DIVINING A DEFINITION: "SUBSTANTIAL BURDEN" IN THE PENAL CONTEXT UNDER A POST-*HOLT* RLUIPA

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This Note attempts to resolve a significant impediment to the religious free exercise of prisoners. The Religious Land Use and Institutionalized Persons Act (RLUIPA) forbids the government from placing a "substantial burden" on a prisoner's religious exercise. Congress did not define substantial burden in the statute, instead indicating that courts should rely on the Supreme Court's free exercise jurisprudence for a definition.

Despite congressional advisement, differing methods of statutory interpretation led to a circuit split over the term's definition. One "plain-meaning" group of circuits defined substantial burden textually, while a second "jurisprudential" group defined it as intended through existing free exercise precedent. In 2015, the Supreme Court exacerbated the split in Holt v. Hobbs. *In dicta, the Court wrote that a substantial burden requires an inmate "to engage in conduct that seriously violates [their] religious beliefs." The plain-meaning circuits adopted this language as a standalone definition, but the jurisprudential circuits held fast to their previous definition.*

The difference between the two definitions is significant for religious inmates. Under the Holt *definition, plain-meaning courts employ a "conduct-focused" analysis for their substantial burden inquiry: Inmates must show that they were forced to "engage in conduct" that seriously violates their beliefs. By contrast, jurisprudential courts maintain a "pressure-focused" analysis, which considers government pressure applied onto the inmate as the harm, rather than the inmate's resulting conduct.*

This Note argues that the conduct-focused approach is inappropriate in the penal context. It calls on the Supreme Court to resolve the circuit divide and to further reconcile inherent differences between RLUIPA's penal and economic contexts. As a remedy, this Note suggests a penal-specific definition of substantial burden that applies a pressure-focused style of analysis, similar to the Supreme Court's early Sherbert–Thomas *framework.*

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INTRODUCTION

Anthony Wright is a devout Rastafarian serving a life sentence in North Carolina.[1] Among his many religious tenets, Wright believes that certain Rastafarian holidays must be celebrated with a communal feast.[2] The North Carolina Department of Public Safety has no problem with Wright celebrating these holidays, but it does not want to foot the bill for any special meals, which, according to Wright, must include delicacies like goat, fish, plantains, and wine.[3] By refusing to pay for the feasts, did the Department "burden" Wright and his religious free exercise? Did it "substantially burden" him? Did it pressure Wright to "modify his behavior," or force him to "engage in conduct" that violates his beliefs? How far must the state go to accommodate his personal religious beliefs, and when does a subjective belief become just an idiosyncratic preference?

Wright filed a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA),[4] alleging that the prison's refusal to pay for the feasts amounted to a substantial burden on his religious exercise.[5] RLUIPA implements a three-pronged analysis for religious exercise claims by plaintiff-inmates. In pertinent part, the Act states that a government action or rule of general applicability may not (1) "substantially burden" an inmate's religious exercise unless the action (2) furthers a "compelling governmental interest" (3) in the "least restrictive means."[6] RLUIPA includes definitions for many of its statutory terms, such as "religious exercise," but it fails to define "substantial burden."[7] Instead, the principal drafters intended for courts to define "substantial burden" based on the Supreme Court's religious exercise jurisprudence.[8] Some lower courts have been more faithful than

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1. See Wright v. Lassiter, 921 F.3d 413, 415 (4th Cir. 2019).

2. Id. Wright is a member of the Ba Beta Kristiyan mansion of Rastafarianism—an esoteric offshoot of the faith founded by a prison chaplain for the New York Department of Corrections. Id. at 416. The sect is notable for its departure from the traditional Rastafarian practices of other mainstream mansions (for example, many Ba Beta Kristiyans eat meat and drink wine, while mainstream Rastafarians abstain from both). Id. at 417. Among their differences from the mainstream, Ba Beta Kristiyans also celebrate four holidays with communal feasts and services. Id. at 415.

3. Id.

4. 42 U.S.C. §§ 2000cc–cc-5 (2012).

5. See *Wright*, 921 F.3d at 415. I worked as an intern in the North Carolina Department of Justice from May to September 2018 while Wright's case was on appeal, and I was involved in the preparation of the state's brief. The Fourth Circuit ultimately did not reach the substantial burden question and instead ruled on causation grounds. Id. at 415, 419–21. As Wright was likely the only Ba Beta Kristiyan worshipper in the entire state, let alone the prison, he was unable to show that any other Rastafarian in the prison would be willing to share in his requested *communal* feasts. Id. at 420.

6. 42 U.S.C. § 2000cc-1(a).

7. Id. § 2000cc-5.

8. See 146 Cong. Rec. 16,700 (2000) (joint statement of Sen. Hatch and Sen. Kennedy) ("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

others when it has come to following that legislative intent, and contrasting methods of statutory interpretation have resulted in a circuit split over the definition of the term.[9]

In 2015, the Supreme Court missed an opportunity to clear up the substantial burden split in *Holt v. Hobbs*.[10] Instead of providing a new definition, the *Holt* Court wrote in dicta that a substantial burden forms when the government forces an adherent to "engage in conduct that seriously violates [their] religious beliefs."[11] This simple language was a significant departure from the Supreme Court's previous substantial burden analysis, and it subsequently deepened the divide between the circuit courts.[12] Indeed, some courts adopted *Holt*'s "substantial burden" language as a standalone definition,[13] while others have ignored the dicta entirely.[14] Consequently, those circuits that conformed to *Holt* now employ a substantial burden definition focused on whether a government action has forced an inmate to "engage in conduct," while the remaining circuits use a definition focused instead on the government's "pressure" as the relevant statutory injury.[15]

The analytical difference between conduct-focused courts and pressure-focused courts is most significant in the penal context. Pressure-focused courts are analytically equipped to deal with claims in which the government pressures, but comes short of compelling, the plaintiff to violate their religious beliefs.[16] Conduct-focused courts, by contrast, can conceive of claims only to the extent that the government has already forced the plaintiff into action violative of their religious beliefs.[17] Since the government maintains near-absolute control over its prisoners, it is uniquely able to pressure a person into violating their beliefs without physically compelling them to do so. In other economic or land-use contexts, the government lacks comparable control. For example, even if the government blocks a group from constructing a church, that group will rarely, if ever, be forced to violate its beliefs—they can always just build the church somewhere else.

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substantial burden or religious exercise."); see also Vision Church v. Village of Long Grove, 468 F.3d 975, 996–97 (7th Cir. 2006) ("RLUIPA's legislative history indicates that the term 'substantial burden' was intended to be interpreted by reference to First Amendment jurisprudence . . . .").

9. See infra section II.B.

10. 135 S. Ct. 853 (2015).

11. Id. at 862 (internal quotation marks omitted) (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014)).

12. See infra section II.C.

13. See, e.g., Schlemm v. Wall, 784 F.3d 362, 364 (7th Cir. 2015) (replacing the Seventh Circuit's previous substantial burden definition with dicta from *Holt*).

14. See, e.g., Jehovah v. Clarke, 798 F.3d 169, 177 (4th Cir. 2015) (quoting *Holt*, 135 S. Ct. at 864, but omitting the "engage in conduct" dicta).

15. See infra section II.D.

16. See infra section II.D.

17. See infra section II.D.

This Note attempts to show how a conduct-focused substantial burden definition, similar to the one used in *Holt*, is inappropriate in the penal context, where inmates are dependent on the government for certain religious accommodations. Part I tracks the development of the Supreme Court's religious freedom jurisprudence, beginning with burden analysis under the Free Exercise Clause and culminating with the introduction of RLUIPA as the main forum for religious exercise claims in the penal context. Part II analyzes how *Holt* exacerbated a circuit split under RLUIPA by emphasizing a conduct-focused style of burden analysis. Part II further details how a conduct-focused inquiry spells trouble for institutionalized persons dependent on the government for religious accommodation. Finally, Part III offers a solution for how the Court can resolve this split with a new, penal-specific definition of substantial burden under RLUIPA. In particular, this Note advocates a pressure-focused substantial burden definition that can account for both overly prohibitive government restrictions as well as an inmate's dependence on the government for religious accommodations.

I. RELIGIOUS FREE EXERCISE JURISPRUDENCE BEFORE RLUIPA

The Religious Land Use and Institutionalized Persons Act prevents government action or policy from substantially burdening a prisoner's religious exercise, unless the action or policy furthers a compelling interest in the least restrictive means.[18] The Act does not define "substantial burden," as its drafters intended for courts to define the term within the scope of the Supreme Court's religious exercise jurisprudence.[19] This Part discusses the development of the Supreme Court's religious exercise jurisprudence since 1963 and concludes with the passage of RLUIPA in 2000. Section I.A examines the early development of the Supreme Court's burden analysis under the Free Exercise Clause, and shows how it later became the basis for RLUIPA's own substantial burden prong. It then details the Court's shift from a strict scrutiny level of review to a "reasonably related" regime and how that shift catalyzed legislative efforts to pass RLUIPA. Section I.B describes how RLUIPA functionally proceeds in litigation and how prisoners use it as their main vehicle for religious exercise claims today.

A. *Development of Free Exercise Under the First Amendment*

1. *The High-Water Mark: Substantial Burden Under* Sherbert. — "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[20]

18. 42 U.S.C. § 2000cc-1(a) (2012).

19. See supra note 8.

20. U.S. Const. amend. I.

The Supreme Court's modern free exercise jurisprudence began in 1963 with *Sherbert v. Verner*.[21] Adell Sherbert, a Seventh-day Adventist, was discharged by her employer after refusing to work on a Saturday, the Sabbath of her faith.[22] She filed a claim for state benefits under the South Carolina Unemployment Compensation Act,[23] but in order to be eligible under the Act, a claimant must not decline suitable work without good cause.[24] In the eyes of the appellee Employment Security Commission, Sherbert's categorical refusal to work on Saturdays disqualified her from benefits.[25]

On review, the Supreme Court explained that the denial of Sherbert's benefits claim could withstand constitutional challenge if: (1) her disqualification as a beneficiary did not represent an "infringement by the State of her constitutional rights of free exercise," or (2) "any incidental burden on the free exercise of [her] religion [was] justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"[26] Siding with Sherbert, the Court held that by rejecting her benefits, the state imposed a "burden" on her free exercise of religion.[27] Since denial of the benefits was solely due to the practice of Sherbert's religion, it came with an "unmistakable" pressure to forego her faith.[28] The Court explained that the disqualification "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[29]

Before *Sherbert*, the concept of a burden on religious exercise was a relatively new one.[30] In other areas of law, a burden is often described as a

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21. 374 U.S. 398 (1963).

22. Id. at 399.

23. Id. at 399–400.

24. Id. at 400–01.

25. Id. at 401.

26. Id. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

27. Id.

28. Id. at 404.

29. Id. This statement, as this Note will demonstrate, remains the basis for a number of circuit court definitions of substantial burden in the penal context. See infra section II.B.2.

30. The Supreme Court first introduced the concept of a "burden" on religious exercise two years before *Sherbert* in Braunfeld v. Brown, 366 U.S. 599, 606 (1961). Before *Braunfeld*, the Court operated its religious exercise jurisprudence on a "belief–action distinction," introduced nearly a century earlier in Reynolds v. United States, 98 U.S. 145, 166 (1879). See Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 938 (1989) (discussing *Reynolds* and the earlier formulation of the belief–action distinction); see also Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America 119–45 (2002) (providing a detailed history of *Reynolds*). Under the belief–action distinction, religiously motivated beliefs and opinions were broadly protected under the Constitution, while actions, even if religiously motivated, could be regulated. See Lupu, supra, at 938. *Braunfeld* exposed the inadequacy of the belief–action distinction. The

responsibility to overcome some kind of threshold (such as a burden of proof, evidence, or persuasion). *Sherbert* used "burden" in the sense that the South Carolina law was applying an unconstitutional pressure on her religious beliefs.[31] Here, that pressure was financial, which the Court likened to "a fine imposed against [Sherbert] for her Saturday worship."[32] By characterizing South Carolina's eligibility requirement as a direct injury under the novel style of burden analysis, the Court found a basis for overruling what it otherwise considered an "indirect result of welfare legislation within the State's general competence to enact."[33]

The *Sherbert* Court concluded its opinion by looking into whether there was "some compelling state interest" advanced by South Carolina's eligibility rule.[34] This analysis was distinct from the Court's substantial burden test, which determined whether review would be triggered at all. By adding a compelling interest prong to its free exercise analysis, the Court indicated that the level of its review had also moved from a previously deferential standard[35] to a higher, strict scrutiny level of review.[36]

Nine years later, the Supreme Court reaffirmed *Sherbert*'s burden analysis in *Wisconsin v. Yoder*,[37] establishing what some scholars have referred

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Braunfeld plaintiffs were a group of Orthodox Jewish merchants who observed a Saturday Sabbath by closing their shops. *Braunfeld*, 366 U.S. at 601. A secular law also required the merchants to close their shops in observance of the Christian Sunday Sabbath, effectively limiting the merchants to only five days of open business a week. Id. at 600–01. Though the law only indirectly burdened the plaintiffs, they advanced the theory that due to the government's Sunday Sabbath law, they felt pressured not to observe their own religious Sabbath on Saturday in order to keep their shops open at least six days a week. Id.

