

COMMENTS

TUG OF WAR: THE SUPREME COURT, CONGRESS, AND THE CIRCUITS: THE FIFTH CIRCUIT'S INPUT ON THE STRUGGLE TO DEFINE A PRISONER'S RIGHT TO RELIGIOUS FREEDOM IN *ADKINS V. KASPAR*

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INTRODUCTION

Religious freedom is arguably the most important fundamental right guaranteed to the American people by the framers of the United States Constitution.¹ Freedom from and freedom of religion were so important to our founding fathers that they warranted inclusion in the first two clauses of the Bill of Rights.² When national legislation implicates these basic rights, it is of the utmost importance to determine the precise

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¹ See U.S. CONST. amend. I, cls. 1–2. “We are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). “There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). See *Everson v. Board of Education*, 330 U.S. 1 (1947), for Justice Black’s account of the history that formed the framers’ intent to, “[i]n the words of Jefferson, . . . erect ‘a wall of separation between church and State.’” *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

² “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I, cl. 1. Justice Jackson explained that:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to . . . freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

scope of the law's impact.³ These basic rights are clearly guaranteed, not only to every member of our free society, but to incarcerated criminals as well.⁴ Although incarcerated criminals experience some limitation of rights, they are still United States citizens and are thus protected by the Constitution.⁵ Congress has recognized this irrefutable fact and has sought to ensure protection of prisoners' religious rights in the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").⁶ The RLUIPA declares that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution."⁷ Because Congress opted not to define what government conduct would qualify as a "substantial burden," this attempt to protect prisoners' religious rights was left largely to judicial interpretation.⁸ Circuit courts across the

³ This is evidenced by the heightened standard of review used by the Supreme Court to assess the constitutionality of a statute affecting a fundamental right. "[Fundamental rights] require particularly careful scrutiny of the [government] needs asserted to justify their abridgment." *Washington v. Glucksberg*, 521 U.S. 702, 790 (1997) (Breyer, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1960) (Harlan, J., dissenting)). Moreover, when legislation specifically affects a constitutionally enumerated right, "[t]here may be [a] narrower scope for operation of the presumption of constitutionality . . ." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). "[T]he review of statutes directed at particular religious . . . minorities" has required the Court to employ a "more searching judicial inquiry." *Id.* at 153 n.4.

⁴ See *Turner v. Safley*, 482 U.S. 78, 84 (1987). "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution Because prisoners retain these rights, 'when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.'" *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974)).

⁵ "[C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); see also Lindy K. Lucero & Jeffery P. Bernhardt, *Thirty-First Annual Review of Criminal Procedure: VI. Prisoners' Rights*, 90 GEO. L.J. 2005, 2010-16 (2002) (outlining the impact incarceration has on prisoners' First Amendment rights).

⁶ 42 U.S.C. §§ 2000cc-2000cc-5 (2000); see also 146 CONG. REC. S7775 (2000) [hereinafter *Legislative Hearings*] (joint statement of Sen. Hatch and Sen. Kennedy). "Congress has long acted to protect the civil rights of institutionalized persons Institutional residents' right to practice their faith is at the mercy of those running the institution [P]rison officials sometimes impose frivolous or arbitrary rules . . . [and] some institutions restrict religious liberty in egregious and unnecessary ways." *Id.*

⁷ 42 U.S.C. § 2000cc-1 (2000).

⁸ 42 U.S.C. § 2000cc-5 (2000) (excluding "substantial burden" from the list of terms defined by the statute); see also *Adkins v. Kaspar*, 393 F.3d 559, 568 (5th Cir. 2004), cert. denied, 125 S. Ct. 2549 (2005) ("The RLUIPA does not contain a definition of 'substantial burden' . . .").

country have disagreed as to what constitutes a “substantial burden” within the meaning of the RLUIPA, but the United States Supreme Court has declined to address the issue.⁹ Recently, in *Adkins v. Kaspar*,¹⁰ the Court of Appeals for the Fifth Circuit added its interpretation of “substantial burden” under the RLUIPA to the already unworkable list of definitions employed by courts across the country.¹¹ In affirming the district court’s dismissal of the plaintiff’s RLUIPA claim, the Fifth Circuit held that “a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.”¹² Because of the importance of the fundamental right to religion, it is imperative that the Supreme Court settle this dispute among the circuits and declare a uniform standard for the lower courts to follow.¹³ The plaintiff’s petition for certiorari in *Adkins* gave the Court the ability to speak on the issue and provide the circuits with much needed guidance.¹⁴ In denying certiorari, the Court not only condemned one man’s quest for religious freedom, but also left all prisoners’ religious rights in a precarious position.¹⁵

⁹ See *Adkins*, 393 F.3d at 568 (“[T]he courts that have assayed [the RLUIPA] are not in agreement.”). See generally *Cutter v. Wilkinson*, 544 U.S. 709, 719–26 (2005) (addressing the constitutionality of the RLUIPA without establishing what constitutes a “substantial burden” within the meaning of the Act).

¹⁰ 393 F.3d 559 (5th Cir. 2004), cert. denied, 125 S. Ct. 2549 (2005).

¹¹ *Farrow v. Stanley*, No. 02-567-PB, 2005 U.S. Dist. LEXIS 24374, at *11–13 (D.N.H. Oct. 20, 2005) (recognizing the disagreement among circuit courts and listing some of the conflicting definitions for “substantial burden”); see also *infra* Part II (surveying the various definitions of “substantial burden” adopted by the circuit courts).

¹² *Adkins*, 393 F.3d at 570; see *infra* Part II.E (elaborating in more detail on the Fifth Circuit’s rationale and holding in the *Adkins* case).

¹³ “A principal purpose for which [the Supreme Court uses its] certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals . . . concerning the meaning of provisions of federal law.” *Braxton v. United States*, 500 U.S. 344, 347 (1991) (citing SUP CT. R. 10); *Petition for Writ of Certiorari at 10, Adkins v. Kaspar*, 125 S. Ct. 2549 (2005) (No. 04-1347).

¹⁴ Because such an important right is at stake and because the RLUIPA has been applied not only in two different ways—as might be the case in the ordinary circuit split—but in several conflicting ways, there is an exceptional need for Supreme Court clarification.

¹⁵ *Adkins v. Kaspar*, 125 S. Ct. 2549 (2005). This unresolved circuit dispute risks violation of all American prisoners’ rights. The inconsistent application of the RLUIPA creates confusion among prison officials as to exactly what conduct amounts to an unconstitutional violation of prisoners’ religious rights. Likewise,

The plaintiff in *Adkins* was a prisoner of the State of Texas, incarcerated at the Coffield Prison, and a practicing member of the Yahweh Evangelical Assembly ("YEA").¹⁶ Plaintiff's YEA religion required that he observe certain days of rest and worship, including each Saturday, for the Sabbath, as well as other specified holy days.¹⁷ According to the YEA faith, the plaintiff and his fellow adherents were required to assemble and worship together, in congregation, on each of those particular days.¹⁸ Nevertheless, as an inmate at Coffield, the plaintiff was prevented from adhering to these religious precepts due to the requirements of the Texas Department of Criminal Justice's ("TDCJ") religious accommodation policy.¹⁹ Under the TDCJ policy, religious assembly and congregation were not permitted unless an accredited outside world religious volunteer was present.²⁰ Because a qualified YEA volunteer only visited Coffield once a month, the plaintiff was denied the ability to adhere to his religious requirements at least three times per month.²¹ It is important to point out, however, that Muslims at Coffield were apparently exempt from the TDCJ policy; Muslims were regularly permitted to assemble in congregation without an accredited outside world religious volunteer being present.²²

Plaintiff brought suit in federal court claiming, among other things, that his rights were violated under the RLUIPA.²³ The

prisoners cannot be sure if they have truly been deprived of these basic rights. Although some may not regret such violation because prisoners have transgressed against society, "the federal courts *must* take cognizance of the valid constitutional claims of prison inmates." *Turner v. Safley*, 482 U.S. 78, 84 (1987) (emphasis added) (citing *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)).

