Notes

WHEN MONEY IS TIGHT, IS STRICT SCRUTINY LOOSE?: COST SENSITIVITY AS A COMPELLING GOVERNMENTAL INTEREST UNDER THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

By Aaron K. Block*

* B.A. Washington University in St. Louis, 2003; J.D. Washington University School of Law, 2009. I would like to thank the Hon. Jean Hamilton for giving me the opportunity to learn about RLUIPA, Prof. Neil Richards and Prof. Margo Schlanger for their insightful comments and advice, and Jeff Drobish for his edits. I would also like to thank Andrea Perry for everything.

I. INTRODUCTION

What happens when prison inmates in state custody think that prison officials are violating their First Amendment right to the free exercise of religion? For example, when the inmate is an observant Jew or Muslim and his jailors give him a steady diet of pork,[1] when he is a devout Catholic and prison officials deny him sacramental wine,[2] or when he is a Native American who has grown his hair long to honor his dead father, and prison guards want to shave his head?[3]

The beginning of the answer is that these inmates may sue under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[4] RLUIPA directs courts to apply strict scrutiny review to state prison regulations that burden religious exercise. Prison officials must show that the burdensome regulation is the least restrictive means of furthering a compelling governmental interest—at least, according to the U.S. Code; according to the case reporters, the answer is a little different, and the review is anything but strict.

In a developing line of cases, the lower federal courts are holding that strict scrutiny review under RLUIPA is different from strict scrutiny

1. *Cf.* El-Tabech v. Clarke, No. 4:04cv3231, 2007 WL 1487148 (D. Neb. May 18, 2007).
2. *Cf.* 146 CONG. REC. S7777 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).
3. Warsoldier v. Woodford, 418 F.3d 989, 991 (9th Cir. 2005).
4. 42 U.S.C. §§ 2000cc-5 (2000).

review elsewhere in civil rights jurisprudence.[5] Namely, the courts are holding that, under RLUIPA, a government's cost[6] sensitivity is a compelling governmental interest, leaving governments free to violate the First Amendment if that is the cheaper option.

In this Note, I demonstrate that this reading of RLUIPA is incorrect. In Part II, I offer some background information about RLUIPA and describe in greater detail the growing trend of holding that cost sensitivity is a compelling governmental interest. Then, in Part III, I explain why this trend reflects an imprecise reading of both RLUIPA and the Supreme Court's major RLUIPA case, *Cutter v. Wilkinson*.[7] I also discuss the normative and extension problems with treating cost sensitivity as a compelling governmental interest. Lastly, in Part IV, I offer proposals for correcting this problem going forward.

II. BACKGROUND

A. The Search for a Test for Inmate Free Exercise Claims

The Constitution is not extinguished at the jailhouse gate[8]—inmates have, like all Americans, a right to the free exercise of religion, as guaranteed by the First Amendment.[9] As a practical matter, though, the challenges of prison administration at times lead prison officials to impose restrictions on inmates' ability to engage in religious practice.[10]

---

5. Although this trend seems limited to RLUIPA and state prison regulations, the concerns discussed below are largely analogous to federal prison regulations, to which the Religious Freedom Restoration Act (RFRA), RLUIPA's predecessor and analogue, applies. That is to say, cost sensitivity is not a compelling governmental interest under either statute.

6. I use costs in the everyday sense of financial or pecuniary costs.

7. 544 U.S. 709 (2005).

8. *See* McKune v. Lile, 536 U.S. 24, 36 (2002) (The Fifth Amendment "does not terminate at the jailhouse door."); Turner v. Safley, 482 U.S. 78, 95 (1987) ("It is settled that a prison inmate retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." (citing Pell v. Procunier, 417 U.S. 817, 822 (1974) (internal quotation marks omitted))).

9. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. "Inmates clearly retain protections afforded by the First Amendment . . . including its directive that no law shall prohibit the free exercise of religion." O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) (*Pell*, 417 U.S. at 822 (1974); *and* Cruz v. Beto, 405 U.S. 319 (1972) (per curiam)). *Cf.* U.S. CONST. AMEND. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

10. "'[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system'. . . . The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security." *O'Lone*, 482 U.S. at 348 (citing Price v. Johnston, 334 U.S. 266, 285 (1948); *Pell*, 417 U.S. at 822-23 (1974); and Procunier v. Martinez, 416 U.S. 396, 412 (1974)). *See also* Overton v. Bazzetta, 539 U.S. 126, 131 (2003) ("Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration." (citations omitted)).

(Sometimes, though, it's not administrative challenges, but ignorance or spite that leads to these restrictions.)[11] In any case, whatever the reasons for such regulations, prison inmates often challenge them as a violation of their free exercise rights.[12]

Over the past several decades, Congress and the federal courts have each struggled to develop a test to determine when prison regulations that burden inmates' religious rights are permissible and when they violate the Constitution.[13] There has been a marked pattern to this effort.[14] In brief, from at least the 1980s to the early 1990s, the federal courts applied a form of rational basis review to regulations that burdened inmates' free exercise.[15] Congress believed that this standard of review was under-protective of inmate free exercise and, in 1993, codified a strict scrutiny test to replace it: the Religious Freedom Restoration Act (RFRA).[16] In the years following RFRA's enactment, the courts weakened RFRA's protections,[17] and the Supreme Court

---

11. As a volunteer prison chaplain described in testimony before Congress, "During shake-downs, searches routinely conducted at every prison, religious items were frequently treated with contempt and were confiscated, damaged or discarded. It should take little imagination to understand the level of rage we encountered in prisoners when this sort of thing occurred." Protecting Religious Freedom after *Boerne v. Flores* (Part II), Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary, 105th Cong. 107 (1998) (statement of Donald W. Brooks, Reverend, Diocese of Tulsa, Oklahoma); *see also* Cutter v. Wilkinson, 544 U.S. 709, 717 n.5 (2005); and Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 510 (2005).

12. *See, e.g.*, Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005). In *Warsoldier*, a Native American inmate challenged a California Department of Corrections prohibition against male inmates having hair longer than three inches. *Id.* at 991. It was a tenet of his faith that he not cut his hair except upon the death of a close relative, and he had not cut his hair since his father's death in 1980. *Id.* at 991-92. The inmate filed suit under RLUIPA. *Id.* at 992. The district court denied his motion for an injunction barring forced grooming, *id.* at 993, but the Ninth Circuit reversed and granted the injunction. *Id.* at 1002. The Ninth Circuit engaged in a RLUIPA analysis to determine whether the inmate had a likelihood of success on the merits of his claim. *Id.* at 994-95. The court found that although the hair grooming policy did constitute a substantial burden, *Id.* at 996, it also furthered a compelling governmental interest in prison security. *Id.* at 998. However, the inmate demonstrated a likelihood that he would prevail on the merits because the prison officials did not show that the policy was the least restrictive means of furthering their interest in security; the court noted that other prisons were able to function safely without forcing either religious or female prisoners with long hair to submit to a similar hair grooming policy. *Id.* at 1001.