31. A religious burden should not be construed as strictly coercive. Conceptually, the state's unemployment prerequisite here could just as easily be interpreted as an incentive for Sherbert to abandon her beliefs and accept the benefits. Thus, whether the state is coercively imposing a cost, or benignly offering an incentive, it is still pressuring the adherent to do something they otherwise would not have done.

32. *Sherbert*, 374 U.S. at 404.

33. Id. at 403. In other words, the state did not criminalize her refusal to work on Saturday—it just refused to acknowledge her religious reason for not working as an exemption from the benefits program.

34. Id. at 406. RLUIPA later codified this secondary analysis as its compelling interest prong. 42 U.S.C. § 2000cc-1(a)(1) (2012).

35. See *Braunfeld*, 366 U.S. at 612–13 (Brennan, J., concurring and dissenting) ("For in this case the Court seems to say, without so much as a deferential nod towards that high place which we have accorded religious freedom in the past, that any substantial state interest will justify encroachments on religious practice . . . .").

36. See *Sherbert*, 374 U.S. at 417 (Stewart, J., concurring in the judgment) ("I cannot agree that today's decision can stand consistently with *Braunfeld v. Brown*."); id. at 421 (Harlan, J., dissenting) ("[D]espite the Court's protestations to the contrary, the decision necessarily overrules *Braunfeld v. Brown* . . . which held that it did not offend the 'Free Exercise' Clause of the Constitution for a State to forbid a Sabbatarian to do business on Sunday.").

37. 406 U.S. 205 (1972). In an opinion by Chief Justice Burger, the Court held that a state law requiring Amish children to attend school until the age of sixteen, under threat of criminal sanction, imposed an undue burden on Amish religious practice. Id. at 207, 218. The Amish parents believed that the values taught in public high schools were "in marked

to as a high-water mark for the Court's free exercise jurisprudence.[38] The *Yoder* Court endorsed and clarified *Sherbert*'s strict scrutiny standard, stating that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[39]

2. Thomas v. Review Board *Reinforces* Sherbert*'s Burden Analysis.* — The Supreme Court's 1981 decision in *Thomas v. Review Board of Indiana Employment Security Division* reinforced *Sherbert*'s prevailing burden analysis by asking whether the contested government action put "substantial pressure" on the claimant to "modify his behavior."[40] At issue was whether

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variance with Amish values and the Amish way of life." Id. at 211. Whereas public school "emphasize[s] intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students[,] Amish society [instead] emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society." Id. Sending Amish children to school "takes them away from their community . . . during the crucial and formative adolescent period of [their] li[ves]." Id. In the Court's view, sending children into an environment that was antithetical, or even "hostile," to the Amish faith "interpose[d] a serious barrier to the integration of the Amish child into the Amish religious community." Id. at 211–12. The Court held that a Wisconsin state law requiring students to attend school beyond the eighth grade in contravention of religious beliefs would pass muster only if "the State does not deny the free exercise of religious belief by its requirement, or [if] there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." Id. at 214. The Court reasoned that enforcing the state's compulsory requirement for formal education after the eighth grade would "gravely endanger if not destroy the free exercise of respondents' religious beliefs." Id. at 219. Although Chief Justice Burger did not explain exactly which part of the Wisconsin law imposed the substantial burden, he did indicate that the government imposes a burden when it compels someone to violate their beliefs in order to avoid criminal punishment. Id. at 218. "The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." Id.

38. See, e.g., Jesse H. Choper, The Rise and Decline of the Constitutional Protection of Religious Liberty, 70 Neb. L. Rev. 651, 684 (1991) (referring to *Yoder* as the "high-water mark" of the Free Exercise Clause); Robert M. Bernstein, Note, Abandoning the Use of Abstract Formulations in Interpreting RLUIPA's Substantial Burden Provision in Religious Land Use Cases, 36 Colum. J.L. & Arts 283, 290 (2013) (expanding on *Yoder*'s influence as a high-water mark).

39. *Yoder*, 406 U.S. at 215. Seeking to cabin its holding somewhat, the *Yoder* Court tried to distinguish a religious way of life from a philosophical one: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief." Id. To illustrate the distinction, the Court analogized to Henry David Thoreau's rejection of majority social values via isolation at Walden Pond. Id. at 216. Regrettably, the analogy did not come with any instructions specifying exactly how "Thoreau's choice was philosophical and personal rather than religious." Id.; see also Mark Strasser, Free Exercise and Substantial Burdens Under Federal Law, 94 Neb. L. Rev. 633, 650–51 (2016) (observing a lack of empirical distinction between philosophical and religious beliefs).

40. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981). "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious

a Jehovah's Witness was entitled to unemployment compensation after quitting his job due to religious beliefs that prohibited the production of weapons.[41] Expanding on the language from *Sherbert*,[42] the *Thomas* Court emphasized that the root of its burden analysis was whether the government's action "substantial[ly]" pressured the adherent to "modify his behavior and to violate his beliefs."[43] The Court was not concerned with whether the plaintiff actually did modify his behavior; rather, the constitutional harm was the pressure applied by the government.[44] Thus, in the eyes of the court, the coercive pressure applied in *Thomas* was "indistinguishable" from *Sherbert*.[45] Combined, these two cases established a pressure-focused burden analysis for free exercise claims that centered on the government's pressure, rather than the forced conduct or expressed injury of the claimant, as the cognizable harm.[46]

In addition to a pressure-focused substantial burden analysis, the *Thomas* Court further cemented a strict scrutiny level of review for free exercise claims by including a "least restrictive means" inquiry in its analysis.[47] The Court held that it was not impermissible for the government to apply some pressure—even substantial pressure—on an adherent's religious beliefs, but only if that pressure was the least restrictive means of furthering a compelling state interest.[48] The least restrictive means, or narrow tailoring, requirement proved too much for the state in *Thomas*,

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faith, or . . . denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." Id. at 717–18. Combined with *Sherbert*, the two cases created the basis for a staple definition relied on by future circuit courts. See infra section II.B.2.

41. See *Thomas*, 450 U.S. at 711 ("The hearing referee found that Thomas' religious beliefs specifically precluded him from producing or directly aiding in the manufacture of items used in warfare. He also found that Thomas had terminated his employment because of these religious convictions." (footnote omitted)).

42. Sherbert v. Verner, 374 U.S. 398, 404 (1963) (defining a burden on religious exercise as something that "force[d] [the adherent] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other").

43. *Thomas*, 450 U.S. at 718. The *Thomas* Court's definition was also the first inclusion of the "substantial" modifier for the Court's modern burden analysis, creating the "substantial burden" term of art eventually adopted by RFRA and RLUIPA.

44. See *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring) (explaining that the harm from the government was not "the degree of injury, which may indeed be nonexistent," but rather the "interference with the individual's scruples or conscience").

45. *Thomas*, 450 U.S. at 717. In both cases, the government pressured the plaintiff to choose between "fidelity to religious belief or cessation of work." Id.

46. In contrast to a pressure-focused style of burden analysis, a conduct-focused style of analysis looks at whether the allegedly infringing government action forced the claimant to do something. See infra section II.D.

47. *Thomas*, 450 U.S. at 718. RLUIPA later incorporated this "least restrictive means" inquiry as its final prong. 42 U.S.C. § 2000cc-1(a)(2) (2012).

48. *Thomas*, 450 U.S. at 718.

which failed to show how its asserted interests justified denying compensation benefits to the plaintiff.[49]

3. *The End of Strict Scrutiny for Religious Free Exercise Claims.* — Strict scrutiny under *Thomas* persisted until 1987, when, in a pair of decisions over three years, the Court ruled that religious exemptions from generally applicable laws are not constitutionally required, and, if granted at all, must be carved out by the legislative process.[50]

Strict scrutiny protection for religious exercise claims first started to unravel in *Turner v. Safley*, a class action by inmates of the Missouri Division of Corrections.[51] *Turner* exposed the Court's difficulty in applying *Sherbert* to penal cases, which have little in common with the unemployment benefit cases that shaped most of the doctrine until this point.[52] At issue was a prison regulation that restricted an inmate's right to marry.[53] Under the Division's rules, an inmate wishing to get married required the prison superintendent's permission, which was granted only for compelling reasons.[54] Seeking injunctive relief and damages, the plaintiff-inmates

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49. Id. at 719. To clarify, *Sherbert* and *Thomas* not only sharpened the Court's pressure-focused burden analysis, which determines whether review would be triggered at all, but the two cases also established a strict scrutiny level of review for generally applicable legislation that indirectly burdens free exercise.

50. See Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990) ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred . . . ."); Turner v. Safley, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

51. 482 U.S. at 81.

52. Recall that before *Sherbert*, the Court's free exercise jurisprudence kept a clear demarcation between religious "belief" and religious "action," or conduct. See Lupu, supra note 30, at 938. With the belief–action distinction, it was impermissible for government to regulate religious beliefs, but it could still regulate conduct that was religiously motivated. See W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (invalidating the rule that required Jehovah's Witness students to salute the flag during the Pledge of Allegiance as an impermissible infringement on religious scruples); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."). *Sherbert* overturned the belief–action distinction by holding that the plaintiff's religious conduct was "good cause" within the meaning of South Carolina's unemployment benefit exemption. See supra notes 22–25 and accompanying text. In effect, the Court was saying that it was impermissible for the government to regulate certain religiously motivated conduct—but while the Court was comfortable saying that such conduct could not preclude an adherent from state unemployment benefits, *Turner* showed that the Court was not as comfortable with extending strict scrutiny protection to all religiously motivated conduct.

53. See *Turner*, 482 U.S. at 81 ("This case requires us to determine the constitutionality of regulations promulgated by the Missouri Division of Corrections relating to inmate marriages and inmate-to-inmate correspondence.").

54. Id. at 82 ("The term 'compelling' is not defined, but prison officials testified at trial that generally only a pregnancy or the birth of an illegitimate child would be considered a compelling reason.").

argued that the regulation impinged upon a fundamental right to marry.[55] Applying strict scrutiny, the district court agreed with the plaintiffs, and the Eighth Circuit affirmed the lower court's analysis.[56] The Supreme Court, however, employed a different legal standard.[57]

Instead of using the same level of strict scrutiny review as the district and appellate courts, Justice O'Connor's majority opinion established a new standard for inmate constitutional claims: the "reasonably related" standard.[58] The Court held that "when a prison regulation impinges an inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[59] In essence, this meant that one's status as a prisoner reduced a court's level of scrutiny from "strict" to "reasonably related" for claims under the First and Fourteenth Amendment.[60] Three years later, the Court held in *Employment Division v. Smith* that rules of general applicability that only inadvertently impinge on religious rights will no longer receive strict scrutiny, no matter who brings the claim.[61]

Although *Turner* and *Smith* made no serious changes to the Court's substantial burden analysis, the abrupt shift away from strict scrutiny sparked public and congressional concern.[62] A subsequent legislative

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55. Id.

56. Id. at 83.

57. Id. at 100. The Supreme Court began its review by dissecting the "many important attributes of marriage," taking into account the spiritual and religious significance of marriage. Id. at 95. Unlike other attributes of marriage, which are "subject to substantial restrictions as a result of incarceration," the "religious and personal aspects of the marriage commitment are unaffected by the fact of confinement or pursuit of legitimate corrections goals." Id. at 95–96. Through this construction, the Court found that marriage relationships were constitutionally protected in the penal context. Id.

58. Id. at 85–89. O'Connor explained that the Court needed a new standard that was "responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" Id. at 85 (alteration in original) (quoting Procunier v. Martinez, 416 U.S. 396, 406 (1974)).

59. Id. at 89.

60. Said differently, while "prison walls do not form a barrier separating prison inmates from the protections of the Constitution," the walls do appear to warp those protections. Id. at 84.

61. Emp't Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990). Two drug counselors were fired for using sacramental peyote in a Native American religious ceremony and sought unemployment compensation. Id. at 874. The Employment Division denied the compensation requests because peyote use was criminal under Oregon law, making respondents' discharge work-related "misconduct." Id. Following a series of appeals and remands, id. at 875–76, the Supreme Court ruled that the Free Exercise Clause was inapplicable to respondents' claim because the state law did not directly target their religious beliefs. Id. at 882. In a recent statement denying a petition for certiorari, however, Justices Alito, Gorsuch, and Kavanaugh hinted that they would be willing to reconsider the holding of *Employment Division*, suggesting a possible return to strict scrutiny for free exercise claims independent of RLUIPA. See Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019).