¹⁶ *Adkins*, 393 F.3d at 562.

¹⁷ *See id.*

¹⁸ *See id.* The requirements of the faith were established by the testimony of a YEA elder at an evidentiary hearing before a magistrate judge. *See id.*

¹⁹ *See id.* at 562–63. The TDCJ, the state agency controlling Coffield Prison, was included as one of the named defendants in *Adkins*, among several others. *See id.* at 562.

²⁰ *See id.* at 566.

²¹ During those months that included YEA holy days, the plaintiff was denied the ability to follow his religious requirements more than three times. For a listing of the annual holy days, as well as other fundamental requirements of the YEA faith, see *Fundamentals of Faith of Yahweh's Evangelical Assembly*, http://members.cox.net/thomasahobbs/yea_8.htm (last visited Sept. 18, 2006).

²² *See Adkins*, 393 F.3d at 566 (noting that Muslims were exempt from the policy due to a separate court order).

²³ 42 U.S.C. §§ 2000cc–2000cc-5 (2000). In the district court, plaintiff also alleged violation of his First and Fourteenth Amendment rights, but likewise failed

matter was referred to a magistrate judge who recommended dismissal after conducting an evidentiary hearing.²⁴ The district court adopted the magistrate judge's recommendation and dismissed the plaintiff's case.²⁵ The Court of Appeals for the Fifth Circuit affirmed the district court's dismissal,²⁶ and the Supreme Court subsequently denied the plaintiff's petition for a writ of certiorari.²⁷

On appeal, plaintiff renewed his RLUIPA claim contending that his rights under the Act were violated.²⁸ Plaintiff argued that the defendants imposed a substantial burden on his religious exercise without demonstrating that the burden was the least restrictive means of furthering a compelling state interest.²⁹ In rejecting his RLUIPA claim, the Fifth Circuit began its analysis by explaining that the plaintiff must first demonstrate that the government imposed a "substantial burden" on his "religious exercise."³⁰ To determine whether the plaintiff met this requirement, the court explained that it would make two inquiries:³¹ (1) whether the burdened activity qualifies as "religious exercise"; and (2) whether this burden is "substantial."³² Pointing out that the RLUIPA defines "religious exercise" as "any exercise of religion," the court found that "[t]he activities alleged to be burdened in this case—YEA Sabbath and holy day gatherings—easily qualify as 'religious exercise' under the RLUIPA[]"³³

Moving to its second inquiry, the court noted that defining "[w]hat constitutes a 'substantial burden' under the RLUIPA is a question of first impression in [the Fifth Circuit]."³⁴ Furthermore, the court pointed out that the RLUIPA left this

on those claims. *Adkins*, 393 F.3d at 562.

²⁴ *Adkins*, 393 F.3d at 562.

²⁵ *Id.*

²⁶ *Id.* at 572.

²⁷ *Adkins v. Kasper*, 125 S. Ct. 2549 (2005).

²⁸ *Adkins*, 393 F.3d at 562. On appeal to the Fifth Circuit, plaintiff also argued that his First Amendment right to free exercise was violated, that his right to equal protection was violated, and that the magistrate judge committed an abuse of discretion in denying witness subpoena requests. *Id.*

²⁹ *Id.*

³⁰ *Id.* at 567.

³¹ *Id.* It seems that other circuit courts have approached the application of the RLUIPA in much the same way. *See infra* text accompanying notes 85–103.

³² *Adkins*, 393 F.3d at 567.

³³ *Id.* at 567–68.

³⁴ *Id.* at 568.

term undefined and that other circuits that have interpreted the language are in disagreement.³⁵ After surveying the plain meaning of the text, the other circuits' definitions, and Supreme Court jurisprudence in other contexts, the court enunciated a new standard for application of the RLUIPA in the Fifth Circuit.³⁶ The court held that "a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."³⁷ According to the Fifth Circuit, however, there was an exception: "[A] government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed."³⁸

The court applied its new RLUIPA standard to the plaintiff's case but gave only a brief rationale to support its conclusion.³⁹ The court held that "[t]he requirement of an outside volunteer—which is a uniform requirement for all religious assemblies at Coffield with the exception of Muslims—does not place a substantial burden on Adkins's religious exercise."⁴⁰ The court found that the burden resulted from "a dearth of qualified outside volunteers available to go to Coffield . . . not from some rule or regulation that directly prohibits such gatherings."⁴¹ Although it is not altogether clear from the opinion, it seems that the plaintiff's case fell under the Fifth Circuit's exception—that is, under the RLUIPA, a substantial burden does not exist if the burden on the adherent's religious exercise is the result of a rule that is generally applicable to all prisoners.⁴² Therefore,

³⁵ *Id.* Moreover, the Supreme Court has neither addressed this dispute among the circuits nor established a definition of "substantial burden" in the context of the RLUIPA. *See Farrow v. Stanley*, No. 02-567-PB, 2005 U.S. Dist. LEXIS 24374, at *11 (D.N.H. Oct. 20, 2005).

³⁶ *See Adkins*, 393 F.3d at 569–70.

³⁷ *Id.* at 570.

³⁸ *Id.*

³⁹ *See id.* at 571. The court's application of the RLUIPA to the plaintiff's case occupied less than one page; indeed, the court allocated a very small proportion of its opinion to the application. *See id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.* at 570 ("[A] government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from

according to the Fifth Circuit, because religious assembly at Coffield was a benefit that was not generally allowed unless a qualified outside volunteer was present, the burden resulting from the TDCJ religious accommodation policy did not rise to the level of a substantial burden under the RLUIPA.⁴³ Because the Fifth Circuit found that the plaintiff was unable to demonstrate a substantial burden under the RLUIPA, it affirmed the district court's dismissal without proceeding through the final statutory step⁴⁴—determining whether imposition of the substantial burden was in furtherance of a compelling governmental interest through the least restrictive means.⁴⁵

This Comment sets forth that the Fifth Circuit, along with several other courts of appeals across the country, erred in interpreting the RLUIPA. Part I gives a brief history of the events leading to the enactment of the RLUIPA and outlines the relevant terms of the statute. Part II charts the circuit dispute that has developed under the RLUIPA. Part III identifies the flaws in the various circuit court approaches and endeavors to create a standard for “substantial burden” under the RLUIPA that remains consistent with congressional intent. Part IV applies what this Comment identifies as the correct standard under the RLUIPA and argues that the Fifth Circuit should have reversed the lower court in *Adkins*. Finally, this Comment concludes by arguing that a Supreme Court standard is necessary to put an end to the circuit dispute and to vindicate prisoners' rights.