13. Gaubatz, *supra* note 11, at 506-12 (describing how Congress and the Supreme Court have—often acting in opposition to one another—shaped modern inmate free exercise jurisprudence).

14. *Cutter*, 544 U.S. at 714-15 (describing the Religious Freedom Restoration Act (RFRA) as Congress's response to *Smith*, the invalidation of RFRA in *City of Boerne*, and RLUIPA as Congress's response to *City of Boerne*).

15. *Cf.* Turner v. Safley, 482 U.S. 78 (1987) (applying rational basis review to prison regulations that burdened inmates' "fundamental liberties"); *and see* O'Lone, 482 U.S. at 342 (same, as applied to inmates' free exercise rights); *see also* Procunier v. Martinez, 416 U.S. 396, 413-14 (1974) (intermediate scrutiny of prison regulations that burden inmates' First Amendment rights), *overruled in part by* Thornburgh v. Abbott, 490 U.S. 401, 413-14 (1989) (adopting rational basis standard of review for prison regulations that burden inmates' First Amendment rights).

16. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-bb-4 (2000), *held unconstitutional as applied to the States by* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

17. *See* Gaubatz, *supra* note 11, at 504 ("Lower courts also gutted the protections afforded to prisoners' religious exercise under the Religious Freedom Restoration Act (RFRA) in the four years it applied to the states (before being held unconstitutional), ruling against prisoners in over 90% of the cases.") (citing Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 607-17 (1998)).

ultimately struck it down in 1997.[18] In 2000, Congress spoke again on the issue and passed RLUIPA, which reinstates RFRA's guarantee of strict scrutiny protection for inmate free exercise claims.[19] Today, perhaps somewhat predictably, the courts have followed the foregoing pattern and have weakened the protections offered by RLUIPA.

B. The History of RLUIPA and RFRA in the Context of the Supreme Court's Modern Prisoner Free Exercise Jurisprudence

1. *The Road to RLUIPA*

RLUIPA was several years and several controversial Supreme Court opinions in the making. It helps to begin with the case law background against which Congress legislated. In the seminal case of *Turner v. Safley*, the Supreme Court articulated the limits on the extent to which the Constitution protects inmates' constitutional rights. The Court held that, although inmates do maintain their constitutional rights during incarceration, restrictions on those rights may be justified by "legitimate penological interests."[20] *Turner* established a four-factor test to determine whether a regulation satisfies this form of rational basis review.[21]

---

18. *City of Boerne* 521 U.S. at 532.

19. 42 U.S.C. §§ 2000cc-5 (2008).

20. Turner v. Safley, 482 U.S. 78, 89 (1987).

In *Turner*, inmates in Missouri prisons challenged two prison regulations, one that restricted inmates' ability to correspond with inmates at other correctional institutions, and another that prohibited inmates from entering a marriage unless they obtained the prison superintendent's permission and there were "compelling reasons" for the marriage. *Id.* at 81-82. Testimony at trial revealed that "only pregnancy or the birth of an illegitimate child would be considered a compelling reason." *Id.* at 82. The Court surveyed its precedent dealing with the legitimacy of restrictions on inmates' constitutional liberties, and formulated a standard to apply in such a situation: when "a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interest." *Id.* at 89. The correspondence regulation violated the inmates' First Amendment rights, but the Court held that it was reasonably related to the legitimate penological interest in ensuring institutional security. *Id.* at 91. The Court agreed with prison officials that the regulation made it more difficult for inmates to coordinate criminal activity. *Id.* at 91-93. The Court struck down the marriage restriction, finding that it interfered with the inmates' constitutional rights and was not reasonably related to any legitimate penological objectives. *Id.* at 95-100.

21. As described by one court: "A prison regulation or action is valid, therefore, even if it restricts a prisoner's constitutional rights if it is "reasonably related to legitimate penological interests." *Turner* sets forth four factors that courts should consider in making that determination. First we ask whether there is a valid rational connection between the prison regulation and the government interest justifying it. Second we consider whether there is an alternative means available to the prison inmates to exercise the right. Third, we examine whether an accommodation would have a significant ripple effect on the guards, other inmates, and prison resources. Fourth, we evaluate whether there is an alternative that fully accommodates the prisoner at de minimis cost to valid penological interests." Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 982-83 (8th Cir. 2004) (internal citations omitted).

In *O'Lone v. Estate of Shabazz*, handed down just a few days after *Turner*, the Court applied *Turner* specifically to prison regulations that burdened inmates' religious exercise.[22] In that case, Muslim inmates in a New Jersey prison challenged a prison regulation that barred them from attending weekly Jumu'ah services.[23] The Koran commands Muslims to attend these services on Friday during midday, when the inmates would otherwise be on work detail.[24] The prison officials defended the regulation by arguing that permitting the inmates to travel from their work stations to the site of the Jumu'ah services would present a security risk.[25]

The Court applied *Turner* and found that, while the regulation burdened the inmates' religious exercise, it did not violate their rights under the Free Exercise Clause.[26] Under *Turner*'s rational basis test, the Court was satisfied that the regulation was reasonably related to the legitimate penological objective of institutional safety.[27]

Subsequently, members of the public, faith groups, and their representatives in Congress expressed alarm at *Turner* and its progeny,[28] and Congress began to consider legislation that would establish greater protection for religious exercise.[29] These efforts culminated in 1993, when Congress passed RFRA.[30] RFRA generally provides that the courts must apply strict scrutiny to all government regulations found to substantially burden religious exercise, regardless of whether the regulations are of general applicability.[31] As to prison inmates specifically, Congress legislatively revived the pre-*Turner* strict scrutiny test.[32]

---

22. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

23. *Id.* at 344-45.

24. *Id.* at 345, 347.

25. *Id.* at 345-47.

26. *Id.* at 342.

27. *Id.* at 350-54.

28. Cutter v. Wilkinson, 544 U.S. 709, 714 (2005); City of Boerne v. Flores, 521 U.S. 507, 515 (1997).

29. *See, e.g.*, Religious Freedom Restoration Act of 1990, S. 3254, 101st Cong. (1990); Religious Freedom Restoration Act of 1991, H.R. 2797, 102d Cong. (1991); Religious Freedom Restoration Act of 1992, S. 2969, 102d Cong. (1992). *See also* H.R. REP. NO. 106-219, at 4-5 (1999) (describing the passage of RFRA and the need for subsequent similar legislation in the wake of *Boerne*); 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy) (same).

30. 42 U.S.C. §§ 2000bb-4 (2000).

31. *Id.*

32. Congress codified this goal in RFRA's "findings" and "purposes" sections, respectively: "The Congress finds that . . . in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and . . . the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a). "The purposes of this chapter are . . . to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b); *see also* Hamilton v. Schriro, 74 F.3d 1545, 1552 (8th Cir. 1996) ("Congress intended to restore traditional protection afforded to prisoners' claims prior to *O'Lone*.") (citing S. REP. 103-111, at 9-10 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1899) (internal quotation marks omitted).

