERENCE: *CUTTER* AND *HOLT*

Since the enactment of RLUIPA, courts have grappled with how much deference to give prison officials when determining if a regulation is the least restrictive means of furthering a compelling interest. The Supreme

---

[69] 486 F.3d 112, 125–26 (5th Cir. 2007). The *Baranowski* Court, applying a deferential analysis, accepted the prison's argument that budget would not allow a separate kitchen to be maintained or food to be brought in from outside. *Id*.

[70] Stout, *supra* note 31, at 1214–15. In particular, prison officials note the effect of the expansive definition of religious exercise in RLUIPA, which not only increases the number of accommodations but also makes the process more complex by possibly "requir[ing] prisons to tailor policies to particular prisoners." *Id*. at 1215.

[71] *Id.* at 1223. For a discussion of the hard look approach some courts have adopted, see *infra* Section II.B. In this respect, prison officials also point to the "significant time and resources" spent responding to RLUIPA litigation. *See* Stout, *supra* note 31, at 1227 (citing Protecting Religious Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 105th Cong. 120–27 (1997) (testimony of Jeffrey Sutton, Solicitor for the State of Ohio)).

[72] Turner v. Safley, 482 U.S. 78, 89 (1987).

[73] 42 U.S.C. § 2000cc-1(a)(2) (2012).

[74] *See supra* notes 60–62 and accompanying text.

[75] *See supra* notes 63–71 and accompanying text.

Court has addressed this question twice—first in its 2005 *Cutter v. Wilkinson* decision[76] and then again in its 2015 *Holt v. Hobbs* decision.[77] In discussing the doctrine, this Part will do three things. First, it will outline the Court's *Cutter* decision. Then, it will discuss the subsequent confusion in lower courts. Third, the Part concludes by discussing the *Holt* decision and its potential implications.

A. Cutter v. Wilkinson—*A Signal for Deference?*

The Court's *Cutter* decision determined the constitutionality of RLUIPA by considering whether the institutionalized persons provision improperly advanced religion in violation of the Establishment Clause.[78] The Court held that RLUIPA did not violate the Establishment Clause in part because the Act would be "administered neutrally among different faiths."[79]

The discussion of RLUIPA's neutral applicability led to confusion regarding the level of deference courts should afford to prison officials' explanations. The Court was convinced that RLUIPA would be evenly applied, as required by the Establishment Clause,[80] because "[w]hile the Act adopt[ed] a 'compelling governmental interest' standard, 'context matters' in the application of that standard."[81] While examining the prison context, the Court noted that "[l]awmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions,"[82] and thus that lawmakers "anticipated that courts would apply the Act's standard with 'due deference to the experience and expertise of prison and jail administrators.'"[83] Though the Court did not analyze

---

[76] 544 U.S. 709 (2005).

[77] 135 S. Ct. 853 (2015).

[78] 544 U.S. at 712–13. Respondents argued that RLUIPA was unconstitutional because prisoners who "cloth[ed] their demands in religious garb" could get benefits generally unavailable in violation of the Establishment Clause. Brief for Respondents at 1–2, Cutter v. Wilkinson, 544 U.S. 709 (2005) (No. 03-9877). The Establishment Clause contained within the First Amendment of the Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. In *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), the Court established three factors a court should consider when determining whether a law impermissibly promoted religion: (1) whether the statute has a "secular legislative purpose," (2) whether its "primary effect [is] one that neither advances nor inhibits religion," and (3) whether it "foster[s] an excessive government entanglement with religion."

[79] *Cutter*, 544 U.S. at 720. The Court also noted that the purpose of RLUIPA was to "alleviate[] exceptional government-created burdens on private religious exercise." *Id.*

[80] *See supra* note 78 and accompanying text.

[81] *Cutter*, 544 U.S. at 722–23 (first quoting 42 U.S.C. § 2000cc-1 (2012); then quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003)).

[82] *Id.* at 723 (citing 139 CONG. REC. 26190 (1993) (remarks of Sen. Hatch)).

[83] *Id.* (citing 146 CONG. REC. 16698–99 (2000) (joint statement of Sen. Hatch & Sen. Kennedy).

whether the prison's failure to accommodate the prisoners' religious exercise was the least restrictive means of furthering a compelling interest, the Court declared that "prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area."[84]

The Court's "due deference" instruction contradicts a principal aim of RLUIPA: the statute replaced the deferential standard established in *Turner* with a strict scrutiny test.[85] In other contexts, strict scrutiny has been viewed as "strict in theory, fatal in fact."[86] However, in a penal context, *Cutter* appeared to signal that the standard was "strict in theory, deferential in fact."[87] The decision could be interpreted as requiring a test somewhere between a rational basis and an "absolute strict scrutiny" test.[88] One explanation for this standard is that the Court wanted to follow its reasoning in earlier prisoners' rights decisions such as *Turner*.[89] On the other hand, the Court cited to *Grutter v. Bollinger*,[90] a case brought under the Equal Protection Clause of the Fourteenth Amendment.[91] There, the Court applied strict scrutiny analysis to determine whether an affirmative action admissions policy was narrowly tailored to a compelling interest.[92] The *Grutter* citation may have signaled that strict scrutiny should be also

---

[84] *Id.* at 725 n.13. The Court also noted that "prison officials [could] appropriately question whether a petitioner's religiosity . . . is authentic" and whether a prisoner's belief is "sincer[e]." *Id.*

[85] *See* David M. Shapiro, *To Seek a Newer World: Prisoners' Rights at the Frontier*, 114 MICH. L. REV. FIRST IMPRESSIONS 124, 126 (2016) ("Since strict scrutiny and deference are in a sense opposites, there was incoherence in the very notion of strict scrutiny with deference.").

[86] *See* Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) ("Indeed, the failure of legislative action to survive strict scrutiny has led some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact.").

[87] Hamilton, *supra* note 9.

[88] Johnson, *supra* note 55, at 595. Taylor G. Stout suggested that the *Cutter* Court's consideration of financial cost and administrative burden in its analysis signaled a retreat from absolute strict scrutiny. *See* Stout, *supra* note 31, at 1202–03. A discriminatory law or classification generally will survive rational basis review if it is "rationally related to a legitimate government interest." City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).

[89] *See* Johnson, *supra* note 55, at 596–97 (arguing that RLUIPA's statutory test ignores the penological interests such as security and order that the Court recognized in *Turner* when developing a rational basis standard). In *Turner*, the Court noted that "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." Turner v. Safley, 482 U.S. 78, 89 (1987); *see also* Lewis v. Casey, 518 U.S. 343, 361 (1996) ("*Turner*'s principle of deference has special force with regard to that issue, since inmates in lockdown include the most dangerous and violent prisoners in the Arizona prison system and other inmates presenting special disciplinary and security concerns." (internal quotation marks omitted)).

[90] 539 U.S. 306 (2003).

[91] The Equal Protection Clause reads: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[92] 539 U.S. at 343 (finding that the affirmative action admissions policy was narrowly tailored and furthered the compelling interest of obtaining educational benefits that a diverse student body provides).

applied for RLUIPA accommodations.[93] *Cutter*'s lack of clarity created confusion in the lower courts, leading to varying levels of deference being afforded to prison officials.[94]

B. Post-Cutter *Confusion in the Lower Courts*

After *Cutter*, a circuit split developed as courts struggled to determine whether they should offer deference to prison officials or if they should take a "harder look" at the explanations offered. The Ninth Circuit's *Warsoldier v. Woodford* decision and the Sixth Circuit's *Hoevennar v. Lazaroff* decision are illustrative, as both cases involved challenges to hair-length restrictions and to prison officials' testimony that the restrictions furthered a compelling security interest.[95] In *Warsoldier*,[96] the Ninth Circuit cited *Cutter*'s recognition that RLUIPA afforded greater protections to prisoners than the First Amendment and consequently did not defer to the prison officials.[97] In particular, the court questioned the prison officials' health and security rationale because female inmates did not have the same hair length restrictions as male inmates did.[98] The Sixth Circuit in *Hoevenaar*,[99] on the other hand, cited *Cutter*'s "due deference" language and did not challenge the prison officials' judgments in holding that the hair-length policy did not infringe upon the prisoner's RLUIPA rights.[100]

Along with the Sixth Circuit, the Fifth,[101] Eighth,[102] Tenth,[103] and Eleventh[104] Circuits interpreted *Cutter* to allow deference towards prison

---

[93] Nelson, *supra* note 21, at 2122–23 ("Only since the decision in *Cutter* have several courts explicitly imported concepts of strict scrutiny from equal protection and free speech contexts into accommodation, where previously such importation was almost unthinkable.").

[94] *Holt Comment*, *supra* note 33, at 358 ("The lack of specificity in *Cutter* opened the door to lower courts' application of varying levels of deference to prison officials in RLUIPA cases between 2005 and 2015.").

[95] *See* Nelson, *supra* note 21, at 2114–15 (identifying the Ninth and Sixth Circuits as the two most polarized circuits in interpreting RLUIPA).

[96] 418 F.3d 989 (9th Cir. 2005).

[97] *Id.* at 999–1000. The Ninth Circuit also noted that other prisons made exceptions to hair length policies without issue. *Id.* at 1001.

[98] *Id.* at 1000.

[99] 422 F.3d 366 (6th Cir. 2005).

[100] *Id*. at 370–71.