62. See Patricia E. Salkin & Amy Lavine, The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government,

effort, spearheaded by Senators Orrin Hatch and Edward "Ted" Kennedy, led to the statutory codification of the Court's pre-*Smith* free exercise jurisprudence, effectively restoring strict scrutiny review to religious exercise claims for laws of general applicability.[63]

B. *Statutory Response: RFRA and RLUIPA*

Following the outrage from the Court's decisions in *Smith* and *Turner*, Congress passed the Religious Freedom Restoration Act (RFRA),[64] which was closely followed a few years later by RLUIPA.[65] These omnibus acts codified the Supreme Court's pre-*Smith* free exercise jurisprudence and effectively returned strict scrutiny review to religious exercise claims.[66] RFRA applies only to the federal government, whereas RLUIPA applies to both the states and the federal government.[67] RLUIPA "mirrors RFRA,"

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40 Urb. Law. 195, 203 (2008) (noting that public sentiment at the time believed "the Supreme Court in *Smith* had done great damage to the constitutional protection of religion").

63. See 146 Cong. Rec. 16,698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy) ("Our bill will ensure that if a government action substantially burdens the exercise of religion . . . [it] must demonstrate that imposing the burden serves a compelling public interest and does so by the least restrictive means."). Notably, RLUIPA's legislative record mentions only the decision in *Smith* and does not mention *Turner*. See id. at 16,698–705. Indeed, the record includes a statement from Senator Harry Reid explaining his personal trepidation about extending strict scrutiny protection to prisoners, and his efforts to include an amendment rescinding those protections in both RFRA and RLUIPA. Id. at 16,702–03. Both efforts failed. Id.

64. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–bb-4 (2012)).

65. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc–cc-5 (2012)). In addition to institutionalized persons, RLUIPA also regulates land-zone ordinances, but this Note focuses only on the former.

66. While religious free exercise claims brought under RFRA or RLUIPA receive strict scrutiny, separate § 1983 claims brought under the First Amendment Free Exercise Clause continue to receive "reasonably related" review. See Lovelace v. Lee, 472 F.3d 174, 199–200 (4th Cir. 2006) ("Thus, as noted earlier, the First Amendment affords less protection to inmates' free exercise rights than does RLUIPA."). For prospective litigants, the main difference is that First Amendment claims allow for damages, while RFRA and RLUIPA claims do not. See infra note 79.

67. See City of Boerne v. Flores, 521 U.S. 507, 516 (1997). RFRA originally advanced the same land-use and institutionalized-persons protections codified by RLUIPA, but RFRA was passed under Congress's Fourteenth Amendment enforcement authority. Id. The Supreme Court held in *Boerne* that this was an unconstitutional overreach of Congress's enforcement power, as applied to the states. Id. at 529–36. To redress the matter, Congress passed RLUIPA seven years later as an "amendment" to RFRA, but this time under the firmer constitutional ground of the Commerce Clause. See 146 Cong. Rec. 16,698 (joint statement of Sen. Hatch and Sen. Kennedy) ("[T]he bill applies only to the extent that Congress has power to regulate under the Commerce Clause, the Spending Clause, or Section 5 of the Fourteenth Amendment."). As a result, RLUIPA is applicable to the states, while RFRA is not.

and as "sister" statutes,[68] the "same standards apply to each."[69] Because the majority of inmate religious exercise claims involve state government action, this Note focuses primarily on RLUIPA, though the case law used to define substantial burden derives from both acts and is often used interchangeably by courts.[70]

RLUIPA "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."[71] In relevant part, the statute states:

> (a) (1) No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.[72]

68. Holt v. Hobbs, 135 S. Ct. 853, 859–60 (2015).

69. New Doe Child #1 v. Cong. of the U.S., 891 F.3d 578, 587 n.2 (6th Cir. 2018) (quoting *Holt*, 135 S. Ct. at 859–60).

70. See, e.g., *Holt*, 135 S. Ct. at 862 (applying language from a RFRA case in a RLUIPA case); EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560, 587 (6th Cir. 2018) (citing *Holt*'s substantial burden language as controlling in a RFRA case).

71. Cutter v. Wilkinson, 544 U.S. 709, 721 (2005).

72. 42 U.S.C. § 2000cc-1(a) (2012).

RLUIPA defines some of its terms, such as "religious exercise,"[73] but it does not define "substantial burden."[74] Instead, the bill's sponsors specified in a joint statement to Congress that courts should define "substantial burden" through the Supreme Court's Free Exercise Clause jurisprudence.[75]

Courts examine RLUIPA claims using a three-pronged analysis. First, a plaintiff bears the initial burden of showing that the government has placed a substantial burden on a sincerely held religious belief.[76] If the plaintiff is successful, analysis shifts to the second prong, where the government bears the burden of persuasion to show how its infringing

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73. As it pertains to institutionalized persons, RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Id. § 2000cc-5(7)(A). This definition casts a wide net for plaintiffs, as it also does not define "religion" or explain what a "system of religious belief[s]" looks like. This is most likely because the Supreme Court has itself never satisfactorily established a legal definition of "religion." One of the earliest attempts to do so came in *Davis v. Beason*, in which the Court defined religion as "reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." 133 U.S. 333, 342 (1890). By the mid-twentieth century, the Court expanded its view to include those "religions in this country which do not teach what would generally be considered a belief in the existence of God." Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961). Soon after, the Court went a step further to say that a religious belief just had to "occup[y] a place in the life of its possessor parallel to that filled by the orthodox belief in God." United States v. Seeger, 380 U.S. 163, 166 (1965). Recall, however, that in *Yoder*, the Court offered no real explanation on the legal difference between the religious Amish and the merely philosophical Thoreau. See Strasser, supra note 39, at 650. Debate over the legal definition of religion continues, with some even arguing that any judicial definition of religion at all violates the Free Exercise and Establishment Clauses of the First Amendment. See Jonathan Weiss, Privilege, Posture and Protection: "Religion" in the Law, 73 Yale L.J. 593, 604 (1964) ("[A]ny definition . . . would dictate to religions, present and future, what they must be . . . ."). For a deeper discussion on the ontological problems of defining religion, see Courtney Miller, Note, "Spiritual but Not Religious": Rethinking the Legal Definition of Religion, 102 Va. L. Rev. 833, 841 (2016) ("Largely accepted in the academic literature is the notion that the search for a single, discrete definition of religion is an undertaking bound for failure."); see also Ben Clements, Note, Defining "Religion" in the First Amendment: A Functional Approach, 74 Cornell L. Rev. 532 (1989) ("Most courts have approached the question with caution, recognizing that a very rigid judicial definition of religion would implicate the concerns underlying the religion clauses.").

74. 42 U.S.C. § 2000cc-5.

75. See 146 Cong. Rec. 16,700 (2000) (joint statement of Sen. Hatch and Sen. Kennedy) ("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 . . . . Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence."); see also Vision Church v. Village of Long Grove, 468 F.3d 975, 996–97 (7th Cir. 2006) ("RLUIPA's legislative history indicates that the term 'substantial burden' was intended to be interpreted by reference to First Amendment jurisprudence . . . .").

76. See 42 U.S.C. § 2000cc-1(a); Holt v. Hobbs, 135 S. Ct. 853, 862 (2015) ("Under RLUIPA, petitioner bore the initial burden of proving that the [government policy] implicates his religious exercise.").

policy or action furthers a compelling state interest.[77] Assuming that the government shows a sufficiently compelling interest, it must then show on the third prong that its policy advances that interest in the least restrictive means.[78] Inmates are unable to recover damages under RLUIPA, so claimants typically request injunctive relief for various religious accommodations.[79] The most common claims involve requests for dietary accommodations, access to religious services, observance of holidays, access to literature, or exemptions from grooming regulations.[80] Prison officials typically rebut these challenges by asserting a need to maintain security or to control costs.[81] Functionally, RLUIPA's effective strict scrutiny standard makes the statute the vehicle favored by plaintiffs for religious exercise claims in the penal context. As a result, most meaningful substantial burden litigation since 2000 has developed under this statutory framework.

II. THE SUBSTANTIAL BURDEN DIVIDE

Despite surviving many of the constitutional infirmities that plagued its sister act,[82] RLUIPA created enough ambiguity in the lower courts to draw Supreme Court attention in *Cutter v. Wilkinson*.[83] Notably, *Cutter*

77. See 42 U.S.C. § 2000cc-1(a)(1); 146 Cong. Rec. 16,700 (joint statement of Sen. Hatch and Sen. Kennedy) ("[T]he government shall bear the burden of persuasion that application of the substantial burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.").

78. See 42 U.S.C. § 2000cc-1(a)(2).

79. See Sossamon v. Texas, 563 U.S. 277, 288 (2011) ("[W]e conclude that [RLUIPA] does not include suits for damages against a State.").

80. See Barrick Bollman, Note, Deference and Prisoner Accommodations Post-*Holt*: Moving RLUIPA Toward "Strict in Theory, Strict in Fact," 112 Nw. U. L. Rev. 839, 848 (2018) (discussing common types of RLUIPA claims).

81. Examples of security interests include cases like *Holt*, 135 S. Ct. at 859 (involving defendant prison that claimed facial hair regulations lower the instance of contraband), and Fowler v. Crawford, 534 F.3d 931, 932 (8th Cir. 2008) (holding that defendant prison had a compelling interest in restricting prisoner access to a religious sweat lodge for security reasons), while typical cost cases include Baranowski v. Hart, 486 F.3d 112, 120–22 (5th Cir. 2007) (finding that meeting the religious requirements of plaintiff's faith would put an undue burden on cost and administration of defendant prison), and Moussazadeh v. Tex. Dep't of Criminal Justice, 703 F.3d 781, 794 (5th Cir. 2012) (recognizing that defendant prison had a legitimate interest in controlling the costs incurred by providing inmates with kosher meal options).

82. After City of Boerne v. Flores, 521 U.S. 507 (1997), struck down RFRA as applied to the states, Congress opted to enact RLUIPA on firmer constitutional ground under its Commerce and Spending Clause authority. See supra note 67; see also Rodrigo L. Silva, Reckoning RLUIPA's Substantial Burden Provision: A Sliding Scale Approach, 8 J. Marshall L.J. 127, 133–35 (2014) (describing the constitutional infirmities of RFRA under Congress's Fourteenth Amendment enforcement authority). The constitutionality of RLUIPA as applied to the states was upheld in Cutter v. Wilkinson, 544 U.S. 709, 713–14 (2005).

83. 544 U.S. 709. One of the principal issues in the case concerned how lower courts should treat compelling interests asserted by prison administrators. Id. at 712–13. The

failed to provide a clear definition for substantial burden, which subsequently initiated a circuit split. This Part analyzes that split by classifying the circuits into two groups that this Note terms the (1) plain-meaning and (2) jurisprudential groups.[84] The plain-meaning circuit group defined substantial burden primarily by looking at its textual meaning, while the jurisprudential group defined the term through the Supreme Court's body of religious exercise jurisprudence.

Section II.A describes the major implications from the Court's decision in *Cutter*, including the establishment of a penal-specific compelling interest prong and the initial "substantial burden" circuit split attained prior to *Holt*. Section II.B outlines the different interpretative methods each circuit group used to define substantial burden. Section II.C explores how new language from the Court's decision in *Holt* impacted the substantial burden debate, and the subsequent circuit reaction. Finally, Section II.D explains how inmate dependence on the government for religious accommodation makes *Holt*'s conduct-focused substantial burden language inappropriate when applied to RLUIPA's penal context.

A. Cutter *Establishes Context-Specific Application of RLUIPA and the Foundation for a Split*

Cutter v. Wilkinson was a penal-context case out of Ohio and RLUIPA's first encounter with the Supreme Court.[85] Along with upholding the constitutionality of the Act as it applied to the states, the decision in *Cutter* came with two important implications for future RLUIPA penal cases.[86]

Supreme Court noted legislative intent to 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." Id. at 723 (internal quotation marks omitted) (quoting 146 Cong. Rec. 16,699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy)). This enumerated list of recognized interests effectively became a safe haven for administrators, as courts will often grant due deference when plaintiff burdens are categorized as some form of security or cost-saving necessity. See Bollman, supra note 80, at 850 ("Prison officials typically assert these regulations are justified by security needs or financial and administrative costs.").

84. For a helpful analogue to this divide in the land-use context pre-*Holt*, see Bernstein, supra note 38, at 289–94.

85. 544 U.S. 709. Plaintiffs were adherents of "nonmainstream" religions including Satanism, Wicca, and Asatru and were inmates of the Ohio Department of Rehabilitation and Correction. Id. at 712. They alleged that the Ohio prison system was "denying them the same opportunities for group worship that are granted to adherents of mainstream religions." Id. at 713 (internal quotation marks omitted) (quoting Brief for the United States as Respondent Supporting Petitioners at 5, *Cutter*, 544 U.S. 709 (No. 03-9877), 2004 WL 2961153).