I. THE HISTORY OF THE RLUIPA

In order to gain a better understanding of the RLUIPA and its proper application to the *Adkins* case, it will be helpful to briefly outline the events leading to enactment. According to one court, the “RLUIPA represents the latest act in an ongoing tug of

either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.”).

⁴³ The court never explicitly stated that the plaintiff's case fell under the exception; however, it is reasonable to conclude that the court thought the exception applied because of the emphasis it placed on the fact that the presence of an outside volunteer was a “uniform requirement” that did not create a substantial burden under the Act. *See id.* at 571.

⁴⁴ *See id.*

⁴⁵ *See* 42 U.S.C § 2000cc-1(a)(2) (2000).

war between Congress and the Supreme Court.”⁴⁶ This battle between the two branches of government began in 1990 when the Supreme Court decided *Employment Division v. Smith*.⁴⁷ The *Smith* Court held that the Free Exercise Clause of the First Amendment does not protect against government-imposed substantial burdens on religion that result from rules of general applicability.⁴⁸ Before the *Smith* decision, the Court regularly applied the test it developed in *Sherbert v. Verner*⁴⁹ to all government-imposed substantial burdens, whether or not they resulted from a rule of general applicability. Under the *Sherbert* test, any government action that substantially burdened religious exercise could only be justified by a compelling governmental interest.⁵⁰ The *Smith* Court, however, changed this inquiry and held that the *Sherbert* test should no longer be used when a burden on religious exercise is the result of a generally applicable rule.⁵¹ Essentially, the *Smith* Court lowered the standard of scrutiny for the review of government intrusions on religious exercise if they are derived from rules that are equally applicable to all individuals.⁵²

In direct response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (“RFRA”).⁵³ The Act explicitly sought to supersede *Smith*; on its face, the Act stated:

[G]overnments should not substantially burden religious exercise without compelling justification; in [*Smith*] the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion The purposes of this Act are to restore the compelling interest test as set forth in

⁴⁶ *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1088 (C.D. Cal. 2003); *see also* *St. John's United Church of Christ v. City of Chicago*, 2005 U.S. Dist. LEXIS 28072, at *28 (N.D. Ill. Nov. 11, 2005).

⁴⁷ 494 U.S. 872 (1990).

⁴⁸ *See id.* at 878–79. “[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

⁴⁹ 374 U.S. 398 (1963).

⁵⁰ *See Sherbert*, 374 U.S. at 403.

⁵¹ *See Smith*, 494 U.S. at 884–85. “Although . . . we have sometimes used the *Sherbert* test to analyze free exercise challenges . . . [w]e conclude today that the sounder approach . . . is to hold the test inapplicable to such challenges.” *Id.*

⁵² *See id.* at 888–90.

⁵³ 42 U.S.C. §§ 2000bb–2000bb-4 (2000).

[*Sherbert*] . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened . . .⁵⁴

The RFRA, therefore, codified the *Sherbert* test, also known as the compelling interest test.⁵⁵ It applied to all government-imposed substantial burdens on the exercise of religion “even if the burden result[ed] from a rule of general applicability”⁵⁶ The government could overcome the RFRA requirements only if it could demonstrate that the resulting burden was “(1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest.”⁵⁷ While the RFRA effectively overruled *Smith*, the Act would only survive until its constitutionality was tested in the Supreme Court.

By 1997, a case questioning the validity of the RFRA made its way to the Court.⁵⁸ In *City of Boerne v. Flores*,⁵⁹ the Supreme Court explained that by enacting the RFRA, Congress exceeded its remedial powers under the Fourteenth Amendment.⁶⁰ Thus, the Court held that the RFRA was unconstitutional as applied to the States.⁶¹ At the conclusion of its opinion, the Court sought to send a message to Congress in response to this “tug of war” that was developing.⁶² The Court wrote “[w]hen the political branches of the Government act against the background of a judicial

⁵⁴ *Id.* §§ 2000bb(a)(3)–(a)(4), (b)–(b)(1).

⁵⁵ *See id.* § 2000bb(b)(1).

⁵⁶ *Id.* § 2000bb-1(a).

⁵⁷ *Id.* § 2000bb-1(b)–(b)(2).

⁵⁸ The case arose after the defendant municipality denied a building permit application for the erection of a church. Plaintiff Archbishop brought suit claiming, *inter alia*, violation of the RFRA. *See City of Boerne v. Flores*, 521 U.S. 507, 511 (1997). The municipality’s defense included the argument that the RFRA was unconstitutional. *Id.* at 512.

⁵⁹ 521 U.S. 507 (1997).

⁶⁰ *See id.* at 519. Under the Fourteenth Amendment, Congress has the power to enforce the First Amendment Free Exercise Clause on the States, but only through remedial or preventative measures. *See id.* The Court found that the RFRA, however, was not remedial in nature, but was a legislative attempt to alter the substance of the Free Exercise Clause, which it had no power to do. *See id.*

⁶¹ *See id.* at 536 (“[T]he provisions of the [RFRA] here invoked are beyond congressional authority . . .”). *But see* *Cutter v. Wilkinson*, 544 U.S. 709, 715 n.2 (2005) (collecting cases) (explaining that the Supreme Court has never ruled on the RFRA’s constitutionality as applied to the federal government, although some courts of appeals have held it to be constitutional in that context).

⁶² *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1088–89 (C.D. Cal. 2003) (referring to Congressional efforts to supersede the Supreme Court and vice versa as a “tug of war”).

interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them . . .”⁶³ By this point, it appears that the “tug of war” between Congress and the Court was fully underway but not over by any means.

Once again, Congress responded to the Supreme Court ruling. In the three years following the Court’s decision in *City of Boerne*, Congress held hearings to evaluate how it could reinstate the protection of religious liberty it hoped to achieve under the RFRA with new legislation that would pass constitutional muster with the Court.⁶⁴ The culmination of these hearings eventually ended in 2000 with the enactment of the RLUIPA.⁶⁵ The RLUIPA reinstated the same standard for protecting religious liberty previously provided by the RFRA, but significantly narrowed the scope of application; the RLUIPA applies only to institutionalized persons⁶⁶ and land use regulations.⁶⁷ For the purposes of this Comment, the focus will be on the protection the RLUIPA supplies to institutionalized persons.

For the most part, within its scope of application, the RLUIPA mirrors its RFRA predecessor.⁶⁸ The RLUIPA applies to all government imposed substantial burdens on an *institutionalized person’s* religious exercise “even if the burden results from a rule of general applicability . . .”⁶⁹ Consistent with the RFRA, the RLUIPA also included a provision outlining the *Sherbert* test; the government may overcome the Act’s requirements only if it can demonstrate that the burden resulting “(1) is in furtherance of a compelling governmental

⁶³ *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

⁶⁴ See, e.g., *Legislative Hearings*, *supra* note 6, at S7774. “The bill [targeting burdens on religious liberty,] is based on three years of hearings . . . that addressed in great detail both the need for legislation and the scope of Congressional power to enact such legislation.” *Id.*

⁶⁵ 42 U.S.C. §§ 2000cc–2000cc-5 (2000).