[101] *See* Baranowski v. Hart, 486 F.3d 112, 125 (5th Cir. 2007) (deferring to prison officials' submission that the prison budget was not adequate to cover the expense of "providing a separate kosher kitchen or bringing in kosher food from the outside" in holding a policy denying kosher food was permissible).

[102] *See* Fowler v. Crawford, 534 F.3d 931, 943 (8th Cir. 2008) ("JCCC officials have exercised their discretion and determined that a sweat lodge at JCCC jeopardizes prison safety and security to an unacceptable degree. This is precisely the exercise of discretion to which RLUIPA requires us to defer.").

officials' determinations when considering whether a regulation was the least restrictive means of furthering a compelling interest. This manifested in multiple ways. As an initial matter, deferential courts placed barriers to even considering the compelling interest test. For example, these courts generally focused on whether the regulation was coercive, an inquiry used in the older RFRA cases, rather than whether the regulation merely pressured the inmate to violate his beliefs, the proper inquiry under RLUIPA.[105] Deferential courts also at times required the plaintiff to show that the entire regulatory system at a given prison was intolerant of a religion, rather than simply require the plaintiff to identify an individual burden.[106] Finally, some deferential courts have considered the centrality of faith in the substantial burden analysis despite RLUIPA's instruction that centrality of faith not be considered.[107]

If these deferential courts reached the question of compelling interest and least restrictive means, they generally gave prison administrators significant latitude to justify the burdening policy.[108] For example, some courts required only a "mere assertion of compelling interest,"[109] a standard

---

[103] *See* AlAmiin v. Morton, 528 F. App'x 838, 843–44 (10th Cir. 2013) (deferring to prison officials' judgment that prayer oils diminished dogs' ability to detect drugs in holding that an exception did not apply).

[104] *See* Smith v. Allen, 502 F.3d 1255, 1278 (11th Cir. 2007) (holding that withholding of certain religious objects such as a small quartz crystal did not substantially burden the inmate's rights to practice Odinism), *abrogated by* Sossamon v. Texas, 563 U.S. 277 (2011).

[105] Nelson, *supra* note 21, at 2074. For example, the Fifth Circuit found that a policy prohibiting group worship with an outside volunteer did not substantially burden a prisoner's free exercise because the policy had "no tendency to coerce individuals into acting contrary to their religious beliefs." Adkins v. Kaspar, 393 F.3d 559, 569 (2004) (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n*,* 485 U.S. 439, 450–51(1988)).

[106] Nelson, *supra* note 21, at 2072. In *Brown ex rel. Indigenous Inmates at North Dakota State Prison v. Schuetzle*, the court found the prison's regulations as a whole "afforded a reasonable opportunity to exercise their religious freedoms" and denied a RLUIPA claim regarding the prison's failure to appoint a pipe keeper. 368 F. Supp. 2d 1009, 1023 (D.N.D. 2005); *see also* Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 815 (8th Cir. 2008) (finding that the prison's provision of vegetarian meals mitigated any burden imposed by the prisoner's inability to have a halal meal).

[107] Nelson, *supra* note 21, at 2076–79; *see also* Smith, 502 F.3d at 1280 ("The Chaplain found . . . that the sources that Smith submitted did 'not show[] the necessity of [a pine] fire' . . . . Failing such evidence, we are unable to find how, if at all, the denial of a pine fire pit effectuated a substantial burden on his observance of Odinism."); Murphy v. Mo. Dep't of Corr., 506 F.3d 1111, 1115 (8th Cir. 2007) ("Whether or not RLUIPA's definition includes such a requirement, we have held that it is necessary to show that the existence of a sincerely held tenet or belief that is central or fundamental to an individual's religion is a prerequisite to a 'substantially burdened' claim under RLUIPA.").

[108] Nelson, *supra* note 21, at 2068.

[109] *Id.* at 2080. These courts held either that "testimony from prison administrators is the equivalent of empirical proof" or that due deference does not require empirical proof. *Id.* at 2082–83; *see also, e.g.*, Fowler v. Crawford, 534 F.3d 931, 939 (8th Cir. 2008) ("[O]fficials charged with managing such a volatile environment need [not] present evidence of actual problems to justify security concerns."); Hoevennar v. Lazaroff, 422 F.3d 366, 371–72 (6th Cir. 2005) (noting that the lower court "did not give

that could be seen as moving the burden of proof for compelling interest from the defendant to the plaintiff.[110] Other deferential courts required more than a mere assertion but did not go much further because they accepted "administrative convenience" as a compelling interest[111] or accepted arguments that the state has a compelling interest in the "regulatory scheme *as a whole*."[112] For example, the Sixth Circuit gave weight to the warden's opinion that "individualized exemptions are problematic because they cause . . . problems with enforcement of the regulations due to staff members' difficulties in determining who is exempted and who is not."[113] Deferential courts recognized these administrative cost-saving arguments even though administrative convenience has not been accepted as compelling in other contexts.[114] And by considering the regulatory scheme as a whole, deferential courts allowed prison officials to avoid proving that one accommodation would undermine the overall prison policy.[115]

Deferential courts also engaged in a minimal review of potential alternatives, did not consider accommodations made in other prisons, and ignored inconsistency within a prison when determining whether a policy

---

proper deference to the opinions of . . . veterans of the prison system" and should have found the prison's restrictions were the least restrictive means based on testimony offered by the warden and security specialist).

[110] *See, e.g.*, Fegans v. Norris, 537 F.3d 897, 911 (8th Cir. 2008) (Melloy, J., dissenting). Judge Michael Melloy argued that accepting prison officials' conclusory assertions forced the prisoner to put forth data to refute these assertions. *Id.* Essentially, the burden shifts from the prison officials to the prisoner even though RLUIPA puts the burden to establish the policy was the least restrictive means on the prison. *See* 42 U.S.C. § 2000cc-2(b) (2012) ("If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim . . . .").

[111] Nelson, *supra* note 21, at 2084. In *Baranowski v. Hart*, for example, the Fifth Circuit found that the "policy [of denying kosher food] is related to maintaining good order and controlling costs and, as such, involves compelling government interests." 486 F.3d 112, 125 (5th Cir. 2007); *see also Fegans*, 537 F.3d at 902–03, 906 (finding there is a compelling interest presented by the "strain on prison resources and inmate-staff relations" caused by the increased number of searches that an exception would require).

[112] Nelson, *supra* note 21, at 2068–69, 2085. In *Fegans*, for instance, the Eighth Circuit "d[id] not interpret RLUIPA to prevent a prison from applying certain important security regulations to all inmates without providing for exemptions." 537 F.3d at 907.

[113] Hoevenaar v. Lazaroff, 422 F.3d 366, 371 (6th Cir. 2005); *see also* Nelson, *supra* 21, at 2080 (noting that officials argued that administrative costs were linked with security).

[114] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (finding administrative convenience does not pass what has been termed as an immediate scrutiny test—a lower standard than the strict scrutiny RLUIPA's language suggests—applied to claims of sexual discrimination).

[115] Nelson, *supra* note 21, at 2068. Nelson additionally notes that such a broad analysis conflicts with the "case-by-case" standard the Court applied to analogous RFRA claims. *Id.* at 2086 n.142 (citing as an example *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006)).

was the least restrictive means.[116] For example, the Eighth Circuit noted that "[i]t would be a herculean burden to require prison administrators to refute every conceivable option in order to satisfy the least restrictive means prong."[117] The court further claimed that "evidence of policies at one prison is not conclusive proof that the same policies would work at another institution"[118] and that comparisons do "not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers."[119] Essentially, courts that read *Cutter* to require deference to prison officials have tolerated even the weakest arguments for compelling interest and least restrictive means.

In contrast, the First,[120] Third,[121] Fourth,[122] Seventh,[123] and Ninth[124] Circuits have found that prison officials' rationales deserve a "hard look."[125] Though these courts recognized the deference suggested by *Cutter*, some justified a more stringent standard because RLUIPA's legislative history also suggested "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements."[126] Other courts relied on RLUIPA's mandate to "afford [the] confined populations greater protection of religious exercise than what the

---

[116] Nelson, *supra* note 21, at 2068–69.

[117] Fowler v. Crawford, 534 F.3d 931, 940 (8th Cir. 2008).

[118] *Id.* at 941.

[119] *Id*. at 942 (emphasis omitted).

[120] *See* Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 39 (1st Cir. 2007) (finding an RLUIPA exception to a regulation prohibiting inmate preaching without a chaplain because the prison official's assertion was speculative).

[121] *See* Washington v. Klem, 497 F.3d 272, 284 (3d Cir. 2007) (finding the prison's interest in safety and health was not furthered by a policy limiting the number of books allowed in a cell because the prison allowed magazines and newspapers).

[122] *See* Lovelace v. Lee, 472 F.3d 174, 190 (4th Cir. 2006) (finding that prison officials' mere assertion that a "legitimate interest in removing inmates from religious dietary programs where the inmate flouts prison rules reasonably established in order to accommodate the program" did not articulate why the interest was compelling without evidence "with respect to the policy's security or budget implications").

[123] *See* Koger v. Bryan, 523 F.3d 789, 800 (7th Cir. 2008) (discussing how orderly administration of a dietary system did not constitute a compelling interest to justify the requirement that a clergy member verify that a nonmeat diet was part of a religious belief system).

[124] *See* Warsoldier v. Woodford, 418 F.3d 989, 1002 (9th Cir. 2005) (finding that the prison "utterly failed to demonstrate that the disputed grooming policy is the least restrictive means necessary to ensure prison safety and security").