86. Id. at 720. The Supreme Court in *Cutter* held that RLUIPA was facially constitutional and not in violation of the Establishment Clause. Id. at 719–20 ("Our decisions recognize that 'there is room for play in the joints' between the Clauses . . . . On its face, the Act qualifies as a permissible legislative accommodation of religion that is not

First, *Cutter* demonstrated that parts of the RLUIPA test can be context specific. *Cutter* explained that lower courts must grant "due deference" to the "experience and expertise" of defendant prison administrators on RLUIPA's compelling interest prong.[87] Crucially, this deference is only available under the unique conditions of the penal context. The Court recognized that unlike other economic or land-use contexts, RLUIPA's penal protections are for "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."[88] This dependence thus makes prisons distinct because the government has at least some limited duty to provide religious accommodation—not at all a standard requirement in public zoning or land use. Despite recognizing this limited duty, the Court makes clear that it does "not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety."[89] To resolve the tension between the government's affirmative duty to accommodate prisoners and the sober realities of operating a prison environment, the Court endorsed the "due deference" standard for RLUIPA's compelling interest prong.[90] At bottom, *Cutter*'s due deference shows that compelling interest analysis in the penal context is distinct from other RLUIPA contexts and gives no reason why other prongs cannot also be context specific.[91]

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barred by the Establishment Clause." (quoting Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 669 (1970))).

87. Id. at 723 (quoting 146 Cong. Rec. 16,699 (joint statement of Sen. Hatch and Sen. Kennedy)). "Due deference" is similar to the corporate business judgment rule, under which a court will not substitute its own judgment for that of a presumed expert—in this case, a prison administrator charged with the safety and security of an institution. Often, if a defendant prison administrator asserts a recognized compelling interest, such as maintaining security, a court will simply defer to the defendant's judgment and the plaintiff's claim will fail, even if they can show a substantial burden. See supra note 83. In recent years, the strength of this defense has faded and courts have started to take a "hard look" at asserted government interests. See infra note 139.

88. *Cutter*, 544 U.S. at 721.

89. Id. at 722.

90. The congressional record indicates that lawmakers always intended for RLUIPA's institutionalized persons analysis to include a "due deference" standard. This could suggest that creating new context-specific RLUIPA standards is outside the purview of the Court and may only be legislatively mandated. See 146 Cong. Rec. 16,699 (joint statement of Sen. Hatch and Sen. Kennedy) ("[T]he committee 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." (alteration in original) (internal quotation marks omitted) (quoting S. Rep. No. 103-111, at 10 (1993))).

91. See Bethel World Outreach Ministries v. Montgomery Cty. Council, 706 F.3d 548, 555 (4th Cir. 2013) (noting that one substantial burden standard "is entirely appropriate in the institutionalized persons context, since the Government can employ its absolute control over prisoners," while a different standard is appropriate in the "land use context" because "the Government lacks comparable control").

Second, *Cutter* notably shied away from elaborating on RLUIPA's substantial burden prong.[92] Failure to provide guidance on this prong allowed the circuits to split into two conceptual groups, which this Note has termed (1) the plain-meaning group and (2) the jurisprudential group.[93] The plain-meaning group has relied on various textualist methods to define "substantial burden," including dictionary definitions and "common meaning[s]."[94] Shared among the plain-meaning courts was an ostensibly high substantial burden threshold for plaintiffs.[95] The juris-prudential group, on the other hand, hewed more closely to RLUIPA's legislative intent to define "substantial burden" through the Supreme Court's pre-*Turner* jurisprudence.[96] In general, jurisprudential courts maintained a pressure-focused style of burden analysis, which turns on the government's coercive pressure as the statutory injury.[97]

B. *The Plain-Meaning and Jurisprudential Interpretations of Substantial Burden*

1. *The Plain-Meaning Interpretation of Substantial Burden.* — The plain-meaning group of circuits comprises courts of appeals that intentionally rejected RLUIPA's legislative intent to define "substantial burden" through the Supreme Court's free exercise jurisprudence. The Seventh and Eleventh Circuits did so in order to raise the threshold for plaintiff claims on the substantial burden prong,[98] while the Ninth Circuit held it unnecessary to review legislative intent for a statutory term that was suffi-

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92. See *Cutter*, 544 U.S. at 715–16 (mentioning the substantial burden prong but not discussing it in detail).

93. See Bernstein, supra note 38, at 289–94 for helpful discussion on this divide. Conceptually, this framework is useful in understanding how the various circuits adopted their original substantial burden definitions, and in turn, how they have since reacted to Holt v. Hobbs, 135 S. Ct. 853 (2015). In particular, this framework is helpful in understanding why some circuits have been quick to adopt *Holt*'s burden language, while others have been more reticent.

94. San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) ("When a statute does not define a term, a court should construe that term in accordance with its 'ordinary, contemporary, common meaning.'" (quoting A-Z Int'l v. Phillips, 323 F.3d 1141, 1146 (9th Cir. 2003))).

95. See, e.g., id. (holding that a regulation "must be 'oppressive' to a 'significantly great'" degree in order to constitute a "substantial burden" (first quoting Burden, Black's Law Dictionary 190 (7th ed. 1999); then quoting Substantial, Merriam-Webster's Collegiate Dictionary 1170 (10th ed. 2002))).

96. See, e.g., Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006) (relying on Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981) and Sherbert v. Verner, 374 U.S. 398, 404 (1963)).

97. See infra section II.B.2.

98. See Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) (attempting to prevent "the slightest obstacle to religious exercise" from triggering a RLUIPA violation); see also Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) ("'[S]ubstantial burden' requires something more than an incidental effect on religious exercise.").

ciently unambiguous.[99] As a result, these three courts used textualist methods, like consulting a dictionary, to define "substantial burden."[100] Given the textualist nature of this interpretative method, each of the plain-meaning circuits ended up with its own idiosyncratic definition.

For example, in *San Jose Christian College v. City of Morgan Hill*, the Ninth Circuit wrote: "[I]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed."[101] By that light, the court reasoned that "[w]hen a statute does not define a term, a court should construe that term in accordance with its 'ordinary, contemporary, common meaning,'" and "[o]nly if an ambiguity exists in the statute" should the court "refer to the statute's legislative history."[102] Thus, to determine the "plain meaning" of substantial burden, the court simply combined two dictionary definitions.[103] From Black's Law Dictionary, the Ninth Circuit defined "burden" as "something that is oppressive,"[104] and from Merriam-Webster it defined "substantial" as "significantly great."[105] Fusing these definitions, the Ninth Circuit concluded that a substantial burden on religious exercise "must impose a significantly great restriction or onus upon such exercise."[106]

The Seventh Circuit took a similar textualist approach in *Civil Liberties for Urban Believers v. City of Chicago*.[107] For its substantial burden analysis, the Seventh Circuit reasoned that under the Supreme Court's existing First Amendment jurisprudence, even "the slightest obstacle to religious exercise" would trigger a RLUIPA violation and "render meaningless the word 'substantial.'"[108] Instead, the court held that "a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable."[109]

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99. See *San Jose Christian Coll.*, 360 F.3d at 1034.

100. See infra notes 104–105.

101. 360 F.3d at 1034 (internal quotation marks omitted) (quoting Kaplan v. City of North Las Vegas, 323 F.3d 1226, 1231 (9th Cir. 2003)).

102. Id. (quoting A-Z Int'l v. Phillips, 323 F.3d 1141, 1146 (9th Cir. 2003)).

103. Id.

104. Id. (internal quotation marks omitted) (quoting Burden, Black's Law Dictionary 190 (7th ed. 1999)).

105. Id. (internal quotation marks omitted) (quoting Substantial, Merriam-Webster's Collegiate Dictionary 1170 (10th ed. 2002)).

106. Id.

107. 342 F.3d 752 (7th Cir. 2003). An association of churches challenged the city of Chicago in a religious land-use case, alleging that the city's ordinance requiring special approval to operate within certain commercial zones violated RLUIPA's religious land-use protections. Id. at 755. The ordinance not only affected smaller churches that met in private homes but also congregations that renovated older buildings in residential areas for religious use. Id. at 757. The district court granted summary judgment for the city. Id. at 752.

108. Id. at 761.

109. Id. Under this more stringent standard, the court ruled that the city ordinance did not substantially burden the plaintiff association of churches. Id. at 762. The Seventh Circuit

The Eleventh Circuit rounds out the plain-meaning triumvirate with a substantial burden construction from *Midrash Sephardi, Inc. v. Town of Surfside*.[110] Just like the Seventh Circuit, the Eleventh Circuit intended to create a standard that "requires something more than an incidental effect on religious exercise."[111] The appellate court began its burden analysis by examining "the language of the statute in question" and explained that because RLUIPA "does not define 'substantial burden,'" the court should "give the term its ordinary or natural meaning."[112] The court further reasoned that although the "history of a statute is relevant to the process of statutory interpretation, 'we do not resort to legislative history to cloud a statutory text that is clear.'"[113] Ultimately, the Eleventh Circuit held:

> [A] "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.[114]

At the outset, the plain-meaning approach used by the Seventh, Ninth, and Eleventh Circuits is in tension with congressional intent.[115] Some scholars believe that Senators Hatch and Kennedy's joint statement to Congress shows an intention to define "substantial burden" more like a singular "term of art"[116]—not meant to be a combination of two independent dictionary definitions,[117] or based on a court-perceived "ordinary or

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in *Civil Liberties* attempted to cabin its new substantial burden definition by limiting it to only RLUIPA land-use cases. Id. at 761. However, later penal-context cases from the Seventh Circuit, including *Schlemm v. Wall*, applied the definition to all RLUIPA cases and contexts. 784 F.3d 362, 364 (7th Cir. 2015) (applying verbatim the definition of "substantial burden" from *Civil Liberties*).

110. 366 F.3d 1214 (11th Cir. 2004). Surfside, Florida prohibited churches and synagogues in seven of its eight zoning districts. Id. at 1219. The plaintiff, a synagogue, brought a RLUIPA claim against the town, arguing that the permissible building zone was out of walking range for many of its elderly members. Id. at 1221. Though the Eleventh Circuit ultimately reversed the district court to hold in plaintiff's favor, the court first determined that there was not a substantial burden. Id. at 1228, 1243.

111. Id. at 1227.

112. Id. at 1226.

113. Id. (quoting Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994)).

114. Id. at 1227. The Eleventh Circuit definition is odd, because while the court explicitly claims to use a plain-meaning interpretation for its definition, the final result is quite close to a typical *Sherbert–Thomas* burden analysis. See infra note 120 and accompanying text. This definition would probably fit just as easily among the jurisprudential group of circuits, but it is included in this group to illustrate the lack of consistency in the plain-meaning approach and the variety of resulting definitions.

115. See supra note 8.

116. See, e.g., Bernstein, supra note 38, at 289.

117. See San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) (combining dictionary definitions).

natural meaning."[118] The Seventh and Eleventh Circuits explained this defiance of congressional intent as an attempt to avoid "render[ing] meaningless the word 'substantial.'"[119] The Ninth Circuit, on the other hand, found "the language in which the act is framed" satisfactory and consequently saw no need to turn to legislative intent for guidance.[120]

2. *The Jurisprudential Interpretation of Substantial Burden.* — Unlike their plain-meaning cousins, the jurisprudential circuits adhered more closely to the RLUIPA drafters' intent by defining substantial burden through the Supreme Court's free exercise jurisprudence.[121] These circuits typically adopted language from *Sherbert* and *Thomas* to form the basis of a definition that emphasized government pressure as the injury itself.[122]

The Fourth Circuit provides a good example of a "jurisprudential" definition with its seminal RLUIPA case, *Lovelace v. Lee*.[123] A Virginia prison offered a special Ramadan observance program to its Muslim inmates.[124] The program allowed participating inmates to eat meals before dawn and after dusk in order to accommodate daily fasting as required by Islamic precepts.[125] When Lovelace violated the program's terms, prison administrators revoked his Ramadan privileges and excluded him from the special meals and group services.[126] Lovelace claimed that removal from

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118. *Midrash Sephardi*, 366 F.3d at 1226.

119. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003); see also *Midrash Sephardi*, 366 F.3d at 1227 (declining to go as far as the Seventh Circuit's definition from *Civil Liberties*, but agreeing "that 'substantial burden' requires something more than an incidental effect on religious exercise").

120. *San Jose Christian Coll.*, 360 F.3d at 1034 (quoting Kaplan v. City of North Las Vegas, 323 F.3d 1226, 1231–32 (9th Cir. 2003)). Some scholars have noted that the Ninth Circuit's approach in particular creates more of a stamp of approval to justify predetermined outcomes, rather than providing an applicable test, leading to contradictory rulings between similar cases. See, e.g., Bernstein, supra note 38, at 296.

121. See, e.g., Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006) (interpreting RLUIPA in the context of an institutionalized person case); Adkins v. Kaspar, 393 F.3d 559, 569 (5th Cir. 2004) ("The RLUIPA's legislative history, although sparse, affords some guidance: '[Substantial burden] as used in the Act should be interpreted by reference to Supreme Court jurisprudence.'" (alterations in original) (quoting 146 Cong. Rec S7776 (daily ed. July 27, 2000))).

122. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981) (defining substantial burden as a "substantial pressure on an adherent to modify his behavior and to violate his beliefs"); Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable."); see also Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) (finding "no meaningful distinction" between the kind of pressure applied in *Sherbert*, *Thomas*, and the present case).

123. 472 F.3d 174.

124. Id. at 182.

125. Id. The program also permitted participating inmates to attend special Ramadan group services with other inmates. Id.

126. See id. at 183. Plaintiff Lovelace and other Muslim inmates refused to drink expired milk provided during one of the predawn Ramadan meals. Id. Lovelace informed

the Ramadan program was a substantial burden on his religious exercise under RLUIPA.[127] The Fourth Circuit agreed. Quoting from *Thomas*, the Court held that "a substantial burden on religious exercise occurs when a state or local government, through act or omission, 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'"[128] According to the Fourth Circuit, removal from the Ramadan program put substantial pressure on Lovelace because it forced him to either eat during the day and violate his faith, or go hungry.[129]

Compare the Fourth Circuit's definition with the plain-meaning definition from the Seventh Circuit.[130] Removal from the prison's Ramadan program certainly put pressure on the plaintiff in *Lovelace* to "modify his

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kitchen staff that the milk had expired and that he was refusing to drink it. Id. That evening, the administrators removed him from the program after accusing Lovelace of accepting a lunch tray in violation of the program terms. Id. Removal excluded the plaintiff from future Ramadan meals and group services. Id. at 187–88. Interestingly, the court noted that the prison temporarily cancelled its regular weekly Islamic services during Ramadan and replaced them with the special program services. Id. The opinion hints that the ancillary effect of preventing the plaintiff from participating in the regular weekly services was the actual burden on the plaintiff. Id. at 189. Had the prison continued to offer regularly scheduled Islamic services in addition to the special Ramadan program, the court may not have found a substantial burden on the plaintiff's exercise. Id. In other words, the court may have been willing to believe that Lovelace did not sincerely believe that fasting was a required religious precept, but that did not give the prison license to impinge an entirely separate religious precept: group worship.

127. Id. at 181.

128. Id. at 187 (quoting Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981)). Many of the remaining circuits adopted similar tests to *Lovelace* that focused on government pressure as the harm. The Third Circuit explained in *Washington v. Klem* that "the courts of appeals . . . have defined [substantial burden] in several ways. Most of those courts have adopted some form of the *Sherbert–Thomas* formulation, but have often reworded their holdings. The result of this practice has been to create several definitions of 'substantial burden' with minor variations." 497 F.3d 272, 279 (3d Cir. 2007); see also, e.g., Hayes v. Tennessee, 424 F. App'x 546, 555 (6th Cir. 2011) ("An action of a prison official will be classified as a substantial burden . . . when the action in question place[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." (internal quotation marks omitted) (quoting Barhite v. Caruso, 377 F. App'x 508, 511 (6th Cir. 2010))); Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010) (defining substantial burden as "when a government . . . places substantial pressure on an adherent"); *Washington*, 497 F.3d at 280 ("[A] substantial burden exists where . . . the government puts substantial pressure on an adherent . . . to violate his beliefs."); Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 38 (1st Cir. 2007) ("[A] substantial burden is one that 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" (second alteration in original) (citing *Thomas*, 450 U.S. at 718, and *Lovelace*, 472 F.3d at 187)); Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004) ("[A] substantial burden truly pressures the adherent to . . . violate his religious beliefs.").

129. *Lovelace*, 472 F.3d at 187–88.

130. Compare id. at 187 ("[A] 'substantial burden' is one that 'puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" (quoting *Thomas*, 450 U.S. at 718)), with Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) ("[A] substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rending religious exercise . . . effectively impracticable.").

behavior" by breaking his fast or by missing important religious services[131]—but did it render celebration of Ramadan "effectively impracticable"?[132] It is easy to see how a plain-meaning circuit might have decided *Lovelace* differently. For example, if Lovelace were still able to celebrate all, or even part, of Ramadan privately in his cell, the religious exercise would not be "effectively impracticable" and therefore not a substantial burden in the Seventh Circuit.[133] One can imagine a number of situations in which a prison might make a religious exercise just inconvenient enough to pressure an adherent to modify behavior, without rendering the exercise totally impracticable. *Lovelace* helps us to see the heart of the plain-meaning and jurisprudential interpretative divide: The question is whether courts should measure a substantial burden by the consequences of government pressure on the adherent or by the amount of government pressure itself.

C. Holt *Warps the Circuit Definitions of Substantial Burden*

1. Hobby Lobby *and* Holt *Introduce New Substantial Burden Language*. — The interpretive divide between plain-meaning and jurisprudential circuits went undisturbed for eight years after *Cutter*, until the Supreme Court took a fresh look at religious exercise in *Burwell v. Hobby Lobby Stores, Inc.*[134] In an opinion by Justice Alito, the majority held for defendant Hobby Lobby.[135] In dicta, the Court explained that the religious

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131. *Lovelace*, 472 F.3d at 187.

132. *Civil Liberties*, 342 F.3d at 761.

133. See supra note 109 and accompanying text. The very notion of weighing the practicality of a person's religious exercise pushes courts toward defining religious orthodoxy. For a court to decide whether something is practicable it must first establish a baseline for what a practicable exercise looks like. This means that a court essentially has to determine an orthodoxy, or correct way, to do that exercise. Take Anthony Wright's case from North Carolina, described supra notes 1–3 and accompanying text. Wright claims that without a communal feast, he cannot celebrate certain Rastafarian holy days—if one asked him, he might say his practice is made effectively impracticable by the prison. See Wright v. Lassiter, 921 F.3d 413, 415 (4th Cir. 2019). But some mainstream Rastafarian branches don't even celebrate the same holy days as Wright. See id. at 417. Whose version of Rastafarianism is "correct"? Who should a court ask to find the answer? Moreover, what exercise is the court really weighing? The celebration of a holy day, or the exercise of holding a feast on a holy day?

134. 134 S. Ct. 2751 (2014). The U.S. Department of Health and Human Services (HHS) sought to compel closely held corporations to "provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners." Id. at 2759. The challenge in this case came under RFRA, but courts treat the standards of RFRA and RLUIPA as interchangeable. See Holt v. Hobbs, 135 S. Ct. 853, 860 (2015) ("[RLUIPA] mirrors RFRA and provides that '[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . .'" (alteration in original) (quoting 42 U.S.C. § 2000cc-1(a) (2012))); New Doe Child #1 v. Cong. of the U.S., 891 F.3d 578, 587 n.2 (6th Cir. 2018) ("Although *Holt* involved a claim under RFRA's 'sister statute,' . . . the same standards apply to each." (quoting *Holt*, 135 S. Ct. at 859)).

135. *Hobby Lobby*, 134 S. Ct. at 2759.

exercise of Hobby Lobby's owners was substantially burdened because the government required the company to "engage in conduct that seriously violates their religious beliefs."[136] This phrase broke new ground in the substantial burden debate, and the emphasis on "engag[ing] in conduct" was a significant analytical departure from the *Sherbert–Thomas* emphasis on government pressure itself being the harm.[137]

A year later, the Supreme Court applied the same substantial burden language from *Hobby Lobby* to a penal RLUIPA case in *Holt v. Hobbs*.[138] A Muslim inmate challenged an Arkansas prison's hair-grooming regulations that prohibited him from growing a half-inch beard in accordance with his religious beliefs.[139] Citing *Hobby Lobby*, the Supreme Court simply declared that the Arkansas regulation substantially burdened the plaintiff as it required him to "engage in conduct that seriously violates [his] religious beliefs."[140]

The second use of the same substantial burden language in as many years suggested that the Court considered it more than just passing dicta. The Court's pronouncement resulted in two significant developments: (1) It spurred the circuit courts to question whether existing substantial burden definitions were still compatible with *Holt*, and (2) it signaled the replacement of the *Sherbert–Thomas* pressure-focused framework with a focus on whether the claimant has been forced to "engage in conduct." The subsequent two subsections (II.C.2 and II.C.3) discuss the first of these

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136. Id. at 2775.

137. See supra section I.A.2.

138. 135 S. Ct. at 862.

139. Id. at 859. The principal issue involved the lower court's application of *Cutter*'s "due deference" standard, see supra note 87 and accompanying text, to the compelling interest and least restrictive means prongs. See *Holt*, 135 S. Ct. at 863–64; see also Bollman, supra note 80, at 858–60. Some circuits have split over how deferential courts must be toward prison officials, but in recent years they have come closer to unifying under a "hard look" analysis of deference. See Bollman, supra note 80, at 853–58, 862 (discussing the level of deference employed by courts before and after *Holt*). Barrick Bollman explains that prior to *Holt*, some courts required minimal supporting evidence before ruling in favor of defendant prison administrators under the due deference standard, making the level of review something akin to rational basis. See id. at 853–56. Following *Holt*, Bollman shows through empirical analysis that circuit courts are now generally demanding a greater showing from prison officials on the compelling interest and least restrictive means prongs. See id. at 862, 874–75. While this shift may benefit inmate claims, it also limits prisons from implementing prophylactic security measures without sufficient evidence to support otherwise good-faith restrictions. For example, a prison may wish to implement a rigid worship schedule that only allows inmates to attend services at certain times in order to avoid potential inmate violence. Under Bollman's "hard look" analysis, prison officials may be unable to achieve RLUIPA deference on the compelling interest prong without evidence showing increased likelihood of potential inmate violence under a more relaxed worship schedule. See id. Thus, prison administrators would be unable to prophylactically implement a security measure based solely on experience or intuition, rather than hard evidence.

140. *Holt*, 135 S. Ct. at 862 (alteration in original) (internal quotation marks omitted) (quoting *Hobby Lobby*, 134 S. Ct. at 2775).

developments and illustrate the divergent reactions of the plain-meaning and jurisprudential circuits. The second development is discussed in its own section (II.D), which shows how inmate dependence on the government for religious accommodation makes *Holt*'s substantial burden language inappropriate in RLUIPA's penal context.

2. *The Plain-Meaning Circuits React to* Holt. — The Seventh, Ninth, and Eleventh circuits each derived pre-*Holt* "substantial burden" definitions through some form of textualist, plain-meaning interpretation.[141] As this section shows, after the decision in *Holt*, these circuits have also been the most willing to conform with the Court's new "engage in conduct" dicta.[142] This is because each of these circuits originally constructed relatively difficult "substantial burden" barriers for plaintiffs and are now forced to play catch-up to a comparatively plaintiff-friendly standard from *Holt*.

For example, in *Schlemm v. Wall*, the Seventh Circuit replaced its previous definition outright with the *Holt* dicta.[143] A Navajo prisoner claimed that a prison restriction on consuming game meat for a holiday ceremony constituted a substantial burden under RLUIPA.[144] The district court, following the Seventh Circuit's "effectively impracticable" standard, held for the defendants.[145] The court of appeals reversed.[146] In an opinion by Judge Frank Easterbrook, the court wrote that in light of the recent decisions in *Hobby Lobby* and *Holt*, the Seventh Circuit's prior plain-meaning "approach did not survive."[147] Easterbrook explained that under the previous "effectively impracticable" standard, "Schlemm would lose, for he still could dance and pray during the Ghost Feast."[148] By contrast, *Holt* and *Hobby Lobby* "articulate[d] a standard much easier to satisfy," under

141. See supra section II.B.1.

142. *Holt*, 135 S. Ct. at 862. The Seventh Circuit recently acknowledged the pre- and post-*Holt* substantial burden divide in *Jones v. Carter*. 915 F.3d 1147, 1149 (7th Cir. 2019) ("For a time, there was some confusion among the circuits about what constitutes a substantial burden under RLUIPA."). The *Jones* court claimed that *Holt* and *Hobby Lobby* "dispelled" circuit confusion, but it failed to synthesize a single, unifying definition from the two cases. Id. at 1149–51. Instead, the court determined that since the plaintiff's harm "would be enough under *Hobby Lobby* for the Supreme Court," it was also "enough for [the Seventh Circuit]." Id. at 1151.

143. 784 F.3d 362, 364 (7th Cir. 2015); see also *Jones*, 915 F.3d at 1149 ("We recognized in *Schlemm v. Wall* that *Holt* and *Hobby Lobby* 'articulate[d] a standard much easier to satisfy' than our former search for something rendering the religious exercise 'effectively impracticable.'" (alteration in original) (quoting *Schlemm*, 784 F.3d at 364)).

144. *Schlemm*, 784 F.3d at 363.