⁶⁶ 42 U.S.C. § 2000cc-1 (2000) (providing for “[p]rotection of religious exercise of institutionalized persons”).

⁶⁷ 42 U.S.C. § 2000cc (2000) (providing for “[p]rotection of land use as religious exercise”).

⁶⁸ *Legislative Hearings*, *supra* note 6, at S7774. “Within this scope of application, the bill applies the standard of the [RFRA], 42 U.S.C. § 2000bb-1 (1994) . . .” *Id.*

⁶⁹ 42 U.S.C. § 2000cc-1(a) (2000).

interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”⁷⁰

Therefore, at least with regard to institutionalized persons, the RLUIPA simply reinstated the protection afforded by the RFRA. Further investigation into the RLUIPA, however, reveals that it also made two significant advances. First, no doubt to avoid the fate suffered by the RFRA in *City of Boerne*,⁷¹ Congress clearly stated that it invoked its powers under the Spending Clause⁷² and Commerce Clause⁷³ to enact the RLUIPA. Second, Congress defined the term “religious exercise” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”⁷⁴ This definitional change was crucial because under the RFRA, “exercise of religion” was originally defined by importing the meaning of the term as used under the First Amendment.⁷⁵ Supreme Court First Amendment Free Exercise jurisprudence holds that the burdened activity must be a “central tenet” of the adherent’s religion,⁷⁶ while under the RLUIPA definition, as noted, the burdened activity must only be considered “any exercise of religion.”⁷⁷ Consequently, although the RLUIPA’s scope of application is narrower, the new statute protects a much broader range of religious activity than did the RFRA.

The years immediately following the enactment of the RLUIPA were plagued with doubt as to the Act’s constitutionality.⁷⁸ These doubts were echoed in debate among

⁷⁰ *Id.* Compare 42 U.S.C § 2000cc-1(a)(1)–(2) (2000), with 42 U.S.C § 2000bb-1(b)(1)–(2) (2005).

⁷¹ See *City of Boerne v. Flores*, 521 U.S. 507, 532–36 (1997) (finding the RFRA unconstitutional because congress exceeded its enforcement powers).

⁷² See 42 U.S.C § 2000cc-1(b)(1) (2000) (“This section applies in any case in which—(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance . . .”).

⁷³ See 42 U.S.C § 2000cc-1(b)(2) (2000) (“This section applies in any case in which—(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.”).

⁷⁴ 42 U.S.C § 2000cc-5(7)(A) (2000).

⁷⁵ See 42 U.S.C § 2000bb-2(4) (1993) (amended 2000) (“The term ‘exercise of religion’ means the exercise of religion under the First Amendment to the Constitution.”).

⁷⁶ See, e.g., *Hernandez v. Comm’r.*, 490 U.S. 680, 699 (1989) (explaining that “[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a *central* religious belief or practice”) (emphasis added).

⁷⁷ 42 U.S.C § 2000cc-5(7)(A) (2000).

⁷⁸ See *Adkins v. Kaspar*, 393 F.3d 559, 570 n.52 (2004), *cert. denied*, 125 S. Ct.

commentators and courts.⁷⁹ It was not until 2005 when the Supreme Court decided *Cutter v. Wilkinson*⁸⁰ that it addressed the question of the RLUIPA's constitutionality. The *Cutter* Court held that the RLUIPA "qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause."⁸¹ The Court explained that there is in fact "some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause."⁸² Although the Court found that the RLUIPA did not violate the Constitution on those grounds, it did not undertake to answer whether Congress exceeded its powers under the Commerce Clause or the Spending Clause,⁸³ as those questions apparently were not properly before the Court.⁸⁴ Thus, presently it appears that the RLUIPA remains in full force and effect. The *Cutter* Court, however, did not explain what constitutes a "substantial burden" under the RLUIPA. Neither the RFRA nor the RLUIPA defined the term and circuit court interpretations vary. For that reason, the next section will explore the disagreement that has emerged among the circuits over what constitutes a "substantial burden" within the meaning of the RLUIPA.

II. THE RLUIPA SUBSTANTIAL BURDEN AND THE CIRCUIT SPLIT

Outlining the approaches different circuits have taken in assessing what constitutes a "substantial burden" under the RLUIPA will help to highlight the Fifth Circuit's error in *Adkins*. Furthermore, surveying the leading case from each circuit that

2549 (2005) (collecting cases) (recognizing that, after the RLUIPA was enacted, a circuit split developed as to the Act's constitutionality).

⁷⁹ *Id.*; see also, e.g., Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 572-607 (2005) (surveying the debate among scholars and the judiciary over the RLUIPA's constitutionality); Lawrence G. Sager, *Panel One Commentary*, 57 N.Y.U. ANN. SURV. AM. L. 9, 9-16 (2000) (outlining some of the constitutional predicable questions that might arise under the RLUIPA).

⁸⁰ 544 U.S. 709 (2005).

⁸¹ *Id.* at 720.

⁸² *Id.* at 719.

⁸³ See *id.* at 719 n.7.

⁸⁴ See *id.* ("[T]hese defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.").

2006]

ADKINS V. KASPAR

1347

reviewed the issue will aid in determining the correct application of the RLUIPA for future cases.

A. *The Eighth Circuit*

The Eighth Circuit uses the same definition of “substantial burden” under the RLUIPA as it did under the RFRA. In *Murphy v. Missouri Department of Corrections*,⁸⁵ the court explained that “the language of the [RLUIPA] is to be applied just as it was under [the] RFRA.”⁸⁶ In the Eighth Circuit, under the RFRA and now also under the RLUIPA, a substantial burden exists if the government action “significantly inhibit[s] or constrain[s]” some conduct that is a “central tenet” of the person’s religion.⁸⁷

B. *The Seventh Circuit*

The Seventh and Eighth Circuits used the same definition of “substantial burden” under the RFRA;⁸⁸ however, after interpreting the RLUIPA in *Civil Liberties for Urban Believers v. City of Chicago*,⁸⁹ the Seventh Circuit declined to follow its previous formulation of “substantial burden” under the RFRA

⁸⁵ 372 F.3d 979 (8th Cir. 2004). The plaintiff in *Murphy*, a member of the Christian Separatist Church Society, was incarcerated at a prison facility operated by the Missouri Department of Corrections. *Id.* at 981. The plaintiff claimed, among other things, that prison officials violated his rights under the RLUIPA by denying him group worship, discussion, and study. *See id.* at 988. On summary judgment, the district court concluded that the plaintiff’s religion was not substantially burdened because group worship, discussion, and study could not be considered central tenets of his religion. *Id.* On appeal, the Eighth Circuit held that the district court’s conclusions were improper for summary judgment and remanded the case for a trial to determine the merits of the plaintiff’s allegations. *See id.*

⁸⁶ *Id.* at 987.

⁸⁷ *Id.* at 988 (quoting *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997)).

⁸⁸ *See Mack v. O’Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (holding that a substantial burden under the RFRA “is one that forces adherents of a religion to refrain from religiously motivated conduct, *inhibits or constrains conduct* or expression that manifests a *central tenet of a person’s religious beliefs*, or compels conduct or expression that is contrary to those beliefs”) (emphasis added).