However, in 1997's *City of Boerne v. Flores*, the Supreme Court held RFRA to be unconstitutional as applied to the States.[33] Understandably dismayed,[34] RFRA's supporters in Congress considered legislative responses,[35] and, three years after RFRA's invalidation, passed RLUIPA.[36] RLUIPA employs RFRA's strict scrutiny test,[37] but RLUIPA applies only to land use regulations and regulations that burden the religious exercise of prison and jail inmates and those otherwise confined by the state.[38] Hoping to avoid RFRA's constitutional infirmity, Congress based RLUIPA on the Spending and Commerce Clauses.[39]

2. *RLUIPA's Prisoner Provision*

As described above, RLUIPA is in some sense RFRA reanimated, albeit with a more limited scope and different constitutional bases.[40] Importantly though, Congress's goal was the same with each: to move the standard of review for prisoner free exercise claims from *Turner*'s

---

33. *City of Boerne*, 521 U.S. 507, 532 (1997). Congress based those provisions of RFRA applicable to the States on its powers under § 5 of the Fourteenth Amendment. *Id.* at 516. The Court held that RFRA was not remedial legislation, but was rather a grant of a substantive constitutional right, and therefore in excess of Congress's power under § 5. *Id.* at 532. RFRA does appear, however, to remain applicable to the federal government. The Supreme Court noted in 2005 that it had not yet ruled on whether RFRA still applied to the Federal Government, but remarked that several courts of appeals had held it did. Cutter v. Wikinson, 544 U.S.709, 715 n.2 (2005). And the next year, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006), the Court remarked that "[u]nder RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability." *Gonzales*, 546 U.S. 418, 424 (2006) (citing 42 U.S.C. § 2000bb-1(a)) (quotation marks omitted).

34. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

35. *See, e.g.*, H. Rep. No. 106-219 (1999) (describing the passage of RFRA and the need for subsequent similar legislation in the wake of *City of Boerne*); 146 CONG. REC. S7774 (2000); *see also* Christopher L. Eisgruber and Lawrence G. Sager, *Congressional Power and Religious Liberty after* City of Boerne v. Flores, 1997 SUP.CT.REV. 81-82 (1997) ("Within weeks of [*City of Boerne*], Florida Congressman Charles Canady convened public hearings. At the hearings, critics of *Smith* and [*City of Boerne*] offered suggestions about how Congress might reenact RFRA in a new guise.") (citation omitted).

36. 42 U.S.C. §§ 2000cc to q-5 (2000).

37. *Id.*

38. *Id.*

39. *See* 146 CONG. REC. S7774-75 (2000) (discussing the Spending and Commerce power bases for RLUIPA's prisoner provisions); *see also* 42 U.S.C. § 2000cc-1(b) (2000) ("This section applies in any case in which . . . the substantial burden is imposed in a program or activity that receives Federal financial assistance; or . . . the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes."). As the Supreme Court noted in *Cutter*, "[e]very state . . . accepts funding for its prisons." Cutter v. Wilkinson, 544 U.S. 709, 716 n.4 (2005) (citation omitted).

40. 146 CONG. REC. S7774-75 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy) (describing RLUIPA as Congress's second attempt at accomplishing the goals underlying RFRA, albeit with a more limited scope); 146 CONG. REC. E1563, E1563 (statement of Rep. Canady) (same); Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 987-88 (8th Cir. 2004) (same).

rational basis test to strict scrutiny.[41]

RLUIPA provides, in pertinent part, that:

> No government shall 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 government demonstrates that imposition of the burden on that person—is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.[42]

In terms of procedure, an inmate must first make a prima facie showing that his or her religious exercise has been substantially burdened by a prison regulation.[43] RLUIPA defines religious exercise rather broadly: "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'"[44] The lower federal courts employ different definitions of "substantial burden," but that used by the Eighth Circuit is representative. According to that court, a "substantial burden" is that which:

> [M]ust significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual [religious] beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion.[45]

---

41. S. REP. No. 103-11, at 8-9 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1897-98; *Cutter*, 544 U.S. at 715. It is possible that Congress intended RLUIPA to subsume the *Turner* test as the basis for inmate free exercise challenges, rather than simply to provide an alternative means of bringing the same claim. RLUIPA's § 2000cc-2(b) explains the procedure and burdens of proof for the act's strict scrutiny test, and by its own terms it applies whether the challenge to the burdensome regulation is brought for a violation of RLUIPA or the First Amendment: "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*. . . " 42 U.S.C. § 2000cc-2(b) (emphasis added).

42. 42 U.S.C. § 2000cc-1. RFRA's test is substantially the same: "(a) In general: Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.(b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

43. RLUIPA allocates the burdens of production and persuasion thusly: "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, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion." 42 U.S.C. § 2000cc-2(b).

44. 42 U.S.C. § 2000cc-5(7)(A).

45. Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 988 (8th Cir. 2004) (citing Weir v. Nix, 114 F.3d 817, 820 (8th Cir. 1997)). The Fifth Circuit uses a different definition of "substantial burden": "[A] government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate[s] his religious beliefs. And, in line with the . . . teachings of the Supreme Court, the effect of a

If a plaintiff makes a prima facie showing of a RLUIPA violation, the defendant then bears the burden of demonstrating that the challenged regulation serves a compelling governmental interest, and that the regulation is the least restrictive means of furthering that interest.[46]

3. *RLUIPA's Compelling Governmental Interest Prong*

Often—and central to the trend under examination here—RLUIPA cases turn on whether an asserted justification for a challenged regulation is a compelling governmental interest.[47] In the prison context, both Congress and the courts consider inmate and staff safety and institutional security to be the most compelling governmental interests.[48] Beyond safety and security, the definition of compelling governmental interests in the prison context becomes murkier; however, a number of the lower federal courts have held that avoiding increased costs is a compelling governmental interest.[49]

Defendants to RLUIPA claims will often assert an interest in avoiding increased costs when an inmate seeks a religiously-based diet,

---

government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs." Longoria v. Dretke, 507 F.3d 898, 903 (5th Cir. 2007) (citing Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004)). The Ninth Circuit uses still another definition: "a prison policy that 'intentionally puts significant pressure on inmates . . . to abandon their religious beliefs . . . imposes a substantial burden on [the inmate's] religious practice.'" Shakur v. Schriro, No. 05-16705, 2008 WL 195496, at *7 (9th Cir. Jan. 23, 2008) (quoting Warsoldier v. Woodford, 418 F.3d 989, 996 (9th Cir. 2005)). Congress purposely left the definition of "substantial burden" open to interpretation: "The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of "substantial burden" on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. . . . The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise." 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy); *but see* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) ("The [Supreme] Court's articulation of what constitutes a "substantial burden" has varied over time.")

46. 42 U.S.C. § 2000cc-2(b); *see also* Warsoldier v. Woodford, 418 F.3d 989, 995 (9th Cir. 2005) (describing RLUIPA's allocation of the burdens of production and persuasion).