[125] James D. Nelson used the term "hard look" when describing the lack of deference shown by these courts. *See* Nelson, *supra* note 21, at 2054–55.

[126] *See, e.g.*, Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 39 (1st Cir. 2007) (quoting 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy)).

Constitution itself affords" as a reason to closely examine the prison regulations.[127]

Courts that took a hard look at the substantial burden prong examined the effect of the discrete policy on the individual.[128] These courts also found that a prisoner's rights are substantially burdened when the prisoner is pressured into forgoing exercise or faces a "hard choice" between exercise and punishment.[129] Hard look courts further obeyed RLUIPA's command to not consider the centrality of a religious exercise and even avoided trying to determine a prisoner's sincerity, which is permitted by the statute.[130]

Moreover, hard look courts required prison officials to actually demonstrate a compelling interest rather than simply assert it.[131] For example, in *Lovelace v. Lee*, the Fourth Circuit found the prison's lack of evidence regarding budget implications of an exception to be fatal.[132] Additionally, these courts rejected the legitimacy of a government interest when the policies were significantly underinclusive.[133] For instance, as mentioned above, the *Warsoldier* court was skeptical about restrictions on men's hair length, ostensibly to prevent hiding of contraband, when women's hair of similar length was not restricted.[134] Hard look courts,

---

[127] *See, e.g.*, *Lovelace*, 472 F.3d at 186.

[128] Nelson, *supra* note 21, at 2093 ("[This] approach marked a stark departure from pre-RLUIPA prisoner case law, where one-time impositions on religion were almost always held to be de minimis, even if the deprivation was quite serious.").

[129] *Id.* at 2094–96. For example, in *Warsoldier*, the Ninth Circuit found that a reduction of benefits or application of pressure—even pressure not rising to the level of coercion—on a prisoner imposed a substantial burden on that prisoner's religious exercise. 418 F.3d at 996. And in *Washington v. Klem*, the Third Circuit found a substantial burden exists when "1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available . . . OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." 497 F.3d 272, 280 (3d Cir. 2007).

[130] Nelson, *supra* note 21, at 2096–98; *see also, e.g.*, *Lovelace*, 472 F.3d at 188 (finding that RLUIPA does not permit "blanket assumption[s]" about sincerity because a prisoner may be sincere in belief even if he does not adhere to every tenant of the faith).

[131] Nelson, *supra* note 21, at 2099–2100; *see also, e.g.*, *Klem*, 497 F.3d at 283 ("[T]he mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement.").

[132] *Lovelace*, 472 F.3d at 190; *see also, e.g.*, Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 39 (1st Cir. 2007) (noting that the government's case suffered from a lack of research on the effects of past experimentation with similar policies).

[133] Nelson, *supra* note 21, at 2101. A law is underinclusive if it does not affect others similarly situated. *Underinclusive*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/underinclusive [https://perma.cc/LA5L-BVV2].

[134] 418 F.3d at 1000.

moreover, found that administrative convenience was not a compelling interest.[135]

If a compelling interest was found, hard look courts required that prison administrators affirmatively prove that less restrictive alternatives did not exist to achieve the compelling interest.[136] For example, one court required a prison to "demonstrate[] that it ha[d] actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice."[137] Courts also looked at similarly situated prisons to see if they were able to accommodate similar requests and if these other prisons were able to make accommodations, required the prison officials to explain sufficiently what makes the prison different such that they could not make those accommodations.[138] Thus, at each step of the analysis, hard look courts questioned the assertions made by prison officials and required the presentation of evidence to support the assertions.

C. Holt v. Hobbs*: An Opportunity to Clarify the Law*

The circuit split that followed *Cutter* presented a significant problem: a prisoner incarcerated in a hard look jurisdiction was far more likely to obtain a religious accommodation than a prisoner in a deferential jurisdiction. So, in 2015, the Court reexamined RIULPA in *Holt v. Hobbs*.[139] The issue in *Holt* was whether an Arkansas Department of Corrections (ADOC) policy prohibiting facial hair violated the rights of a Muslim prisoner who wished to grow a half-inch beard pursuant to his faith.[140] This presented an opportunity for the Court to clarify strict scrutiny under RLUIPA and the level of deference that should be extended to prison officials. But instead of providing clarification, the Court issued a fact-specific ruling that offered little precision and, in fact, may have increased the level of confusion in the lower courts.

---

[135] Nelson, *supra* note 21, at 2101–03; *see also, e.g.*, *Lovelace*, 472 F.3d at 191 (suggesting that only "security, safety, or cost considerations" are acceptable compelling interests).

[136] Nelson, *supra* note 21, at 2103–05.

[137] Shakur v. Schriro, 514 F.3d 878, 890 (9th Cir. 2008) (quoting *Warsoldier*, 418 F.3d at 996); *see also Warsoldier*, 418 F.3d at 998–1000 (demanding "detailed evidence" of alternatives considered and why they were rejected).

[138] Nelson, *supra* note 21, at 2105. For example, in *Spratt v. Rhode Island Department of Corrections*, the First Circuit found that "in the absence of any explanation by [the Department of Corrections] of significant differences between [this prison] and a federal prison that would render the federal policy unworkable, the Federal Bureau of Prisons policy suggests that some form of inmate preaching could be permissible without disturbing prison security." 482 F.3d 33, 42 (1st Cir. 2007).

[139] 135 S. Ct. 853 (2015).

[140] *Id.* at 859.

In its decision, the Court first examined the substantial burden prong. It found that the petitioner met his burden of proving that the no-facial-hair policy substantially burdened his religious exercise because "[i]f petitioner contravene[d] that policy and gr[ew] his beard, he [would] face serious disciplinary action."[141] Essentially, the Court made an individualized determination by asking whether the prisoner would be forced to decide between violating his beliefs or violating prison policy (and facing sanctions).

Next, the Court addressed the compelling interest prong. It agreed with prison officials that the policy furthered the compelling interest of security by allowing for "quick and reliable identification of prisoners."[142] The Court, however, seemed to take a hard look at whether the no-facial-hair policy was the least restrictive means for furthering that interest: the Court maintained that this standard was "exceptionally demanding," and required the government to "sho[w] it lack[ed] other means" to meet its objective.[143]

In its least restrictive means analysis, the Court said that "RLUIPA requires us to 'scrutinz[e] the asserted harm of granting specific exemptions to particular religious claimants' and 'to look to the marginal interest in enforcing' the challenged government action in that particular context."[144] Additionally, the Court looked for underinclusiveness, finding it incongruent to allow hair longer than a half inch but not beards longer than a half inch if the purpose of the regulation was to prevent hiding contraband.[145] The Court also noted that because the prison already searched head hair for contraband and allowed quarter-inch beards for dermatological reasons, prison officials needed to explain why these grooming types could be searched to prevent hiding of contraband but a half-inch beard could not be.[146] Finally, the Court found that other prisons effectively use before-and-after photographs to prevent a situation where guards could be confused by a prisoner who shaves his beard and that the ADOC did not show that it needed a different policy.[147] A unanimous Court thus held that the ADOC policy was not the least restrictive means of

---

[141] *Id.* at 862.

[142] *Id.* at 864.

[143] *Id.*

[144] *Id.* at 863 (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014)).

[145] *Id.*

[146] *Id.* at 864.

[147] *Id.* at 865. The Court noted that other prison policies are not controlling but that "when so many prisons offer an accommodation, a prison must, at minimum, offer persuasive reasons why it believes that it must take a different course." *Id.* at 866.

ensuring prison security and that an accommodation for Petitioner's half-inch beard had to be made.[148]

Regarding deference specifically, the Court said that although prison officials are experts who should be respected, RLUIPA "does not permit such unquestioning deference" because "respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard."[149] At the same time, however, the Court also suggested that "courts should not blind themselves to the fact that the [RLUIPA] analysis is conducted in the prison setting" and that RLUIPA "affords prison officials ample ability to maintain security."[150] This language resembles *Cutter*'s "context matters" instruction[151] and appears to qualify, if not contradict, the hard look analysis the Court had just conducted. Indeed, the Court failed to cite or discuss *Cutter*'s due deference language or the split it caused in the lower courts. Thus, it appeared that lower courts could read *Holt* and *Cutter* as still permitting significant deference to prison officials, requiring a hard look at a prison's interests and policies, or somewhere in between. In fact, initial scholarship suggested that the Court's failure to discuss *Cutter*'s due deference standard and its ruling out only unquestioning deference served to "outline[] an upper bound" of the appropriate level of deference in RLUIPA claims.[152] At first glance, the Court simply did not sufficiently clarify the matter for lower courts.

In her concurrence, Justice Sonia Sotomayor attempted to reconcile the unanimous majority decision with *Cutter*'s discussion of "context" and "due deference."[153] She asserted that *Cutter* still stands and that the *Holt* opinion did not preclude courts from giving due deference to prison officials who "offer a plausible explanation for their chosen policy that is supported by whatever evidence is reasonably available to them."[154] Justice Sotomayor indicated that this deference did not extend to prison officials who "declare a compelling governmental interest by fiat" or to policies grounded upon "mere speculation."[155] Furthermore, she noted that *Holt* did not require prison officials to consider and reject all conceivable alternatives that might be a less restrictive means to meet a compelling

---

148 *Id.* at 859.

149 *Id.* at 864.