⁸⁹ 342 F.3d 752 (7th Cir. 2003). The plaintiffs in *Urban Believers* were members of an association of Chicago-area churches that brought suit contending that the City of Chicago’s zoning policies violated their rights under the RLUIPA. *Id.* at 756–58. The district court denied the plaintiffs’ claim and the Seventh Circuit affirmed, finding it significant that the churches were ultimately able to locate themselves within the city limits. *See id.* at 761. Furthermore, the court explained that the considerable amount of time and money the churches were required to expend under the zoning laws did not create a substantial burden under the RLUIPA. *See id.*

and adopted a new standard under the RLUIPA.⁹⁰ The court explained that because the RLUIPA expands the definition of “religious exercise to encompass any exercise of religion,”⁹¹ the RLUIPA’s protection is broader than its RFRA predecessor, and thus the “central tenet” requirement does not apply.⁹² At the same time, however, the court recognized that the word “substantial” must still retain some meaning.⁹³ Therefore, the Seventh Circuit held that under the RLUIPA, a “substantial burden” exists when government actions render “religious exercise . . . effectively impracticable.”⁹⁴

C. *The Ninth Circuit*

In *San Jose Christian College v. City of Morgan Hill*,⁹⁵ the Ninth Circuit explained that its interpretation of “substantial burden” under the RLUIPA was “entirely consistent” with the Seventh Circuit’s “effectively impracticable” standard.⁹⁶ Although the Ninth Circuit analogized its standard to the Seventh Circuit standard, it set out its own version in slightly different terms. As the Seventh Circuit did, the Ninth Circuit first found that “religious exercise” under the RLUIPA was rather easily satisfied due to the Act’s broad statutory definition.⁹⁷ In contrast to the Seventh Circuit’s approach, however, the Ninth Circuit went on to explain that because the RLUIPA did not define “substantial burden,” it would consult the

⁹⁰ *See id.* at 761.

⁹¹ *Id.* at 760 (internal quotation marks omitted).

⁹² *See id.* at 761.

⁹³ *See id.* (“Application of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise . . . would render meaningless the word ‘substantial,’ because the slightest obstacle to religious exercise . . . could then constitute a burden sufficient to trigger [the] RLUIPA[. . .].”).

⁹⁴ *Id.*

⁹⁵ 360 F.3d 1024 (9th Cir. 2004). The plaintiff in *San Jose Christian College* was a religious educational institution that brought suit under the RLUIPA against the defendant municipality for denying its rezoning application. *Id.* at 1027. The district court granted summary judgment in favor of the defendant and the Ninth Circuit subsequently affirmed. *See id.* at 1035–36. The Ninth Circuit explained that the municipality’s zoning application process did not create a substantial burden under the RLUIPA and that the plaintiff seemed to be “simply adverse to complying with the [application process] requirements.” *Id.* at 1035. The court explained further that the municipality placed no restriction on religious exercise and should the plaintiff submit a complete application, it would not likely be denied. *See id.*

⁹⁶ *See id.*

⁹⁷ *See id.* at 1034.

dictionary to help it determine the “plain meaning” of the term.⁹⁸ After combining the two sources—the statutory-supplied definition of “religious exercise” and the dictionary supplied plain meaning of “substantial burden”—the Ninth Circuit concluded that a “substantial burden” exists under the RLUIPA when the government imposes a “significantly great restriction or onus on any exercise of religion.”⁹⁹

D. *The Eleventh Circuit*

In *Midrash Sephardi, Inc. v. Town of Surfside*,¹⁰⁰ the Eleventh Circuit rejected the Seventh Circuit’s “effectively impracticable” standard, criticized it for being too harsh, and created its own more relaxed definition for “substantial burden” under the RLUIPA.¹⁰¹ Because the RLUIPA does not define the term, the Eleventh Circuit sought to “give the term its ordinary or natural meaning.”¹⁰² Instead of following the Ninth Circuit’s dictionary method, the Eleventh Circuit found guidance by looking to the Supreme Court’s Free Exercise cases that used the term “substantial burden.”¹⁰³ After combining the import of articulations from those cases, the Eleventh Circuit concluded that under the RLUIPA, “a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.”¹⁰⁴

E. *The Fifth Circuit*

Finally, in the *Adkins* case, the Fifth Circuit contributed its formulation of “substantial burden” to the growing list of

⁹⁸ *Id.*

⁹⁹ *Id.* at 1034–35 (internal quotation marks omitted).

¹⁰⁰ 366 F.3d 1214 (11th Cir. 2004). The plaintiffs in *Midrash Sephardi* were two Florida synagogues that challenged the validity of the defendant municipality’s zoning ordinances under the RLUIPA. *Id.* at 1218–19. The plaintiffs argued that the municipality’s zoning regulations that required them to relocate their synagogues, constituted a substantial burden because the regulations would “require their congregants to walk farther,” causing congregants to cease attending services and consequently impairing their synagogues’ operation. *Id.* at 1227. The Eleventh Circuit agreed that walking farther might be burdensome, but because it was only a matter of a few extra blocks, the burden was not substantial under the RLUIPA. *See id.* at 1228.

¹⁰¹ *See id.* at 1227.

¹⁰² *See id.* at 1226.

¹⁰³ *See id.* at 1226–27.

¹⁰⁴ *Id.* at 1227.

definitions. The Fifth Circuit reviewed the various definitions of substantial burden employed by other circuits under the RLUIPA, as outlined above, but declined to adopt any of them.¹⁰⁵ In creating its own definition, the Fifth Circuit explained that it took into account “the plain wording of the statute, its legislative history, the decisions of other circuits, and the Supreme Court’s pronouncements on the meaning of ‘substantial burden’ in other contexts”¹⁰⁶ The Fifth Circuit ultimately concluded that a government action rises to the level of a substantial burden on religious exercise under the RLUIPA if it “truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.”¹⁰⁷ However, the court did not stop there. The Fifth Circuit went on to create an exception to the rule: “[A] government action . . . does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.”¹⁰⁸ Significantly, it seems that the *Adkins* case fell under this exception.¹⁰⁹ What is more important, though, is that no other circuit has ever recognized an even remotely similar exception under the RLUIPA.¹¹⁰

III. THE RLUIPA SUBSTANTIAL BURDEN AND THE PROPER STANDARD

The above review of the circumstances leading to enactment of the RLUIPA as well as the examination of the various circuit court definitions for “substantial burden” under the Act provide an outline of the issues implicated by the *Adkins* case.¹¹¹ It is now necessary to identify the accurate articulation of “substantial burden” under the RLUIPA.

A. *Finding the Flaws*

The definitions of “substantial burden” under the RLUIPA

¹⁰⁵ See *Adkins v. Kaspar*, 393 F.3d 559, 568–69 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 2549 (2005).

¹⁰⁶ *Id.* at 569.

¹⁰⁷ *Id.* at 570.

¹⁰⁸ *Id.*

¹⁰⁹ See *supra* notes 40–43 and accompanying text.

¹¹⁰ See *supra* text accompanying notes 85–103.