47. *See, e.g.*, Baranowski v. Hart, 486 F.3d 112, 126 (5th Cir. 2007) (concluding that controlling costs is a compelling governmental interest), *cert. denied*, 128 S.Ct. 707 (2007); El-Tabech v. Clarke, No. 4:04cv3231, 2007 WL 1487148 (D. Neb. May 18, 2007).

48. Cutter v. Wilkinson, 544 U.S. 709, 723 (2005); 146 CONG. REC. S7775 (2000).

49. *See, e.g.*, *Baranowski*, 486 F.3d at 126; Lovelace v. Lee, 472 F.3d 174, 190 (4th Cir. 2006); Berryman v. Granholm, No. 06-CV-11010-DT, 2007 WL 2259334, at *2 (E.D. Mich. Aug. 3, 2007); Blount v. Fleming, No. 7:04cv00429, 2006 WL 1805853, at *15 (W.D. Va. June 29, 2006); McManus v. Bass, No. 2:05CV117, 2006 WL 753017, at *6 (E.D. Va. March 22, 2006). *See also Shakur*, 2008 WL 195496, at *8-9 (treating cost concerns as a compelling governmental interest, but reversing the district court's grant of summary judgment because of material fact disputes). This trend seems limited to RLUIPA cases, but the problem I describe here is equally applicable with regard to RLUIPA's analogue and predecessor, RFRA. If RLUIPA does not permit states to infringe free exercise rights when it is less expensive to do so, then neither should RFRA permit the federal government to do so.

such as a kosher or Halal diet.[50] These diets tend to be more expensive than the traditional prison fare,[51] and prisons, like many government institutions, generally operate within a limited budget.[52] So, often when an inmate seeks a more expensive diet that is mandated by his or her faith, a prison faces the prospect of spending more money to accommodate that inmate than if he or she would (or could) eat the usual fare.[53]

It may seem that an inmate's lack of food that conforms to the requirements of his or her faith is a rather minor concern, given the litany of hardships that accompany a prison term. But for many individuals, to consume food prohibited by the laws of their faith is to defile their body and to sin before their god.[54] Even if an inmate bears all the responsibility for his imprisonment, when he depends on the state for his sustenance and is served only food that violates his faith, the state offers him only the "Hobson's choice" of sinning or starving.[55] Indeed, it is this sort of state-imposed burden on one's faith that Congress sought to ameliorate with RFRA and then RLUIPA.[56] Unfortunately for inmates, as prisons have refused to spend money to accommodate inmates' religious diets, and as the courts have sanctioned such policies as serving a compelling governmental interest in avoiding increased costs, RLUIPA has failed to accomplish some of its purpose.

---

50. *See, e.g.*, *Blount*, 2006 WL 1805853, at *1 (inmate, member of House of Yahweh faith, requesting kosher diet); *El-Tabech*, 2007 WL 2066510, at *1 (Muslim inmate requesting Halal diet).

51. *See, e.g.*, *Baranowski*, 486 F.3d at 118 (comparing Florida's cost per inmate for providing kosher meals at $12-15 dollars per day with Texas's cost of providing non-kosher meals at $2.46 per day); Bilal v. Lehman, No. C04-2507 JLR, 2006 WL 3626808, at *7 n.4 (W.D. Wash. Dec. 8, 2006) ("The State estimates the following costs per DOC inmate, per day: standard meal at $6.03, halal meal at $6.91, and kosher meal at $12.").

52. *See, e.g.*, *Baranowski*, 486 F.3d at 112.

53. *See, e.g.*, *id.* at 118. *Cf.* Glover v. Johnson, 138 F.3d 229, 253 (6th Cir. 1998). "When determining programming at an individual prison under the restrictions of a limited budget, prison officials must make hard choices. They must balance many considerations, ranging from the characteristics of the inmates at that prison to the size of the institution, to determine the optimal mix of programs and services."

54. The Ninth Circuit eloquently discussed one aspect of this issue in *Ward v. Walsh*: "It is one thing to curtail various ways of expressing belief, for which alternative ways of expressing belief may be found. It is another thing to require a believer to defile himself, according to the believer's conscience, by doing something that is completely forbidden by the believer's religion." 1 F.3d 873, 878 (9th Cir. 1993).

55. *Cf.* Cutter v. Wilkinson, 544 U.S. 709, 721 (2005) ("RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion.").

56. As RLUIPA's chief Senate sponsors explained: "Far more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials. Institutional residents' right to practice their faith is at the mercy of those running the institution, and their experience is very mixed. It is well known that prisoners often file frivolous claims; it is less well known that prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy); *see also Cutter*, 544 U.S. at 717 n.5.

C. *Cutter v. Wilkinson* and its Implications for RLUIPA's Compelling Governmental Interest Prong

Cutter v. Wilkinson[57] is the Supreme Court's leading statement on RLUIPA's prisoner provision. In upholding the act against an Establishment Clause challenge, the Court made a series of statements about how the courts should apply RLUIPA; in particular, the Court went to some length to address concerns that RLUIPA threatened prison safety.[58] *Cutter* declared that courts reviewing RLUIPA claims should recognize that "context matters" in the application of the Act's strict scrutiny test.[59] Referencing the Act's legislative history, the Court noted that "[l]awmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions."[60] The Court also quoted a statement from the Act's legislative history, in which Senators Orrin Hatch and Edward Kennedy (RLUIPA's chief Senate sponsors) signaled their expectation about how the courts would treat RLUIPA claims.[61] The senators expressed their belief that courts would apply RLUIPA's strict scrutiny standard 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."[62]

D. The Growing Trend in the Lower Federal Courts: Misinterpreting *Cutter* and RLUIPA's Compelling Governmental Interest Prong

The lower federal courts have often relied on the above-noted passage in *Cutter* when examining whether an asserted justification for a burdensome regulation is a compelling governmental interest.[63] The

---

57. *Cutter*, 544 U.S. 709 (2005).

58. *Id.* at 723; *see also* Steven Goldberg, Cutter *and the Preferred Position of the Free Exercise Clause*, 14 WM. & MARY BILL RTS. J. 1403, 1404 (2006) ("The Court reached its decision [in *Cutter*] despite opposition to the law by correctional officials, a group to which it usually defers.").

59. 544 U.S. at 723 ("We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns. While the Act adopts a 'compelling governmental interest' standard . . . [c]ontext matters in the application of that standard." (citing Grutter v. Bollinger, 539 U.S. 306, 327 (2003)) (internal quotation marks and citations omitted).).

60. *Cutter*, 544 U.S. at 723

61. *Id.*

62. *Id.* at 723 (quoting 146 CONG. REC. S7775) (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy) (quotation marks omitted). Senators Hatch and Kennedy were actually quoting language that appeared in a Senate Judiciary Committee report that accompanied RFRA. *See* S. REP. 103-111, at 10 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1900.

63. *See, e.g.*, Baranowski v. Hart, 486 F.3d 112, 125 (5th Cir. 2007); Berryman v. Granholm, No.

courts have treated this passage—particularly the Court's quotation of the Hatch/Kennedy statement—as the Court's endorsement of cost sensitivity as a compelling governmental interest.[64] This phenomenon is most clearly illustrated in several recent cases.