150 *Id.* at 866. The Court also noted that security could be protected by questioning whether a claimant is sincere in his belief and by withdrawing accommodations if abused. *Id.* at 866–67.

151 *See supra* note 81 and accompanying text.

152 *See Holt Comment*, *supra* note 33, at 360.

153 *See supra* notes 81–83 and accompanying text.

154 135 S. Ct. at 867 (Sotomayor, J., concurring).

155 *Id.*

interest.[156] Rather, she suggested that a prison only need to respond adequately to "less restrictive policies [that] the petitioner identified in the course of the litigation."[157]

At first glance, Justice Sotomayor's reconciliation of *Holt* and *Cutter* does not provide complete clarity for the lower courts. Her inclusion of deferential language could be used to maintain *Cutter*'s deferential standard,[158] but the Court's analysis in *Holt* appears to have required more than a plausible explanation for the grooming policy at issue and more than an adequate response to policies suggested by the inmate. It seems perfectly plausible that, as ADOC suggested, before-and-after photographs could fail to protect prison security because a half-inch beard could conceal a prisoner's facial features and make him unrecognizable if he were to shave it, thus allowing him to potentially gain access to restricted areas.[159] But the Court required more: it required an explanation why Arkansas could not allow longer beards as other state prisons did.[160]

Professor David Shapiro, who considered how these cases can be reconciled, suggested that because the majority did not discuss *Cutter* and no other Justice joined Justice Sotomayor's concurrence attempting to reconcile the two decisions, the lower courts should send the *Cutter* decision "to the dustbin of history."[161] Professor Shapiro posited that, though overruling by implication is disfavored, "*Cutter*'s principal holding was that RLUIPA did not violate the Establishment Clause"[162] and thus lower courts could see the Court as simply "ignor[ing] its previous, erroneous dictum."[163] Shapiro noted, however, that lower courts may not wish to fully implement *Holt* because doing so would necessarily imply that all previous decisions under *Cutter* were decided under the wrong legal standard.[164] Thus, Shapiro speculated that *Holt*'s lack of clarity will allow judges inclined to be lenient toward prisoners and religion to find religious

---

[156] *Id.* at 868.

[157] *Id*.

[158] *See* Shapiro, *supra* note 85, at 128. ("Cloaked as a statement of agreement with the lead opinion, the concurrence is in fact an attempt to gut the decision and resurrect *Cutter*.").

[159] *See Holt*, 135 S. Ct. at 865.

[160] *Id.*

[161] Shapiro, *supra* note 85, at 127; *see also* David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 1024–25 (2016) ("*Holt* strongly suggests that courts should apply RLUIPA with far less deference than the dictum in *Cutter* had implied."). As Professor Shapiro noted, it is especially striking that the Court completely omitted reference to *Cutter*, considering it was the only prior Supreme Court interpretation of the deference standard. *See* Shapiro, *supra* note 85, at 127. This omission suggests *Cutter* might be overruled by implication. *Id.* at 128.

[162] Shapiro, *supra* note 85, at 128.

[163] *Id*.

[164] *Id.*

accommodations for prisoners, whereas judges who are unsympathetic to prisoners will be deferential to prison officials' polices.[165]

That said, Professor Shapiro suggested that "context still matters" and *Holt*'s analogous instruction that courts should not "blind themselves" to the prison setting is the key to understanding the seemingly incongruent standard—quite simply, there should be a hard look, but courts should not forget that prison restrictions happen in an environment with unique security and management concerns.[166] But as this Note's analysis will show, there has been a shift, albeit incomplete, toward *Holt*'s harder look standard, and there has been less lower court resistance to *Holt* than Professor Shapiro predicted.

III. RLUIPA LITIGATION POST-*HOLT*

Confusion abounded after *Holt*.[167] Professor Shapiro noted that the early results of *Holt* suggested the Court did not set forth a clear standard: some courts saw the standards to be reconcilable, but others ignored *Cutter* deference.[168] This Note goes a step further in conducting a comprehensive quantitative review of every RLUIPA decision citing *Holt* for two years after it was decided. Overall, this analysis reveals that the lower courts have heeded *Holt*'s instruction to take a harder look, which has tipped the balance in favor of prisoners' rights. However, this trend towards a hard look framework has not completely repudiated *Cutter* deference.

A. Methodology

There are 115 cases from January 20, 2015 to January 20, 2017 adjudicating prisoners' requests for religious accommodations that reached a dispositive stage.[169] I analyzed each case to determine the level of

---

[165] *Id*. at 129–30.

[166] Shapiro, *supra* note 161, at 1025.

[167] For example, in discussing the RLUIPA analysis post-*Holt*, Judge William Conley noted, "District courts are left to apply a balancing test under RLUIPA. Unfortunately, there has yet to be a sufficient number of cases to assess with much confidence how to weigh either side of the scale now that RLUIPA has apparently lowered the threshold on both sides." Tatum v. Meisner, No. 13-CV-44-WMC, 2016 WL 323682, at *7 (W.D. Wis. Jan. 26, 2016).

[168] Shapiro, *supra* note 161, at 1028–30.

[169] This sample of cases was located by searching "*Holt v. Hobbs*, 135 S. Ct. 853 (2015)" in WestLawNext. Next, the "Citing References" hyperlink was selected, and the search was narrowed to "Cases," and narrowed by "Date" to "Date Range" from 01/20/2015 until 01/20/2017. The sample does not include cases that were dismissed for failure to meet the frivolity review required by the Prisoner's Litigation Reform Act (PLRA), cases that were disposed of on other bases, or cases where the RLUIPA issue was not fully litigated. The PLRA permits a case to be dismissed if the court determines the claim is facially frivolous. *See* 42 U.S.C. § 1997e(c) (2012). It is possible that courts dismiss cases as frivolous under the PLRA to either avoid the *Holt* issue or to reach a decision in the prison's favor. *See*

deference that was applied to prison officials' explanations.[170] Although a few cases declined to even cite *Cutter*, the vast majority cited both *Holt* and *Cutter* in explaining the state of the law.[171] Thus, my coding focused on application—did the courts ask for more from prison officials than mere plausible assertions of a compelling interest and that the policy in question was considered to be the least restrictive means of meeting that interest? An example of deferential reasoning is *Rush v. Malin*,[172] where the court relied solely on a prison administrator's declaration to determine that a policy of providing separate services for Sunni and Shi'a inmates was the least restrictive means of meeting safety, security, and cost concerns.[173] On the other hand, examples of hard look reasoning include questioning explanations offered by prison officials,[174] looking for underinclusivity,[175]

Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prisoner Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 142 (arguing that the PLRA has prevented prisoners from raising legitimate claims); Corbett H. Williams, Note, *Evisceration of the First Amendment: The Prison Litigation Reform Act and Interpretation of 42 U.S.C. § 1997e(e) in Prisoner First Amendment Claims*, 39 LOY. L.A. L. REV. 859, 864 (2006) ("[The PLRA] has served to stifle not only frivolous litigation, but meritorious constitutional claims as well."). Moreover, these cases are often litigated without the benefit of counsel, which could further impede the claim's ability to meet the frivolity standard. *See* Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 277–84 (2010) (discussing barriers pro se prisoners must overcome to research and file a legal claim). Because these decisions often do not discuss the RLUIPA standard in any depth, I have excluded them to focus the analysis on those that do.

[170] Admittedly, coding determinations can be more art than science. Additionally, other unseen factors, such as bad lawyering, could account for some dispositions.

[171] *See, e.g.*, Marshall v. Pa. Dep't. of Corr., No. 3:12-0351, 2015 WL 1224708, at *9 (M.D. Pa. Mar. 17, 2015) (citing *Cutter*'s due deference language while noting that *Holt* does not allow mechanical acceptance of prison administrators' explanations), *aff'd mem.*, 690 F. App'x 91 (3d Cir. 2017); Williams v. Leonard, No. 9:11-CV-1158 (TJM/TWD), 2015 WL 3536733, at *13 (N.D.N.Y. Mar. 19, 2015) (quoting *Cutter*'s due deference language and qualifying it with *Holt*'s disallowance of unquestioning deference).

[172] No. 15 CV 3103 (VB), 2016 WL 5793752 (S.D.N.Y. Oct. 4, 2016).

[173] *Id.* at *5 ("Defendants have also satisfied the Court that [the] policies are the least restrictive means available . . . as explained in a declaration by [the] Director of Ministerial, Family and Volunteer Services . . . .").

[174] *See, e.g.*, Ware v. La. Dep't of Corr., No. 14-2214, 2016 WL 4916844, at *4 (W.D. La. Sept. 12, 2016) ("It is clear to this Court from the testimony of Warden Goodwin and Colonel Odom that at this time there is no correlation between the Rastafarian faith, including the wearing of dreadlocks, and any concern surrounding the STGs."). The district court in *Ware* found the policy was the least restrictive means to achieve the compelling interests of contraband control, offender identification, offender hygiene, and inmate–employee safety. *Id.* at *12. The Fifth Circuit, however, reversed and found these justifications were also underinclusive and the policy was not the least restrictive means to achieve the Department of Corrections' compelling interests. Ware v. La. Dep't of Corr., 866 F.3d 263, 270–74 (5th Cir. 2017).