¹¹¹ See *supra* text accompanying notes 46–77, 85–109.

used by the Eighth, Seventh, and Ninth Circuits are flawed, and the Fifth Circuit's exception completely contradicts the language of the statute. The Eighth Circuit's approach can be easily discounted by simply comparing the text of the RFRA to the text of the RLUIPA. The definitional change in "exercise of religion" from the RFRA to the RLUIPA is instructive. The RFRA originally defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution."¹¹² Under the First Amendment, the exercise of religion encompassed only those practices that were considered "central tenets" of the adherent's religion.¹¹³ Although the RLUIPA adopted a great deal from the RFRA, it did not carry over the same definition of "exercise of religion." The RLUIPA abandoned the RFRA's term "exercise of religion,"¹¹⁴ and renamed it "religious exercise."¹¹⁵ Moreover, the RLUIPA further departed from its predecessor by defining "religious exercise" as "any exercise of religion, *whether or not compelled by, or central to, a system of religious belief.*"¹¹⁶ Thus, it seems clear that in ratifying the RLUIPA, Congress unequivocally intended to remove the "central tenet" requirement that previously existed under the RFRA and the First Amendment. In addition, the other circuits all appear to agree that the RLUIPA does not require that the burdened activity be central to the adherent's religion.¹¹⁷ Therefore, the Eighth Circuit's definition of "substantial burden" is wrong and the RLUIPA cannot be applied under the same standard as was the RFRA.

Similarly, the standard used by the Seventh and Ninth Circuits can be discarded by reviewing the text of the RLUIPA. The test adopted by the Seventh Circuit and accepted by the Ninth Circuit requiring religious exercise to be rendered "effectively impracticable" decreases the protection of the RLUIPA far beyond the protection those circuits afforded religious adherents under the RFRA; the Seventh Circuit's RLUIPA definition of "effectively impracticable" is distinctly stronger than its RFRA definition of "significantly inhibit or

¹¹² See *supra* note 75 and accompanying text.

¹¹³ See *supra* note 76 and accompanying text.

¹¹⁴ 42 U.S.C. § 2000bb-2(4) (1993) (amended 2000).

¹¹⁵ 42 U.S.C. § 2000cc-5(7)(A) (2000).

¹¹⁶ *Id.* (emphasis added).

¹¹⁷ See *supra* text accompanying notes 85–103.

constrain.”¹¹⁸ This stricter “effectively impracticable” standard directly contradicts the text of the statute, which states that the RLUIPA “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this [Act] and the Constitution.”¹¹⁹ Because the “effectively impracticable” standard does not afford broad protection of religious exercise but instead actually diminishes it, the Seventh and Ninth Circuit standards must also be rejected.

The text of the RLUIPA further supports the elimination of the exception created by the Fifth Circuit.¹²⁰ The Fifth Circuit’s exception provides that a substantial burden will not exist if the government action “merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.”¹²¹ Stating the exception in another way, the government *may* impose a substantial burden if it results from a generally applicable rule.¹²² The RLUIPA, however, explicitly states that “[n]o government shall impose a substantial burden . . . even if the burden results from a rule of general applicability”¹²³ It appears that the Fifth Circuit’s exception completely contradicts the express terms of the RLUIPA and, accordingly, it too must be abandoned.

B. *Gathering the Evidence*

The preceding discussion has led to several conclusions. Briefly summarized, the RFRA and, subsequently, the RLUIPA were legislative reactions to Supreme Court decisions.¹²⁴ After those decisions, Congress explicitly sought to expand the protection of religious liberty.¹²⁵ The RFRA first removed the general applicability requirement in response to *Smith*.¹²⁶ The RLUIPA followed suit by reinstating the removal of the general

¹¹⁸ See *supra* text accompanying notes 89–98.

¹¹⁹ 42 U.S.C. § 2000cc-3(g) (2000).

¹²⁰ See *supra* text accompanying note 38.

¹²¹ See *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 2549 (2005).

¹²² See *Petition for Writ of Certiorari* at 15, *Adkins v. Kaspar*, 125 S. Ct. 2549 (2005) (No. 04-1347).

¹²³ 42 U.S.C. § 2000cc-1(a) (2000).

¹²⁴ See *supra* text accompanying notes 53, 63–65.

¹²⁵ See *supra* text accompanying notes 54, 118.

¹²⁶ See *id.*

applicability requirement but also went further by removing the central tenet requirement as it existed under the RFRA and the First Amendment.¹²⁷ Finally, portions of the different approaches taken by the Eighth, Seventh, Ninth, and Fifth Circuits are flawed.¹²⁸

It appears that each circuit's definition of substantial burden can be dismantled into two prongs that, when met, trigger the protections of the RLUIPA. One prong identifies the impermissible degree of burden while the other identifies the scope of religious activity that cannot be burdened. After reviewing the statutory language, the second prong is clearly satisfied by "any exercise of religion."¹²⁹ This leaves the first prong: the language used to articulate the impermissible degree of burden. Among the several first prong definitions discussed above, this Comment has discarded all but three: (1) the Eighth Circuit definition—"significantly inhibit or constrain";¹³⁰ (2) the Fifth Circuit definition—conduct that "truly pressures the adherent to significantly modify . . . and . . . violate";¹³¹ and (3) the Eleventh Circuit definition—"pressure that tends to force adherents to forgo . . ."¹³² Although a simple review of the statutory language has helped significantly narrow the conflicting definitions, the fact remains that neither the RFRA nor the RLUIPA defined the term substantial burden.¹³³ For that reason, the analysis must proceed beyond the text of the statute to find the meaning of the term.

C. *Moving Beyond the Text*

The ultimate goal in constructing a definition for "substantial burden" under the RLUIPA is to create a standard that accords with Congressional intent.¹³⁴ When a statute is

¹²⁷ See *supra* text accompanying notes 68–69, 114–15.

¹²⁸ See *supra* text accompanying notes 110–23.

¹²⁹ See *supra* note 74 and accompanying text.

¹³⁰ *Murphy v. Miss. Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) (quoting *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997)).

¹³¹ *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 2549 (2005).

¹³² *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

¹³³ See 42 U.S.C. §§ 2000bb–2000bb-4 (2000); 42 U.S.C. §§ 2000cc–2000cc-5 (2000).

¹³⁴ See *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). "In the interpretation of statutes, the function of the courts is easily stated. It is to construe

clear on its face, the plain meaning of the words should control.¹³⁵ Although the term “substantial burden” is not ambiguous, it is rather vague. In order to give the term more meaning, the Ninth Circuit looked to the dictionary, but its efforts were futile because they produced only more vague words.¹³⁶ The plain meaning, therefore, seems to be anything but clear, especially considering the varying and conflicting definitions employed by the circuit courts.¹³⁷ If the plain meaning of a term in a statute is unclear, it is permissible to consult legislative history for guidance.¹³⁸ As the Fifth Circuit pointed out, the legislative history of the RLUIPA indicates that “[s]ubstantial burden] as used in the Act should be interpreted by reference to Supreme Court jurisprudence.”¹³⁹ The term “substantial burden” has indeed been used by the Court in its Free Exercise cases.¹⁴⁰ In logical progression, the next analytical step will pursue a comparison between the Supreme Court’s Free Exercise cases and the remaining circuit court definitions that this Comment has yet to reject.