145. Id. at 364 (quoting Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro, 734 F.3d 673, 680 (7th Cir. 2013)).

146. Id. at 365–66.

147. Id. at 364.

148. Id.

which the Seventh Circuit held that Schlemm was able to meet his substantial burden threshold.[149]

The Ninth Circuit was equally willing to adopt *Holt*'s "engage in conduct" dicta in place of its own "substantial burden" analysis in *Oklevueha Native American Church of Hawaii v. Lynch*.[150] A Native American church sought injunctive relief against the government from prosecution under the Controlled Substances Act for possessing, obtaining, and cultivating cannabis.[151] The church argued that cannabis was an integral part of a religious congregation and that its prohibition was a substantial burden on religious exercise.[152] The reviewing court determined that the cannabis prohibition did not require Oklevueha to "engage in conduct that seriously violates their religious beliefs," and therefore did not constitute a substantial burden on religious exercise.[153]

Finally, the Eleventh Circuit completed the trilogy of plain-meaning definitional swaps after it endorsed the *Holt* standard in *Smith v. Owens*.[154] On a prisoner's pro se RLUIPA claim, the *Owens* court vacated the judgment of the district court for failure to comply with the Supreme Court's standard in *Holt* on the substantial burden, compelling interest, and least restrictive means prongs. The Eleventh Circuit stated that a substantial burden was one that forced an inmate to "engage in conduct that seriously violates [their] religious beliefs."[155] Remanding the case, the court ordered that the district court analyze the plaintiff's substantial burden claim "in a manner consistent with *Holt v. Hobbs*."[156]

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149. Id. at 365. Easterbrook nevertheless believed that this standard "leaves a lot of uncertainty" as to the difference between a policy that "seriously" violates one's beliefs, and one that "modestly" or "overwhelmingly" violates them. Id. at 364–65.

150. 828 F.3d 1012, 1017 (9th Cir. 2016). Plaintiffs challenged under RFRA, and the reviewing court relied on the "seriously violates" language from *Hobby Lobby*, though the language is identical to that used in *Holt*. Id. (citing identical language from both *Holt* and *Hobby Lobby*). Because RLUIPA and RFRA are "sister statute[s]," and because the *Oklevueha* court uses the case law under each act interchangeably, they are analytically the same. See id. at 1017; see also Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2781 (2014) (referring to "both RFRA and its sister statute, RLUIPA"); 146 Cong. Rec. 16,702 (2000) (statement of Sen. Reid) (indicating that RLUIPA was intended to amend RFRA for constitutional infirmities found by the Supreme Court in *Boerne* as they related to land use and institutionalized persons).

151. *Oklevueha*, 828 F.3d at 1014.

152. Id. at 1015.

153. Id. at 1017 (internal quotation marks omitted) (quoting *Hobby Lobby*, 134 S. Ct. at 2775). Indeed, the Ninth Circuit noted that the appellant's counsel had admitted on multiple occasions that cannabis was only a substitute for peyote, and therefore its prohibition did not "force [the church] to act at odds with their religious beliefs." Id.

154. 848 F.3d 975, 981 (11th Cir. 2017).

155. Id. at 979 (internal quotation marks omitted) (quoting Holt v. Hobbs, 135 S. Ct. 853, 862 (2015)).

156. Id. at 981. But see *Ray v. Dunn*, a recent high-profile case in Alabama in which a death-row inmate was denied access to a Muslim imam before his execution. No. 2:19-CV-88-WKW, 2019 WL 418105, at *1 (M.D. Ala. Feb. 1, 2019). As part of his motion for an

The pattern here indicates that plain-meaning appellate courts have been quick to adopt the *Holt* standard as a standalone substantial burden definition. For the Seventh and Eleventh Circuits, this may be in an effort to lower the substantial burden threshold to be more plaintiff friendly. The Seventh Circuit's pre-*Holt* threshold specified a desire not to have the "slightest obstacle" trigger RLUIPA review and "render meaningless the word 'substantial,'"[157] while the Eleventh Circuit reasoned that a substantial burden must "place more than an inconvenience" on an adherent before review is triggered.[158] Similarly, the Ninth Circuit's pre-*Holt* reliance on Black's Law Dictionary and Merriam-Webster required the plaintiff to show a "significantly great restriction" on a religious exercise.[159] The substantial burden language from *Holt* articulated a comparatively more plaintiff-friendly substantial burden prong. According to *Holt*, a plaintiff need only show (1) that they were forced to engage in conduct and (2) that the conduct "seriously violate[d]" their religious belief.[160] It is uncertain if the *Holt* standard is actually more plaintiff friendly or if the plain-meaning circuits simply interpreted it as more plaintiff friendly than their previous standards.[161] Regardless, the new language caused the plain-meaning circuits to re-adjust and hold *Holt* as controlling on the substantial burden prong.[162]

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emergency stay, Domineque Hakim Marcelle Ray lodged Establishment Clause and RLUIPA complaints against the state, arguing that denial of access to a Muslim imam substantially burdened his religious exercise. Id. at *3. The district court applied the Eleventh Circuit's pre-*Holt* test from *Midrash* to hold that a substantial burden must "place more than an inconvenience." Id. at *5 (quoting Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004)). Under the *Midrash* standard, the district court held that Ray had not established a likelihood of success on his RLUIPA claim. Id. The district court's application here seems to contravene *Smith v. Owens*, which indicated that *Holt* should be controlling in substantial burden analysis. 848 F.3d at 981. On appeal, the Eleventh Circuit did not reach Ray's RLUIPA claim, instead finding a violation under the Establishment Clause and granting the emergency stay. Ray v. Comm'r, Ala. Dep't of Corr., 915 F.3d 689, 701, 703 (11th Cir. 2019). The Supreme Court vacated the stay on the ground that Ray filed too late, and he was executed on February 7, 2019. Dunn v. Ray, 139 S. Ct. 661, 661 (2019); Adam Liptak, Justices Allow Execution of Muslim Death Row Inmate Who Sought Imam, N.Y. Times (Feb. 7, 2019), https://www.nytimes.com/2019/02/07/us/politics/supreme-court-domineque-ray.html [https://perma.cc/4PMK-EG4E].

157. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).

158. *Midrash Sephardi*, 366 F.3d at 1227.

159. San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004); see also supra section II.B.1.

160. See *Holt*, 135 S. Ct. at 862 (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014)).

161. See Schlemm v. Wall, 784 F.3d 362, 364 (7th Cir. 2015) (holding that the Seventh Circuit's pre-*Holt* "approach did not survive").

162. Other recent Supreme Court cases support the theory that there is a faction of Justices pushing for greater recognition of individual religious rights and, by consequence, a substantial burden prong that is easier to satisfy. For example, in *Ben-Levi v. Brown*, a Jewish inmate wished to study the Torah in a manner that comported with his religious demands. 136 S. Ct. 930, 930 (2016) (Alito, J., dissenting). A third-party rabbi consulted by the state said that the inmate's request was not necessary to fulfill religious requirements. Id. at 931.

3. *The Jurisprudential Circuits React to* Holt. — The jurisprudential group makes up a majority of the remaining circuits,[163] and had primarily relied on *Sherbert* and *Thomas* to form a basis for substantial burden definition and analysis.[164] Consequently, these circuits have been more willing to try and reconcile *Holt* with existing definitions.[165]

The Fifth Circuit presents an example of how jurisprudential courts have attempted to reconcile *Holt* with existing precedent.[166] In *Ali v. Stephens*, an inmate challenged a Louisiana prison's grooming policy that prohibited him from growing dreadlocks in accordance with his religious beliefs.[167] The court explained that under RLUIPA, it was impermissible for the government to substantially burden an inmate "by, for example, forcing the plaintiff 'to engage in conduct that seriously violates [his or her] religious beliefs.'"[168] Because both parties already agreed that the grooming policy constituted a substantial burden, the court of appeals did not provide any

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The Supreme Court denied certiorari, but Justice Alito attached a dissent, arguing that the rabbi's opinion was inconsequential, as the correct inquiry was whether the inmate believed that he needed to study the Torah in order to satisfy his religious requirements. Id. at 933–34. This reading comports with the theory that the Court may be seeking to lower the threshold for substantial burden claims and increase religious rights by protecting the subjective beliefs of the individual from a court's interpretation of what is or is not orthodox.

163. See supra note 128.

164. See Washington v. Klem, 497 F.3d 272, 279 (3d Cir. 2007) ("[T]he courts of appeals . . . have defined [substantial burden] in several ways. Most of those courts have adopted some form of the *Sherbert*–*Thomas* formulation, but have often reworded their holdings. The result of this practice has been to create several definitions of 'substantial burden' with minor variations.").

165. But see Real Alts., Inc. v. Sec'y Dep't of Health & Human Servs., 867 F.3d 338, 359 (3d Cir. 2017) (relying exclusively on the *Holt* line of cases to emphasize that "a substantial burden on the exercise of religion exists only where the Government 'demands that [an individual] *engage* in conduct that seriously violates [his or her] religious beliefs.'" (alterations in original) (quoting *Hobby Lobby*, 134 S. Ct. at 2775)).

166. The Fifth Circuit originally adopted a *Sherbert*–*Thomas* framework for its burden analysis in Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004). In the years immediately following the Supreme Court's decision in *Holt*, the Fifth Circuit appeared to bypass all in-depth substantial burden analysis in RLUIPA cases, declining to reference its previous *Adkins* definition but also not giving full-throated support to the *Holt* "seriously violates" dicta. Instead, the Fifth Circuit was careful to use *Holt* as an "example" of a substantial burden, rather than as a definition. See Ali v. Stephens, 822 F.3d 776, 782–83 (5th Cir. 2016) (holding that a substantial burden occurs when the government action burdens a religious exercise "by, for example, forcing the plaintiff 'to engage in conduct that seriously violates [his or her] religious beliefs'" (alteration in original) (quoting Holt v. Hobbs, 135 S. Ct. 853, 862 (2015))); see also Ware v. La. Dep't of Corr., 866 F.3d 263, 268 (5th Cir. 2017) ("[T]he government's action or policy 'substantially burden[s]' that exercise by, for example, forcing the plaintiff 'to engage in conduct that seriously violates [his or her] religious beliefs.'" (alterations in original) (quoting *Ali*, 822 F.3d at 782–83)). However, initial attempts to reconcile the various standards appear to have subsided in more recent cases. See infra note 170.

167. 822 F.3d at 782.

168. Id. at 782–83 (alteration in original) (quoting *Holt*, 135 S. Ct. at 862).

deeper analysis on the issue.[169] Instead, the court ostensibly paid lip service to the *Holt* standard, citing it as an "example" of a substantial burden, but refusing to go as far as the Seventh Circuit and adopt the *Holt* language as a standalone definition. This indicates that jurisprudential courts like the Fifth Circuit may view *Holt* as compatible with previous definitions and not necessarily displacing.[170]

The Fourth Circuit seems to have taken a different approach by completely ignoring *Holt* in favor of its existing substantial burden standard from *Lovelace*.[171] For example, in *Jehovah v. Clarke*, a prisoner alleged that a North Carolina prison's categorical ban on wine substantially burdened the ability to practice communion in accordance with a sincerely held religious belief.[172] Despite referencing *Holt* throughout the opinion, the *Jehovah* court omitted the case from its substantial burden analysis and instead relied on *Lovelace*'s definition verbatim.[173] The latest district court decisions from the Fourth Circuit further support the enduring authority of *Lovelace*. In *Prosha v. Robinson*, the Eastern District of Virginia held in a penal-context case that the *Lovelace* definition for substantial burden governs.[174] Another recent penal-context case, *Jones v. North Carolina Department of Public Safety* from the Western District of North Carolina, also bent to the *Lovelace* definition.[175] Both the *Jones* and *Prosha* decisions fail to even mention *Holt*, let alone rely on it for its burden analysis.

The Fourth Circuit's (non)treatment of *Holt* in its substantial burden analysis is emblematic of most other post-*Holt* RLUIPA cases from the jurisprudential group, which typically restrict *Holt*'s influence to RLUIPA's

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169. By, for example, parsing the difference between a "serious" violation and a merely "modest" one. See supra note 149.

170. See Brown v. Collier, 929 F.3d 218, 229 (5th Cir. 2019) (returning to the "truly pressures" substantial burden definition originally developed in *Adkins* and declining to invoke *Holt*'s "seriously violates" dicta in the court's analysis).

171. See, e.g., Incumaa v. Stirling, 791 F.3d 517, 525 (4th Cir. 2015) ("A prison regulation may impose a 'substantial burden' by forcing 'a person to "choose between following the precepts of her religion and forfeiting [governmental] benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand."'" (alterations in original) (quoting Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006))).

172. 798 F.3d 169, 179 (4th Cir. 2015).

173. See id. ("[S]ubstantial burden on religious exercise occurs when a state or local government, through act or omission, puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." (internal quotation marks omitted) (quoting *Lovelace*, 472 F.3d at 187)).

174. Prosha v. Robinson, No. 3:16CV163, 2018 WL 5779478, at *6 (E.D. Va. Nov. 2, 2018) ("The Fourth Circuit has explained that a substantial burden 'is one that put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs . . . .'" (quoting Couch v. Jabe, 679 F.3d 197, 200 (4th Cir. 2012))).