[175] For an example of a court finding an underinclusive policy, consider *Harris v. Wall*:

> Specifically, RIDOC has failed to present creditable reasons why Plaintiff's suggestion that the wearing of a kufi in the design already offered in RIDOC's commissary at least while exercising

finding inconsistent application of the policy in question[176] or that the prison officials did not consider the plaintiff's specific request,[177] being skeptical of total bans,[178] and considering practices in other prisons.[179]

Some cases were difficult to categorize, typically because either the plaintiff-inmate or defendant-prison officials did not contest the

---

> in the yard is not workable. RIDOC asserts only that a kufi can be tipped or worn sporadically as a gang signal and that it would identify Plaintiff as a Muslim. The first justification fails because the kufi would create no more risk of gang signaling than that posed by the stocking and baseball caps already worn in the yard.

217 F. Supp. 3d 541, 559 (D.R.I. 2016).

[176] For an example of a court finding an inconsistent application of the regulation, see *Aiello v. West*:

> At least so far, defendants have also failed to meet their burden of showing that a general ban on inmate-led services is the least restrictive means of addressing that risk. In particular, defendants do not dispute that Aiello and a group of two to four other Jewish inmates had, without incident, been permitted in the past to lead their own services in the resource room with staff from the chapel watching and listening from a nearby officer's station. Nor do defendants explain why Aiello had been permitted to meet with other inmates without a supervisor leading the meetings, nor why this previous method of permitting inmates to congregate in small groups in the resource room is no longer feasible.

207 F. Supp. 3d 886, 896 (W.D. Wis. 2016) (emphasis omitted).

[177] For an example of prison officials not considering the plaintiff-inmate's suggested alternative means, consider *Schlemm v. Wall*:

> Even so, these concerns do not justify the policies that prohibit vetted and approved spiritual advisors or other volunteers from bringing in a sufficient amount of traditional foods—game meat with fried bread in particular—for all Ghost Feast attendees. For legitimate security and administrative reasons, the DAI may obviously limit the number and quantity of supplies brought into the prison by a spiritual advisor, even one sufficiently vetted to limit the potential security risks, but that is not what plaintiff requires.

No. 11-CV-272-WMC, 2016 WL 6603269, at *8 (W.D. Wis. Nov. 8, 2016).

[178] For an example of a court questioning a total ban of a religious grooming standard, item, or practice, see *Davis v. Davis*:

> In the district court, TDCJ presented photographs of objects small enough in size to hypothetically be hidden in a kouplock, and evidence that inmates at other institutions hide contraband in various styles of short and long hair, indicating that the grooming policy does further an interest in preventing the transfer of contraband. But TDCJ has not demonstrated on the present record that a total ban on the growing of kouplocks, even as to low security risk inmates such as Plaintiffs, is the least restrictive means of furthering that interest.

826 F.3d 258, 272 (5th Cir. 2016).

[179] For an example of a court looking at other prison's practices, see *United States v. Secretary of Florida Department of Corrections*:

> The Secretary argues that denying a kosher diet statewide is the least restrictive means of furthering Florida's interest in cost containment, but she fails to rebut three arguments to the contrary. First, she fails to explain why the Department cannot offer kosher meals when the Federal Bureau of Prisons and other states do so. When so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course . . . .

828 F.3d 1341, 1348–49 (11th Cir. 2016).

determination.[180] These cases were coded as "mixed." Additionally, several cases became moot at the disposition stage. Usually, these cases involved grooming policies that were changed in light of *Holt*'s allowance of half-inch beards,[181] the prison ended up making the specific accommodation voluntarily,[182] or a prisoner that had since been transferred from the facility.[183] Finally, and significantly, many courts found the policy at issue did not pose a substantial burden and did not reach a decision on compelling interests and least restrictive means—the stage at which prison explanations are most pertinent.[184] These cases were coded separately.

Beyond this coding, I also examined whether an accommodation was made. In many cases, it appears the parties settled following a defendant-prison's failure to dismiss a prisoner's litigation.[185] In these instances, I coded the court's disposition as an accommodation for the plaintiff, or vice versa if the last decision was against the plaintiff. In several cases, the plaintiff asked for more than one type of accommodation—for example, asking for a dietary accommodation and certain religious items such as

---

[180] For example, in *Casey v. Stephens*, the plaintiff-inmate did not contest the prison official's determination of least restrictive means.

> Defendant . . . has offered *unrefuted* summary judgment evidence that . . . banning personal and communal pipes while allowing a contract chaplain to smoke the ceremonial pipe and to offer the prayers on behalf of the Native American offenders in attendance is the least restrictive means of conducting the sacred pipe ceremonies . . . .

161 F. Supp. 3d 496, 511 (S.D. Tex. 2016) (emphasis added). On the other hand, in *Walker v. Scott*, the defendant-prison officials did not argue that a compelling interest was served by the policy at issue:

> Defendants, however, have presented no argument or evidence regarding a compelling government interest the policy seeks to advance, much less that the denial of a Halal diet was the least restrictive means of doing so. Therefore, the Court finds that the Defendants have failed to meet their burdens . . . .

No. 13-3153, 2015 WL 5450497, at *3 (C.D. Ill. Sept. 15, 2015).

[181] *See, e.g.*, Deaton v. May, No. 2:13CV00136-KGB-JTK, 2015 WL 9999233, at *2 (E.D. Ark. July 24, 2015) (Kearney, Mag. J.) (noting the prison changed its grooming policy to comply with *Holt*'s instruction that half-inch-long beards be permitted), *adopted by* No. 2:13CV00136-KGB-JTK, 2016 WL 447608 (E.D. Ark. Feb. 4, 2016); Kelley v. Hobbs, No. 2:13CV00169 BSM-JTK, 2015 WL 3633721, at *4 (E.D. Ark. June 10, 2015) (same).

[182] *See, e.g.*, Parkell v. Senato, No. 14-446-SLR, 2016 WL 4059640, at *5 (D. Del. July 26, 2016) (dismissing the RLUIPA claim as moot because the plaintiff received the relief he asked for—kosher meals), *aff'd in part*, 704 F. App'x 122 (3d Cir. 2017).

[183] *See, e.g.*, Gamble v. Kenworthy, 5:12-CT-3053-F, 2015 WL 631329, at *2 (E.D.N.C. Feb. 12, 2015), *aff'd,* 604 F. App'x 301 (4th Cir. 2015) (dismissing plaintiff's RLUIPA claim as moot because the plaintiff was no longer at the prison where the regulation allegedly infringed upon his free exercise).

[184] *See infra* notes 200, 203, 205–206 and accompanying text.

[185] For example, consider *West v. Grams*, in which the case history ends after the Seventh Circuit determined the RLUIPA claim was not moot. 607 F. App'x 561 (7th Cir. 2015); *see also* Boyd v. Comm'r, Ind. Dep't of Corr., No. 3:15-CV-082 RM, 2016 WL 1089850, at *2 (N.D. Ind. Mar. 21, 2016) (explaining how Plaintiff, who settled his previous RLUIPA claim a year prior, argued that the prison did not live up the conditions of the settlement).

prayer oils in the same suit.[186] Each type of accommodation was considered separately to determine if certain types of accommodations were more frequently granted than others; therefore, there are more data on accommodations than on cases. Additionally, cases that were moot because the accommodation had already been granted were categorized as accommodations, and cases that were moot because the prisoner had transferred or another reason not involving an accommodation were categorized as no accommodation.

I also tabulated the stage at which each accommodation was granted or denied. For example, courts finding for a plaintiff-inmate did so because there was no compelling interest[187] or the least restrictive means of furthering that compelling interest was not used or considered.[188] Likewise, courts generally ruled for a defendant-prison by either determining that there was no substantial burden placed on the inmate's religious activity[189]

---

[186] *See, e.g.*, LaPlante v. Mass. Dep't of Corr., 89 F. Supp. 3d 235, 253 (D. Mass. 2015).

[187] For an example of a court finding for the plaintiff because there was no compelling interest in the regulation, consider *United States v. Secretary of Florida Department of Corrections*:

> At the summary judgment hearing, the United States maintained that, while the costs involved in providing kosher meals are substantial, Defendants have not shown that they have a compelling state interest in containing these particular costs because: (1) Defendants are already providing kosher meals and incurring the associated costs; (2) Defendants have not shown that the Florida prison system is different from the majority of state prison systems and the Federal Bureau of Prisons, which are all able to offer kosher meals to prisoners; and (3) Defendants have not demonstrated that avoiding these costs actually furthers a compelling state interest . . . . [T]he Court agrees with the United States . . . .

No. 12-22958-CIV, 2015 WL 1977795, at *8 (S.D. Fla. Apr. 30, 2015) (footnote omitted).

See also, e.g., Hughes v. Heimgartner, No. 5:12-CV-3250-JAR, 2015 WL 1292253, at *9–12 (D. Kan. Mar. 23, 2015) (finding that the cost of permitting inmates to celebrate a religious holiday was not compelling); Hodges v. Brown, No. 5:11-CT-3242-D, 2015 WL 736077, at *9 (E.D.N.C. Feb. 20, 2015) (finding that the prison did not present a compelling government interest regarding security because the group services policy was applied inconsistently).

[188] *See, e.g.*, Utt v. Brown, No. 5:12-CT-3132-FL, 2015 WL 5714885, at *11–12 (E.D.N.C. Sept. 29, 2015) (finding that the prison failed to consider other alternatives for preventing the Wiccan inmates from using food in religious celebrations or for the denial of group worship due the lack of an outside volunteer, such as permitting the services with a correctional officer present).