For example, in *Baranowski v. Hart*, the Fifth Circuit considered whether a Jewish prisoner's rights under RLUIPA were violated when a Texas prison refused to provide him with a kosher diet.[65] The district court had granted summary judgment for the defendant prison officials, holding in relevant part that "defendants' [sic] financial . . . concerns . . . are compelling governmental interests."[66]

On appeal, the Fifth Circuit first determined that the prison substantially burdened the plaintiff's religious exercise when it denied him a kosher diet.[67] The court then turned to consider whether "the dietary policy of not providing kosher meals is the least restrictive means of furthering a compelling governmental interest,"[68] making several statements about the manner in which it would conduct this inquiry.[69] Quoting *Cutter*, the court first noted that "[c]ontext matters in the application of [RLUIPA's] standard."[70] Next, the court looked to *Cutter*'s quotation of the Hatch/Kennedy statement. The Fifth Circuit read *Cutter* to say that "courts should apply the 'compelling governmental interest' standard 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.'"[71] The court interpreted this passage in *Cutter* to mean that "RLUIPA . . . is not meant to elevate accommodation of religious observances over the institutional need to maintain good order, security, and discipline or *to control costs*."[72]

In defending their regulation, the defendant prison system and prison officials argued that the cost of providing kosher food to the small number of Jewish inmates was itself burdensome and would moreover necessitate spending less on the other inmates' food.[73] The court agreed

---

06-CV-11010-DT, 2007 WL 2259334, at *3 (E.D. Mich. Aug. 3, 2007); McManus v. Bass, No. 2:05CV117, 2006 WL 753017, at *6 (E.D. Va. March 22, 2006). *But see* Gaubatz, *supra* note 11, at 552 ("Congress could have chosen to codify a standard such as 'intermediate scrutiny' that would have given prison administrators more deference, yet also increased the level of protection for prisoner religious exercise beyond that of the *Turner/O'Lone* rational basis standard. But Congress did not do that, and RLUIPA must be enforced according to its terms.").

64. *See, e.g.*, *Berryman*, 2007 WL 2259334, at *3.

65. *Baranowski*, 486 F.3d at 116.

66. *Id.* at 119.

67. *Id.* at 124.

68. *Id.* at 125.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* (emphasis added) (citing Lovelace v. Lee, 472 F.3d 174, 190 (4th Cir. 2006)).

73. *Id.* at 118. Prison authorities were also concerned that the provision of kosher food for a few inmates would be seen as special treatment, would create resentment among the rest of the inmates,

with the defendants and held that the policy of not providing a kosher diet to Jewish inmates was related to "controlling costs" and therefore served a compelling governmental interest.[74] Notably, the court did not discuss whether the policy of denying Baranowski a kosher diet was the least restrictive means of furthering that compelling governmental interest.[75]

In addition to *Baranowski*, one can find examples of this trend from the Fourth Circuit, the Seventh Circuit, and district courts around the nation.[76] The result is that, in many parts of the country, the courts are preventing RLUIPA from working in the way that Congress intended.

Admittedly, prison officials have lost a few RLUIPA cases in which they pleaded poverty,[77] but the courts in these cases tend to be very equivocal about whether avoiding increased costs may be a compelling governmental interest.[78] Indeed, in many of these cases, the defendants were already providing some form of more expensive religious diet to other inmates and thus had little room to argue about the cost of one more such diet.[79] Certainly these opinions cannot be said to squarely reject the proposition that avoiding increased costs is a compelling governmental interest.

---

and would lead to a proliferation of requests for specialized diets from other inmates. *Id.* There may not be as much to this argument as might appear at first glance, though—prisons may provide inmates with less-than-appetizing food in order to meet religious dietary needs. "While some accommodations of religious observance, notably the opportunity to assemble in worship services, might attract joiners seeking a break in their closely guarded day, we doubt that all accommodations would be perceived as 'benefits.' For example, congressional hearings on RLUIPA revealed that one state corrections system served as its kosher diet 'a fruit, a vegetable, a granola bar, and a liquid nutritional supplement—each and every meal.'" Cutter v. Wilkinson, 544 U.S. 709, 721 n.10 (2005) (citation omitted). *See also* Kretchmar v. Beard, 241 F. App'x. 863, 864 (3d. Cir. 2007) (cold, non-rotating kosher diet does not impose a substantial burden on plaintiff's religious exercise under RLUIPA).

74. Baranowski v. Hart, 486 F.3d 112, 125 (5th Cir. 2007) (citing Andreola v. Wisconsin, 211 F. App'x. 495, 498-99 (7th Cir. 2006)).

75. *Baranowski*, 486 F.3d at 125-26.

76. *See, e.g.*, Lovelace v. Lee, 472 F.3d 174, 190 (4th Cir. 2006); *Andreola*, 211 F. App'x. at 498-99 (7th Cir. 2006); Berryman v. Granholm, No. 06-CV-11010-DT, 2007 WL 2259334, at *2 (E.D. Mich. Aug. 3, 2007); Blount v. Fleming, No. 7:04CV00429, 2006 WL 1805853, at *15 (W.D. Va. June 29, 2006); McManus v. Bass, No. Civ.A. 2:05CV117, 2006 WL 753017, at *6 (E.D. Va. March 22, 2006).

77. *See, e.g.*, Agrawal v. Briley, No. 02 C 6807, 2004 WL 1977581, at *9 (N.D. Ill. Aug. 25, 2004); Buchanan v. Burbury, No. 3:05 CV 7120, 2006 WL 2010773, at *6 (N.D. Ohio July 17, 2006).

78. *See, e.g.*, Bilal v. Lehman, No. C04-2507 JLR-JPD, 2006 WL 3626781, at *11 (W.D. Wash. Oct. 2, 2006) ("This Court does not need to make a determination as to whether increased costs alone would constitute a 'compelling governmental interest' for RLUIPA purposes, because the cost claim in this case is not supported by the evidentiary record.").

79. *See, e.g.*, *Buchanan* 2006 WL 2010773, at *6 (rejecting prison officials' cost sensitivity as justification for not providing religious diet to inmate where prison already offered suitable diet to other inmates); *Agrawal* 2004 WL 1977581, at *8 (same).

III. ANALYSIS

There are a number of arguments against allowing budget worries to trump the rights RLUIPA guarantees. With regard to the Act itself, there are numerous reasons to think that Congress did not intend for the courts to treat cost sensitivity as a compelling governmental interest. First, the statutory language suggests as much. Second, the courts have misread both RLUIPA's legislative history and the Supreme Court's opinion in *Cutter v. Wilkinson*. Third, if cost sensitivity is a compelling governmental interest, then RLUIPA offers less protection in some cases than the *Turner* test that Congress intended RLUIPA to overrule. At a normative level, significant problems arise when courts must resolve RLUIPA cases on the tailoring inquiry. Finally, the courts' solicitude for governmental budgetary concerns finds no place in other contexts subject to strict scrutiny; this is anomalous and threatens to weaken strict scrutiny review outside the context of RLUIPA.