175. Jones v. N.C. Dep't of Pub. Safety, No. 3:17-cv-00256-FDW, 2018 WL 5281728, at *4 (W.D.N.C. Oct. 24, 2018) ("A 'substantial burden' on a person's religious exercise is one that 'put[s] substantial pressure on an adherent to modify his behavior and to violate h[is] beliefs[.]'" (alterations in original) (quoting *Couch*, 679 F.3d at 200)).

compelling interest and least restrictive means prongs.[176] This is because, unlike the plain-meaning courts, some of which openly admitted incompatibility with *Holt*,[177] it is not entirely clear whether *Holt* is incompatible with definitions based on *Sherbert* or *Thomas*. After all, *Holt*'s "seriously violates" standard was only dicta, and the Court made no effort to otherwise clarify the "substantial burden" prong. Said differently, because *Holt* did not explicitly overturn the *Sherbert–Thomas* framework, jurisprudential courts have been less willing to abandon their own circuit precedent.

D. Holt *Has Failed in the Penal Context*

Along with concerns about inconsistent application of the law inherent to any circuit split, *Holt*'s switch to a conduct-focused burden analysis proves especially problematic in the penal context. Because institutionalized persons are dependent upon the government for certain religious accommodations, a conduct-focused analysis does not easily allow for claims that are the result of a government omission or denial of an accommodation. Rather, a conduct analysis is more effective when a government exerts coercive force. Indeed, for institutionalized persons in the government's charge, coercive force is only half of the equation.

By displacing the previous "substantial burden" definitions in the three plain-meaning circuits, *Holt* appears to have softened their harsh, textualist approach but not in a way that fundamentally aligns them with the other circuits on burden analysis. Instead, *Holt* functionally created three circuits that apply a conduct-focused burden analysis, while the remaining jurisprudential circuits continued to apply a pressure-focused analysis. Conduct-focused analysis asks how a government action or policy has impacted a plaintiff's conduct. In *Holt*, that analysis proceeds by asking if the government forced the plaintiff to "engage in conduct that seriously violates [their] religious beliefs."[178] This is an entirely different inquiry

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176. See, e.g., Robertson v. McCullough, 739 F. App'x 932, 936 (10th Cir. 2018) ("[A] religious exercise is substantially burdened under [RLUIPA] when a government . . . prevents participation in conduct motivated by a sincerely held religious belief . . . ." (internal quotation marks omitted) (quoting Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010))); Robinson v. Superintendent Houtzdale SCI, 693 F. App'x 111, 115 (3d Cir. 2017) (applying the standard from *Washington v. Klem* rather than *Holt*); Livingston Christian Schs. v. Genoa Charter Twp., 858 F.3d 996, 1002 (6th Cir. 2017) ("Even in *Holt*, the Supreme Court did not articulate a definition of 'substantial burden,' but rather explained that the ability to engage in other religious practices did not prevent a prisoner from making a substantial-burden claim as to the rule against growing a half-inch beard."); Hudson v. Spencer, 180 F. Supp. 3d 70, 78 (D. Mass. 2015), aff'd in part, vacated in part, No. 15-2323, 2018 WL 2046094 (1st Cir. Jan. 23, 2018) ("[A] substantial burden exists when the government puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs . . . .'" (quoting Hudson v. Dennehy, 538 F. Supp. 2d 400, 409 (D. Mass. 2008), aff'd sub nom. Crawford v. Clarke, 578 F.3d 39 (1st Cir. 2009))).

177. Schlemm v. Wall, 784 F.3d 362, 364 (7th Cir. 2015).

178. Holt v. Hobbs, 135 S. Ct. 853, 862 (2015) (internal quotation marks omitted) (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014)).

than the pressure-focused analysis used by most jurisdictional circuits under the *Sherbert–Thomas* framework.[179] In a pressure-focused framework, a court asks if the government's action has pressured the plaintiff to modify their behavior—whether the plaintiff actually does modify their behavior is immaterial to establishment of the harm. The conduct framework from *Holt* requires the plaintiff to have actually engaged in conduct that violates their beliefs before they can show a substantial burden.

Circuits applying these differing styles of analysis are not only likely to come to different conclusions about the existence of a substantial burden in similar cases but also likely to hear entirely different kinds of cases. For example, pressure-focused jurisprudential circuits are analytically equipped to hear prophylactic-pressure claims, such as when an inmate feels pressure to violate their beliefs, but hasn't yet been forced to engage in violative conduct. In other words, the government is still pressuring their religious scruples but has yet to force action. By contrast, a conduct-focused, plain-meaning circuit can conceive only of cases involving injuries that are the result of already-engaged conduct that violates religious belief.

The harm from this analytical inconsistency is heightened even more in the penal context. As the *Cutter* Court explained, RLUIPA "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."[180] The protection of institutionalized persons thus includes providing certain religious accommodations, and makes penal analysis fundamentally different from those land-use or employment cases advanced by free citizens.[181] Under *Holt*'s conduct-focused burden analysis, it becomes much more difficult for an inmate to claim relief when a prison refuses to hire a chaplain or fails to provide space for a religious service. Strictly speaking, the prison has not forced the inmate to "engage" in any conduct. It simply declined to provide a religious accommodation. By contrast, under pressure analysis, the plaintiff could easily show how the failure to provide an accommodation, such as access to a priest, puts pressure on the plaintiff to "violate his beliefs."[182]

Granted, the scope of RFRA and RLUIPA goes beyond the penal context, and the interchangeability of case law and statutory definitions may suggest that *Holt* (or more likely, *Hobby Lobby*) intended to remedy a burden issue in another context. In employment and land-use cases, for

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179. Recall that under the *Sherbert–Thomas* framework, the constitutional harm was the impermissible "substantial pressure" applied to an adherent to "modify his behavior and to violate his beliefs." See supra section I.A.2.

180. Cutter v. Wilkinson, 544 U.S. 709, 721 (2005).

181. See Bethel World Outreach Ministries v. Montgomery Cty. Council, 706 F.3d 548, 555 (4th Cir. 2013) ("[The *Lovelace*] standard is entirely appropriate in the institutionalized persons context, since the Government can employ its absolute control over prisoners (like absolute control over eligibility for unemployment benefits) to pressure a person to violate his religious beliefs.").

182. Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006).

example, a conduct-focused inquiry may be prudent. When dealing with the open world of commerce, it is wise to avoid a standard where even "the slightest obstacle to religious exercise" could result in litigation.[183] Often, markets are simultaneously governed by hundreds of different municipal, state, and federal regulations, so it is more efficient for courts to focus only on those situations in which a plaintiff was actually forced to engage in violative conduct. Moreover, plaintiffs outside the penal context are more likely to have alternative methods for accommodating religious needs amid government pressure.[184] Fortunately, *Cutter* provides a resolution by showing that RLUIPA's various prongs may be context specific.[185] Therefore, preference for a conduct-focused style of analysis in one RLUIPA context (for example, land use) should be compatible with maintaining a pressure-focused analysis in another (for example, penal cases).

Holt's definition of substantial burden failed to bring clarity to RLUIPA's penal context. *Holt* deepened the plain-meaning and jurisdictional circuit split by creating at least three conduct-focused circuits and questioning the vitality of existing pressure-focused frameworks. Further, switching to a conduct-focused burden inquiry made it more difficult for already vulnerable plaintiff-inmates to assert religious exercise claims. The Supreme Court must resolve this split by clarifying how courts should apply RLUIPA's substantial burden prong. In the penal context, the Court should take a step further by creating a penal-specific substantial burden definition patterned on a *Sherbert–Thomas* pressure-focused framework.

III. A PENAL-SPECIFIC DEFINITION FOR SUBSTANTIAL BURDEN

Holt v. Hobbs highlighted a need for greater guidance on RLUIPA's substantial burden analysis, particularly in the penal context. This Part offers suggestions for how the Supreme Court could create a penal-specific definition of substantial burden that will resolve the plain-meaning and jurisprudential circuit split. Section III.A discusses the various components the Supreme Court should consider in crafting a new substantial burden definition for the penal context, including how a new definition would interact with the compelling interest and least restrictive means prongs. Section III.B offers a new penal-specific definition of "substantial burden,"

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183. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).

184. See, e.g., *Bethel World*, 706 F.3d at 555 ("But the Government lacks comparable control in the land use context. Even government action preventing a religious organization from building a church will rarely, if ever, force the organization to violate its religious beliefs, because the organization can usually locate its church elsewhere.").

185. See supra section II.A; see also *Bethel World*, 706 F.3d at 555 (applying distinct substantial burden definitions that are context dependent but acknowledging that it knows of no other "appellate court [that] has applied an unmodified *Lovelace*-like standard in the land use context").

and explains how courts should use it as a workable analytical standard. The proposed definition mirrors the Fourth Circuit's current standard, but omits the "modify behavior" component. Specifically, the proposed definition reads: A substantial burden on an inmate's religious exercise occurs when a state or local government, through act or omission, puts substantial pressure on an adherent to violate their beliefs.[186] This remains only the first step in a court's analysis, however, and is not determinative of the remedy, as the government may still meet the highly deferential compelling interest and least restrictive means prongs.[187]

A. *Components of a New Substantial Burden Definition and How It Fits Under RLUIPA*

1. *Pressure v. Conduct: Picking an Analytical Approach.* — In constructing a new substantial burden definition, the first question is whether court analysis should be conduct focused or pressure focused. Recall that the Supreme Court in *Holt* and the plain-meaning circuits currently emphasize a conduct-focused style of analysis, in which the principal inquiry is whether the plaintiff has been forced to "engage in conduct that seriously violates [their] religious beliefs."[188] Conduct analysis asks whether the government has forced the plaintiff to affirmatively act in a way that violates their beliefs.[189] As discussed in the foregoing, this style of analysis is inappropriate in the penal context. Indeed, burden analysis in the penal context must account for the total control that prisons have over inmates and the fact that inmates are dependent on the government for certain religious accommodations. This is achievable through a pressure-focused style of analysis similar to that used in most *Sherbert*–*Thomas* frameworks.

A pressure-focused analysis would allow plaintiff-inmates to bring a claim when the government has refused to provide a religious accommodation but has not otherwise forced the plaintiff to do anything. In other words, pressure-focused analysis proceeds without the plaintiff having to first complete an action that violates their beliefs in order to bring a claim. Moreover, pressure-focused analysis is already endorsed by the Supreme Court's pre-*Turner* free exercise jurisprudence, and was the style of analysis contemplated by RLUIPA's authors.[190] Multiple circuit

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186. See infra section III.B.

187. See supra section II.A.

188. Holt v. Hobbs, 135 S. Ct. 853, 862 (2015) (internal quotation marks omitted) (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014)); see also supra notes 141–162 and accompanying text.

189. See Real Alts., Inc. v. Sec'y Dep't of Health & Human Servs., 867 F.3d 338, 359 (3d Cir. 2017) ("[A] substantial burden on the exercise of religion exists only where the Government 'demands that [an individual] *engage* in conduct that seriously violates [his or her] religious beliefs.'" (alterations in original) (quoting *Hobby Lobby*, 134 S. Ct. at 2775)).

190. See supra sections I.A.2, I.B; supra note 75.

courts continue to effectively employ pre-*Turner* analysis frameworks and could act as models for a new definition. The Fourth Circuit, for example, publishes a number of RLUIPA opinions each year,[191] and *Lovelace* remains one of the most robust and relied-upon appellate court RLUIPA cases.[192]

On a more conceptual level, pressure-focused analysis also comports with the First Amendment principle of self-fulfillment.[193] Since RLUIPA's legislative history makes clear that "substantial burden" should be defined through the Supreme Court's First Amendment jurisprudence, the ultimate substantial burden definition should also align with the principles that animate the Amendment.[194] One of these principles is individual self-fulfillment or the "Western thought that the proper end of [a person] is the realization of [their] character and potentialities as a human being."[195] While scholars often invoke self-fulfillment in order to justify the First Amendment's freedom of expression, it can be argued that the principle similarly justifies the First Amendment's freedom of religious belief.[196]

The freedom of expression and the freedom of religious belief slightly differ, however, in how they help an individual to realize their "character and potentialities as a human being."[197] Expression is externally directed; it is how an individual participates in the social order, making expression inherently defined by its relation to, and contact with, other people.[198] By contrast, religious belief is internally directed.[199] Belief may be expressed externally, but it justifies its First Amendment protection by helping the individual to realize their "character and potentialities as a human being" in relation to something greater than the social order.[200] Thus, the external expression of opinion and the internal reflection of religious belief equally serve an individual's pursuit of self-fulfillment.

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191. See, e.g., Jesus Christ Is the Answer Ministries, Inc. v. Baltimore County, 915 F.3d 256 (4th Cir. 2019) (relying on a modified *Lovelace* standard from Bethel World Outreach Ministries v. Montgomery Cty. Council, 706 F.3d 548, 555–56 (4th Cir. 2013), in a land-use context); Carter v. Fleming, 879 F.3d 132, 139–40 (4th Cir. 2018) (applying *Lovelace* to a free exercise and RLUIPA challenge).

192. See supra section II.C.3.

193. See Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 879–81 (1963) (discussing "individual self-fulfillment" as a justification for protecting a system of free expression in democratic society).

194. See supra note 75.

195. See Emerson, supra note 193, at 879. In slightly more relatable parlance, this notion could be described as human dignity.