[189] *See, e.g.*, Incumaa v. Stirling, 791 F.3d 517, 525–26 (4th Cir. 2015) (holding that the prisoner was not substantially burdened because he did not have to choose between violating his beliefs and punishment); Berger v. Burl, No. 5:15-CV-262-JM-BD, 2016 WL 4445771, at *2 (E.D. Ark. Aug. 5, 2016) (Deere, Mag. J.) (finding that the grooming policy did not substantially burden the inmate because, as an atheist who claimed that he "ha[d] no religious beliefs," the inmate did not actually hold a sincere religious belief), *adopted by* No. 5:15-CV-262-JM-BD, 2016 WL 4445248, at *1 (E.D. Ark. Aug. 22, 2016); Vazquez v. Maccone, No. 12-CV-4564 (JMA), 2016 WL 2636256, at *9 (E.D.N.Y. May 6, 2016) ("Petitioner's inability to kneel on the floor to silently pray—while temporarily held in the squad room for arrest processing—does not rise to the level of a constitutional violation but was, at most, a *de minimis* burden."); Muhammad v. Commonwealth, No. 7:14CV00529, 2016 WL 1068019, at *9–10 (W.D. Va. Feb. 1, 2016) (Hoppe, Mag. J.) (finding no substantial burden on the prisoner's

or that the least restrictive means were used to further a compelling interest or were at least considered.[190] Summary results are presented in Section III.B.

B. The Numbers: Type of Analysis Used by the Courts

There are three immediate conclusions from the data regarding the type of analysis used by lower courts: (1) most cases were disposed of by determining the regulation in question did not pose a substantial burden to the exercise of a sincere religious belief; (2) the courts that did reach the question of compelling interest and least restrictive alternative were more inclined to follow a hard look analysis post-*Holt*; and (3) there is still some inconsistency between the circuits, and surprisingly, some circuits seem to have become more deferential post-*Holt*.[191]

Table 1: Results (Aggregate)		
Type	**Number**	**Percentage**
Hard Look	30	26.09%
Deferential	8	6.96%
No Substantial Burden	54	46.96%
Mixed	7	6.09%
Moot/Other	16	13.91%
Total	**115**	**100%**

exercise because he did not indicate that the feast meals were inadequate), *adopted by* No. 7:14CV00529, 2016 WL 1072092, at *1 (W.D. Va. Mar. 17, 2016).

[190] *See*, *e.g.*, McLenithan v. Williams, No. 3:09-CV-00085-AC, 2016 WL 1312314, at *5 (D. Ore. Apr. 4, 2016) (Acosta, Mag. J.) (finding and ordering to the effect that restricting Kosher meal access to Jewish inmates was the least restrictive means of accommodating individuals with those beliefs without incurring a prohibitive cost), *appeal filed*, No. 16035376 (9th Cir. May 4, 2016); Tucker v. Livingston, No. 6:14CV659, 2015 WL 6560538, at *7–8 (E.D. Tex. Oct. 28, 2015) (holding that the policy banning the NOGE groups was permissible because the group's racist beliefs posed a threat to a compelling interest, security, and that a complete ban was the least restrictive means of ensuring security due to the group's status as a security threat group in many states), *appeal filed sub nom.* Tucker v. Colier, No. 15-41643 (5th Cir. Dec. 9, 2015). *But see* Lawson v. Dep't of Corr., No. 4:04-CV-00105-MP-GRJ, 2015 WL 9906259, at *12 (N.D. Fla. Sept. 30, 2015) (Jones, Mag. J.) (noting that prison did not consider methods used by other prisons that allowed the use of a Sukkah lodge for religious ceremonies), *adopted by* 4:04-CV-00105-MP-GRJ, 2015 WL 2997710, at *1 (N.D. Fla. Jan. 22, 2016).

[191] For example, the Fourth Circuit generally applied a hard look type analysis pre-*Holt*, *see supra* notes 122, 125, 127, 130, 133, 135 and accompanying text, and yet Fourth Circuit courts were the most deferential post-*Holt* once they passed the substantial burden question, *see supra* Table 2.

Table 2: Results (by Circuit)											
Cir	**Hard Look**	**%**	**Deference**	**%**	**No Substantial Burden**	**%**	**Mix**	**%**	**Moot/ Other**	**%**	**Total Cases**
1st	6	85.7	0	0.0	1	14.3	0	0.0	0	0.0	7
2nd	1	33.3	1	33.3	1	33.3	0	0.0	0	0.0	3
3rd	2	22.2	0	0.0	5	55.6	1	11.1	1	11.1	9
4th	2	9.1	4	18.2	13	59.1	0	0.0	3	13.6	22
5th	4	44.4	0	0.0		0.0	2	22.2	3	33.3	9
6th	0	0.0	0	0.0	9	0.0	0	0.0	0	0.0	9
7th	6	42.9	1	7.1	1	7.1	4	28.6	2	14.3	14
8th	1	11.1	0	0.0	4	44.4	0	0.00	4	44.4	9
9th	1	6.7	2	13.3	10	66.7	0	0.00	2	13.3	15
10th	1	33.3	0	0.0	2	66.7	0	0.00	0	0.0	3
11th	6	40.0	0	0.0	8	53.3	0	0.00	1	6.7	15
DC	0	0.0	0	0.0	0	0.00	0	0.00	0	0.0	0
Total	**30**	**26.1**	**8**	**7.0**	**54**	**47.0**	**7**	**6.1**	**16**	**13.9**	**115**

Table 3: Justifications for Finding for Defendant–Prison		
Type	**Number**	**Percentage**
No Substantial Burden	71	73.20%
Least Restrictive Means Used	21	21.65%
Moot	4	4.12%
Other	1	1.03%
Total	**97**	**100%**

Table 4: Justifications for Finding for Plaintiff–Inmate		
Type	**Number**	**Percentage**
No Compelling Interest	14	25.45%
Least Restrictive Means Not Used/Considered	27	49.09%
Moot	13	23.64%
Other	1	1.82%
Total	**55**	**100%**

1. *Many Cases Do Not Find a Substantial Burden and Do Not Need to Determine the Level of Deference Due to Prison Officials*

To begin, 60.8% of all cases examined did not consider whether courts should afford deference to prison officials' policy determinations or whether courts should take a harder look when determining whether the policy was the least restrictive means of furthering a compelling interest. Sixteen of the cases were deemed moot or disposed of for other reasons, leaving just fifty-four cases that determined the policy did not substantially burden the plaintiff-inmate's exercise of a sincere religious belief. This is striking, especially because a pre-*Cutter* study of RLUIPA found that most cases succeeded in establishing substantial burden.[192] While conclusions are somewhat limited because there is no post-*Cutter* quantitative study of dispositions pre-*Holt*, this data suggests three possibilities, which are outlined below.

a. Substantial burden analysis might be an avoidance tool

The first possibility is that courts may be using a stringent substantial burden standard to avoid the deference question because courts have institutional limitations that can hinder their ability to apply strict scrutiny in a prison context.[193] Courts lack investigatory power beyond the parties' testimony and briefs and thus are unable to independently adduce the legislative facts that are crucial to understanding issues faced in penal institutions.[194] Though adversarial proceedings are seen as an effective method of arriving at the truth,[195] prisoners often file pro se and often lack the resources and legal knowledge needed to represent their arguments effectively.[196] Thus, in some instances, courts may not have the information needed to apply strict scrutiny and might prefer to dodge the question.

---

[192] *See* Gaubatz, *supra* note 25, at 569–72.

[193] As Justice Antonin Scalia noted in his dissent in *Brown v. Plata*, courts "are ill equipped to deal with the increasingly urgent problems of prison administration and reform" because "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources." 536 U.S. 493, 559 (2011) (Scalia, J., dissenting) (quoting Turner v. Safley, 482 U.S. 78, 84–85 (1987)).

[194] Toch & Acker, *supra* note 64 ("Understanding the prerequisites for the safe and effective operation of prisons largely depends on the more transcendent types of information common to legislative facts. The courts consequently are challenged to somehow gain entry into the insulated world of prison administration.").

[195] *See* Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 316–17 (1989) ("When each side presents its best case, the decisionmaker has all the information he needs to reach a just result."). *But cf.* Toch & Acker, *supra* note 64 (suggesting that "information presented in briefs circumvents adversarial testing" and thus can be "inaccurate, incomplete, or misleading").

[196] *See* Robbins, *supra* note 169, at 275–76 ("[M]ost pro se litigants also lack the resources and expertise necessary to succeed in their claims.").

Furthermore, separation of powers concerns may encourage courts to avoid applying strict scrutiny:[197] as the *Turner* Court noted, prison administration is "a task that has been committed to the responsibility of [the legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint."[198] Although these rationales and the prevalence of substantial burden dispositions found in this study might support the suggestion that courts use the substantial burden test in order to avoid the challenges of applying strict scrutiny, not a single opinion examined explicitly expressed these concerns or this strategy.

b. Substantial burden analysis might be a substitute for deference

Second, courts may be using the substantial burden analysis as a substitute for the deference normally applied at the compelling interest stage so that prison officials have leeway to conduct operations as they see fit. In fact, *Holt* suggested that prison officials can use a determination of whether a prisoner's religiosity is authentic to ensure prison security "if an institution suspects that an inmate is using religious activity to cloak illicit conduct."[199] Though courts have found lack of substantial burden in various instances,[200] as of yet, no court has relied on this passage to rule against an inmate.