A. RLUIPA's Text Indicates That Governments May Have to Incur Costs to Avoid Violating the Act

One of RLUIPA's provisions seems to plainly foreclose the possibility that cost sensitivity is a compelling governmental interest. This provision (the "incur expenses" provision) states:

> Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, *but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.*[80]

This section states clearly that compliance with the Act—avoiding the imposition of substantial burdens on inmates' free exercise—may require governments to spend money.[81] The provision is thus in direct

80. 42 U.S.C. § 2000cc-3(c) (emphasis added).

81. Three district court opinions contain citations to the "incur expenses provision," and each of these courts read it to mean that states *might* have to spend money to avoid violating RLUIPA. Two of these opinions are equivocal, though, on whether this means that cost sensitivity is not a compelling governmental interest. *See* Acoolla v. Angelone, No. 7:01-CV-01008, 2006 WL 938731, at *12 (W.D. Va. Apr. 10, 2006) (stating that the "incur expenses provision . . . contemplates" that governments would have to spend money to avoid violating RLUIPA, but noting that avoiding increased costs "may well" be a compelling governmental interest); Sutherland v. Angelone, No. 7.02CV00477, 2006 WL 733976, at *5 (W.D. Va. Mar. 21, 2006) (stating that the "incur expenses provision" means that states may have to incur costs, but that this should be balanced against the "deference" Congress intended courts to practice toward prison administrators when costs are at issue). *But see* Gerhardt v. Lazaroff, 221 F. Supp. 2d 827, 842 (S.D. Ohio 2002) (stating that the incur expenses provision imposes spending requirement on states for purposes of *Dole* Spending

conflict with the notion that *avoiding spending money* is a compelling governmental interest and may therefore justify imposing a substantial burden on inmates' free exercise.[82]

B. The Courts Have Misused RLUIPA's Legislative History

1. *Courts Should Not Rely on RLUIPA's Legislative History to Interpret RLUIPA's Strict Scrutiny Test*

Most of the courts that have held that cost sensitivity is a compelling governmental interest have relied heavily—and incorrectly—on statements from RLUIPA's legislative history in reaching this conclusion.[83] In the first instance, these courts should not have relied on that legislative history to determine how the Act's test should be applied: it is a fundamental principle of statutory interpretation that where legislation is clear, courts should not inquire into extrinsic materials to determine its meaning.[84] It is hard to suggest that RLUIPA's strict scrutiny test is unclear. Strict scrutiny is a common enough test in the federal courts,[85] and RLUIPA's test in particular ought to be very familiar to the courts, since Congress looked to federal common law in drafting RLUIPA and its predecessor, RFRA.[86] Further, one finds no suggestion in the cases that parties have argued that RLUIPA's strict scrutiny test is unclear. Accordingly, the courts should not have used RLUIPA's legislative history to interpret the Act's test. Even more

---

Power analysis). Surprisingly, no other opinions in which defendants assert that avoiding increased costs is a compelling governmental interest cite this provision.

82. *See, e.g.*, Baranowski v. Hart, 486 F.3d 112, 126 (5th Cir. 2007); Berryman v. Granholm, No. 06-CV-11010-DT, 2007 WL 2259334, *2 (E.D. Mich. Aug. 3, 2007).

83. *See, e.g.*, Lovelace v. Lee, 472 F.3d 174, 190 (4th Cir. 2006); *Baranowski*, 486 F.3d at 125; McManus v. Bass, No. 2:05CV117, 2006 WL 753017, at *6 (E.D. Va. March 22, 2006) (each relying on *Cutter* and its quotation of the Hatch/Kennedy statement to determine that costs may be a compelling governmental interest).

84. This is a core principle of sound statutory interpretation. "A basic insight about the process of communication was given classic expression by the Supreme Court of the United States when it declared that 'the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.' This generally means when the language of the statute is clear and not unreasonable or illogical in its operation, the court may not go outside the statute to give it a different meaning." NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2008) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917).

85. *See, e.g.*, Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738, 2751 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.") (citing Johnson v. California, 543 U.S. 499, 505-06 (2005)); Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S.Ct. 2652, 2664 (2007) (strict scrutiny applies to laws that burden political speech); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 695 (1994) (strict scrutiny is applied to "statutes singling out a particular religion for special privileges or burdens.").

86. *See* 42 U.S.C. § 2000bb (seeking to restore the pre-*Smith* common law test).

troubling, though, is how the courts have misread that legislative history.

2. *The Courts Have Misinterpreted Key Aspects of RLUIPA's Legislative History and the* Cutter *Court's Use of that Legislative History*

As noted above, many courts that have found cost sensitivity to be a compelling governmental interest have relied heavily on a statement from RLUIPA's legislative history, made by Senators Hatch and Kennedy (the "Hatch/Kennedy statement"), to justify this conclusion.[87] Several of these courts have also read the Supreme Court's opinion in *Cutter* to endorse this interpretation of the Hatch/Kennedy statement.[88] It is important, then, to closely examine both the Hatch/Kennedy statement and what the *Cutter* Court was doing in quoting it.

In introducing RLUIPA, Senators Hatch and Kennedy said: "[Congress] expects that courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources."[89] Many of the lower federal courts have interpreted this to mean that Congress intended the courts to defer to prison administrators when the justification for a burdensome regulation involves safety *or* cost concerns.[90] These courts have bolstered this reading by citing to the Supreme Court's opinion in *Cutter*, in which the Court said:

> Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. They anticipated that courts would apply the Act's standard 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."[91]

To begin with, the *Cutter* Court, in quoting the Hatch/Kennedy statement, did not endorse the idea that cost sensitivity is a compelling

---

87. *See, e.g.*, *Baranowski*, 486 F.3d at 125; *Lovelace*, 472 F.3d at 190; *McManus*, 2006 WL 753017, at *6.

88. *See, e.g.*, Berryman v. Granholm, 2007 WL 2259334, at *3 (E.D. Mich. Aug. 3, 2007) ("This financial reason for limiting access to the Kosher Meal Program is among those specifically recognized by the Supreme Court as compelling.") (relying on *Cutter* and its treatment of the Hatch/Kennedy statement); *Baranowski*, 486 F.3d at 125.

89. 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy) (quoting S. REP. 103-11, at 10 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1900).

90. *See, e.g.*, *Lovelace*, 472 F.3d at 190; *Baranowski*, 486 F.3d at 125.

91. Cutter v. Wilkinson, 544 U.S. 709, 723 (2005) (quoting S. REP. 103-111, at 10 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1900) (internal citations omitted).

governmental interest. Rather, the Court mentioned the statement in the course of explaining that "[w]e do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety."[92] The Court used the Hatch/Kennedy statement only to make the point that "[l]awmakers were mindful of the urgency of discipline, order, safety, and security"[93] in prisons. The word "costs" in the Hatch/Kennedy statement is thus coincidental to the point that the Court was making about Congress's understanding of prison security concerns. The word's mere presence in the opinion, then, cannot fairly be read to mean that the Court was holding that cost sensitivity is a compelling governmental interest.