Although the Supreme Court has never created a bright-line test to determine what constitutes a “substantial burden” in every case, five cases provide useful guidance. These cases can be broken down into two groups. The first group consists of cases where the Court held that a substantial burden did exist. In *Sherbert v. Verner*,¹⁴¹ the Court held that a substantial burden

the language so as to give effect to the intent of Congress.” *Id.*

¹³⁵ See *Cent. Trust Co. v. Official Creditors’ Comm. of Geiger Enters.*, 454 U.S. 354, 359–60 (1982) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)) (“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.”).

¹³⁶ See *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034–35 (9th Cir. 2004) (holding that substantial burden results from a “‘significantly great’ restriction or onus on ‘any exercise of religion’”) (citation omitted).

¹³⁷ See *supra* text accompanying notes 85–109.

¹³⁸ The words of the Supreme Court lend support to this approach:

When [a statute’s plain] meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no “rule of law” which forbids its use, however clear the words may appear on “superficial examination.”

Am. Trucking Ass’ns, 310 U.S. at 543–44.

¹³⁹ *Adkins v. Kaspar*, 393 F.3d 559, 569 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 2549 (2005) (quoting *Legislative Hearings*, *supra* note 6, at S7776).

¹⁴⁰ See *infra* text accompanying notes 143–51.

¹⁴¹ 374 U.S. 398 (1963).

exists when an individual is required 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 . . . on the other hand.”¹⁴² In *Hobbie v. Unemployment Appeals Commission of Florida*,¹⁴³ the Court reaffirmed its finding in *Thomas v. Review Board of the Indiana Employment Security Division*,¹⁴⁴ that a substantial burden exists when the government puts “substantial pressure on an adherent to modify his behavior and to violate his beliefs.”¹⁴⁵

The second group consists of cases where the Court held that a substantial burden did not exist. In *Bowen v. Roy*,¹⁴⁶ the Court found that there was “no substantial burden where government action interfered with, but did not coerce, an individual’s religious beliefs.”¹⁴⁷ Finally, in *Lyng v. Northwest Indian Cemetery Protective Ass’n*,¹⁴⁸ the Court held that a substantial burden did not exist where the government action did not create a “tendency to coerce individuals into acting contrary to their religious beliefs.”¹⁴⁹

Comparing those cases to the definitions created by the Fifth, Eighth, and Eleventh Circuits provides no apparent basis on which to discount their standards. The Eighth Circuit definition—“significantly inhibit or constrain”;¹⁵⁰ the Fifth Circuit definition—conduct that “truly pressures the adherent to significantly modify . . . and . . . violate”;¹⁵¹ and the Eleventh Circuit definition—“pressure that tends to force . . . to forego,”¹⁵² all appear to accord with the above accounting of the Supreme Court’s “substantial burden” holdings.¹⁵³ Thus, applying any of

¹⁴² *Id.* at 404.

¹⁴³ 480 U.S. 136 (1987).

¹⁴⁴ 450 U.S. 707 (1981).

¹⁴⁵ *Hobbie*, 480 U.S. at 141 (quoting *Thomas*, 450 U.S. at 718).

¹⁴⁶ 476 U.S. 693 (1986).

¹⁴⁷ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (interpreting *Bowen*, 476 U.S. at 707–08).

¹⁴⁸ 485 U.S. 439 (1988).

¹⁴⁹ *Id.* at 450.

¹⁵⁰ *Murphy v. Mo. Dep’t of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) (quoting *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997)).

¹⁵¹ *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 2549 (2005).

¹⁵² *Midrash Sephardi*, 366 F.3d at 1227.

¹⁵³ The Fifth and Eleventh Circuits both surveyed at least some of the Supreme Court’s Free Exercise cases before creating their own definitions. *See id.* at 1226–27; *Adkins*, 393 F.3d at 569–70. In addition, the Free Exercise cases that this Comment

these definitions to the *Adkins* case should produce the same correct result that the Fifth Circuit should have reached.

D. Establishing the Right Standard

After analyzing the history and text of the RLUIPA and reviewing the circuit court approaches along with Supreme Court Free Exercise cases, the discussion must turn to articulating a definition for “substantial burden” that remains consistent with congressional intent. As previously noted, under the RLUIPA, the term “substantial burden” consists of two prongs. This Comment has narrowed the first prong to three circuit court definitions that seem to be essentially identical and also appear to be equally valid.¹⁵⁴ Under the second prong, however, this Comment has identified only one valid definition, as it is clearly prescribed by the text of the RLUIPA.¹⁵⁵ Combining the analysis of both prongs, therefore, produces three equally valid definitions. This Comment concludes that a “substantial burden” results under the RLUIPA when the government action (1) significantly inhibits or constrains any exercise of religion,¹⁵⁶ (2) truly pressures the adherent to significantly modify and violate any exercise of religion,¹⁵⁷ or (3) creates pressure that tends to force the adherent to forgo any exercise of religion.¹⁵⁸ Thus, the application of each of these definitions to the facts of the *Adkins* case should produce the same correct result.

IV. THE RLUIPA SUBSTANTIAL BURDEN AND
THE *ADKINS* CASE

Before applying the three standards to the *Adkins* case, the

reviewed also lend support to the rejection of the Seventh and Ninth Circuit standard. *See supra* text accompanying notes 117–18. The “effectively impracticable” standard employed by Seventh and Ninth Circuits erects an almost insurmountable barrier and, therefore, simply cannot be reconciled with the attainable standards that are found in the Supreme Court’s Free Exercise cases. *Compare supra* notes 89–98 and accompanying text, *with supra* notes 140–48 and accompanying text.

¹⁵⁴ *See supra* notes 149–52 and accompanying text.

¹⁵⁵ *See* 42 U.S.C. § 2000cc-5(7)(A) (2000) (“The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”).

¹⁵⁶ *Murphy v. Mo. Dep’t of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) (quoting *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997)).

¹⁵⁷ *Adkins*, 393 F.3d at 570.

¹⁵⁸ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

2006]

ADKINS V. KASPAR

1357

RLUIPA can be broken down into three manageable elements. The RLUIPA provides:

[1] No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . [2] even if the burden results from a rule of general applicability, [3] unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling state interest; and (2) is the least restrictive means of furthering that compelling governmental interest.¹⁵⁹

The discussion thus far has focused on the first two elements of the RLUIPA. This is because, although not completely clear from its opinion, the *Adkins* court found that the plaintiff's RLUIPA claim failed on some combination of those two elements and, therefore, never reached the third element.¹⁶⁰ The culmination of the preceding discussion, however, reveals that the Fifth Circuit erred in not finding the first two elements satisfied. This Comment, therefore, will analyze the third element—as the *Adkins* court should have—to determine whether there was in fact a violation of the plaintiff's rights under the RLUIPA.

The plaintiff in *Adkins* contended that his “inability to assemble on every Sabbath and every YEA holy day ‘substantially burden[ed]’ the practice of his religion”¹⁶¹ This burden, he claimed, resulted from the TDCJ religious accommodation policy, which generally applied to all inmates incarcerated by the State of Texas.¹⁶² Keeping the previous discussion in mind, the inquiry under the RLUIPA's first element will turn on the answer to three questions. Does the prison policy (1) significantly inhibit or constrain any exercise of religion; (2) truly pressure the adherent to significantly modify and violate any exercise of religion; and (3) create pressure that tends to force the adherent to forgo any exercise of religion?¹⁶³ All three questions must be answered in the affirmative. Assembling on the Sabbath and on holy days easily qualifies as an exercise of religion.¹⁶⁴ Moreover, it cannot be said that this

¹⁵⁹ 42 U.S.C. § 2000cc-1(a) (2000).