If courts are using substantial burden analysis to give prison officials latitude, one might expect that previously deferential circuits would find there was no substantial burden in a high percentage of post-*Holt* cases. The data show this happened in one circuit: the Sixth Circuit, deferential pre-*Holt*, did find there was no substantial burden in all nine cases post-*Holt*. Outside of the Sixth Circuit, however, data fail to support the hypothesis—for example, both the Ninth Circuit and Fourth Circuit were categorized as hard look circuits pre-*Holt*,[201] and both found that there was no substantial burden in most of their cases post-*Holt*. One possible answer for this discrepancy is that courts are simply taking a hard look at both sides of the equation—the plaintiff's burdens and the prison's burdens.[202]

---

[197] Sidhu, *supra* note 23, at 940–41.

[198] *Turner*, 482 U.S. at 85.

[199] Holt v. Hobbs, 135 S.Ct. 853, 866–67 (2015).

[200] *See supra* note 189 and accompanying text.

[201] *See supra* notes 122–138 and accompanying text.

[202] For example, in *Blake v. Rubenstein*, the court found that an affidavit claiming food must be prepared by a member of the Hare Krishna religion did not outweigh other exhibits that indicated a different food preparation procedure. No. 2:08-0906, 2016 WL 5660355, at *18–19 (S.D. W. Va. Apr. 5, 2016) (Aboulhson, Mag. J.), *adopted by* No. 2:08-0906, 2016 WL 5661233, at *1–2 (S.D. W. Va. Sept. 28, 2016).

Therefore, it is only reasonable to suggest that courts in the Sixth Circuit may be using substantial burden analysis as a substitute for deference.

c. Substantial burden analysis might eliminate pretextual complaints

Finally, the large amount of no substantial burden adjudications could be the result of *Holt* clarifying the substantial burden test and the fact that some inmates use religious claims as a pretext for a desired outcome.[203] *Holt* was clear that the substantial burden analysis considered the prisoner's subjective religious beliefs, the specific exercise in question, and whether the prisoner had to choose between disciplinary action and not following his or her subjective beliefs.[204] Indeed, several of the courts applied this exact analysis and found that the regulation in question did not pose a substantial burden.[205] This test is somewhat of a meld of the methods used by the hard look and deferential courts—although there is an individualized determination of plaintiffs' subjective beliefs (an easier hurdle), plaintiffs also need to show more than mere pressure to not follow their beliefs (a harder hurdle). Thus, perhaps the higher level of substantial burden dispositions reflects that lower courts are doing the job required by *Holt* and getting rid of pretextual claims.

*2. Cases That Consider Compelling Interest and Least Restrictive Means Are More Inclined to Follow a Hard Look Analysis Post-*Holt

Courts that did find a regulation substantially burdened a prisoner's religious exercise next considered the deference question post-*Holt*. If the lower courts followed Professor Shapiro's suggestion that *Holt* could be

---

[203] *See, e.g.*, Arendas v. Lewis, No. 16-CV-00256-GPG, 2016 WL 6962878, at *5 (D. Colo. Nov. 29, 2016) (Gallagher, Mag. J.) ("[U]nder these circumstances the targeted nature of the claim, which appears to be a cleverly faceted attempt to only avoid wearing an identity bracelet but which is not aimed at other requirements such as his jail uniform, is in no way supported by sufficient statements which state a sincere religious belief."); Peters v. Clarke, No. 7:14CV00598, 2015 WL 5042917, at *7 (W.D. Va. Aug. 26, 2015) ("Peters also does not explain how his own desire to meet regularly with other Rastafarians is rooted in any particular or sincere religious belief, rather than in some nonreligious pursuit, such as a desire to socialize and discuss politics or other secular ideas.").

[204] *See Holt*, 135 S. Ct. at 862.

[205] *See, e.g.*, Floyd v. Williams, No. 6:15-CV-103, 2016 WL 7477765, at *5 (S.D. Ga. Dec. 29, 2016) (Baker, Mag. J.) (noting that the defendant did not entirely prevent the inmate from attending the religious feast or force the defendant to decide to either attend or face punishment); Adams v. Woodall, No. 3:14-CV-00020, 2015 WL 998324, at *6 (M.D. Tenn. Mar. 5, 2015) (Brown, Mag. J.) (finding that while one prayer oil vendor was more expensive than another, that did not place unreasonable pressure on the plaintiff to forgo his religious beliefs, and finding that the plaintiff did not have a substantial burden placed on his religious belief when he had kosher and alternative meals even though the plaintiff did not have confidence in the Halal menu), *adopted by* No. 3:14-CV-00020, 2015 WL 1549002, at *1 (M.D. Tenn. Apr. 7, 2015).

viewed as sending *Cutter*'s due deference instruction to the dustbin of history,[206] one would expect to find the lower courts conducting a hard look-type investigation once the analysis advances to the compelling interest and least restrictive alternative stages. The data shows that courts have indeed been inclined to take a harder look post-*Holt*, with the majority of cases either succeeding or failing when least restrictive means were considered.[207]

Of the forty-five cases that reached this stage of the RLUIPA inquiry, 67% took a hard look at the interests offered by the defendant and the different means that could be used to meet that interest. An additional 16% of cases could be characterized as mixed—these cases refused to accept the prisons' mere assertions of a compelling interest and least restrictive means because the officials did not respond to potential alternatives posited by the plaintiff.[208] Only eight cases, or 17%, could be described as deferential to prison officials' explanations.[209]

3. *Post-*Holt*, Circuit Courts Still Do Not Give Prison Officials a Uniform Level of Deference*

Though as a whole it appears that *Holt* has tipped the scales to a harder look, the opinion's language and failure to directly repudiate or distinguish *Cutter* has led to some confusion at the circuit level. Post-*Holt*, six circuits have exclusively followed the hard look framework—the First, Third, Fifth, Eighth, Tenth, and Eleventh Circuits. The Eleventh and Fifth Circuits bear special mention because they had previously been considered more deferential.[210] Though an accommodation was not granted in the controlling Eleventh Circuit case post-*Holt*, *Knight v. Thompson*,[211] the court followed the hard look framework by requiring the prison to prove that denying the plaintiff's specific exemption was the least restrictive

---

[206] *See supra* notes 161–163 and accompanying text.

[207] Adjudication based on the least restrictive means test is unsurprising because *Holt* focused on this stage of the analysis and accepted security as a compelling interest. *See* 135 S. Ct. at 863.

[208] *See supra* note 180 and accompanying text.

[209] *See supra* note 173 and accompanying text. A court clearly defers to a prison official's explanation when it explicitly relies on the testimony or declaration of an official without much discussion of other evidence presented by the plaintiff when determining an accommodation should not be granted. For example, in *Walker v. Beard*, the Ninth Circuit did not examine all possible alternatives to the regulation and found that the prison carried its burden by asserting it considered the only alternative proposed by the plaintiff and determined it to be race biased. 789 F.3d 1125, 1137 (9th Cir. 2015). *But see* United States v. Sec'y, Fla. Dep't of Corr., 828 F.3d 1341, 1348–49 (11th Cir. 2016) (taking a hard look at other prisons' policies to determine if there were alternatives to the regulation at issue).

[210] *See supra* notes 101, 104 and accompanying text.

[211] 796 F.3d 1289, 1292 (11th Cir. 2016).

means.[212] It noted that unlike in *Holt*, where the prison officials relied on bare assertions and could not point to an instance where contraband could be hidden in a half-inch beard, the officials in *Knight* established a lengthy record that long hair could present a security problem through both prison official and unaffiliated testimony.[213] And in *Wilkinson v. Secretary, Florida Department of Corrections*,[214] the Eleventh Circuit applied the same standard and was unconvinced by the prison officials' bare assertions that denial of a fasting holiday was the least restrictive means of promoting security.[215]

The outlier may be the Fourth Circuit, which was deemed a hard look circuit pre-*Holt*.[216] Of its twenty-two cases post-*Holt*, the Circuit applied a hard look analysis only twice and was deferential four times. The rest of the cases were disposed of for lack of substantial burden or mootness. In the cases where lower courts in the Fourth Circuit applied deference, they noted that defendants are required to "acknowledge and give some consideration to least restrictive alternatives."[217] This language mirrors (without citing) Justice Sotomayor's concurrence, in which she suggested that prison officials only need to respond to least restrictive alternatives brought to their attention by prisoners.[218] Thus, it appears the Fourth Circuit has interpreted *Holt*'s no "unquestioning deference" prohibition to demand some level of deference. For example, in *Snodgrass v. Robinson*, a district court in the Fourth Circuit found that the prison failed its burden because it put forth a single affidavit stating that it had considered other alternatives to the religious celebration policy in question.[219]

* * *

At bottom, this data shows three trends. First, for various potential reasons, most cases are dismissed for want of substantial burden. Second, *Holt* does appear to have led to a more stringent review in those cases that do past the substantial burden stage. Third, despite this, there still is some confusion as to the proper standard in the lower courts. This Note next

---

[212] *Id.*

[213] *Id.* at 1292–93.

[214] 622 F. App'x 805 (11th Cir. 2015) (unpublished).

[215] *Id.* at 815 ("Indeed, Chaplain Ojukwu has failed to show, as he must, 'that [SBCF's religious services] lack[] other means of achieving its desired goal without imposing a substantial burden on the exercise of religion' by Mr. Wilkinson." (quoting Holt v. Hobbs, 135 S. Ct. 853, 864 (2015))).