Moreover, the courts have misunderstood the point that Senators Hatch and Kennedy were making. Read carefully, their statement simply expresses their expectation that courts will give deference to prison administrators who, by virtue of their experience and expertise, establish necessary safety regulations while considering costs. Put simply, the statement says that prison administrators develop security regulations while keeping money in mind. It does not say that *the courts* should keep money in mind when reviewing regulations that burden inmate religious exercises.

It becomes even clearer that the courts have been misreading the Hatch/Kennedy statement when the full statement is examined in its original context. Senators Hatch and Kennedy were quoting the Senate Judiciary Committee report that accompanied RFRA, RLUIPA's predecessor.[94] The sentence that Senators Hatch and Kennedy quoted was part of a broader discussion about the difficult task of balancing inmates' religious exercises against the recognized need for safe prisons.[95] The committee report suggested that the proper balancing of these concerns existed in the pre-*Turner* cases: "government interests of the highest order" may suffice to justify substantial burdens on inmates' religious exercise; lesser government interests ("legitimate penological interests" in the language of *Turner*'s prison progeny, *O'Lone*) may not.[96] To Congress, then, only those governmental interests that can justify laws undergoing strict scrutiny review will satisfy RFRA (and thus its descendent, RLUIPA). And, as the Acts' drafters must have been well aware, "conservation of the taxpayers' purse is simply not a sufficient state interest."[97] (Or, at least it was not a compelling governmental interest before the courts began to treat it as such in the

92. *Cutter*, 544 U.S. at 722.

93. *Id.* at 723.

94. 146 CONG. REC. S7774-75.

95. *See* S. REP. No. 103-111, at 10-11 (1993).

96. *See id.* (describing the phrase as "a term of precise meaning . . . derived from the United States Supreme Court's decision in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).").

97. Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974); *see also* Shapiro v. Thompson, 394 U.S. 618, 633 (1969); Stewart v. Blackwell, 444 F.3d 843, 869 (6th Cir. 2006); Doe v. Rose, 499 F.2d 1112, 1117 (10th Cir. 1974).

RLUIPA cases.)

Continuing this textual analysis, the sentence that Senators Hatch and Kennedy quoted begins with "accordingly"—it expresses a conclusion rather than a stand-alone thought. The relevant preceding language is this:

> The committee does not intend the act [RFRA] to impose a standard that would exacerbate the difficult and complex challenges of operating the Nation's prisons and jails in a safe and secure manner. Accordingly, the committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.[98]

The committee was simply suggesting that the courts should be slow to substitute their own judgment for that of prison officials with regard to whether a regulation really does further an asserted security interest. Prison administrators, the committee knew, have greater experience and expertise than generalist judges in formulating prison regulations.[99]

To read the passage otherwise, as the courts have done, is to have it say that judges should defer to prison administrators in determining—as a matter of law—what is or is not a compelling governmental interest. Instead, the "deference" Congress intended the courts to practice refers to gauging whether the regulation actually *serves* the "compelling governmental interest," not whether the interest actually *is* one.

To illustrate the soundness of the reading I propose, imagine that inmates bring a RLUIPA challenge against a prison regulation that forbids them from wearing large, steel necklaces in the shape of religious icons. Assume that this regulation substantially burdens these inmates' religious exercise—maybe their faith requires them to show their devotion by keeping these icons against their chest. The prison officials then defend the regulation, arguing that inmates might be able to sharpen the edges of these necklaces and use them as weapons, which would present a threat to inmate and staff safety.

Under a proper reading of the Hatch/Kennedy statement, Congress expects that the courts will determine whether the asserted interest in institutional safety is a compelling governmental interest. Courts are, of course, better equipped than prison administrators to make the legal

---

98. S. REP. 103-111, at * 10 (1993).

99. *Cf.* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 845 (1986) ("An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference.") (internal quotation marks omitted).

determination of what is or is not a compelling governmental interest. "Deference" comes into play when the courts have to determine whether the restriction on steel necklaces actually serves (and is the least restrictive means of serving) that compelling governmental interest.

In this example, Congress would expect the courts to give some deference to the prison officials' judgment about whether the prisoners will turn the steel necklaces into weapons and whether that would present a threat to prison security. Unlike deference toward prison officials on the legal issue of what constitutes a compelling governmental interest, deference toward prison officials on this fact-bound issue makes a good deal of sense—given their experience and expertise, prison administrators are better positioned than judges to gauge the effect of a particular policy on prison security.

When read correctly, then, the Hatch/Kennedy statement stands only for several unexceptional propositions: prison administrators make regulations to achieve their security goals while keeping their resources in mind; courts applying RLUIPA's strict scrutiny test to prison regulations should know that safety in prisons is a compelling governmental interest; and courts should bear in mind prison administrators' expertise when gauging the fit between a challenged regulation and the compelling governmental interests it putatively serves. What the Hatch/Kennedy statement does not mean, and what *Cutter* did not say, is that Congress expected prison administrators' desire to avoid increased costs to be a compelling governmental interest under RLUIPA.

C. Treating Cost Sensitivity as a Compelling Governmental Interest Makes RLUIPA Less Protective of Inmates' Religious Exercise Rights than the *Turner* Test, Contrary to RLUIPA's Purpose

As noted above, Congress drafted RLUIPA to guarantee greater protection for inmate religious exercise than the *Turner* test permits.[100] Yet, treating cost sensitivity as a compelling governmental interest means, in some instances, *Turner* offers inmates more protection than RLUIPA does.

Under *Turner*, the courts have recognized that budgetary concerns are legitimate penological interests, which may therefore justify burdening inmates' religious exercise.[101] But the *Turner* test also

100. *See* Cutter v. Wilkinson, 544 U.S. 709, 714 (2005).

101. *See* Baranowski v. Hart, 486 F.3d 112, 125 (5th Cir. 2007) (holding that budgetary concerns are a legitimate governmental interest); Williams v. Morton, 343 F.3d 212, 218 (3d Cir. 2003) (refusing to provide prisoners with a more expensive meal than the regular fare is "rationally related to the legitimate penological interest[] in . . . staying within [a] prison's budget"); Beerheide v. Suthers, 286 F.3d 1179, 1186 (10th Cir. 2002) ("[P]rison administrators have a legitimate interest in working within a fixed budget."); Holterman v. Helling, 70 F.3d 1276, 1276 (8th Cir. 1995) (noting

suggests that prisons might be required to incur at least some costs to accommodate inmate religious exercise: the fourth *Turner* factor directs courts to consider whether it is possible to accommodate the inmate's religious exercise at a "*de minimis* cost to valid penological interests."[102] If so, "a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard."[103] That is, if prison officials can accommodate an inmate's religious needs by spending a small amount of money, a burdensome regulation may well fail *Turner*'s rational basis review.[104]

Because Congress was trying to provide more protection for inmates' free exercise under RLUIPA than under *Turner*,[105] it would be strange indeed if *Turner* actually provided more protection than RLUIPA where (at least minimal) costs are implicated.[106] The backward result of treating cost sensitivity as a compelling governmental interest is that, where an accommodation of religion might require a prison to spend money, *Turner*'s rational basis test offers more protection than RLUIPA's strict scrutiny test does.[107]

D. The Judging Problem with Treating Costs as a Compelling Governmental Interest

Moving away from the text, there are broader, normative problems with treating cost sensitivity as a compelling governmental interest. Separation of powers and institutional competency principles argue for keeping the action in RLUIPA cases on the asserted governmental interest (the "ends" prong of the strict scrutiny test). Nearly everything governments do costs money, so if saving money is a compelling governmental interest, that prong of the strict scrutiny test will be satisfied in nearly every RLUIPA case. The cases will thus turn on the "means" prong—whether the challenged law is narrowly tailored to cost control. This will force the courts to closely measure prison budgets; courts will have to determine whether the government's budget figures are sound, whether the government's math is correct, and even whether the court itself cannot perhaps come up with a good deal on, say, kosher

---

that economic concerns are legitimate penological interests under *Turner*).