196. See id. ("The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual.").

197. Id.

198. See id. at 879–81 ("The right to freedom of expression derives, secondly, from basic Western notions of the role of the individual in his capacity as a member of society.").

199. See id. at 919 ("Freedom of belief concerns the right of individuals to form and hold ideas and opinions which are not communicated to others.").

200. Id. at 879.

Just as the First Amendment limits the government from interfering with one's external expression in order to preserve the individual's pursuit of self-fulfillment, it similarly should limit the government from interfering with one's internal religious beliefs for the same reason. Pressure-focused analysis conceptually accounts for that internal interference,[201] while conduct-focused analysis treats religious beliefs the same as expression—inherently external.[202] As a result, conduct-focused courts attempt to redress only external manifestations of government interference with a person's religious scruples, even when the constitutional harm is actually more internal in character. Outside of prison, this internal harm is not as significant because a free person has many ways of relieving government interference or pressure.[203] Inside prison, there are few, if any, avenues for a person to reaffirm their faith as they grapple with the guilt, doubt, and uncertainty that come with confinement.[204] The internal harm is more acute in the penal context, and any court's analysis should reflect that.

2. *Measuring Substantiality.* — If courts were to adopt a pressure-focused substantial burden test, the next question would be how they should measure pressure. Frameworks like those in *Lovelace* and *Sherbert–Thomas* measure pressure by asking if the adherent feels pressure to "modify his behavior."[205] While much of the *Sherbert–Thomas* framework works well in the penal context, this portion is problematic and should be eliminated. Indeed, because the harm to the adherent is the pressure from the government, and not the actual result of that pressure, substantial burden analysis should focus more on the government than on the plaintiff.[206] Moreover, the "modify behavior" component complicates a judicial inquiry by requiring both a definition of "behavior"[207] and a threshold level of "modification" needed to trigger review.[208] By elimin-

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201. See supra section II.D.

202. See supra note 189.

203. See supra note 184 and accompanying text.

204. See supra note 181 and accompanying text.

205. See, e.g., Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006) (internal quotation marks omitted) (quoting Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981)).

206. See Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) (explaining that the harm from the government was not "the degree of injury, which may indeed be nonexistent," but rather the "interference with the individual's scruples or conscience").

207. Does "behavior" mean a daily routine? An emotional disposition? General temperament? Physical behavior?

208. A "modify behavior" standard comes with other complications as well. How would an inmate who converts while in prison show that a policy has forced him to "modify" his behavior if he's never practiced his faith before? For example, if an inmate converted to Judaism and requested a kosher meal, could the prison argue that its policy has not caused the inmate to modify his behavior since he was incarcerated?

ating this component, a court only needs to ask if the government has placed "substantial pressure" on an adherent to violate their beliefs.[209]

Instead, courts should consider "substantial pressure" on an adherent to be either (1) direct or (2) conditional. Direct pressure is any government action or policy that directly prohibits or restricts an adherent's religious exercise. An archetypal example would be the prison policy from *Holt*, in which a grooming regulation prohibited inmates from growing a beard.[210] While that policy was facially neutral, it directly prohibited the Islamic religious exercise of growing a half-inch beard. As a result, the Muslim plaintiff was forcibly shaved in direct, coercive violation of his beliefs.[211] Direct pressure will almost always be "substantial pressure."[212]

The second kind of pressure, which this Note has termed "conditional" or "indirect" pressure, comes from a government omission or failure to accommodate a religious exercise. It is pressure that comes from the condition of being "dependent on the government's permission and accommodation for exercise of [one's] religion."[213] A typical example of this kind of pressure would be a prison's refusal to provide halal meals to a Muslim inmate.[214] To weigh the substantiality of conditional pressure, a court should evaluate the frequency and completeness of the pressure. Frequency refers to how often the plaintiff feels pressure to violate their beliefs due to a government omission.[215] For example, failure to provide a

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209. It is tempting, though incorrect, to think of substantiality in reference to cost to the prison. The substantial burden inquiry focuses solely on the plaintiff's subjective belief and whether that belief is burdened. Concerns about cost to the government and taxpayers are fully addressed in the compelling interest and least restrictive means prongs.

210. See supra notes 138–139 and accompanying text.

211. The direct-pressure category is not limited to situations in which the prison exerts coercive power. It could also be applied to situations where a benefit is denied or taken from an adherent for violating a policy that directly prohibits or restricts a religious exercise.

212. This would not prevent some courts from officially recognizing certain situations of government action that are prima facie not direct pressure. For example, confinement to a cell is not a substantial burden for a religion that, say, requires absolute freedom of movement at all times. See, e.g., United States v. Lee, 455 U.S. 252, 258–61 (1982) (holding that the Free Exercise Clause does not require religious exemption from taxation, as "mandatory participation is indispensable to the fiscal vitality" of government programs).

213. Cutter v. Wilkinson, 544 U.S. 709, 721 (2005).

214. See, e.g., Abdulhaseeb v. Calbone, 600 F.3d 1301, 1317 (10th Cir. 2010) (holding that failure to provide a halal dietary option to a Muslim inmate put "substantial pressure" on the adherent to violate his beliefs). Other examples might include access to religious literature, weekly services, or idols.

215. The "centrality," or significance, of a belief to the adherent's faith is immaterial to RLUIPA analysis. See Holt v. Hobbs, 135 S. Ct. 853, 860 (2015) ("Congress defined 'religious exercise' capaciously to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" (quoting 42 U.S.C. § 2000cc-5(7)(A) (2012))). By using frequency to measure pressure instead of centrality or significance, courts are able to still recognize those beliefs and practices that are most essential to practicing a religion without having to make a subjective determination on the practice's religious value or orthodoxy. Necessarily, this means that courts will recognize pressure on daily rituals more often than pressure on potentially very significant holy days.

special diet would put the adherent in a state of constant violation, making the frequency of the pressure great. Completeness refers to how dependent the plaintiff is on the government for accommodation, and what, if anything, the government has already done to help accommodate the subject religious exercise. For example, if an inmate requires daily religious services from a chaplain, they are completely dependent upon the government to hire and allow a chaplain into the prison facility.[216] Without the government's accommodation, the religious exercise cannot be performed. But, if instead of daily services, the government provides weekly services from a chaplain, the pressure is reduced and becomes only partial—it is not as complete as providing no religious services at all. After weighing the frequency and completeness of the conditional pressure, a court would then determine its substantiality.[217]

3. *Interaction with the Other RLUIPA Prongs.* — The final consideration for a new substantial burden definition is how it will interact with the compelling interest and least restrictive means prongs. This consideration takes on particular significance in the penal context, where *Cutter*'s "due deference" standard governs for prison administrators.[218] While some scholars have argued that the "due deference" standard has weakened post-*Holt*,[219] the compelling interest prong in the penal context remains a significant barrier to plaintiffs. Consequently, in terms of outcome, a more plaintiff-friendly substantial burden prong likely won't have much effect on the rate of plaintiff success in penal cases.

An easier-to-satisfy burden prong would, however, provide more frequent official recognition of the hardships endured by inmates. Increased judicial recognition of the burdens on inmates, while mostly symbolic, would at least have the benefit of generating local and regional sympathy and would further serve to build a greater body of case law protecting individual religious rights. In turn, this sympathy may encourage more charities and nearby churches to create prison-outreach programs and to donate to area prisons. State correctional departments welcome these kinds of donations, which often allow volunteers and contributors to

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That, however, may be addressed by the completeness inquiry.

216. A court would also be permitted to ask how the plaintiff has attempted to alleviate the burden. For example, the court may ask if the plaintiff attempted to identify and solicit a suitable chaplain if a specific one was needed.

217. Regardless of whether the pressure is "direct" or "conditional," the government would still have an opportunity to prove necessity on the compelling interest and least restrictive means prongs of the RLUIPA test. See 42 U.S.C. § 2000cc-1(a)(1) (2012).

218. See *Cutter*, 544 U.S. at 723. This Note does not call for the removal of *Cutter*'s "due deference." See supra section II.A. What makes the penal context unique is the imposition on the government to actually provide religious accommodations for prisoners. Prison administrators must balance this affirmative duty against daily institutional pressures to maintain security and control costs. Courts are ill-equipped to coach administrators on how best to maintain these objectives, therefore, changes to the substantial burden prong should be thought of in terms of functionalism within the existing "due deference" framework.

219. See Bollman, supra note 80; supra note 139.

provide meals or services that cut down costs and help the administrators comply with RLUIPA's least restrictive means prong.[220] Greater recognition and sympathy from outside religious communities would in turn encourage more support for rehabilitation and push inmates toward reform, reducing recidivism and lowering total long-term costs for the state.

B. *Divining a Definition*

Cutter v. Wilkinson showed the Supreme Court's willingness to recognize a context-specific application of RLUIPA's three-prong test.[221] The Court acknowledged that institutionalized persons are uniquely vulnerable due to their dependence on the government to provide certain religious accommodations.[222] From this dependence, *Cutter* established the "due deference" standard, which applies to the compelling interest and least restrictive means prongs solely in the penal context. It is time that the Court recognized a penal-specific definition for "substantial burden" as well.

The Supreme Court should adopt a definition similar to the Fourth Circuit's *Sherbert–Thomas* framework,[223] specifically: A substantial burden on an inmate's religious exercise occurs when a state or local government, through act or omission, puts substantial pressure on an adherent to violate their beliefs.

As discussed above, this definition drops the "modify behavior" language used by the Fourth Circuit and instead focuses solely on the pressure the government applies, and how that pressure induces an inmate to violate their beliefs.[224] Under this formulation, a court need only to evaluate the sincerity of the adherent's belief,[225] and the substantiality of the government's pressure. Whether the adherent actually violates their beliefs because of the pressure is immaterial to the analysis.

Substantiality, in turn, should be evaluated by the character of the pressure being applied: either (1) direct pressure or (2) conditional pressure.[226] Direct pressure is pressure from a government that directly

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220. See, e.g., *Abdulhaseeb*, 600 F.3d at 1323 ("Foods that have a verifiable religious significance may be donated by an outside religious organization . . . ."). One way for a plaintiff to overcome a prison's compelling interest in reducing costs is to find an outside contributor willing to pay for or provide the food. Unless there are additional security concerns, allowing outside volunteers to provide the food would be the least restrictive means of controlling costs.

221. See *Cutter*, 544 U.S. at 722–23; supra section II.

222. See *Cutter*, 544 U.S. at 721; see also supra note 181.

223. See supra section II.B.2.

224. See supra section III.A.2.

225. This is another aspect of the RLUIPA test that is beyond the scope of this Note. Suffice to say a RLUIPA claim will not move forward at all if a court finds that a plaintiff does not sincerely believe in the religious exercise.

226. See supra section III.A.2.

prohibits or restricts an adherent's religious exercise. Conditional, or indirect pressure, is pressure arising from a prison's omission of a religious accommodation, and requires a more thoughtful analysis than direct pressure. One way to evaluate conditional pressure could be by measuring the frequency and the completeness of the pressure.[227] Based on a nondispositive combination of frequency and completeness, a court should determine the substantiality of the pressure before proceeding to the compelling interest and least restrictive means prongs, at which point the government would have a chance to defend its policies.

This penal-specific definition would help courts avoid a number of difficult issues. First, the pressure-focused analysis recharacterizes the plaintiff's injury as impermissible government pressure, rather than a conduct-driven, action injury. Second, courts no longer have to balance a burden test with outside economic contexts, like employment and land use. Third, this penal definition creates a clear demarcation between coercive government actions that are obvious restrictions and government actions or omissions that are related to an inmate's dependence on the government for religious accommodation. Finally, in addition to resolving a widening circuit split, this definition provides greater recognition of the religious burdens endured by inmates without severely increasing costs to local or state governments.

CONCLUSION

Holt exacerbated a decade-old split over the definition of "substantial burden" under RLUIPA. The language "to engage in conduct that seriously violates their beliefs" further upended sixty years of religious exercise jurisprudence as circuits scrambled to reconcile the new standard with existing precedent. This Note has attempted to show how early interpretative methods used by different circuits, whether plain-meaning or jurisprudential, informed the contrasting conduct- and pressure-focused analytical approaches that have emerged after *Holt*. The Supreme Court must resolve this analytical split first and foremost, but as this Note has shown, it should also reconcile the inherent differences between RLUIPA's penal and economic contexts on the substantial burden prong. At bottom, these differences come down to the fact that institutionalized persons are dependent on the government for religious accommodation in a way that free persons are not. As a remedy, this Note has suggested a penal-specific definition of substantial burden that applies a pressure-focused style of analysis, similar to the Supreme Court's *Sherbert–Thomas* framework. The proposed definition would both create a robust avenue for attaining necessary religious accommodations from the government

227. See supra section III.A.2.

and ensure that "[p]rison walls do not form a barrier separating prison inmates from the protections of" RLUIPA.[228]

228. Turner v. Safley, 482 U.S. 78, 84 (1987).