[216] *See supra* notes 122, 125, 127, 130, 133, 135 and accompanying text.

[217] *See* Jehovah v. Clarke, 798 F.3d 169, 177 (4th Cir. 2015).

[218] *See supra* notes 153–157 and accompanying text.

[219] No. 7:14CV00259, 2015 WL 4743986, at *10–12 (W.D. Va. Aug. 10, 2015).

considers whether, in light of these trends, *Holt* has led to an increase in granted accommodations under RLUIPA.

*C. The Numbers: Accommodation Success Post-*Holt

Moving beyond analysis type, there was a relatively high success rate for prisoners seeking accommodations under RLUIPA post-*Holt*: 27.63% of requested accommodations were granted.[220] By contrast, between 1993 and 1998, only 10% of RFRA claims under similar statutory language succeeded.[221] Additionally, there were thirteen moot cases where the prison voluntarily made the accommodation. Thus, courts have perhaps been more amenable to prisoners' religious rights. The Seventh and First Circuits have proven to be the most accommodating: each found for the inmate over 75% of the time. Both circuits employed a hard look framework, showing there is some correlation between courts applying a more stringent RLUIPA standard and success on the merits.

Table 5: Success Rate		
Type	**Number**	**Percentage**
Accommodation	42	27.63%
No Accommodation	93	61.18%
Moot (Accommodation)	13	8.55%
Moot (No Accommodation)	4	2.63%
Total	**152**	**100%**

This quantitative analysis demonstrates that *Holt* has had a significant effect. When courts did reach the compelling interest and least restrictive means tests, they generally applied a hard look analysis. These courts gave less deference to prison officials, asking them to explain their policies adequately and questioning these explanations. This shift led to an increase in accommodations for prisoners' religious exercise. These findings, however, are qualified because most cases were still disposed of without accommodation due to lack of substantial burden. Though there is no unequivocal explanation for courts' focus on substantial burden, one reasonable conclusion is that in light of *Holt*'s clarification of substantial burden, lower courts are scrutinizing inmate burdens just as closely as prison official burdens to determine whether a prisoner's exercise is

[220] More accommodations were found involving beards and grooming policies than any other type of accommodation—not surprising, considering that *Holt* involved a grooming policy.

[221] *See* Lupu, *supra* note 34, at 607–17.

burdened or the asserted burden is just a pretext to gain a certain accommodation. And although these are clear trends, there is still some confusion in both result and method within the circuits.

Table 6: Success Rate: Circuit					
Circuit	**Accommodations**	**%**	**No Accommodation**	**%**	**Total Cases**
First	11	78.57%	3	21.43%	14
Second	2	40.00%	3	60.00%	5
Third	4	33.33%	8	66.67%	12
Fourth	5	15.63%	27	84.38%	32
Fifth	6	54.55%	5	45.45%	11
Sixth	0	0.00%	13	100.00%	13
Seventh	12	75.00%	4	25.00%	16
Eight	5	55.56%	4	44.44%	9
Ninth	2	10.53%	17	89.47%	19
Tenth	1	33.33%	2	66.67%	3
Eleventh	7	38.89%	11	61.11%	18
DC	0	0.00%	0	0.00%	0
Total	**55**	**36.18%**	**97**	**63.82%**	**152**

D. Understanding Holt *and* Cutter *Moving Forward*

So did *Holt* overrule *Cutter*? Some courts that have expressly addressed the question claim *Holt* merely has refined the law.[222] Indeed, most cite both standards while reaching their decision.[223] Further, the Supreme Court denied a petition for a writ of certiorari in *Knight v. Thompson*,[224] a deferential Eleventh Circuit case that explicitly discussed how *Holt* did not change the outcome of its pre-*Holt Knight I* decision, which applied the *Cutter* standard.[225] Though denial of a petition is not dispositive, if the Court wished to clarify any confusion post-*Holt* and explicitly overrule *Cutter* deference, it could have done so. The Court did

[222] *See, e.g.*, Sareini v. Burnett, No. 08-CV-13961, 2017 WL 85766, at *3 (E.D. Mich. Jan. 10, 2017) ("The Court does not believe that *Holt* constitutes a significant change in law sufficient to justify vacating the previous judgment. *Holt* may have refined or altered the analysis under RLUIPA, but it did not dramatically change the analytical framework.").

[223] *See supra* note 171 and accompanying text.

[224] 136 S. Ct. 1824–25 (2016), *reh'g denied*, 136 S. Ct. 2534 (2016). For the Eleventh Circuit's original opinion, see Knight v. Thompson, 796 F.3d 1289 (11th Cir. 2015) (per curiam).

[225] *See* 723 F.3d 1275, 1276–77 (11th Cir. 2013).

not, and as the results of this study suggest, *Cutter* is still alive in some form.

If both *Cutter*'s and *Holt*'s instructions about deference still apply, how should a court ideally balance the two? The answer lies in the majority's language in *Holt*: The Court disavowed "unquestioning deference" while clarifying that the "test requires the Department not merely to explain why it denied the exemption but to *prove* that denying the exemption is the least restrictive means of furthering a compelling governmental interest."[226] In other words, courts should not simply accept a prison official's assertions without examining additional proof, such as other expert testimony, evidence of alternative regulations' effectiveness, or evidence of underinclusiveness.

Accordingly, many lower courts have recognized Justice Sotomayor's suggestion that officials need not prove that every conceivable option is not the least restrictive means but merely need to consider that the options presented by the petitioner when asking for an accommodation.[227] A court cannot consider every conceivable alternative, but these courts are right to generally require proof to be presented that the plaintiff's suggested alternatives did not meet the compelling interest. As outlined above,[228] courts should ask for more than Justice Sotomayor's plausible explanation for why the alternative did not meet the compelling interest in that specific instance. Though the *Holt* majority did not measure the quantum of proof required, one court has suggested a sufficiency standard, rather than a more stringent standard like "beyond a reasonable doubt."[229]

Sufficiency makes sense—requiring a sufficiency standard does give courts leeway to consider prison officials' legitimate need for order and security as suggested in *Cutter*[230] and as elaborated by Professor Shapiro.[231] A mere explanation of the rationale behind a regulation that burdens a prisoner's exercise should not be enough because deferring to such explanations without more is clearly "unquestioning" deference. *Cutter*'s requirement of some deference to prison officials' determination, however, remains intact under this standard. This, then, may be the best path to reconciling *Cutter* and *Holt*.

---

[226] 135 S. Ct. 853, 858, 864 (2015) (emphasis added).

[227] *Id.* at 868 (Sotomayor, J., concurring).

[228] *See supra* notes 158–160 and accompanying text.

[229] *See, e.g.*, Aurel v. Kammuaf, No. ELH-15-1581, 2016 WL 3418818 at *8 (D. Md. June 22, 2016) ("Rather, due deference will be afforded to those explanations that *sufficiently* 'take[] into account any institutional need to maintain good order, security, and discipline.'" (emphasis added) (quoting Couch v. Jabe, 679 F.3d 197, 201 (4th Cir. 2012))).

[230] *See supra* notes 153–157 and accompanying text.

[231] *See supra* note 161 and accompanying text.

CONCLUSION

The Supreme Court's decision in *Holt* helped clarify the conflict between *Cutter*'s due deference instruction and RLUIPA's traditional strict scrutiny language. As a result, the First, Third, Fifth, Eight, Tenth, and Eleventh Circuits have now adopted a hard look framework when determining RLUIPA claims instead of simply deferring to prison officials' recognitions. Post-*Holt*, courts simply deferred to prison officials' determinations in only eight of the forty-five cases that considered prison explanations when examining compelling interest and least restrictive means. Thus, once a prisoner shows that a prison regulation substantially burdens her religious exercise, it is more likely that the court will order an accommodation be made after applying a higher level of scrutiny to the regulation at issue. *Holt* has therefore nudged the RLUIPA standard away from "strict in theory, deferential in fact" and closer to "strict in theory, strict in fact."

This picture, however, is not complete. A significant number of cases did not consider the level of deference due to prison officials because the courts found the regulation did not substantially burden the prisoner's religious exercise. There are three possible reasons for this: (1) courts use a substantial burden analysis to avoid determining the level of deference due to prison officials post-*Holt*; (2) courts use substantial burden analysis as a substitute for deference in order to give prison officials latitude to maintain prison control; and (3) *Holt* clarified the substantial burden test by focusing on the individual's subjective beliefs, and some inmates are simply using religion as a pretext for an accommodation. Further, even though more courts are taking a harder look at prison officials' determinations when examining RLUIPA claims, some circuits—such as the Fourth Circuit—still defer to such determinations. Therefore, *Holt* did not completely solve the deference question, and some uncertainty remains in the lower courts.

It is possible reconcile *Cutter*'s "due deference" language with *Holt*'s no "unquestioning deference" instruction. The *Holt* Court explained the upper bounds of deference that can be accorded to prison officials' determinations: Instead of receiving "unquestioning deference," a prison must sufficiently prove to the court that the burdening policy is in fact the least restrictive means presented to meet a compelling interest. So, rather than simply accepting prison officials' assertions as true, courts should consider additional proof such as other expert testimony, evidence of underinclusiveness (or lack thereof), evidence of efficacy (or lack thereof), and evidence of other prisons' policies. This sufficiency standard allows courts to recognize the unique aspects of security and order within the

penal system while still critically examining infringements upon prisoners' RLUIPA-protected religious exercise.