102. Turner v. Safley, 482 U.S. 78, 91 (1987).

103. *Id.*

104. *Id. cf. Beerheide* 286 F.3d at 1189; Thompson v. Vilsack, 328 F. Supp. 2d 974, 979-80 (S.D. Iowa 2004).

105. *See* Warsoldier v. Woodford, 418 F.3d 989, 998 (9th Cir. 2005).

106. *Cf. Thompson*, 328 F. Supp. 2d at 980 ("Accordingly, having already found that the proposed co-payment for kosher meals is not reasonably related to legitimate penological concerns, it is clear that Plaintiff would prevail under a RLUIPA analysis as well, which requires a much more substantial showing by Defendants.").

107. *Cf.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738, 2774 (2007) (strict scrutiny offers more protection to plaintiffs than does rational basis review).

pastrami.[108] This raises the question whether judges should be involved with administrative budgets in such a particular and precise way, to say nothing of whether judges are likely to be good at this sort of work.

By contrast, when we keep the action in RLUIPA cases on the ends prong, the cases can turn on considerations which the political branches—by codifying strict scrutiny for prisoners' free exercise rights—have found sufficient to merit the protection of important rights. It is then political actors, not judges, who have done the balancing of prison administrative concerns and important rights.

E. Cost Sensitivity Is Generally Not a Compelling Governmental Interest in Other Strict Scrutiny Contexts, and Its Use Here May Weaken Strict Scrutiny Review Elsewhere

Finally, there are troubling implications with treating cost sensitivity as a compelling governmental interest under RLUIPA. Currently, the notion that cost sensitivity is a compelling governmental interest appears to be anomalous to RLUIPA's prisoner provision. Indeed, the Supreme Court has explicitly held in other strict scrutiny cases that guarding against cost increases is not a compelling governmental interest.[109] Further, at least one court has rejected budgetary concerns as a compelling governmental interest under RLUIPA's land use provision.[110]

One might suggest that the use of cost sensitivity as a compelling governmental interest—weakening the usual strict scrutiny standard—is sensible here because restrictions on inmates' constitutional rights

---

108. *See* El-Tabech v. Clarke, 2007 WL 2066510, at *3 (suggesting prison officials should "contract with their canteen supplying vendor for a list of generally available kosher items").

109. *See, e.g.*, Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974) ("The conservation of the taxpayer's purse is simply not a sufficient state interest to sustain a duration residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State."). *See also* Doe v. Rose, 499 F.2d 1112, 1117 (10th Cir. 1974).

110. *See* Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1228-29 (C.D. Cal. 2002). In *Cottonwood*, a growing church congregation wanted to expand its facilities. *Id.* at 1212-13. The church sought permission from the City of Cypress, but the city refused to allow the expansion. *Id.* at 1213-14. In addition, the city began eminent domain proceedings against the church, seeking to develop the site for commercial purposes. *Id.* at 1214-15. The church challenged the city's action under RLUIPA. *Id.* at 1220. The city urged that it had a compelling governmental interest in converting the property into a revenue-generating commercial site. *Id.* at 1228. The court rejected the city's suggestion that revenue generation is a compelling governmental interest: "Cottonwood is, as are most churches, a tax-exempt non-profit group. If revenue generation were a compelling state interest, municipalities could exclude all religious institutions from their cities." *Id. See also* Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1093 (C.D. Cal. 2003) ("[I]f a city's interest in maintaining property tax levels constituted a compelling governmental interest, the most significant provision of RLUIPA would be largely moot, as a decision to deny a religious assembly use of land would almost always be justifiable on that basis."), *rev'd on other grounds*, Elsinore Christian Ctr. v. City of Lake Elsinore, 197 F. App'x. 718 (9th Cir. 2006).

undergo lesser scrutiny than restrictions placed on non-incarcerated citizens.[111] But this disparate treatment for prisoners' religious rights is precisely what Congress was trying to correct with RLUIPA's prisoner provision.[112] In terms of logical implications, as the Supreme Court emphasized in *Employment Division, Department of Human Resources of Oregon v. Smith*, to "water down" strict scrutiny in one context would be to "subvert its rigor" elsewhere.[113] If financial concerns can justify the invasion of inmates' free exercise rights today, such concerns may sap the vigor of strict scrutiny in other contexts tomorrow.

IV. CONCLUSION & PROPOSAL

There may be strong policy arguments for why cost sensitivity should be a compelling governmental interest under RLUIPA. Prison management is an important but exceedingly difficult task. We live in a world of limited government resources, especially at the state level. Perhaps there are better uses for scarce funds than providing religious accommodations for inmates, especially if inmates end up with a (subsidized) level of practice above that which non-inmate individuals can provide for themselves.

On the other hand, the Framers thought enough of religious exercise to put it first in the Bill of Rights.[114] And there is something intuitively troubling when government officials, out of what may nevertheless be a legitimate concern for the public coffers, force themselves between a man and his faith—as, for example, when an inmate's only choice is to starve or to eat food that his religion deems unclean and thus to defile himself in the eyes of his god.

Regardless of the merits of these competing arguments, Congress reconciled them as it saw fit. By its terms, RLUIPA indicates that governments may have to spend money to avoid violating the act. This rule is consistent with strict scrutiny generally and with RLUIPA's purposes in particular. Those courts that have found otherwise have had to misinterpret the Supreme Court's opinion in *Cutter* and the will of Congress as reflected in the relevant legislative history to reach that result. Moreover, treating cost sensitivity as a compelling governmental interest makes RLUIPA weaker than the *Turner* test Congress intended it to replace, and creates a troubling anomaly in strict scrutiny jurisprudence.

RLUIPA, as it was drafted and as Congress intended it to be

111. *See generally* Turner v. Safley, 482 U.S. 78 (1987).

112. *See* Cutter v. Wilkinson, 544 U.S. 712, 714-15 (2005).

113. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 888 (1990).

114. U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

applied, does not allow for cost sensitivity to be a compelling governmental interest. Going forward, courts should interpret RLUIPA accordingly, and Congress should pass a clarifying amendment to that effect for good measure.