¹⁶⁰ See *supra* text accompanying notes 41–45.

¹⁶¹ *Adkins*, 393 F.3d at 566.

¹⁶² See *id.* at 566.

¹⁶³ See *supra* text accompanying notes 155–57.

¹⁶⁴ Even the Fifth Circuit, before rejecting the plaintiff's RLUIPA claim, acknowledged that the YEA required gatherings for Sabbaths and holy days easily

religious exercise is not inhibited, modified, violated, or foregone; indeed, preventing assembly on even one day should suffice to meet each standard. Finally, congregation on the Sabbath and on holy days is a requirement of the plaintiff's faith and, therefore, preventing assembly on any of these days must be significant to the adherent.¹⁶⁵ Affirmatively answering each of the three questions proves that the first element of the RLUIPA was satisfied in the *Adkins* case and that a substantial burden on the plaintiff's exercise of religion did exist.

The second element of the RLUIPA represents the point where the Fifth Circuit committed its greatest error.¹⁶⁶ The *Adkins* court explained that "a government action . . . does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed."¹⁶⁷ As pointed out above, this exception completely contradicts the text of the RLUIPA, and specifically the second element.¹⁶⁸ The preceding analysis already established that under the first element, the prison policy imposed a substantial burden on the plaintiff's religious exercise.¹⁶⁹ Furthermore, the second element is also met because, as explicitly stated, the RLUIPA is violated "even if the burden results from a rule of general applicability."¹⁷⁰ This assessment thus supports two conclusions: First, although the TDCJ religious accommodation policy is a rule of general applicability, the RLUIPA remains violated; and second, the Fifth Circuit's exception was unquestionably wrong.

Although, as noted, the *Adkins* court's errors allowed it to reject the plaintiff's RLUIPA claim on the bases of the first two elements,¹⁷¹ this Comment now proceeds to the third element, as

qualify as religious exercise under the Act. *See Adkins*, 393 F.3d at 567–68.

¹⁶⁵ *Id.* at 562 ("[T]he YEA requires its adherents to meet together on every Sabbath and to congregate and make particular observations on specific holy days.") (emphasis added); *see also* Fundamentals of Faith of Yahweh's Evangelical Assembly, http://members.cox.net/thomasahobbs/yea_8.htm (last visited Sept. 15, 2006) (listing the fundamental requirements of the YEA faith).

¹⁶⁶ *See supra* text accompanying note 158.

¹⁶⁷ *Adkins*, 393 F.3d at 570.

¹⁶⁸ *See supra* text accompanying notes 119–23.

¹⁶⁹ *See supra* text accompanying notes 160–65.

¹⁷⁰ 42 U.S.C. § 2000cc-1(a) (2000); *see also supra* text accompanying note 158.

¹⁷¹ *See supra* text accompanying note 159.

an error free *Adkins* court would have.¹⁷² Under the RLUIPA, the plaintiff bears the initial burden of demonstrating that the government action imposed a substantial burden on his religious exercise.¹⁷³ Once the plaintiff has made a sufficient showing, the burden shifts to the government to satisfy the third element: The substantial burden on religious exercise may only be justified if imposed on the adherent in furtherance of a compelling governmental interest through the least restrictive means.¹⁷⁴

That leaves two final inquiries before determining whether the *Adkins* court's errors amounted to a violation of the plaintiff's rights under the RLUIPA: Could the government have demonstrated that imposition of the religious accommodation policy was in furtherance of a compelling state interest and, if so, did it further that interest through the least restrictive means?¹⁷⁵ The government's strongest argument would likely be that the TDCJ policy sought to promote safety and security in its prisons. Under normal circumstances this might be a sufficiently compelling interest to sustain the policy; however, Muslims in the same facility were exempt from following the same rule.¹⁷⁶ Could it be the case that prison officials compromised safety and security in order to allow Muslims unaccompanied congregation? Certainly not. Prison officials must have found some other way to maintain safety and security while still allowing Muslims unaccompanied congregation. For that reason, the exemption for Muslims proves that the government could not have satisfied the second inquiry. If Muslims were permitted to congregate without following the TDCJ policy, it necessarily follows that less restrictive means were available to achieve the government's interest in maintaining safety and security in its prisons.¹⁷⁷ Thus, although the government might have a compelling interest in maintaining safety and security, preventing unaccompanied religious congregation could not be the least restrictive means of furthering that interest. As a result, the government would not

¹⁷² 42 U.S.C. § 2000cc-1(a); *see also supra* text accompanying note 158.

¹⁷³ *See Adkins v. Kaspar*, 393 F.3d 559, 567 n.32 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 2549 (2005).

¹⁷⁴ *Id.*; *see also* 42 U.S.C. § 2000cc-1(a); *supra* text accompanying note 158.

¹⁷⁵ *See* 42 U.S.C. § 2000cc-1(a)(1)–(2); *Adkins*, 393 F.3d at 567 n.32; *supra* text accompanying note 158.

¹⁷⁶ *See Adkins*, 393 F.3d at 566.

¹⁷⁷ *See* 42 U.S.C. § 2000cc-1(a)(1)–(2).

have been able to meet its burden under the third element of the RLUIPA.¹⁷⁸ The correct and ultimate conclusion, therefore, is that the Fifth Circuit erred in *Adkins*; the Fifth Circuit should have reversed the lower court because the plaintiff's rights were violated under the RLUIPA.

CONCLUSION

After walking through the *Adkins* opinion, this Comment exposed the defects in the Fifth Circuit's resolution of the case. The plaintiff in *Adkins* proved that the government imposed a substantial burden on his religious exercise. The Fifth Circuit erred in creating the exception that a substantial burden does not exist when it results from a rule of general applicability; the exception is totally inconsistent with the history and text of the RLUIPA. Finally, had the Fifth Circuit not made this mistake, the government would not have been able to meet its burden under the RLUIPA because less restrictive alternatives must have been available. In the *Adkins* case, therefore, the plaintiff's rights under the RLUIPA were indeed violated.

The controversy, however, runs deeper. The RLUIPA is currently being applied inconsistently throughout the nation. Moreover, the Eighth, Seventh, and Ninth Circuits are all applying flawed standards. Along with the Fifth Circuit, these courts will likely continue to misapply the RLUIPA and continue to violate prisoners' rights. Although the Supreme Court declined to address the issue in its recent review of the RLUIPA, it took a step in the right direction when it upheld the Act's constitutionality. But it must go further. Considering the circuit split, the flaws in the various analyses, and the erroneous outcome reached by the Fifth Circuit, the Supreme Court's failure to grant certiorari was, at the very least, an unfortunate oversight that resulted in severe injustice for one ill-fated plaintiff. Injustice for future plaintiffs, however, can and must be avoided. The Supreme Court must accept a case in which it can create a fair and uniform standard for "substantial burden" that will put an end to the conflict among the circuits.

¹⁷⁸ See *id.*; *Adkins*, 393 F.3d at 567 n.32; *supra* text accompanying note 158.